This article explores the engagement of the European Union with the caring relationship and focuses on the socio-economic impact on those who provide care. It argues that, albeit care was not an initial concern of the EU legislator, over the years, a discourse has gradually been shaped. The needs of carers have been addressed with a variety of approaches such as non-discrimination legislation and policy, as well as specific employment policy and legislation. So far, however, this intervention has been ad hoc: accordingly it has not helped to formulate a coherent set of principles, let alone propose satisfactory solutions to the demands that carers experience on a daily basis. It is now time to reshape this discourse: this article maintains that the caring relationship needs to be reconceptualised in order to fit the evolving reality. Ultimately, it argues for a more proactive, rights-based approach and explores the possibility of introducing a specific catalogue of carers’ rights in EU law.

‘… the way ahead is to focus on care … Caring relationships are the ones that need promoting … because they are the relationships that are key to the well-being of society.’¹

Introduction

Traditionally, the caring relationship has been of limited interest for European Union (EU) law. This, like the law in general, has been structured around an individualistic model based on notions of rationality and personal autonomy that reflect a vision of a person controlling his own destiny and taking decisions.² Furthermore, the EU Treaty was devised as a market-
making rather than a market-correcting instrument.\textsuperscript{3} Within this context the relevant model was the ‘well-dressed businessman with his right to autonomy\textsuperscript{4} and freedom to choose to enter a contract. By contrast, the ‘exhausted mother\textsuperscript{5} or the exhausted carer of a disabled spouse, both of them ‘with little autonomy [and/or] freedom\textsuperscript{6} remained outside the realm of EU law.

This model fails to accommodate today’s social reality, where care is becoming a prominent feature of a large number of individuals’ lives – whether exhausted mothers or well-dressed businessmen. It is estimated that at some point in their lives most people will become a carer, either as parents or for dependent adults:\textsuperscript{7} at the time of writing, in the EU 51 percent of individuals aged 18–64 provide some form of care for an elderly or disabled relative and the statistics are higher when looking at childcare.\textsuperscript{8} In many cases carers will have no choice but to continue working.\textsuperscript{9} Yet, no allowances are made to cater for their extra duties: carers are simply expected to conform to (often inflexible) working practices.

The aim of this paper is to explore the EU engagement with the caring relationship. Specifically, it focuses on the socio-economic impact on those who care either for children or adults and need to balance caring responsibilities with their work commitments.\textsuperscript{10} Although the EU does not have a normative framework directly addressed to care, over the years it has shaped a policy discourse with several (non-binding) documents\textsuperscript{11} and some legislative interventions to protect carers’ needs have been devised, namely through non-discrimination legislation and policy and specific employment measures. Overall, however, this intervention has been ad hoc: accordingly it has failed to devise a coherent set of principles, let alone a satisfactory solution.

This article maintains that it is now time to reshape this discourse. On the one hand, it acknowledges that the intervention of the EU legislator on care might be impractical and possibly even undesirable. On the other hand, some intervention aimed at acknowledging and alleviating the burden on carers would be welcomed and is overdue. In this respect, it argues for a more proactive, rights-based approach and, specifically, explores the possibility of introducing into EU law specific rights for carers.

The article is organised as follows. Section one aims to set out a case for EU engagement with the caring discourse. Against this background, section two looks at the measures that, over the years, the EU has enacted to seek to alleviate the burden of carers. Section three

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\textsuperscript{5} Ibid.

\textsuperscript{6} Ibid.


\textsuperscript{8} Figures from the Eurofound’s third European Quality of Life Survey (EQLS) reveal that 12% of men and 16% of women aged 18–64 in employment care for an elderly or disabled relative less than once a week, and 8% of men and 9% of women care for an elderly or disabled relative at least once or twice a week. Among workers aged 50–64, 18% of men and 22% of women provide care at least once a week. Figures are much higher when looking at childcare; see European Commission, The Provision of Childcare Services (Luxembourg Office for Official Publications, 2009).

\textsuperscript{9} Office for National Statistics, Carers UK, 2002 (ONS, 2013).

\textsuperscript{10} This is not to say that those carers who do not need to balance work and care are not worthy of protection; simply, they are outside the focus of this article.

\textsuperscript{11} See, for example, European Commission, Long Term Care for the Elderly: Provisions and Providers in 33 Countries (EC, 2012).
argues that these have only provided limited success and therefore a more robust approach is needed; accordingly, this section explores the potential to build upon the current measures and develop a set of specific rights for carers. Finally, in light of this discussion, some conclusions are drawn.

Why should the EU care about carers?

‘Our common goals of smart, sustainable and inclusive growth – as defined in the Europe 2020 strategy – cannot be met if informal carers are left out of the labour market or overlooked by welfare systems.’

The socio-economic impact of caring responsibilities is becoming too widespread to be ignored: they are not an exception to the norm but rather an inalienable element of many individuals’ lives. For these individuals, as O’Brien argues, if not regulated, care can become a ‘penalty’ where they might have to work reduced hours or even be forced out of employment altogether. There is a wealth of evidence that caring does not only bring a financial disadvantage associated with exit from the workforce or a change to part-time hours, but also the so-called ‘hidden costs’, such as poorer physical and mental health, as well as increased risk of social exclusion. In turn, if individuals are unable to work, not only will they suffer detrimental consequences, but the economy as a whole will suffer. The economy benefits from the fact that individuals are actively engaged in paid employment by avoiding long-term consequences of the so-called ‘old social risks’ such as unemployment and long-term poverty, as well as the ‘new social risks’, most notably inadequate social security coverage. By the same token, if individuals do not go to work, they will not be able to contribute to a pension fund to sustain an ageing society.

For these reasons, care is rising up the agenda of the Member States that are responsible for deciding the most appropriate way to organise it: by providing cash, namely social security benefits, pensions, tax credits, or providing payments to enable individuals to purchase their own arrangements, or by providing services in kind that enable people to participate in the

14 Interlinks, Informal Care in the Long-Term Care System (Interlinks, 2010).
employment market.\textsuperscript{22} In any case, at the time of writing, the decision is left to the Member States and the EU has neither direct nor express competence in this area.

By contrast, this article maintains that the intervention of the EU legislator would be desirable for several reasons. To start with, it is becoming increasingly clear that care cannot be addressed solely within national borders. Not only is care rapidly changing into services accessible on the global market, but it is also increasingly being framed within the concept of citizenship rights and welfare state obligations.\textsuperscript{23}

Furthermore, there is a compelling economic argument to support the EU engagement with care. Simply put, care underpins the functioning of the internal market. If the EU is serious about reaching the target of 75\% employment in the Europe 2020 strategy,\textsuperscript{24} it will have to enable individuals to work. At the moment, in particular as far as women are concerned, this target has not been reached: in 2014, only 63\% of women were in employment. The Ageing Report has estimated that, without additional measures, this figure is projected to rise to 71\% in 2060.\textsuperscript{25} Unsurprisingly, the European Commission has identified caring responsibilities as one of the main reasons for this situation.\textsuperscript{26} This brings us to another EU policy where the regulation of care is essential: care is instrumental to the achievement of gender equality. It is trite but true that care, overall, is a gendered activity;\textsuperscript{27} whilst women are more likely to provide more physical, emotional and long-term care, men, unless caring for spouses or partners, care for fewer hours per week and undertake less physically demanding tasks.\textsuperscript{28}

The economic imperative is supported by the fact that to care for young children can also be seen as economically productive as it enhances society’s future human capital and ensures the workforce for the next generation.\textsuperscript{29} To care for frailer adults also opens up economic opportunities. The so-called Silver Economy covers new market opportunities arising from public and consumer expenditure related to the rights, needs and demands of the (growing) population over 50.\textsuperscript{30} It could potentially create new jobs in the long-term care sector and a

\textsuperscript{22} C Glendinning and PA Kemp (eds), \textit{Cash and Care. Policy Challenges in the Welfare State} (The Policy Press, 2006).


\textsuperscript{25} European Commission, \textit{Ageing Report 2015}:

\textsuperscript{26} European Commission, \textit{ROADMAP: New Start to Address the Challenges of Work Life Balance Faced by Working Families} (2015):


\textsuperscript{28} In 2006, of those caring for older persons 76\% were women; see J Triantafillou and E Mestheneos, \textit{Summary of Main Findings from Eurofamcar} (Institute for Medical Sociology, University of Hamburg, 2006).


\textsuperscript{30} European Commission, \textit{Growing the Silver Economy} (EC, 2015).
wide range of older-age related goods and services such as the development of new technologies.

Seen in this light, the economic rationale is straightforward and shows that the EU needs to develop suitable strategies to allow individuals to care for their dependents so to enable them to participate in paid employment as a matter of urgency.

The very value of care, however, goes beyond its mere economic currency. Care is important because it is the foundation of society: it is a most basic human need: young children and frailer adults cannot survive without care. The economic argument cannot be ‘decoupled’ from a moral one that values carers for what they are actually doing, for their contribution to society, rather than focusing on their reduced potential in the employment market. Care is a form of social capital that should be embedded in a variety of fields and should be constructed as, at least, a moral obligation to provide for people who cannot support themselves: it is ‘a social responsibility, an obligation that reflects our ties to one another as a human community’. It would be unacceptable to view people in need of care as economic resources or potential investments; they should be viewed as individuals who at different stages in their life, like all of us, need care. As the EU is no longer a merely economic structure but embraces and promotes human and social rights, the need to address the economic and moral elements of the caring relationship as part of a joined-up discourse becomes more evident than ever.

Shaping the care discourse in the EU

Against this background, the EU approach to care has been mixed. The social value of care and the strain that care responsibilities place on carers has long been acknowledged and, despite the lack of specific competences, a discourse on the care relationship has emerged. Already in 1999, Advocate General Cosmas referred to carers as ‘unsung heroes’ and urged that ‘measures should … be taken to protect those persons because of the range of risks they run (psychological damage, social isolation, and so forth) as a result of being continually occupied in looking after someone reliant on care’.

In 2006 the European Commission advocated for the need to explore other reconciliation measures such as ‘leave to care for elderly parents or disabled family members’. This line of reasoning was echoed in a series

37 See the recent Communication from the Commission launching a Consultation on a European Pillar of Social Rights, COM (2016) 127 final. One of the headings of the Pillar entails ’Adequate and sustainable social protection, as well as access to high quality essential services, including childcare, healthcare and long-term care, to ensure dignified living and protection against risks, and to enable individuals to participate fully in employment and more generally in society’.
38 A Numhausen-Henning and M Rönnmar (eds), Normative Patterns and Legal Developments in the Social Dimension of the EU (Hart Publishing, 2013).
40 European Commission, Communication from the Commission: First Stage Consultation of European Social Partners on
of policy decisions. In 2008, the Commission presented the Work Life Balance Package, in 2011, a consultation was initiated on the possibility of introducing measures in the area of carers’ leave and in 2013 the European Parliament passed a Resolution calling on the Commission and the Member States to ‘develop a coherent framework for all types of care leave’ and to ‘propose a directive on carers’ leave, in line with the subsidiarity principle as set out in the Treaty’. More recently, the Commission Roadmap of August 2015 calls for initiatives ‘to allow for parents with children or those with dependent relatives to better balance caring and professional responsibilities’. However, the possibility of introducing specific legislation was not taken any further.

Albeit in an ad hoc fashion, the Court of Justice of the European Union (CJEU) has also contributed to shaping this discourse: not only, in some cases, has it delivered individual justice, it has emphasised the gender equality element, and has also been instrumental in making care and carers visible. Perhaps the most important case in this area is that of Martínez Sala. In this case the applicant, a Spanish national resident in Germany applied for a child raising allowance. The allowance was originally refused on the basis that Ms Martínez Sala was not a German national and, although she had been engaged in paid work in the past, was not working at the time of the application. The court found that refusing the child-raising allowance on the ground that she was not a national amounted to discrimination on grounds of nationality. Thus, indirectly the court acknowledged the value of care and the importance of carers’ contribution to the well-being of society in general. However, both the court and the Advocate General missed the opportunity to develop the potential of this case: rather than stating that care could be work for the purposes of EU law, they sought to establish whether someone who has ceased to be a worker to engage in a caring relationship could still be regarded as a worker.

Overall, the EU discourse in this area lacks conceptual cohesion because it has been organised around a two-tier structure that differentiates between the care of young, healthy children (childcare) on the one hand and the care of disabled children and/or dependent adults (eldercare or long-term care) on the other hand. Unsurprisingly, the former has been easier to address, rather than the more challenging care for older people or children (or adults) with

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**Reconciliation of Professional, Private and Family Life**

SEC (2006) 1245, at p 10; such recommendations were considered in the Framework Agreement on Parental Leave, but the care of adults was not addressed.


42 European Commission, ROADMAP: Reconciliation between Work, Family and Private Life (2011): [WEB ADDRESS?]

43 SI 2013/2044.


47 See recently the cases of *M Leone and B Leone v Garde des sceaux, Ministre de la Justice and Caisse nationale de retraite des agents des collectivités locales* (C-173/13) and *Maistrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton* (C-222/14); ECLI:EU:C:2014:2090, [2015] EUECJ (C-222/14) that reiterated the message of *Roca Álvarez v Sesa Start España ETT SA* (C-104/09) [2010] ECR I-08661.


49 (C-85/96), ibid, at para 61.
disabilities.

On the one hand, childcare was addressed as early as 1986 with the creation of the European Childcare Network that ran for ten years between 1986 and 1996. The Network sowed the seeds for a proposal for a Directive in this area but the necessary majority could never be achieved and the 1992 Childcare Recommendation was adopted instead.\textsuperscript{50} This recommends Member States to encourage and promote initiatives on childcare.\textsuperscript{51} Although this was an important symbolic achievement, it failed to place enough emphasis on the role of the public sector. Nearly a decade later the Lisbon strategy reiterated the need to provide for childcare facilities and in 2002 the Barcelona European Council set specific targets: Member States were required to take into account the demand for childcare facilities and, in line with national patterns of provision, ‘to provide childcare by 2010 to at least 90\% of children between 3 years old and the mandatory school age and at least 33\% of children under 3 years of age’.\textsuperscript{52} However, in practice, in 2013 many countries were still far away from reaching the Barcelona targets.\textsuperscript{53} This failure prompted the Commission to emphasise the necessity for the EU to take strong leadership in this area, which directly contributed to the (economic) objectives of the EU. As a result, the discourse on childcare has recently been revamped with the adoption of the 2013 Social Investment Package (SIP), which places childcare at the heart of economic recovery.\textsuperscript{54} Yet, not only the social dimension is overlooked, its implementation remains based on the goodwill of the Member States.

On the other hand, the EU engagement with long-term care has been even scarcer.\textsuperscript{55} A number of relevant policy documents acknowledge that this is an issue of public interest;\textsuperscript{56}

\textsuperscript{50} (1992) OJ L 123/16.


\textsuperscript{56} See for example: Regional Implementation Strategy for the Madrid International Plan of Action on Ageing 2002 (ECE/AC.23/2002/2/Rev.6; commitment No 9: ‘To support families that provide care for older persons and promote inter-generational and intra-generational solidarity among their members’); Recommendation Rec (2006) 5 of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life with disabilities in Europe 2006–2015 (Article 3.8, ‘Community living’ calling on states to assess the needs of families as providers of informal care, to provide them with information, training and assistance, psychological support and to enable reconciliation of private and professional life and gender equality); UN Convention on the Rights of Persons with Disabilities (A/61/611 from 6 December 2006; Preamble: ‘Persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities’); Long-term care in European Union (2008), within the Open Method of Coordination (OMC) related to the health and LTC agenda, informal care is recognised as a key factor in LTC system sustainability (Article 3.3); Recommendation CM/Rec (2009) 6 of the Committee of Ministers to Member States on ageing and disability in the 21st century: sustainable frameworks to enable greater quality of life in an inclusive society.
they focus on the need to close the gap between the supply and demand for long-term care across Europe and explore how to extend or restore older people’s autonomy and capacity to live independently. However, they do not make up a coherent policy framework: there is no specific legislation or even a ‘strategy’ to address elderly care.\(^\text{57}\)

If the EU has not clearly intervened on the organisation of care, perhaps because it is widely acknowledged that ‘non-professional family care plays a major role’,\(^\text{58}\) a more decisive (but still inadequate) intervention to protect carers has gradually been developed. This focuses on non-discrimination provisions and on employment-based work/life reconciliation measures.

**Carers and the non-discrimination principle**

The fight against discrimination has traditionally been part of the make-up of the European Union.\(^\text{59}\) The principle was originally introduced by article 119 of the Treaty of the European Economic Community (now 157 TFEU) and was gradually developed by a sophisticated array of secondary legislation.\(^\text{60}\) Accordingly, EU (and thus national) law protects individuals against direct and indirect discrimination.\(^\text{61}\) Whilst the former occurs when two individuals are simply treated differently because of suspected characteristics, the latter occurs when an apparently gender neutral provision, criterion or practice would put a person at a particular disadvantage’: this can very well be the case of a person who has care responsibilities and, for example, is unlikely to be as flexible as workers without caring responsibility or might be unable to work at certain times of the day.\(^\text{62}\)

However, in order to prove discrimination it is not enough to be discriminated against because of an unfair disadvantage or simply because of the feeling of being unfairly treated. It is necessary to rely on a specific ground.\(^\text{63}\) In the EU legal system, possibly the main ground that offers protection against discrimination is sex. In the context of care, this provision has proven a crucial tool in shaping the debate because women are more likely than men to be spending time caring, and this affects the time they spend in paid employment.\(^\text{64}\) The difficulties that women as carers face have been acknowledged for some time. In 1997 the court held that:

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\(^\text{64}\) Inter alia, L Waddington, ‘Carers, Gender and Employment Discrimination: What does EU Law offer Europe’s Carers’ in M Moreau (ed), Before and After the Economic Crisis: What Implications for the ‘European Social Model’? (Edward Elgar, 2011).
‘[e]ven where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and the capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.’

Furthermore, Article 157 TFEU contains a specific reference to positive action, namely it allows Member States to maintain or adopt measures ‘providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional career’. This provision could potentially be used to accommodate female workers with caring responsibilities, for example by giving subsidised places in a nursery, by excusing them from working unsociable hours or by granting the possibility to work from home.

With that said, to rely exclusively on discrimination on grounds of sex overlooks the fact that care is not (or should not be) an inherent risk of either sex; not all carers are women and this is particularly true in the case of a dependent spouse. To provide relief only to women carers is not only wrong, as it ignores the disadvantages that men might endure, it also perpetuates the stereotype that caring is a woman’s job.

Apart from sex, the EU Treaty has introduced other grounds: according to Article 19 TFEU (previously Article 13 EC):

‘the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.’

Although this provision considerably extends the grounds for discrimination and has indeed been successfully used to extend the scope of application of the concept of equality, unfortunately it does not expressly address discrimination on grounds of care. The Court of Justice has confirmed that the list is exhaustive. Thus, apart from the grounds expressly mentioned, ‘[t]here is no clear, logical scheme to identify those grounds for discrimination that are morally reprehensible to be categorised as unlawful’. Arguably, the lack of a specific ground that protects carers in the EU Treaty is one of the main obstacles to their protection. Yet, carers are in a different position from non-carers: they might not be able to work the same hours, or under the same conditions, or they might not be able to be part of the

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66 Emphasis added.
67 See, for example, the case in Lommers v Minister van Landbouw, Natuurb beheer en Visserij (C-476/99) [2002] ECR I-2891, [2004] 2 CMLR 1141.
68 Griesmar v Ministre de l’Économie, des Finances et de l’Industrie et Ministre de la Fonction publique, de la Réforme de l’État et de la Décentralisation (C-366/99) [2001] ECR I-9383, [2003] 3 CMLR 95; and more recently Leone (C-572/10) [2015].
70 Chacón Navas v Eurest Colectividades SA (C-13/05) [2006] ECR-6467, at para 55 and more recently reiterated by Attorney-General Jääskinen in his opinion in FOA, acting on behalf of Karsten Kaltoft v Billund Kommune (C-354/23), at para [23].
workforce at all, and regardless of whom they are caring for. Furthermore, they are in this position not because of a lifestyle choice but because a characteristic (caring) over which, in the same way as sex or age, they have little control or choice: they are just treated unfairly. Instead, their position:

‘should not disentitle them to opportunities available to people who do not have caring responsibilities. To argue otherwise would be to suggest that it is legitimate to discriminate against carers in a way that would not be acceptable for any other group.’

The court has made a valuable and valiant attempt to broaden the scope of some of the grounds of the provision by introducing the concept of discrimination by association. In the case of Coleman, Mrs Coleman, a legal secretary, was the primary carer of her disabled son, who needed specialised care. She was forced to resign after being harassed by her employer and being refused flexible working arrangements offered to her colleagues without disabled children. In a brave decision, the CJEU recognised that, in order to be effective, the protections against discrimination must extend not only to those having ‘suspected characteristics’ themselves, but also to those who are associated with them, which may include their carers. It followed the opinion of the Advocate General who argued that discrimination by association:

‘undermines the ability of persons who have a suspect characteristic to exercise their autonomy … People belonging to certain groups are often more vulnerable than the average person, so they have come to rely on individuals with whom they are closely associated for help in their effort to lead a life according to the fundamental choices they have made. When the discriminator deprives an individual of valuable options in areas which are of fundamental importance to our lives because that individual is associated with a person having a suspect characteristic then it also deprives that person of valuable options and prevents him from exercising this autonomy.’

Potentially, this decision might have crucial repercussions for carers: although it does not directly address the issue of discrimination on grounds of caring, it is the closest it gets to offering some guidance. People are indeed likely to be in need of care because of some specific characteristics encapsulated in Article 19 TFEU such as their age (they are either very young or old) or because of a disability.

In order to unveil its full potential, the principle needs to be further developed, however. The possibility of expanding the scope of application of the principle of discrimination by association was presented in the case of Kulikaokas v MacDuff Shellfish, where the CJEU

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75 Coleman v Attridge Law, ibid, at para 38. See more recently, Truman v Bibby Distribution Ltd ET/2404176/2014 where an employee with caring responsibilities who was performing satisfactorily was suddenly dismissed.

76 Opinion of Attorney-General Maduro in Coleman v Attridge Law, ibid, at para 14.

was asked whether an employee could bring an associative discrimination claim following dismissal allegedly due to his partner’s pregnancy.78 This case was redrawn from the registry but Lady Smith in the domestic court stated that pregnancy and maternity are not covered by ‘associative discrimination’ and therefore the Employment Tribunal decided correctly.79 In the same vein, in Hainsworth v Ministry of Defence, the claimant alleged associative discrimination on the ground of her daughter’s disability and a failure to make reasonable adjustments. The claimant’s daughter had Down’s Syndrome and further education could not appropriately be provided in Germany, where the claimant worked, and would have been facilitated had the claimant been permitted to move her place of work. The tribunal rejected the argument that Article 5 of the EU Directive 2000/78 extended to persons who were not in a relationship with the employer.80 Moreover it argued that Article 5 was insufficiently clear and precise in its language.81 On appeal, the domestic court reiterated that that EU law does not require employers to provide reasonable accommodation for employees who are not themselves disabled but who care for a disabled person.82

In practice, the dicta in both Coleman and in the domestic cases confirm that discrimination by association remains limited in its ability to improve the lives of working carers. It applies in case of direct discrimination or harassment of carers of disabled individuals and it does not necessarily extend to indirect discrimination or to other carers, such as the carers of healthy children or frailer adults.83

Carers and the work/family life reconciliation measures

A further approach used by the EU legislator to address the position of (certain) carers has been a set of measures aimed at protecting the rights of those working parents who fulfil certain conditions in terms of employment status or length of service.84 Such measures have resulted in a broad strategy where the relevant provisions have been articulated around three main areas: leave, time and care.85 This strategy has gained momentum thanks to the EU Charter of Fundamental Rights, which has elevated reconciliation of work and family life to a fully fledged fundamental right.86

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79 Kulikaoskas v MacDuff Shellfish [2011] ICR 48. In this case both Mr Kulikaoskas and his partner were dismissed: Mr Kulikaoskas was allegedly dismissed for helping his partner lift heavy weights at work because she was pregnant. MacDuff Shellfish disputed the reason for dismissal and asserted K’s poor performance.
81 Hainsworth v Ministry of Defence [2013] EqLR 1159.
83 By contrast, the court in a recent judgment has stated that the principle of equal treatment applies not only to persons who have a certain ethnic origin, but also to those who, although not themselves a member of the ethnic group concerned, suffer, together with the former, less favourable treatment or a particular disadvantage on account of a discriminatory measure CHEZ Razpredelenie Bulgaria AD v Komisia za zashitba ot diskriminatsia (C-83/14) [2016] CMLR 491. See also R Horton, ‘Caring for Adults in the EU: Work–Life Balance and Challenges for EU Law’ (2015) 37 Journal of Social Welfare and Family Law 356.
86 Article 33(2) states that ‘[t]o reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child’. See further C Costello, ‘Family and Professional Life’, in S Peers, T Hervy, J Kenner and A Ward (eds), The EU Charter of Fundamental Rights – A Commentary (Hart Publishing, 2014), at 891–925; M Barbera,
Leave provisions allow parents to take time off in connection with the birth of a child. These include the Pregnant Workers\(^ {87}\) and the Parental Leave\(^ {88}\) Directives, which both grant time off to parents in order to care for newborns and young children. The Parental Leave Directive goes further by providing the right to take time off in case of force majeure which can apply to any family members and/or dependents. It is available to workers ‘on grounds of force majeure, for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable’.\(^ {89}\) However, while this may be of valuable assistance in emergencies, it is clearly not a useful right in relation to meeting ongoing needs inherent in the caring relationship. Moreover, by granting more time to mothers rather than fathers (maternity leave), and being unpaid (parental leave), these two directives set out a framework that is deeply gendered and fails to provide genuine choices.\(^ {90}\)

Time provisions enable individuals to adjust their working hours in order to fulfil their family-related responsibilities and care relates to the arrangements that are in place while they are at work. Perhaps the most important provision of the work/family life strategy is the Part Time Work Directive\(^ {91}\) which prohibits discrimination against such workers. The Directive is relevant because carers are more likely to work part time in order to meet different demands. Before the Directive was introduced, women working part time were able to rely on the principle of indirect discrimination,\(^ {92}\) but male carers were not able to rely on any specific provision to address potential discrimination. The gender neutral provision of the Part Time Workers Directive has, prima facie, considerable potential. A closer look reveals that it is not above criticism, however. De facto it provides a right to request and not an automatic right to obtain.\(^ {93}\) Furthermore, once obtained, the right cannot be easily reversed or modified and this denies the very nature of the caring relationship and its demands.

Whilst the leave and time components of the reconciliation policy are reasonably well developed both at domestic and EU level, when it comes to care, progress has been slow. Yet, care is perhaps the most important element of the work/family reconciliation strategy: parents can take all the forms of leave available (maternity, paternity and parental leave) and can arrange their professional commitments in order to be able to fulfil their family commitment, but children will still need to be cared for whilst parents are at work. Thus, from an economic perspective, whilst a right to leave and to alter working arrangements would give individual time to care, a right to care would provide individuals with time to work.\(^ {94}\)

The care element of the reconciliation measures would also highlight a less discussed angle of work/family reconciliation: it not only concerns babies and young children but also dependent adults, be these disabled, elderly or chronically ill.

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\(^ {89}\) Article 7, Council Directive 2008/104/EC.


\(^ {93}\) But see Mascellani v Ministero della Giustizia (C-221/13) [2015] 1 CMLR 1031.

Reshaping the care discourse: towards rights for carers?

The above section has shown that the tentative approach of the EU legislator and policymaker, although laudable, has failed to deliver credible results and only pays lip service to the caring relationship. In practice, any initiatives remain entrusted to the political goodwill of Member States and depend on external factors such as the financial resources available to individual states. In the same vein, the legislation targeted at carers as part of the non-discrimination provisions and the reconciliation measures establish ‘workplace rights’ that can only be a small part of the response to the challenges posed by the increasing demand for care. These, in particular the latter, are de facto aimed at carers (parents) of young children; where – and if – specific rights for carers of adults have been created, they tend to map onto existing rights for parents. In other words, these approaches have partially answered ad hoc needs, rather than providing an over-arching, long-term, sustainable strategy.

Given the over-arching importance of care, the limited EU engagement demonstrated so far is perhaps puzzling. This article identifies some possible explanations.

To start with, the law traditionally speaks the language of rights. The benefits of a rights-based approach cannot be under-estimated: rights have the power to transform issues that would normally be addressed within the context of welfare and justice into precise entitlements. As amply illustrated by liberal legal theory, rights can provide clear protection for individuals; they can also impose duties that the law can enforce. Rights have limitations, however. For example, in certain instances, some rights (namely, economic rights) might be regarded as more relevant than others (these being social rights, such as those aimed at promoting the well-being of people). EU law has traditionally been characterised by a tension between social and economic rights that becomes apparent in the care discourse. This is particularly so at times when many governments across Europe are adopting stringent austerity measures that deeply affect welfare policies. Services in general, and in particular those aiming at supporting the rights of working parents and carers, have been cut back, postponed or abandoned. A further difficulty with the traditional understanding of rights is that they imply a form of choice where the recipient is able to exercise them. This does not sit easily with caring relationships and responsibilities where often, if not always, there is no choice element. Indeed, they are better understood within the framework of the ethic of care. Although the theory on the ethic of care is vast, has been criticised and ‘there is no complete agreement over what … [it] means’, it is widely acknowledged that it is based on the idea that life is a series of mutual and interdependent relationships without which we would not exist. These relationships carry responsibilities and should be used as a starting point to re-evaluate legal norms and, accordingly, the law should promote care and enable caring relationships. The primary focus should be ‘what is my


96 R Dworkin, Taking Rights Seriously (Harvard University Press, 1978); J Waldron, Theories of Rights (Oxford University Press 1982).

97 S Choudhry, J Herring and J Wallbank, ‘Welfare, Rights, Care and Gender in Family Law’ in J Wallbank, S Choudhry and J Herring (eds), Rights, Gender and Family Law (Routledge, 2010) 1–25.


100 The ethic of care was developed in the seminal work of C Gilligan, In a Different Voice (Harvard University Press, 1992).
proper obligation within the context of this relationship’, rather than ‘is it my right to do X?’. Seen in this light, the ethic of care will offer an important contribution to the discourse on care.

Furthermore, the very nature of care makes it difficult to regulate. Caring is often informal and takes places within ordinary family relationships and as such is traditionally perceived to be part of the private sphere which ‘denote[s] civil society, the values of family, intimacy, the personal life, home, women’s domain or behaviour unregulated by law’\(^\text{101}\) as opposed to the public sphere that refers to ‘the values of the marketplace, work, the male domain or that sphere of activity which is regulated by law’\(^\text{102}\). Care work is not normally viewed as a ‘genuine economic activity’. It is often invisible, unpaid, not all of it is productive and thus falls outside the traditional market-based, commodifiable EU notion of work. This remains the reality in many Member States.

It would be tempting, yet simplistic, to conclude that care is low status and unregulated simply because it belongs to the private sphere. However, care highlights the irrelevance of the private/public sphere dichotomy: when in the public sphere, it continues to be perceived as low status employment.

The perception that care is a peripheral activity that people choose to do in their own time has been challenged on numerous occasions by feminist scholars. These have cogently argued that what happens in the private sphere, far from being akin to a leisure activity, supports, and is the precondition of, what takes place in the public sphere. Simply put: ‘without the contribution of unpaid care, markets would not grow, economies would not prosper and capitalism would not be possible’\(^\text{103}\).

A final difficulty is that care policies are not an express competence of the EU. Instead, how children and frailer members of society are looked after and who should provide care is still very much perceived as the domain of Member States’ domestic policies. These are influenced and shaped by different perspectives and priorities dictated by culture (expectation of the role of the family), working patterns (in particular amongst women), societal attitudes to care, religion and resources available.\(^\text{104}\) Accordingly, national governments have allocated budgets that vary considerably and affect the very structure of care: certain governments have taken the policy decision to support carers of young children mainly through cash benefits, while others, such as France and Sweden, invest in formal public care arrangements. In the UK, childcare provisions are very much market-oriented and choices to expand the public sector in this sense has been described as a Brave New Word scenario with ‘rows of mothers at work and rows of tiny children in uniform state-run nurseries – a real nanny state’\(^\text{105}\). The situation is no better for adult care. A recent report prepared jointly by the Social Protection

\(^{101}\) KO ‘Donovan, Sexual Division in Law (Weidenfield and Nicholson, 1985).

\(^{102}\) Ibid.

\(^{103}\) N Busby, ‘Unpaid Care-giving and Paid Work within a Right Framework’ in N Busby and G James (eds), Families, Care-Giving and Paid Work (Edward Elgar, 2011), at 203.

\(^{104}\) C Glendinning et al, ‘Care Provision within Families and its Socio-Economic Impact on Care Providers Across the European Union’, Research Works, No 2009-05, Social Policy Research Unit. See also T Rostgaard, ‘Caring for Children and Older People in Europe – A Comparison of European Policies and Practice’ (2002) 23(1) Policy Studies 51. Furthermore, the differences are emphasised by the fact that comparative information is currently patchy and does not provide a clear picture of the situation, see Social Protection Committee and the European Commission, Adequate Social Protection for Long-Term Care Needs in an Aging Society, 10406/14 ADD 1; SOC 403 ECOFIN 525.

Committee and the Commission acknowledged that ‘there are more pronounced differences between Member States in the way long-term care is provided than in any other aspect of social protection’.\footnote{Social Protection Committee and European Commission, \textit{Adequate Social Protection for Long-Term Care Needs in an Ageing Society} (2014), at p 8.}

As a result, to date, the EU can only act as a facilitator that provides policy support and information sharing and encourages the exchange of good practices, rather than as a direct player. Its role is limited to overseeing, and at best to coordinate policies mainly with soft law, in particular the Open Method of Coordination.\footnote{C de La Porte and P Pochet, ‘The OMC Intertwined with the Debates on Governance, Democracy and Social Europe: Research on the Open Method of Co-ordination and European Integration’ (Observatoire Sociale Européen/European Trade Union Institute, Brussels, report prepared for F Vandenbroucke, Belgian Minister for Social Affairs and Pensions, June 2003); see also E Radulova, ‘The construction of EU’s childcare policy through the Open Method of Coordination’ European Integration Online Papers, Special Issue 1, Vol 13 (2009), Art 13, available at: www.researchgate.net/publication/40822265_The_construction_of_EU%27s_childcare_policy_through_the_Open_Method_of_Coordination.}

By contrast, this article contends that there is a strong argument to support EU intervention, to devise a clear and cohesive framework to protect its carers. Indeed, in a recent speech to the European Parliament Interest Group on Carers Commissioner Tonio Borg promised to look into a possible carers’ strategy.\footnote{T Borg, Speech given to European Parliament Interest Group on Carers, Brussels, Belgium, 9 April 2014.} Drawing on this, this article argues for a catalogue of rights. Three elements are necessary in order to make rights effective: a strong foundation, namely a legal base, clear and enforceable content and, last but not least, a precise set of beneficiaries, namely people who are entitled to them.

**A legal base for caring rights**

Every right needs to be supported by a legal base: only in this way is the EU legislator able to have precise competencies in a given area.\footnote{Article 4 and 5 TEU. In particular Art 4(1) expressly states that: ‘In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States’.} As care was not contemplated by the EU founding fathers, technically, there is not a specific legal base that could underpin carers’ rights in the original Treaty. This article has illustrated how traditional provisions such as Article 157 TFEU on the principle of gender equality and Article 19 TFEU on a broader non-discrimination principle, have proven to have pitfalls. There is an argument to support the view that a provision specifically contemplating care should be introduced in the Treaty. Such a provision could be modelled on Article 45 TFEU on the free movement of workers or Article 45 itself could be restructured as to include the rights of carers. However, this article has highlighted that a traditional normative framework based on rights that value personal autonomy and free choice might not be apt to fully capture the essence of the caring relationship. Instead, any provision in this area needs to be grounded in the ethic of care where the interdependence of individuals is acknowledged and valued. Arguably, an ‘EU ethic of care’, or at least the potential to develop one, already exists: there are indeed a number of principles that could underpin the development of a specific legal strategy on care.\footnote{N Busby, \textit{A Right to Care?: Unpaid Care Work in European Employment Law} (Oxford University Press, 2011).} These can be found in the EU Treaty, the EU Charter of Fundamental Rights, as well as the general principles of EU law\footnote{T Tridimas, \textit{The General Principles of EU Law} (Oxford University Press, 2006); P Craig, \textit{EU Administrative Law} (Oxford University Press, 2012).} developed over the years by the Courts of Justice of the European Union and the European Court of Human Rights.

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\footnote{Social Protection Committee and European Commission, \textit{Adequate Social Protection for Long-Term Care Needs in an Ageing Society} (2014), at p 8.}

\footnote{C de La Porte and P Pochet, ‘The OMC Intertwined with the Debates on Governance, Democracy and Social Europe: Research on the Open Method of Co-ordination and European Integration’ (Observatoire Sociale Européen/European Trade Union Institute, Brussels, report prepared for F Vandenbroucke, Belgian Minister for Social Affairs and Pensions, June 2003); see also E Radulova, ‘The construction of EU’s childcare policy through the Open Method of Coordination’ European Integration Online Papers, Special Issue 1, Vol 13 (2009), Art 13, available at: www.researchgate.net/publication/40822265_The_construction_of_EU%27s_childcare_policy_through_the_Open_Method_of_Coordination.}

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\footnote{T Tridimas, \textit{The General Principles of EU Law} (Oxford University Press, 2006); P Craig, \textit{EU Administrative Law} (Oxford University Press, 2012).}
To start with, the Treaty on the European Union lists the values on which the Union is established. Article 2 TEU provides that:

‘[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

In this context, the concept of human dignity is particularly relevant. It is not a new concept in EU law: prior to its integration into the Treaty, the CJEU had already described it as one of the general principles of European law. It is a complex concept to define, however. Advocate General Maduro has indicated that dignity entails ‘the recognition of equal worth of every individual’ which arguably must be protected regardless of the economic contribution that an individual can make. Thus, human dignity represents a crucial principle that can highlight and protect the needs of vulnerable individuals engaged in caring relationships, be those cared for and/or carers.

Furthermore, Article 3 TEU states that the Union ‘shall promote … solidarity between generations and protection of the rights of the child’. This is an expression of the principle that ‘providing care for people over the life cycle is a social responsibility, an obligation that reflects our ties to one another as a human community’.

This emerging ‘EU ethic of care’ is further supported by the EU Charter of Fundamental Rights, which now has the status of primary legislation and thus is binding. First, it reiterates the importance of dignity (Article 1). Secondly, it refers to specific areas that entail a caring relationship, such as the rights of children (Article 24), the rights of the elderly (Article 25), the rights of persons with disabilities (Article 26), the right to respect for family life (Article 7) and the right to reconcile work and family life (Article 33). These provisions are complemented by the right to engage in work (Article 15), and the more general non-discrimination clause (Article 21). The CJEU is increasingly referring to the Charter in its judgments. Thus, although the practical effect of the Charter might (still) be marginal, there is little doubt about its growing weight: it represents an enormous transformative potential in particular for the development of an ethic of care within EU law. Specifically

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112 In 1993, Advocate General Jacobs stated that ‘the constitutional traditions of the Member States in general allow for the conclusion that there exists a principle according to which the State must respect not only the individual’s physical well-being, but also his dignity, moral integrity and sense of personal identity’. *Christos Konstantinidis v Stadt Altensteig – Stendesamt and Landratsamt Calw–Ordnungsamt* (C-168/91) [1993] ECR I-1191, Opinion of Advocate General F Jacob delivered on 9 December 1992, para 39. Furthermore, in *P v S and Cornwall County Council* (C-13/9) [1996] ECR I-2143, the CJEU held, in relation to the treatment of transsexuals in the workplace, that ‘to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard’ (at para 22).


118 N Countouris and M Freedland, ‘Resocialising Europe – Looking back and thinking forward’ in N Countouris and
for the purpose of carers, it opens up possibilities for a new discussion that emphasises the importance of the caring relationship and an alternative way to interpret the non-discrimination provisions and workplace rights.

Furthermore, the rights discussed above are also supported by provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention), in particular Article 8 on respect for family life and Article 14 on the prohibition of discrimination.\(^\text{119}\) The European Court of Human Rights (European Court) has held that, even if Article 8 does not expressly mention care, family life does indeed depend on close, continuing and practical ties.\(^\text{120}\) Care often takes place within the family and the latter often has an invaluable role in providing high quality care.\(^\text{121}\) The relationship between the EU and the European Convention has always been harmonious and cooperative. Since the entry into force of the Lisbon Treaty it has been further strengthened and accession is likely to follow in the not too distant future.\(^\text{122}\)

**A content for the catalogue of rights**

The idea that carers need specific rights is not new.\(^\text{123}\) At the moment, there are limited employment-related rights available to some carers to be free from direct discrimination and harassment. Whilst valuable, these are unlikely to offer working carers much assistance in managing the demands of juggling work and care. Carers need something more: they need an integrated system of rights designed on a lifecycle approach. Some commentators have suggested extending the model of ‘reasonable adjustments’ currently provided to allow disabled people to participate in employment, and more generally society, to address the shortcomings experienced by carers.\(^\text{124}\) This model requires that employers ‘shall 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’.\(^\text{125}\) Whilst there is an argument to support this approach, as it can certainly remedy specific shortcomings, this paper maintains that it would be conceptually inappropriate to extend it to carers for two main reasons. First, it makes a dangerous link between carers and disability. This link is particularly inappropriate in the case of childcare. In 1988 the Court of Justice finally made it clear that ‘pregnancy is not an illness’.\(^\text{126}\) As disability has been indeed linked with illness,\(^\text{127}\)

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\(^\text{119}\) J Herring, *Caring and the Law* (Hart Publishing, 2013). The relevance of the European Convention is also evident in other relevant Articles, such as Art 3 on the protection from torture or inhuman or degrading treatment.


\(^\text{121}\) See the European Parliament Resolution of 4 July 2013, ‘Impact of the Crisis on Access to Care for Vulnerable Groups’ (2013/2044 (INI)).


\(^\text{126}\) See in particular, *Dekker v Stichting VJV* (C-177/88) [1990] ECR I-3941, [1991] IRLR 27 and *Handels-og*
it would be paradoxical to now equate the very consequence of pregnancy, namely care, to illness and disability. Secondly, the reasonable adjustments connected with disability are constructed in a reactive and individualistic way. This means that the employer is required to make specific adjustments for the individual situation of a particular employee: what might be reasonable for one employee is not necessarily reasonable for another. Thus, they might not be the right tool to create a more general framework. By contrast, care, far from being an individual problem, is widespread and any approach to deal with it should be proactive rather than reactive.

With that said, although the language of ‘reasonable adjustment’ might be inappropriate, a set of wide ranging and imaginative measures is required in order to allow informal carers to combine paid work with their care responsibilities. These rights should contain a mixture of positive (proactive) and negative (reactive) obligations and should reflect the fact that carers of adults and carers of children require specifically tailored measures.

In terms of positive obligations, first and foremost, carers need to be able to take periods of leave which, at EU level, are currently only available to parents. The only possibility available to carers in general at the time of writing is the right to take leave on ground of force majeure.\textsuperscript{128} A wide range of leave capable of catering for different situations should be introduced; this could be modelled on the existing family-friendly rights.\textsuperscript{129}

Secondly, carers need to be able to introduce flexibility in their working arrangements. Flexibility is already one of the buzzwords of EU law and is contained in many legislative and policy initiatives. However, it needs to be ‘redesigned’ with the specific needs of carers in mind. At the moment it consists only of the possibility to ask to modify their employment relationships (for example to go from full time to part time) but not a right to obtain it. Furthermore, if and when obtained, the desired change is permanent: needless to say this makes the right very inflexible. By contrast, carers need flexibility to take into consideration the range of (changing) needs and the level of dependency involved in the relationship. For example, the care that an infant needs will differ from the care that a schoolchild needs, which will again differ from the demands of a dependent adult or a disabled child.

In order to be effective, these rights should be complemented with additional support. Periods of leave need to be paid, otherwise individuals would be left to carry the financial burden of care; equally, the right to introduce flexibility in the working arrangement should be complemented by some sort of financial support to help the employee in case of unforeseeable difficulties.

Furthermore, a consideration of the effect of care on carers’ well-being should also be considered.\textsuperscript{130} These proposals, however, might be more difficult to implement at EU level as they involve a level of expenditure from the Member States. They could instead be formulated as soft law and ‘implemented’ through the Open Method of Coordination (OMC).

In terms of negative obligations, a catalogue of carers’ rights needs, in order to be effective,
to be complemented by a specific right not to be discriminated against because of caring responsibilities. This could be achieved by introducing a specific ground in Article 19 TFEU.

**Who is entitled to carers’ rights?**

Finally, carers’ rights require clearly designated individuals eligible to enforce them. In other words: who is a carer in legal terms? This is a deceptively simple question. A carer is like the proverbial duck – ‘when I see a bird that walks like a duck, swims like a duck and quacks like a duck, I call that bird a duck’\textsuperscript{131} – or elephant – ‘it is difficult to describe, but you know it when you see it’.\textsuperscript{132} Although in many cases it might be obvious who a carer is, and despite the fact that the CJEU has, on several occasions, referred to carers,\textsuperscript{133} there is no definition in the EU Treaty. Yet to define a carer is as important as it was important to define workers in order to understand who could enjoy certain rights.\textsuperscript{134} A clear definition would also ensure uniformity: at the time of writing Member States provide a variety of definitions of carers,\textsuperscript{135} with the risk that a carer in one Member State might not be considered a carer in another Member State. The UK Government, for example, defines a carer as ‘someone who uses a significant proportion of their life providing unpaid support to family or potentially friends. This could be caring for a relative, partner or friend who is ill, frail, disabled or has mental health or substance misuse problems’.\textsuperscript{136} Notably this definition does not include parents. To allow the Member States to have different definitions of ‘carer’ will only allow for confusion and potentially discriminatory treatment.

The definition of who is a worker has been provided by the CJEU on a case-by-case approach. This might prove difficult in the case of care where the EU has no precise competences and continues to be mainly preoccupied with paid work; as a consequence the court has fewer occasions to deliver interpretations. This paper suggests using, as a starting point, some markers. In light of these, a carer is somebody who has little choice but to look after a frailier dependent, be this a child or an adult; his/her task is relentless and often interferes with the capacity of the carer to be able to (fully) participate in paid employment work. Furthermore, as a result of these caring responsibilities, the carer is experiencing financial and emotional difficulties. Finally, often there is an emotional link between the carer and the person cared for: this link does not need to be a blood link: rather than a child or an elderly parent, it can also be a friend who is ill, frail, disabled or has mental health or substance misuse problems.\textsuperscript{137} Notably this definition does not include parents. To allow the Member States to have different definitions of ‘carer’ will only allow for confusion and potentially discriminatory treatment.

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\textsuperscript{131} James Whitcomb Riley, as discussed in M Heim, *Exploring Indiana Highways* (Publisher, 2007), at p 68.

\textsuperscript{132} Per Lord Justice Stuart-Smith in *Cadogan Estates Ltd v Morris* [1999] EWCA Civ 1671, [1999] 1 EGLR 59.


\textsuperscript{135} *Carers at the Heart of 21st Century Families and Communities* (The Stationery Office, 2008), at p 18.
of carer, in the same way as the CJEU has, over the years, done for workers.

Conclusion

This article has discussed the EU engagement – or rather the lack of engagement – with the caring relationship and its socio-economic impact on carers. Despite the fact that the social importance of caring has been acknowledged, at the time of writing, the EU engagement remains minimal. This article has identified two situations: that of care and carers. In the first case, the EU role has been limited to that of a facilitator that provides policy support, information sharing and, through the OMC, promotes cooperation between Member States. In the second case, the few attempts to regulate the position of carers have not lead to any credible results and carers remain in a disadvantageous position and in many cases suffer discrimination.

Whilst to regulate care in a more stringent way might be difficult, possibly even undesirable, a more robust approach when it comes to protecting carers is long overdue. For too long they have been undervalued, exploited and expected to offer unrealistic standards of care.\footnote{S Dodds, ‘Depending on Care: Recognition of Vulnerability and the Social Contribution of Care Provisions’ (2007) 21 Bioethics 500.}

It is time to rethink the traditional EU normative framework with a view to including a set of specific rights for carers. To some extent, the EU has already used a variety of instruments to address the concerns of (certain) carers, be this through the non-discrimination provisions or employment policies and legislation. In doing so, it has shaped a discourse on the caring relationship. In order to develop this discourse into a cohesive strategy, these measures should be supported by an ethic of care that, this article has argued, is already embedded in the EU legal framework. The question now is how to find a way to unpack all these elements in order to reshape this discourse.

If it is true that the caring relationship has finally found a place on the EU agenda, it is imperative to move this forward, as neither caring responsibilities nor the disadvantages created by the caring relationship will go away. At the same time, Member States will not be able to avoid regulating the effects of the caring relationship by simply claiming that is too complex or too expensive.