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Surrogacy leave as a matter of EU law: *CD* and *Z*

Judgments of the Court of Justice (Grand Chamber) in Case C-167/12, *C.D.* v. *S.T.*, EU:C:2014:169 and Case C-363/12, *Z.* v. *A Government Department and The Board of management of a community school*, EU:C:2014:159.

1. Introduction

Surrogacy raises a number of socio-cultural, ethical, medical and legal questions. Under a surrogacy arrangement, a surrogate mother becomes pregnant with the intention of delivering the child for the commissioning parent(s).[1] Surrogacy is complex not least because it can involve numerous permutations and combinations: the surrogate mother can carry a genetic or partly genetic child of the commissioning parents but also a child which has no genetic relationship to them.

Surrogacy constitutes a fascinating topic from a legal perspective as science has evolved at a quicker pace than the law surrounding it. Whereas surrogacy is increasingly common as a reproductive practice,[2] the law often seems to ignore this reality; many legal orders have not yet taken a stance on how to approach the complex legal questions that surround surrogacy.[3] Within the EU, the practice is legal in a few Member States, whereas others have outlawed it or simply not regulated the matter at all.[4] However, despite the reluctance to regulate surrogacy, courts in many Member States are confronted with the issue due to cross-border practices, i.e. the parent(s) travel(s) to another country to commission a woman to bear a child for them,

1. The judgments analysed in this case note were accompanied by two largely opposed A.G. Opinions by A.G. Wahl in *Z.* and A.G. Kokott in *C.D*. It should be noted that they also took diverging positions regarding terminology. While A.G. Wahl (as well as the Court) referred to the "commissioning" mother/parents, A.G. Kokott refers to "intended" mother/parents.

2. Opinion in *Z.*, para 1 (arguing that surrogacy is "an increasingly common form of medically assisted reproduction" that "constitutes a sensitive political and social issue in a number of Member States").

3. For an overview, see Trimmings and Beaumont, *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart, 2013); Kharb, "Assisted reproductive techniques ethical and legal concerns", 4 *The Internet Journal of Law, Healthcare and Ethics* (2006); Swain, "Surrogacy and gestational carrier arrangements: Legal aspects", in Goldfarb (Ed.), *Third Party Reproduction* (Springer, 2014).

4. For an overview of the different regimes, see Max-Planck-Datenbank zu den rechtlichen Regelungen zur Fortpflanzungsmedezin in europäischen Ländern, available online: <www.mpicc.de/meddb/show_all.php> (last accessed 23 June 2014).

and once the child is born, they try to take it to their home country.[5] It is an instance of what Ackerman once strikingly described as judges and the law sitting on the back of a train, looking backward from their caboose, and only seeing (social and medical) change after it occurred. [6]

Recently, the Grand Chamber was faced with two preliminary references that raised the question whether a woman is entitled to maternity leave where it is not herself but a surrogate who has given birth to the child. While surrogacy as such does not fall within the competence of the EU, maternity leave is regulated at EU level. However, the law surrounding working parents was fashioned with regard to couples that procreate naturally. It is therefore in question whether the existing legal framework can accommodate surrogacy arrangements. Taking into account that surrogacy allows same-sex couples and reproductively challenged couples to fulfil their desires to raise a child they have a genetic link with, this question raises broader implications regarding equality among individuals regardless of their sexual orientation.

The ECJ did not formally join the two preliminary references, and it was faced with two separate and diametrically opposed Opinions of Advocate Generals Kokott in *CD* and Wahl in *Z*. While Advocate General Kokott argued for an EU right to maternity leave for commissioning mothers in order to protect the commissioning mother's bond with the child, Advocate General Wahl denied extending the right to maternity leave under the current state of EU law, arguing in favour of gender equality *vis-à-vis* commissioning fathers. Whereas the reasoning of the Court is notably scarce in both decisions, it reflects both the outcome and approach of Advocate General Wahl in *Z*.

2. Facts of the cases and questions referred

Ms D ("the commissioning mother") works for the National Health Service in the UK. She entered into a surrogacy agreement under the UK Human Fertilisation and Embryology Act 2008. After the surrogate mother gave birth to the child, Ms D began breastfeeding the child for three months. In line with the 2008 Act, Ms D and her partner became the child's legal parents. Before

5. From the perspective of the welfare of the child, international cross-border surrogacy arrangements give rise to the risk of non-recognition of legal parenthood by the home country of the commissioning parents, meaning that the child might remain parentless, and sometimes even stateless. On this, see the ECtHR, *Wagner and J.M.W.L.* v. *Luxembourg*, Appl. No. 76240/01, judgment of 21 June 2007.

6. Ackerman, "Constitutional politics/constitutional law", 99 *Yale Law Journal* (1989), 546.

the child was born Ms D had unsuccessfully applied for paid leave under her employer's adoption policy. She could not satisfy the requirements of that policy and her subsequent request for surrogacy leave was refused as there was "no legal right to paid time off for surrogacy".[7]

Ms Z ("the commissioning mother") is a schoolteacher in Ireland. Together with her husband she decided to have recourse to surrogacy, turning to a specialist agency in California, where their genetic child was born in 2010. In accordance with California law, the couple were identified as parents on the birth certificate. Surrogacy remains unregulated in Ireland and the commissioning mother's request for adoption leave was rejected, as it did not comply with the legal requirements for adoption or maternity leave.[8]

The UK Employment Tribunal and the Irish Equality Tribunal referred different preliminary questions to the ECJ. The main issues raised will be examined in the following order: in *CD*, the issue was raised whether the refusal to grant paid leave equivalent to maternity or adoption leave to a commissioning mother is contrary to the Pregnant Workers Directive.[9] In both *CD* and *Z*, it was questioned whether the refusal to grant paid leave to a commissioning mother constitutes discrimination on grounds of sex, which is prohibited under the Equal Treatment Directive.[10] Finally, the *Z* case raised the issue whether the denial of paid leave constitutes discrimination on the basis of disability under the Employment Equality Framework Directive.[11]

7. The UK Paternity and Adoption Leave Regulations 2002 lay down a right to adoption leave under certain conditions. Under the Regulations, where the employer requests it, an employee must provide his employer with evidence in the form of documents issued by the adoption agency that match the employee with the child. According to the Maternity and Parental Leave etc. Regulations 1999, maternity leave and additional maternity leave is reserved for women in connection with their pregnancy. Persons to whom parental responsibility for a child has been transferred pursuant to a parental order may receive only unpaid leave.

8. The Irish Adoptive Leave Act 1995 entitles an employed adopting mother or sole male adopter to adoption leave. The grant of adoption leave requires that the employer be notified in advance of the adoption and for the provision of a certificate of placement or, in the case of a foreign adoption, a certificate of eligibility and suitability. The right to maternity leave under the Maternity Protection Act 1994 is reserved for pregnant employees. It requires a medical certificate or equivalent confirming the pregnancy and the expected week of confinement to be presented to the employer.

9. Council Directive 92/85/EEC of 19 Oct. 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Art. 16(1) of Directive 89/391/EEC), O.J. 1992, L 348/1.

10. Directive 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 (recast), O.J. 2006, L 204/23.

11. Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.

3. The Opinions of Advocate General Kokott and Advocate General Wahl

Since a commissioning mother does not give birth herself, the question arises as to whether such a mother can benefit from the right to maternity leave as provided for by the Pregnant Workers Directive. The opposite conclusions reached by Advocate Generals Kokott and Wahl on this matter are rooted in different interpretative techniques. Whereas in *CD* Advocate General Kokott employs a contextual and teleological approach in the light of social developments and primary law, in particular the Charter of Fundamental Rights of the EU, in *Z* Advocate General Wahl adhered closely to the wording of the Pregnant Workers Directive to determine its underlying rationale and the legislature's intention.

3.1. *The right to maternity leave under the Pregnant Workers Directive*

The Pregnant Workers Directive governs the right to maternity leave under EU law. The personal scope of the Directive restricts the right to maternity leave under Article 8 to pregnant workers (Art. 2(a)), workers who have recently given birth (Art. 2(b)), and workers who are breastfeeding (Art. 2(c)). As the Directive does not refer to surrogacy, the question was whether commissioning mothers come within its personal scope.

Advocate General Kokott admitted that the structure and general scheme of the Directive suggest a biological and monistic concept of motherhood. However, since surrogacy was not widespread in the early 1990s and, therefore not specifically considered by the legislature at that time, she examined whether the broad logic and objectives of the Directives require commissioning mothers to fall within its scope.[12] She concluded that a breastfeeding commissioning mother is in a situation equivalent to that of a breastfeeding biological mother as they are both subject to particular health risks and time demands arising from childcare.[13] Moreover, maternity leave is not intended solely to protect workers but also the special relationship between a woman and her child over the period which follows pregnancy and childbirth, a position consistent with Articles 24(3) and 7 of the Charter.[14] Article 24(3) of the Charter requires that "every child shall have the right to

12. Opinion in *C.D.*, paras. 39, 41.
13. Ibid., para 44.
14. Ibid., para 45. With reference to Case C-411/96, *Margaret Boyle and Others* v. *Equal Opportunities Commission*, EU:C:1998:506, para 41, Case C-285/98, *Tanja Kreil* v. *Bundesrepublik Deutschland*, EU:C:2000:2, para 30, Case C-366/99, *Joseph Griesmar* v. *Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation*, EU:C:2001:648, para 43, Case C-342/01, *María*

maintain on a regular basis a personal relationship and direct contact with both of his or her parents". Article 7 protects the right to a family life. On that basis, she argued that, just like a biological mother, a commissioning mother "has in her care an infant for whose best interests she is responsible".[15] In addition, "precisely because she herself was not pregnant, she is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother".[16] The specific method of feeding the infant is of less significance considering that the right to maternity leave of a biological mother does not cease if she bottle-feeds the child.[17] Consequently, Advocate General Kokott concluded that commissioning mothers fall within the personal scope of the Directive even if they decide against breastfeeding the baby and have a right to maternity leave on condition that surrogacy is permitted in the respective Member State.[18] Since in surrogacy arrangements the mothering role is shared between two women, she proposes that maternity leave be divided between them.[19] The compulsory maternity leave of two weeks under Article 8(2) must be granted to both women in full.[20] Regarding the total of at least 14 weeks of maternity leave under Article 8(1), the division of roles by the women must be reflected to avoid a doubling of the leave entitlement. Accordingly "the leave already taken by the surrogate mother must be deducted from that of the intended mother, and vice versa".[21] To determine each woman's right to maternity leave, account must be taken of the protected interests under the Directive, namely, before the birth, the protection of the pregnant woman, and, after the birth, the protection of the woman who has recently given birth and the child's best interests.[22]

Although the applicability of the Pregnant Workers Directive was not directly invoked in *Z*, Advocate General Wahl gave his view of its scope of protection. The Directive aims at protecting female workers from the "physical and mental constraints of enduring pregnancy and the aftermath of childbirth, as well as at facilitating their return to the labour market at the end of their leave".[23] He stressed that Recital 14 of the Directive "emphasizes the vulnerability of workers who have given birth" and that Article 8 embodies

Paz Merino Gómez v. *Continental Industrias del Caucho SA*, EU:C:2004:160, para 32, Case C-116/06, *Sari Kiiski* v. *Tampereen kaupunki*, EU:C:2007:536, para 46.

15. Ibid., para 46.
16. Ibid.
17. Ibid., paras. 61, 62.
18. Ibid., paras. 63 and 64.
19. Ibid., paras. 70, 71.
20. Ibid., para 73.
21. Ibid., para 74.
22. Ibid., para 75. In this regard, A.G. Kokott proposes the application by analogy of the rules on joint and several creditors.
23. Opinion in *Z.*, para 46.

the same spirit in seeking to "protect the woman during a period when she is particularly vulnerable both before and after confinement".[24] Accordingly, the Directive protects "a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth".[25] However, this special relationship should be seen in context "as a logical corollary of childbirth (and breastfeeding)".[26] Otherwise, the Directive would also cover adoptive mothers or "any other parent who takes full care of his or her new-born child".[27] He concluded that a commissioning mother does not fall within the personal scope of the Directive. [28] In line with the minimum harmonization nature of the Directive, the Member States are not precluded to provide a more extensive protection.[29] As the Directive is not applicable, the question cannot be evaluated in light of the Charter, in accordance with Article 51(1) thereof.[30]

3.2. *The right to maternity leave under the Equal Treatment Directive*

The Equal Treatment Directive implements the principle of equal treatment between men and women in matters of employment and occupation. It prohibits direct and indirect sex discrimination (Arts. 2(1)(a) and (b)) and specifically, any less favourable treatment of a woman related to pregnancy or maternity leave (Art. 2(2)(c)).

Advocate General Kokott swiftly rejected the applicability of the Directive. As Article 15 only concerns the return from maternity leave, it is irrelevant to determine the conditions under which maternity leave is to be granted.[31] In addition, there is no sex discrimination by reason of the commissioning mother's association with the surrogate. The former cannot rely on the latter's pregnancy to be treated as a pregnant woman.[32] Finally, there is no direct or indirect sex discrimination as the commissioning mother has not been subject to detriment in comparison with male colleagues on the grounds of her sex.[33]

24. Ibid., para 45.
25. Ibid. With reference to Case C-116/06, *Kiiski*, para 46 and case law cited.
26. Ibid., para 47.
27. Ibid., paras. 47, 51.
28. Ibid., para 50.
29. Ibid., para 49.
30. Ibid., paras. 71, 72. Art. 51(1) establishes that the provisions of the Charter bind Member States only "when they are implementing Union law". Moreover, according to Art. 51(2), the Charter does not extend the field of application of EU law beyond the powers conferred on the EU.
31. Opinion in *C.D.*, para 81.
32. Ibid., para 86.
33. Ibid., para 87.

Advocate General Wahl also denied the applicability of the Equal Treatment Directive, however on different grounds. He distinguished the present situation from *Mayr*,[34] where the Court established that the dismissal of a female worker based on her IVF treatment constitutes discrimination on the basis of sex.[35] According to the Advocate General, the less favourable treatment complained of does not relate to the commissioning mother being or becoming pregnant. Therefore, the rationale from *Mayr* cannot be transposed to surrogacy, which can be relied on by both men and women.[36] The situation of a commissioning mother should thus be compared to that of a commissioning father.[37] As the latter has no right to paternity leave, no discrimination can be established. Construing the Directive differently would lead to discrimination of men relying on surrogacy.[38] The "appropriate point of comparison" for commissioning mothers is hence that of adoptive parents, as in both cases parenthood arises "without enduring the physical and mental effects of pregnancy and childbirth".[39] However, EU law does not govern parental leave for adoptive parents.[40]

3.3. *The right to maternity leave under the Employment Equality Framework Directive*

The Employment Equality Framework Directive prohibits direct and indirect discrimination in employment and occupation on grounds of disability. To guarantee the equal treatment of persons with disabilities, it requires that employers make reasonable accommodation of the needs of disabled persons. As the Directive was only invoked in *Z*, Advocate General Kokott did not have to address this question in her Opinion. Advocate General Wahl examined first whether Ms Z's condition, which prevents her from supporting a pregnancy, is covered by the concept of disability under the Directive. As the

34. Case C-506/06, *Sabine Mayr* v. *Bäckerei und Konditorei Gerhard Flöckner OHG*, EU:C:2008:119.

35. Opinion in *Z.*, para 52 ("Consequently, Articles 2(1) and 5(1) of Directive 76/207 preclude the dismissal of a female worker who . . . is at an advanced stage of *in vitro* fertilization treatment, that is, between the follicular puncture and the immediate transfer of the *in vitro* fertilized ova into the uterus, inasmuch as it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment").

36. Ibid., para 58 (arguing that in Case C-506/06, *Mayr* discrimination "stemmed from . . . the [sex]specific features of the treatment in question, which can only affect women, and pregnancy . . . which is afforded special protection under EU law").

37. Ibid., para 59.

38. Ibid., para 63.

39. Ibid., para 64.

40. Ibid., para 65.

Directive does not provide a definition thereof, he referred to *Ring*,[41] where the ECJ aligned its "markedly narrow" concept of disability as established in *Chacón Navas*[42] with that of the UN Convention on the Rights of Persons with Disabilities.[43] Accordingly, a disability constitutes "a 'limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation' . . . in professional life".[44] In line with the legislative intent and EU competences, the scope of the Directive is limited to an "inherently functional" concept of disability.[45] While Ms Z's condition "may constitute a long-term limitation, which results in particular from physical, mental or psychological impairments", it did not hinder her "full and effective participation" in employment on an equal basis with other workers.[46]

In case the ECJ were to come to a different conclusion as to the scope of the Directive, Advocate General Wahl verified whether Article 5 requires an employer to grant paid leave to a commissioning mother. While he recognized that the provision has to be interpreted broadly in the light of its objectives, he had "difficulty in accepting that an obligation for the employer to grant *paid* leave could be inferred".[47] Instead of striking a just balance between the needs of persons with disabilities and those of the employer, the grant of paid leave caters solely to the interests of the employee, while placing a considerable financial burden on the employer.[48] Moreover, the grant of paid leave does not possess any apparent link to ensuring the disabled person's access or participation in working life.[49] As the Directive is not applicable, the question cannot be evaluated in light of the Charter.[50] The UN Convention cannot be

41. Joined Cases C-335 & 337/11, *HK Danmark, acting on behalf of Jette Ring* v. *Dansk almennyttigt Boligselskab* and *HK Danmark, acting on behalf of Lone Skouboe Werge* v. *Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, EU:C:2013:222, para 38.

42. Case C-13/05, *Sonia Chacón Navas* v. *Eurest Colectividades SA*, EU:C:2006:456, para 43. "Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".

43. Opinion in *Z.*, paras. 87, 88.

44. Ibid., para 89.

45. Ibid., paras. 91, 92, 96, 97 (finding that the Directive establishes a general framework for combating discrimination as regards employment and occupation).

46. Ibid., paras. 93, 95.

47. Ibid., paras. 102, 104.

48. Ibid., paras. 106, 108.

49. Ibid., paras. 109, 110.

50. Ibid., para 113. In this regard, Art. 21 ("Non-discrimination"), Art. 26 ("Integration of persons with disabilities") and Art. 34 ("Social security and social assistance") of the Charter have been invoked.

relied on to challenge the validity of the Directive either, as none of its provisions are unconditional and sufficiently precise.[51]

4. The judgments of the Court of Justice

The Grand Chamber judgments in *CD* and *Z*, which were delivered on the same day under the auspices of the same *juge rapporteur*, largely echoed Advocate General Wahl's Opinion in *Z*. They expose a conception of maternity leave anchored both in the division of competences between the EU and the Member States and conceptions of parenthood based on natural procreation.

4.1. *The right to maternity leave under the Pregnant Workers Directive*

In *CD*, the ECJ held that no right to maternity leave for commissioning mothers arises under the Pregnant Workers Directive, independently of whether they breastfeed the new-born.[52] Echoing the stance of Advocate General Wahl, the ECJ recognized that the Directive constitutes a minimum harmonization measure and the Member States are free to establish more favourable provisions.[53] Under EU law, the grant of maternity leave presupposes that the worker was pregnant and gave birth as it is accorded before and/or after "confinement". [54] It aims to protect the woman's biological condition and to improve the safety and health at work of pregnant workers and those who have recently given birth or are breastfeeding.[55] While the Court recognized in its previous case law that the right to maternity leave is also intended to protect the special relationship between a woman and her child, that protection is limited to the period after "pregnancy and childbirth".[56] The Court affirmed its judgment to be in line with *Mayr* where it held that to benefit from the protection of the Directive, "the pregnancy in

51. Ibid., para 114.
52. Judgment in *C.D.*, para 40.
53. Ibid., paras. 41–42.
54. Ibid., paras. 31, 37. See to that effect the wording of Art. 8 of the Directive.
55. Ibid., paras. 29, 30, 33–35. See to that the 8th and 14th recitals in the preamble to the Pregnant Workers Directive and Case C-460/06, *Nadine Paquay* v. *Société d'architectes Hoet + Minne SPRL*, EU:C:2007:601, para 27, and Case C-232/09, *Dita Danosa* v. *LKB Līzings SIA*, EU:C:2010:674, para 58.
56. Ibid., paras. 34, 36. See in that regard Case 184/83, *Ulrich Hofmann* v. *Barmer Ersatzkasse*, EU:C:1984:273, para 25, Case C-116/06, *Kiiski*, para 46, and Case C-5/12, *Marc Betriu Montull* v. *Instituto Nacional de la Seguridad Social (INSS)*, EU:C:2013:571, para 50.

question must have begun".[57] As this question was not raised in *Z*, there was no need for the Court to rule on it.

4.2. *The right to maternity leave under the Equal Treatment Directive*

The ECJ found no breach of the Equal Treatment Directive in either case. A commissioning father is treated equally to a commissioning mother and there is no indication that female workers are put at a particular disadvantage compared to male workers.[58] Moreover, a commissioning mother cannot be subject to less favourable treatment related to her pregnancy if she has not been pregnant herself.[59] Since the commissioning mother is outside the scope of the Pregnant Workers Directive, she cannot be subject to a less favourable treatment related to maternity leave either.[60] As the question referred falls outside the ambit of EU law, the ECJ declined to review the validity of the Directive in the light of the Charter.[61]

4.3. *The right to maternity leave under the Employment Equality Framework Directive*

Regarding discrimination on grounds of disability, the ECJ held that the condition of Ms Z "constitutes a limitation which results in particular from physical, mental or psychological impairments".[62] However, her inability to support a pregnancy does not in itself prevent her from having access to, participating in, or advancing in employment.[63] As the situation is outside the scope of EU law, the validity of the Directive was not examined in light of the Charter. [64] Finally, since the provisions of the UN Convention on the Rights of Persons with Disabilities are "programmatic", they do not have direct effect in EU law and cannot be relied on to challenge the validity of the Directive.[65]

57. Case C-506/06, *Mayr*, para 37.
58. Judgment in *C.D.*, paras. 47–50, Judgment in *Z.*, paras. 52, 54. To that effect, the Court relied on the Case C-177/88, *Elisabeth Johanna Pacifica Dekker* v. *Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, EU:C:1990:383, para 10, Case C-421/92, *Gabriele Habermann-Beltermann* v. *Arbeiterwohlfahrt, Bezirksverband Ndb./Opf. e.V.*, EU:C:1994:187, para 14 and Case C-506/06, *Mayr*, para 50.
59. Judgment in *C.D.*, paras. 51, 52; Judgment in *Z.*, paras. 56, 57.
60. Judgment in *C.D.*, para 53; Judgment in *Z.*, para 59.
61. Judgment in *Z.*, para 66.
62. Ibid., para 79.
63. Ibid., para 81.
64. Ibid., para 83.
65. Ibid., paras. 88–90.

5. Comment

The ECJ illustrated in *CD* and *Z* that there is currently no legal basis for granting maternity leave to commissioning mothers under EU law. The judgments are anchored in the division of competences between the Union and Member States as well as the internal EU separation of powers between the ECJ and the EU legislature. Whereas the ECJ's position is unequivocal, the two Advocate General Opinions illustrate that different conclusions could be reached on this matter.

These comments focus on three aspects. First, the role of child protection in regulating maternity leave at the European level is examined. Second, the gendered character of the European conception of parenthood is revealed. Third, by assessing the European definition of disability discrimination, it determines whether the cause of entering into a surrogacy agreement makes any difference for the grant of paid leave.

5.1. *The right to maternity leave in correlation with the rights of the child*

CD and *Z* illustrate the difficulty in operating neat divisions of competences within the EU. Indeed, while employment protection for pregnant workers falls within the ambit of EU law, the recognition of parenthood remains a national competence. Also surrogacy and adoption leave are regulated by national law. As proposed in the Opinion of Advocate General Kokott, the reference to the rights of the child in the Charter could arguably require an extension of the EU right to paid maternity leave to commissioning mothers in case of surrogacy arrangements. The current state of the law results in a situation where, as a matter of EU law, it is guaranteed that children born naturally can enjoy the permanent care of their mother during the early stages of their life whereas those born to a surrogate cannot. It is doubtful whether this is a desirable result.

The EU has no direct legal basis on the general promotion of children's rights.[66] The Treaty of Lisbon incorporated for the first time the "protection of the rights of the child" within the list of general stated objectives of the EU

66. The Treaty identifies children only in the context of the competence over asylum and immigration and cross-border criminal law, i.e. in the Area of Freedom, Security and Justice. However, the EU has been willing and able to protect the interests of children also in other areas as exemplified by Directive 2009/48 on the safety of toys, O.J. 2009, L 170/1, falling within the field of consumer protection.

(Art. 3(3) TEU).[67] The inclusion of the rights of children in Article 24 of the Charter was seen as a substantive step forward in ensuring that children are no longer "invisible" in the EU.[68] However, the Charter applies to every citizen of the Union but only in situations governed by EU law.[69] Reasoning on the basis of the objectives of the Pregnant Workers Directive, Advocate General Kokott found the Charter to be applicable.[70] It is interesting to note in that respect that the report of the European Parliament on surrogacy reveals that national judges are willing to employ the concept of the child's welfare with the aim to fill loopholes in the national legal system or disassociate the illegal nature of the surrogacy contract in order to grant parenthood to commissioning parents.[71] In this context *Mennesson* v. *France* should be mentioned. In this case, from June 2014, the ECtHR allowed the superior interest of the child to play an essential role. When assessing France's refusal to recognize parenthood resulting from a surrogacy arrangement, it found that this violated the child's right to the respect of its private life under Article 8 ECHR as the contradiction between the children's legal status and social reality was found to negatively impact the children.[72]

The ECJ, on the other hand, did not take up the opportunity to "create" a right to maternity leave for commissioning mothers under the Pregnant Workers Directive in order to protect the rights of the child. The Court made clear that the objective of the Directive is not the protection of the interests of the child, but of the health and safety of the pregnant worker.[73] The same

67. Stalford and Schuurman, "Are we there yet?: The impact of the Lisbon Treaty on the EU Children's Rights Agenda", 19 *International Journal of Children's Rights* (2011), 381; Stalford and Drywood, "Coming of age?: Children's rights in the European Union", 46 CML Rev. (2009), 143.

68. Initially, children were not protected as independent citizens under EU law, but enjoyed extended rights of their parents, who qualified under the free movement provisions. For the impact of the Charter, see McGlynn, "Rights for children?: The potential impact of the European Union Charter of Fundamental Rights", 8 EPL (2002), 367.

69. On this, see also Lenaerts and Guriérrez-Fons, "The constitutional allocation of powers and general principles of EU law", 47 CML Rev. (2010), 1657 (arguing that Art. 51(1) of the Charter "requires that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Art. 5(2) TEU"). For a discussion, see also Iglesias Sánches, "The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights", 49 CML Rev. (2012), 1584–1992.

70. Cf. the position that the Directive has "a direct link to and impact on the well-being of the child", EC DG Justice, *EU Acquis and Policy Documents on the Right of the Child*, available at: <ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en> 2014, 27.

71. "A comparative study on the regime of surrogacy in EU Member States", PE 474.403 (available at: <www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET%282013%29474403_EN>).

72. ECtHR, *Mennesson* v. *France*, Appl. No. 65192/11, judgment of 26 June 2014.

73. The ECJ referred for that purpose to its reasoning in Case C-506/06, *Mayr*. That case dealt with the question of when a pregnancy begins under the Pregnant Workers Directive.

approach was exemplified in *Chatzi* regarding parental leave,[74] where the Court held that "the persons granted the right to parental leave are the parents, in their capacity as workers, and they alone" and that Article 24 of the Charter "does not mean that children have to be acknowledged as having an individual right to see their parents obtain parental leave".[75] This result was foreseen by Advocate General Wahl and the Commission, which stressed that the ECJ traditionally approaches cases involving maternity and parental leave from the point of view of gender equality rather than children's rights.[76]

5.2. *Reflections on a European understanding of parenthood*

The two Opinions of the Advocates General expose opposed conceptions of parenthood, an issue that could come to influence subsequent litigation as family structures and family law are undergoing a process of redefinition. Many scholars have pointed out that the view of the natural mother as the main person responsible for care of children has been persistent in EU law, thereby

However, the analogy is questionable as no child was born yet requiring the care of its parents. The ECJ examined the question in *Mayr* by relying exclusively on the objective of protecting the pregnant worker. At paras. 31–32 ("As regards Directive 92/85, it should be borne in mind that its objective is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding"); at para 39 ("It is apparent from the 15th recital in the preamble to Directive 92/85 that the objective of the prohibition of dismissal provided for in Article 10 of that directive is to avoid the risk of a dismissal, for reasons linked to the pregnancy, having harmful effects on the physical and mental state of pregnant workers").

74. Framework agreement on parental leave concluded on 14 Dec. 1995, which is set out in the annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC as amended by Council Directive 97/75/EC of 15 Dec. 1997.

75. Case C-149/10, *Zoi Chatzi* v. *Ypourgos Oikonomikon*, EU:C:2010:534, paras. 34, 39.

76. DG Justice, *EU Acquis and Policy Documents on the Right of the Child*, available at: <ec.europa.eu/justice/fundamental-rights/files/eu_acquis_2013_en> 2014, 65 ("There are a lot of cases concerning equal access to parental leave which naturally involve children. However, the Court has always approached this matter from the point of view of equality between men and women or balance of working and private life"). For an analysis of the reluctance of the EU and the ECJ to engage with children's interests in work-life reconciliation laws, see James, "Forgotten children: Work-family reconciliation in the EU", 34 *Journal of Social Welfare and Family Law* (2013), 363. However, despite the limitation of its competences, the approach of the ECJ in the context of free movement is different, in the sense that the Court takes a proactive stance in promoting the well-being of children. See on this e.g. in relation to enabling children to access, and remain in, education in the EU Case C-389/87, *G. B. C. Echternach and A. Moritz* v. *Minister van Onderwijs en Wetenschappen*, EU:C:1989:130; Case C-413/99, *Baumbast and R* v. *Secretary of State for the Home Department*, EU:C:2002:493. See also, Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen* v. *Secretary of State for the Home Department*, EU:C:2004:639.

failing to recognize the equal participation of fathers in childcare, particularly in the post-birth period.[77]

It follows from the terminology and objectives of the Pregnant Workers Directive that it aims to specifically protect motherhood. In the majority of legal systems, the establishment of maternal parentage follows *mater semper certa est*, according to which the legal mother is the woman giving birth.[78] This conception is reflected by the Pregnant Workers Directive and the judgments in *CD* and *Z*. Advocate General Kokott proposes to adapt this biological and monistic conception of motherhood to the situation of a surrogacy arrangement. In surrogacy arrangements the mothering role is shared between two women who, she argues, must both be granted legal protection according to their specific needs.

It is worthy of special mention that Advocate General Kokott's Opinion is strongly rooted in the special connection between a mother and a child, understanding parenthood as motherhood. Whereas mothers are indeed in a different situation in comparison to fathers after childbirth, it is not entirely clear why they are in the case of surrogacy, save if one assumes that mothers always have a stronger connection to offspring or that they should be (they in fact are) more likely to take employment leave to care for a newborn. Whereas Advocate General Kokott presumably stressed this conception of motherhood to bring surrogacy within the scope of the Directive, which is itself exclusively concerned with motherhood, such reasoning would have had uneasy consequences. Had the ECJ followed this focus on motherhood, commissioning mothers would have been able to benefit from paid maternity leave, while there would be no equivalent available for commissioning fathers.[79]

77. Caracciolo di Torella, "Brave new fathers for a brave new world? Fathers as caregivers in an evolving European Union", 20 ELJ (2014), 88; Weldon-Johns, "EU work-family policies – Challenging parental roles or reinforcing gendered stereotypes?", 19 ELJ (2013), 662; McGlynn, "Ideologies of motherhood in European Community sex equality law", 6 ELJ (2000), 39.

78. "A study into the Rights and Legal Status of Children being brought up in various forms of marital and non-marital partnerships and cohabitation". A Report for the attention of the Committee of Experts on Family Law by Professor Nigel Lowe.Document (CJ-FA (2008) 5) prepared by the Secretariat of the Human Rights and Legal Affairs DG, Council of Europe (available at: <www.coe.int/t/dghl/standardsetting/family/Documents%20for%20Hearing%2017%20D/CJ-FA%20_2008_%205%20E%2025.09.09>), 10.

79. EU law sets out minimum requirements on parental leave and time off from work in Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, O.J. 2013, L 353/7. The right to maternity leave enjoys currently a more generous protection under EU law. Despite that the Parental Leave Directive leaves the

This would have posed particular challenges regarding surrogacy agreements entered into by same-sex couples in which the two partners are male, leading to discrimination on the basis of sexual orientation.[80] The organization of parental care during the post-birth period for children born via surrogacy would be facilitated solely for heterosexual couples and not for same-sex couples.[81] Advocate General Wahl on the other hand does not engage in a distinction of parental link on the basis of gender, and the Court, maybe wisely, also refrained from doing so.[82]

5.3. *Discrimination on the basis of disability as a last resort?*

Ms Z suffers from a rare condition in that even though she has healthy ovaries and is fertile she has no uterus and is accordingly unable to support a pregnancy. The ECJ was consequently asked to determine whether she has a right to maternity leave against the background of the Employment Equality Framework Directive, requiring employers to reasonably accommodate the needs of disabled persons.

With the EU's ratification of the UN Convention on Rights of Persons with Disabilities in December 2010 and its coming into force in the EU in January 2011, the EU is bound by the obligations therein to the extent of its own competences.[83] The UN Convention is a mixed agreement, so the Member States and the EU share competences in many of the covered areas, such as

conditions of access to and adaptability of parental leave to national law and/or collective agreement, unlike the Pregnant Workers Directive, no income replacement is foreseen.

80. Gallo, Paladini and Pustorino (Eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions* (Springer, 2014). As illustrated by its recent ruling in Case C-267/12, *Frédéric Hay* v. *Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, EU:C:2013:823, the ECJ is prepared to protect the rights of same-sex couples on the basis of the prohibition against discrimination on grounds of sexual orientation.

81. In that regard, it has to be noted that it could be argued that there is a difference between heterosexual and same-sex couples, since the latter are not able to have a child, as a result of a surrogacy arrangement, that is genetically related to both of them. However, in principle, also heterosexual couples might resort to egg/sperm donors. In those constellations, complex questions arise as the legal, biological and social understandings of parenthood might conflict. On the different conceptions of a "parent", see Herring, *Family Law* (Pearson, 2013), ch. 7.

82. The judgment of the ECJ in Case C-104/09, *Pedro Manuel Roca Álvarez* v. *Sesa Start España ETT SA*, EU:C:2010:561 has been described as a departure by the ECJ from its focus of the protection of the mother for biological reasons as the Court recognized the father's right to be involved in the care of his children. See on this, Leone, "Towards a more shared parenthood? The Case of Roca Álvarez in context", 4 *European Labour Law Journal* (2010), 513.

83. On the UN Convention, see Mégret, "The disabilities convention: Towards a holisitc approach of rights", 12 *International Journal of Human Rights* (2008), 261.

action to combat discrimination on the ground of disability.[84] In the field of shared competence, the Member States are charged with the responsibility of complying with the Convention, as long as the EU has not acted. So far employment is the only area in which disability discrimination has been prohibited by EU secondary law.[85] As the Employment Equality Framework Directive only establishes minimum standards, Member States are not pre-empted from setting higher levels of protection in that field in order to comply with the UN Convention.[86] However, as pointed out by the ECJ in *Ring*, by virtue of Article 216(2) TFEU, which sets out that international agreements concluded by the European Union are binding on its institutions, the Directive must, as far as possible, be interpreted in a manner consistent with the UN Convention.[87]

In the light of this development, it was understood by Advocate General Wahl that the concept of disability has undergone a "paradigmatic shift" in the ECJ's recent case law.[88] In *Chacón Navas*, the Court defined disability as "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".[89] In *Ring*, the ECJ aligned the concept of disability to the UN Convention[90] as referring to "a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers".[91] It was presumed that the ECJ thereby adapted its original medical understanding of

84. See Annex II of Council Decision of 26 Nov. 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, O.J. 2010, L 23/35.

85. O'Brien, "Equality's false summits: New varieties of disability discrimination, excessive 'equal' treatment and economically constricted horizons", 36 EL Rev. (2011), 26.

86. Waddington, "The European Union and the United Nations Convention on the rights of persons with disabilities: A story of exclusive and shared competences", 18 MJ (2011), 445; see also Cremona, "External relations and external competence of the European Union: The emergence of an integrated policy", in Craig and De Búrca, *The Evolution of EU Law*, 2nd ed. (OUP, 2011).

87. Joined Cases C-335 & 337/11, *Ring*, paras. 28–32.

88. Opinion in *Z.*, para 88.

89. Case C-13/05, *Chacón Navas*, para 43. For a critical reading of the medical approach of the ECJ, see Waddington, case note on *Chacón Navas*, 44 CML Rev. (2007), 487.

90. According to Art. 1 of the UN Convention, "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

91. Joined Cases C-335 & 337/11, *Ring*, paras. 37, 38.

disability to the social model in the UN Convention.[92] Instead of focusing on an individual's impairment, a disability was seen as arising from a failure of the social environment to adapt to and accommodate the needs of people with impairments.[93] However, in this regard, it is notable that the UN Convention refers broadly to *participation in society*, while the Court's definition covered, in line with the scope of the Directive, only participation in occupation or employment.

While the Grand Chamber in *Z* refers to the definition as adopted in *Ring*, it held that "it is not apparent . . . that Ms Z's condition *by itself* made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity".[94] The ECJ thereby tightly adhered to its rather medical understanding of disability as adopted in *Chacón Navas* and refrained from determining whether Ms Z's condition *in interaction with the refusal to paid leave* hindered her participation in professional life on an equal basis with other workers. The Court focused instead on the interrelationship between the limitation and the capacity of the person concerned in terms of employment. Regarding the condition of Ms Z, namely the inability to bear a pregnancy, the ECJ did not find the necessary link to her participation in professional life in order to ensure EU competence on that matter. The decision of Ms Z to enter into a surrogacy agreement is one that aims to fulfil a personal desire and therefore her employer cannot be charged to accommodate this under the current state of EU law. While it is conceivable that Ms Z's condition may constitute a disability under the UN Convention,[95] it is then the competence of the Member States to take action in that regard.

6. Concluding remarks

The legal basis for awarding a right to maternity leave to commissioning mothers under EU law was admittedly weak. Such a right could not be derived from primary nor from secondary EU law. The principle of equality cannot be employed to compensate for the lack of a European conception of parenthood adapted to changing family structures, particularly surrogacy. On the contrary, allowing commissioning mothers to rely on the Pregnant Workers Directive could have led to sex discrimination against commissioning fathers, and

92. See on this Waddington, "HK Danmark (Ring and Skouboe Werge). Interpreting EU equality law in the light of the UN Convention on the rights of persons with disabilities", 17 *European Anti-Discrimination Law Review* (2013), 13.

93. Keleman, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press, 2011), p. 202.

94. Judgment in *Z.*, para 81 (emphasis added).

95. Opinion in *Z.*, para 93.

possibly also to discrimination on the grounds of sexual orientation. The Court refrained from taking a proactive stance itself in this ethically controversial and sensible area, where there is no consensus among the Member States. Therefore, it is for the Member States to take control of the situation, or for them to decide that it would be appropriate for the EU legislature to do so.[96]

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96. It is interesting to note that the UK recently adopted the Children and Families Act 2014, which extends the right to paid leave to individuals who become parents through surrogacy. See the explanatory notes here: <www.publications.parliament.uk/pa/bills/cbill/2012-2013/0131/en/2013131en>.

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