Briefing

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Surrogacy: The legal situation in the EU

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Summary

This analysis sets out the legal situation in the EU regarding surrogacy.

A distinction can be drawn between traditional and gestational surrogacy, depending on the genetic connection of the surrogate to the child. A further distinction is made between altruistic and commercial surrogacy, depending on whether the surrogate receives remuneration.

Among the Member States, Ireland, Greece, Cyprus and Portugal have introduced legislation permitting altruistic surrogacy, but for some of these the legislation has not yet entered into force or further regulations are still missing. The approaches taken by these Member States as to the conditions applying to the surrogate and the intended parents can be quite different.

Many other Member States have banned surrogacy. Some of these bans explicitly prohibit the procedure, whereas others have regulated assisted reproduction in such a way that surrogacy is implicitly prohibited.

Since 2014, the European Court of Human Rights has issued many judgments concerning surrogacy, especially concerning parenthood established abroad. This case law requires that, if the parenthood resulting from surrogacy established abroad is not recognised, the state has to provide for a means to regularise the 'limping' legal relationship.

In 2022, the European Commission made a proposal for regulation on private international law rules relating to parenthood, which would also apply to surrogacy established in a Member State. Discussions in the Council are still ongoing as to how this issue should be dealt with.

The 2024 directive on preventing and combating trafficking in human beings and protecting its victims explicitly identified, for the first time, the exploitation of surrogacy as a form of human trafficking.

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Introduction

Surrogacy is not a recent concept. Traditional surrogacy arrangements already existed in ancient times. [1] However, with the development of in vitro fertilisation (IVF) and gamete donation the possibilities have expanded rapidly. The first successful gestational surrogacy arrangement occurred in 1984. [2]

When it comes to terminology, two clear distinctions must be made, regarding:

1. the **method used,** especially whether the gametes of the person giving birth were used for conception; and
2. the **compensation** given.

As to the method, there are two categories of surrogacy:

1. **traditional surrogacy**, where the surrogate is also the genetic mother, meaning that her gametes were used and that she is therefore genetically related to the child. This form of surrogacy is sometimes also referred to as 'low-technology' or 'partial surrogacy'; and
2. **gestational surrogacy**, where the ovum of the intended mother or of a donor is used, and the surrogate is not the genetic mother. This form of surrogacy is sometimes also referred to as 'high-technology' or 'full surrogacy'.

With regard to compensation, a distinction is drawn between **altruistic** surrogacy and **commercial** surrogacy. In both cases, money may change hands. However, in the case of altruistic surrogacy the main goal for the surrogate is to help another couple to have a child. Therefore, the expenses in altruistic surrogacy are limited to reasonable expenses directly relating to the pregnancy, predominantly the medical costs, whereas commercial surrogacy is about profit. The limits for reasonable expenses can differ greatly between states, and it is therefore not always clear where altruism ends and business begins.

Terminology

Traditional surrogacy arrangement: A surrogacy arrangement where the surrogate provides her own genetic material (egg) and thus the child born is genetically related to the surrogate. Such an arrangement may involve natural conception or artificial insemination procedures.

Gestational surrogacy arrangement: A surrogacy arrangement in which the surrogate does not provide her own genetic material and thus the child born is not genetically related to the surrogate. Such

an arrangement will usually occur following IVF treatment. The gametes may come from both intending parents, one, or neither.

Altruistic surrogacy arrangement: A surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her 'reasonable expenses' associated with the surrogacy. No financial remuneration beyond this is paid to the surrogate. This may be a gestational or a traditional surrogacy arrangement.

Commercial surrogacy arrangement: A surrogacy arrangement where the intending parent(s) pay the surrogate financial remuneration which goes beyond her 'reasonable expenses'. This may be termed 'compensation' for 'pain and suffering' or may be simply the fee which the surrogate mother charges for carrying the child. This may be a gestational or a traditional surrogacy arrangement.

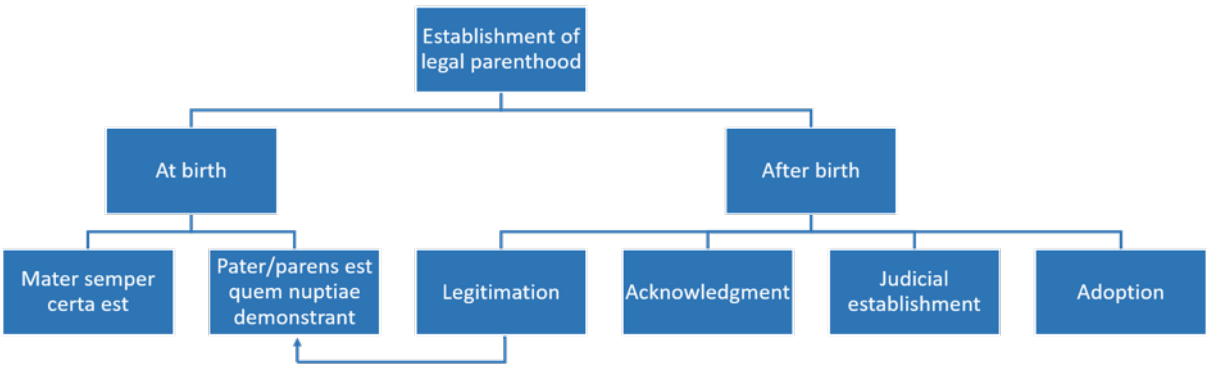
Source: Hague Conference on Private International Law (HCCH), A preliminary report on the issues arising from international surrogacy arrangements, 2012.

Basics on parenthood other than surrogacy

As surrogacy deviates from the traditional ways of establishing parenthood, it is helpful to look first at what those are.

In essence, parenthood is established in one of two sets of circumstances: (1) at birth; and (2) after birth. For the latter case, this does not preclude the possibility that, for example, in the case of acknowledgment, the actual establishment of parenthood could also happen before the birth of the child.

Figure 1 - Pathways in the establishment of legal parenthood



Source: Compiled by the author.

The establishment of parenthood **at birth** *ex lege* (that is, by law) can be done by applying the principle of *mater semper certa est* (the mother of the child is conclusively established) or the principle of *pater est quem nuptiae demonstrant* (the father is he who is married to the mother). The *ex lege* establishment of parenthood means that parenthood exists automatically without the need for any legal action.

The ***mater semper certa est*** principle means that the person who gave birth to the child is automatically considered the mother of the child. This is one of the main parenthood concepts from which surrogacy deviates since the person who gave birth will not be the parent.

The ***pater est*** principle means that the spouse of the woman who gives birth to the child is automatically considered the father of the child. In some Member States, this principle has been extended to also apply to registered partnerships and to same-sex spouses. This principle is also important in the context of surrogacy since, if *mater semper certa est* were applicable, the spouse of the surrogate would in principle be the parent of the child. For this reason, the spouse of the surrogate always has to give consent.

Regarding the legal establishment of parenthood **after birth**, there are in essence four different possibilities, as outlined below.

Legitimation triggers the *pater est* principle retroactively, where the marriage between the parents of the child is concluded after their birth (*legitimatio per subsequens matrimonium*). Following the Marckx judgment of the European Court of Human Rights (ECtHR), this approach to the establishment of parenthood started being regarded as discriminatory, as it draws a distinction between children born in and out of wedlock. In the context of surrogacy, this mode of establishing parenthood is irrelevant.

Voluntary acknowledgment of parenthood is a legal act requiring an expression of intention to establish legal parenthood and – depending on the legal system – the consent of the mother, meaning the person who gave birth to the child. Depending on the legal system, it is also possible to acknowledge a child before they are born. This way of establishing parenthood tends to be used by the genetic (male) intended parent.

In most cases, **judicial establishment** of parenthood focuses on the establishment of fatherhood. There are essentially three different reasons for the legal establishment of parenthood: (1) the parenthood link of another person to the child has to be replaced; (2) the person refuses to acknowledge fatherhood or consent for the acknowledgment is refused; or (3) the person is incapable of making an acknowledgment. In some legal systems, the motherhood of the child can also be established through judicial establishment. Judicial establishment is used in many states where surrogacy is permitted and often a judge is already involved in the process before conception.

Adoptions can be full or simple. In a full adoption (*adoptio plena*), the child's parenthood ties to the original parents are cut, while in a simple adoption (*adoptio minus plena*), the legal family ties to the original family remain and the child has two families. In the case of **stepchild adoption**, the parenthood ties to the spouse or partner of the adopting parent are not cut, while the ties to the other original parent are cut. Stepchild adoption is often used by the spouse of the genetically related intended parent.

The exchange of money makes international surrogacy arrangements problematic when it comes to international adoptions, since the Hague Intercountry Adoption Convention states that the consent of the persons (e.g. parents and the child), institutions and authorities may not have been induced by payment or compensation of any kind.

Very often, the surrogacies established abroad that are the most problematic to recognise are those where the intended parents are named directly on the birth certificate and where no judge in the

context of judicial establishment is involved in the process. The problem arises from the fact that the establishment of parenthood is not based on any of the traditional modes.

Rules on surrogacy in the Member States

While **Ireland, Greece, Cyprus and Portugal** have introduced laws providing for altruistic surrogacy, others have banned surrogacy explicitly. In many Member States surrogacy is unregulated, which means that it can happen, but there may be difficulties when it comes to establishing parenthood and enforcing the surrogacy agreement.

Portugal is a special case, since it has adopted legislation on altruistic surrogacy, but has not yet implemented the necessary regulations. Portugal has previously introduced multiple laws concerning surrogacy, but these were declared unconstitutional by the Constitutional Court.

The first attempt at legislation was with Law 25/2016, which amended Law 32/2006 on medically assisted procreation. In its judgment 225/2018, the Constitutional Court considered that surrogacy by itself is not contrary to the constitution. However, the court considered several aspects of the law problematic. First of all, the law did not provide for sufficient foreseeability, nor were certain requirements controllable. Secondly, the surrogate mother was not able to withdraw her consent. Lastly, the court did not consider that the anonymity of the donors posed unnecessary restrictions on the right of the child's personal identity. After several changes to the law, in its judgment 465/2019 the Constitutional Court again ruled the amended law to be in violation of the constitution. This was due to the fact that the issue of the surrogate mother not being able to withdraw consent had not been addressed.

Finally, the Court considered Law 90/2021 to be in conformity with the requirements set out in its previous judgments and the law entered into force on 1 January 2022. The law nevertheless requires further implementation in the form of regulations. On 13 January 2024, the President referred a draft regulation back to the government. Consequently, the draft regulation is still in development.

In the **Netherlands**, a proposal to regularise altruistic surrogacy introduced in 2023 is still being discussed in parliament. The Council of State considered that there was a lack of reliable research as to the issues arising in the Netherlands. A subsequently commissioned study estimated that, in the Netherlands, there are between 30 and 50 children born by surrogacy annually. The study considered that surrogacy regulation is desperately needed, but that the proposed bill does not yet offer sufficient protection.

Rules in Member States where surrogacy is regulated

In the absence of the further regulations required, **Portugal** will not be discussed in this section.

Greece introduced the option of surrogacy in 2002 with Law 3089/2002, which made changes to the civil code relating to parenthood. Subsequently, Law 3305/2005 set out specific rules for medically assisted reproduction. In 2022, 81 children were born from surrogacy arrangements, and 51 in 2023.

In **Cyprus**, the rules on surrogacy are provided in Articles 22 to 27 of the Medically Assisted Reproduction Law 2015 (69(I)/2015). In 2022, there were 21 and in 2023 10 applications for a surrogacy arrangement, all of which were approved except for one each year. It is unclear how many children were born from these arrangements. More detailed provisions in decrees are envisaged.

While **Ireland** has regulated surrogacy in the Health (Assisted Human Reproduction) Act 2024, it should be noted that the relevant sections of the law have **not yet entered into force**.

All the laws in force have certain things in common:

- commercial surrogacy is prohibited;
- a special body has been set up to oversee surrogacy agreements and its consent must be acquired before entering into a surrogacy arrangement;
- advertisement for surrogacy services is restricted and only allowed by very specific means (usually through the special body established).

Rules applicable to the intended parents

The rules applying to the intended parents differ slightly between the countries concerned.

All the states require the intended parent(s) (or intended mother in the case of Greece and Cyprus) to have their permanent or habitual residence in the country where the child is to be born. Ireland requires at least one of the intended parent(s) (as well as the surrogate) to have resided in Ireland for at least two years.

In Ireland, intended parents must be at least 21 years of age and at least one of the intended parents must have a reasonable expectation of living until the child has turned 18. Under Greek law, the maximum age for the intended parent is set at the boundary of the natural reproductive capacity of the intended mother (namely 50, with the possibility of an extension until 54).

The Greek and Cypriot laws are clear that the agreement between the intended parents and the surrogate mother is mainly between the intended mother and the surrogate, since the intended mother is medically unable to become pregnant. This means that a different-sex couple or a single woman can be intended parents, but a male same-sex couple or a single man cannot. The position of a lesbian couple is, in these countries, not entirely clear. It should, though, be specified that Greece introduced same-sex marriage in 2024, which means that a married couple in this context in principle presumably refers equally to a lesbian couple. The law introducing same-sex marriage also stated that parenthood established abroad will be recognised, implying that surrogacy conducted abroad by male same-sex couples can be recognised.

In Ireland, meanwhile, both different-sex and same-sex couples and single persons can be intended parents, provided that the sole (or both) intended parent(s) is a man/are men, and/or all female intended parent(s) are unable to conceive a child, unable to gestate a pregnancy to birth, unlikely to survive a pregnancy or giving birth, or likely to suffer significant adverse effects to their health through pregnancy or giving birth.

The Irish law specifies that at least one of the intended parents must be genetically related to the child. By contrast, the Greek and Cypriot laws state only that the surrogate may not be the genetic mother (thus implicitly prohibiting traditional surrogacy) and that the ovum can come either from the intended mother or from a donor. No specification is made as to an intended father since the agreement is (mainly) between the surrogate and the intended mother. It therefore seems possible that the child has no genetic connection to the intended parents.

Rules applicable to the surrogate

In all three states, the surrogate must be physically fit and able to go through the pregnancy. She must also undergo a psychological evaluation.

All three states require that the surrogate reside in the Member State concerned, with Ireland specifying that the surrogate should have resided in Ireland for at least two years. Cyprus provides for an exception to this rule: if no surrogate could be found, a surrogate residing abroad may be used providing she will be in Cyprus as of the 28th week of gestation.

In principle, all three states require the surrogate to have had at least one child of her own, though this requirement no longer seems to exist in Greece under the 2022 regulation, despite having been explicitly provided for in the 2017 regulation.

As to age, both Ireland and Greece require the surrogate to be at least 25 years old. Greece sets a maximum age of 50, with the possibility of an extension until 54.

All three states' laws provide that a person can act as a surrogate at most twice, with Greece specifying that she may not have previously undergone more than two caesarians.

In all cases, if the surrogate is married, the spouse has to provide consent as well.

Method of establishing parenthood

As stated before, in all the EU Member States that have introduced regulations, a special body has been set up to oversee surrogacy agreements and these bodies' consent must be acquired before commencement of a surrogacy arrangement.

Both Cyprus and Greece provide for a family court to approve the surrogacy contract prior to the transfer of the fetus and after having received the consent of the special body. Consequently, the intended parents are considered the parents of the child from birth.

Ireland, however, provides for a parental order to be issued by a court after birth. A request for such an order can be made as of 28 days until 6 months after the birth of the child.

The Portuguese law does not seem to have any provision for a court to be involved in the process and provides only for the consent of the special body that oversees the agreement.

Remuneration

Since, in all the Member States that have regulated surrogacy, only altruistic surrogacy is permitted, the types and maximum amounts of remuneration are specified.

This always covers the costs of inducing the pregnancy, and medical costs both during pregnancy and post-partum. There is also always a clause concerning lost income.

Greece has the most specific regulations in this regard. In Cyprus, the rules are being prepared and Ireland still has to provide specific regulations as required by the law. The Greek rules specify that the costs are only required if not already covered by insurance or, as to lost income, the salary has not been paid. The Greek rules also set further limits, however:

- for physical strain, €10 000 for a single pregnancy and € 15 000 for a multiple pregnancy;
- concerning lost income, the Greek rules specify that, in case of unemployment, the amount of lost income is calculated on the basis of the surrogate's professional training and what she would have received had she been working. In any case, lost income is capped at €10 000.

Bans on surrogacy

Certain Member States have banned surrogacy agreements explicitly. It should be made clear that this section concerns bans on such arrangements concluded in the Member States themselves and not necessarily such agreements concluded abroad by Member State residents or nationals. Only Italy has an extraterritorial clause. It is important to note that the existence of such a ban can be grounds for invoking *ordre public* in the context of recognition (see below).

Most states that ban surrogacy do so under their respective assisted reproduction legislation. This ban can be explicit or implicit.

Surrogacy is **explicitly banned** in the following countries.

In **Bulgaria**, the ban on surrogacy is mentioned in paragraph 5.14 of Section IV of the Annex to Ordinance Number 28 on Assisted Reproduction of 20 June 2007. Surrogacy is also prohibited under Articles 182a and 182b of the Penal Code.

In **Croatia**, the ban on surrogacy is provided by Article 31 of Law NN 86/12 on medically assisted reproduction.

In **France**, since 1994, Article 16-7 of the Civil Code states that any agreement on surrogacy is null and void.

In **Germany**, § 1(1)(7) Embryonenschutzgesetz bans surrogacy for medical professionals, penalising it with up to three years in prison, while Article 13c Adoptionsvermittlungsgesetz provides for the prohibition of surrogacy agreements.

In **Italy**, Article 12(6) of Legge 40/2004 prohibits surrogacy, which is punishable with three months to two years in prison. This prohibition was further amended in November 2024 to also apply to Italian nationals who concluded a surrogacy agreement abroad.

In **Lithuania**, surrogacy is banned under Article 11 of Law XII-2608 on Assisted Reproduction.

In **Malta**, Section 6(f) of the Embryo Protection Act has banned surrogacy since 2012.

In **Slovenia**, Article 7 of the Act on Infertility Treatment and Biomedical Assisted Fertilisation Procedures states that a woman intending to act as a surrogate is ineligible for assisted reproduction technology.

In **Spain**, a prohibition on surrogacy was provided for in Article 10 of Lei 35/1988 on Assisted Reproduction Techniques. This was succinctly taken over in the successor law Lei 14/2006 on assisted human reproduction techniques, also in Article 10.

In some countries there is an **implicit ban** on surrogacy that arises from the fact that IVF is only allowed within a marriage or registered partnership. Transfer to a third party is only considered in the context of a donor, which in essence prohibits surrogacy. This is, for example, the case in **Austria**'s Reproductive Medicines Act (although it also has a more explicit prohibition of arrangements for a person to have an egg cell implanted). Such implicit bans also apply in **Estonia**, **Finland**, **Hungary** and **Sweden**.

Recognition of parenthood involving surrogacy abroad

Recognition means the procedure in a state by which a civil status (in the case of surrogacy, this would be parenthood) established abroad is accepted in the receiving state. This involves private international law, which sets the conflict norms for the applicable law and jurisdiction. Private international law includes the 'public policy' concept (generally referred to by the French term *ordre public*), which allows a state to refuse the recognition if the foreign status violates the receiving state's fundamental principles. In such cases, a parent would be considered a parent in one country, but not in another. This is called a **limping legal relationship**. As will be seen below, the European Court of Human Rights has considered that, to resolve such cases, a regularisation method must be provided under certain conditions. This regularisation is, in principle, a domestic procedure and not part of private international law, since in private international law the relationship has not been recognised. A special form of recognition is **transcription**. This means that the foreign status is entered in the national registers and in so doing it becomes a national status.

The Hague Conference on Private International law (HCCH) has been working on a private international law instrument concerning parenthood since 2010. The expert group established between 2015 and 2022 considered that surrogacy should be considered under a separate protocol in order to make it feasible to achieve agreement on a main convention on parenthood. A working group was established in March 2023 and tasked with exploring draft provisions.

Case law of the European Court of Human Rights

The European Court of Human Rights (ECtHR) has had to rule in cases involving surrogacy arrangements many times since 2014. Most of these cases concerned the recognition or transcription of the parenthood established abroad to the intended parents.

Very few of the cases at the ECtHR concerned a **domestic surrogacy arrangement**, an example being *A.L. v France*. In that case, the surrogate mother gave the child to a different couple than the genetic intended parent (for payment) and told the intended parents the child had died. When they found out, the genetic intended parent challenged the paternity. The case was, therefore, rather a classic challenge of paternity. The case took over six years, and in the end family life had already been established, so the courts did not accept the challenge. The ECtHR found a violation of Article 8 ECHR, since the duration of the case had been excessive, while not putting in doubt the final decision. The challenge brought in *H. v United Kingdom* was that the intended parents were not immediately registered on the birth certificate but would have to go through a parental order procedure. The Court considered that the decision of the respondent State to create a clear rule governing parenthood in cases of assisted reproduction from the moment of the child's birth fell within the wide margin of appreciation enjoyed by the State. The Court specified that, to date, it had not held that the intended parents must immediately and automatically be recognised as such in law, but rather, concerning surrogacy conducted abroad, that domestic law provide for a possibility of recognition of the legal relationship between the biological parent and the child, which could be other formal means of recognition. Based on this, the Court stated:

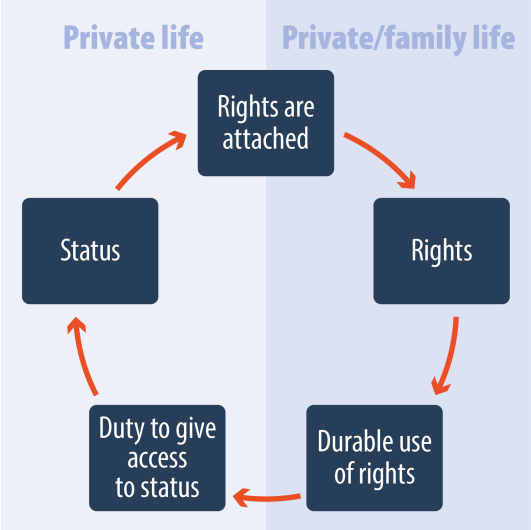
> *'In view of the risk of abuse, and the additional concerns resulting from the number of persons who may have a claim to legal parenthood [...], in the Court's view there is no reason to adopt a different approach in cases where a child was born to a surrogate in the respondent State.'*

The ECtHR has consistently held that there is **no consensus** in Europe either on the lawfulness of surrogacy arrangements or on the legal recognition of the relationship between intended parents and children lawfully conceived abroad as a result of such arrangements. Owing to this lack of consensus, States have a wide margin of appreciation in making surrogacy-related decisions. However, when it comes to parenthood, which constitutes a key aspect of individuals' identity, this margin of appreciation is narrow. Additionally, where children are concerned, the best interest of the child has to be taken into account.

Throughout the case law a **distinction** is drawn between family life and private life. Both of these rights are covered by Article 8 ECHR. **Family life**, in this context, means the possibility to actually live together as a family. **Private life**, in the context of parenthood, relates to personal identity, which includes civil status.

As shown below, as long as the family is able to live together, the right of family life is not violated. However, if this family life has been ongoing for a longer time, the State is under an obligation to regularise the situation with official civil status protected by the right to private life if it has not yet recognised the parenthood established abroad. Subsequently, the rights are exercised on the basis of this civil status. In legal literature, this has been dubbed the 'circle of life' (see Figure 2).

Figure 2 - Circle of life



Source: EPRS, graphic by Samy Chahri.

The case law of the ECtHR can be divided between two main categories:

- cases concerning the genetic link with one of the intended parents; and
- cases concerning the means of regularisation of the parenthood established abroad for the intended parent who does not have a genetic link to the child.

Genetic connection to intended parents

The genetic connection to at least one of the intended parents is in principle what distinguishes surrogacy from adoption (though there are countries where surrogacy is possible without a genetic connection to the intended parent). Consequently, the Court held in *D and Others* v *Belgium* that the convention cannot require states parties to authorise the entry into their territory of children born to a surrogate mother without prior legal verifications on the part of the national authorities. In that case, the birth certificate issued in Ukraine did not mention the surrogate mother and, consequently,

additional proof in the form of a DNA test proving the genetic relationship to the intended father was required. Even though this caused a delay and hardship, the Court considered this interference to be justified by the objectives of preventing criminal offences, and in particular of combating trafficking in human beings. Thus, a state may require **proof of the genetic connection** before allowing a child born from a surrogacy arrangement into the country.

The Grand Chamber judgment in *Paradiso and Campanelli* v *Italy* concerned the **separation** by the Italian authorities of a child from the intended parents, **neither of whom had a genetic connection** to the child (possibly owing to a mix-up). The ECtHR considered that the conditions for concluding the existence of de facto family life had not been met in light of (i) the absence of any biological tie between the child and the intended parents, (ii) the short duration of the relationship with the child (total 8 months), and iii) the uncertainty of the ties from a legal perspective, in spite of the existence of a parental project and the quality of the emotional bonds. As to private life, the child itself had not been a party to the case – since it did not constitute part of the family – and therefore the issue of recognition of the parenthood established abroad was not applicable. The Court accepted that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation (also due to the fact that they took urgent measures), struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them.

Equally, in *Valdís Fjölnisdóttir and Others* v *Iceland* , the child did not have any genetic connection to the intended parents. In that case, however, the authorities permitted a **foster agreement** with the intended parents, which secured the right to family life. An adoption by the intended parents did not, however, go through, since they had in the meantime divorced and were thus no longer eligible for joint adoption. The adoption application was withdrawn and was therefore not part of the case (furthermore, the applicants had relied only on family life and not on private life). Since the applicants had been able to continue the family life through the foster agreement, the ECtHR did not find a violation.

A comparison of *Paradiso and Campanelli* with *Fjölnisdóttir* shows that the approach by the authorities in cases where no genetic connection to the intended parents exists can be quite different. If in such cases the authorities decide to intervene and separate the child permanently from the intended parents, this has to be done with utmost haste and with an assessment of the best interest of the child in order for no family life to have been established.

Concerning cases where there is a genetic connection to the child, a distinction must be made depending on whether the genetic connection is with the intended father or with the intended mother.

For reasons of chronology of the case law, this analysis looks first at the cases on the genetic connection to the intended father, in which the basic principles were established; it then looks at cases where the intended mother has a genetic connection to the child.

Genetic connection to the intended father

The *Mennesson* and *Labassee* v *France* cases were the first cases concerning surrogacy at the ECtHR, and were both decided on 26 June 2014. Both cases concerned intended parents who were French different-sex married couples resident in France, who had children born from surrogacy arrangements in the United States. In both cases the children got entry on the basis of American passports (since the US has *ius soli* acquisition of nationality, the children were American citizens by birth). In both cases the intended father was also the genetic parent, whereas the intended mother was not. Moreover, in both

cases it concerned the transcription of foreign birth certificates (though in the *Mennesson* case this was done by the public prosecutor with a view to having them annulled).

The arguments brought were two-fold:

1. a violation of the right to family life of the parents due to the many difficulties faced, since the American birth certificate with attested translations had to be provided to access all services; and
2. a violation of the right to private life of the children owing to the lack of recognition of parenthood and consequently not acquiring French nationality and not having access to rights such as inheritance rights.

Concerning **family life**, the ECtHR considered that the French prohibition of surrogacy and the consequences of circumventing these had been sufficiently foreseeable. These provisions had the legitimate aims of protecting the health, rights and freedoms of others. The issues faced by the parents in their daily life had not been insurmountable and had not made it impossible to obtain the rights attached to family life. Furthermore, the family had been able to reside together in France. Consequently, there was **no violation of the right to family life**.

However, concerning **private life**, the Court considered that parenthood is an essential part of the identity of a person, as is the nationality. The French courts had accepted the existence of the parenthood established in the US, while simultaneously giving no effect to it, thus undermining the children's identity in the French legal order. While the ECtHR understood that France wanted to discourage its nationals from going abroad for surrogacy arrangements, the effects of the refusal of recognition of parenthood affected not only the intended parents, but especially the children. The Court considered this highly problematic in light of the best interest of the child. The Court stressed that it cannot be argued that it is in the best interest of the child to deprive 'him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof'. This was especially problematic since French law did not allow the genetic father to be given the possibility to adjust the situation by means of a declaration of paternity, adoption or any other means. The Court therefore found a **violation of the right to private life**, since France had overstepped its margin of appreciation by 'preventing both the recognition and establishment under domestic law of their legal relationship with their biological father'.

This principle and approach was subsequently reaffirmed in *Foulon and Bouvet v France* and *Laborie v France*.

In the *D v France* case, which will be discussed more below concerning the intended mother, the Court mentioned that access to an effective and sufficiently rapid mechanism for the recognition of the parent-child relationship could be **adoption**. It considered that this would apply both to the intended father and intended mother. It should be noted, though, that usually for **a man** there will be the possibility of **acknowledgment of paternity**.

Genetic connection to the intended mother

So far, there has been only one case on surrogacy at the ECtHR where the intended mother was also the genetic mother (meaning that her ovum was used). This was the above-mentioned case *D v France*. The fact that the intended mother was also the genetic mother had, however, never been brought up during national proceedings. Consequently, this fact was inadmissible. For this reason,

the intended mother in this case was, in essence, treated as an intended parent, with no genetic connection to the child, who is the spouse or partner of the intended parent who does have a genetic connection to the child. For such cases, as will be seen below, a (stepchild) adoption procedure can be considered sufficient in order to regularise the situation.

Therefore, *de facto*, there has been **no judgment** so far stating precisely what are the rules applicable to the intended mother who is the genetic parent.

As will be seen in greater depth below concerning the non-genetic intended parent who is the partner or spouse of the genetic intended parent, in the very first Protocol 16 Advisory Opinion (Protocol 16 allows the highest national court to make a preliminary reference to the ECtHR) the ECtHR stated that:

> *'the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother".'*

The Court, however, emphasised that, even though in the case laid before it this was not the case, when the child is conceived through gestational surrogacy with the eggs (ova) of the intended mother:

> *'the need to provide a possibility of recognition of the legal relationship between the child and the intended mother applies with even greater force in such a case.'*

While technically not a surrogacy case, in a judgment of 12 November 2024 concerning reciprocal IVF (IVF in a lesbian couple where one is the gestational mother, whereas the ovum comes from the other spouse/partner who is thus the genetic mother), the Court considered that, in reference to *D* v *France*, Article 8 ECHR would not be violated if the genetic mother had access to an adoption procedure.

Consequently, on the basis of the ECtHR case law, it seems that it might be possible that a genetic intended mother might be **treated differently** to a genetic intended father, since the latter might have access to a (very fast) acknowledgment procedure, whereas a genetic intended mother in most Member States will not have access to this procedure, since it is usually reserved for men, and will thus have to rely on a slower adoption procedure. This adoption procedure might also be dependent on the goodwill of the other intended parent.

This might cause issues when **only the intended mother is genetically related** to the child, since, usually, first the intended father would complete an acknowledgment procedure, which would be followed by a stepchild adoption procedure by the intended mother. A stepchild procedure is, however, only possible if the parenthood to one of the intended parents has already been established.

In her concurring opinion in *A.M.* v *Norway*, which will be discussed more below, Judge O'Leary stated:

> *'it is hard not to conclude, from the existing case-law of the Court, that the journey [of entering into a gestational surrogacy arrangement abroad] is particularly precarious for non-biological parents and even genetic (not gestational) mothers, in relation to whom the law has not kept apace either of social reality or of science.'*

Regularisation to the non-genetic intended parent who is the spouse/partner of the genetic intended parent

The first ever Protocol 16 Advisory Opinion concerned the intended mother in the *Mennesson* case, who was not genetically related to the child. In the Advisory Opinion, the ECtHR repeated that the lack

of recognition of a legal relationship has consequences in particular as to access to the nationality of the intended parent, residence in the country of nationality, inheritance, continued relationship in the event of divorce or death of the genetic intended parent, and protection in the event that the intended mother will not or ceases to take care of the child.

The Court considered that the 'general and absolute impossibility of securing recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests'. Therefore, it is required that domestic law provide for a possibility to recognise a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother'.

This does not mean that the state is necessarily obliged to recognise the foreign birth certificate. What it does mean is that **other means that produce similar effects** to registration of the foreign birth details can be suitable, including adoption. This procedure, laid down by domestic law, must ensure that alternatives to registration of the foreign birth certificate can be implemented **promptly and effectively**.

As to the **timing** of the possibility, this has to be, at the latest, when the relationship between the child and the intended mother has become a **practical reality**.

The principles from the Advisory Opinion have subsequently been confirmed in *C and E* v *France* and the previously mentioned *D* v *France* case.

The availability of such means is, however, not always assured.

In the Advisory Opinion, the Court noted, concerning **stepchild adoption**, which France had argued sufficed, that in France this form of adoption is reserved for married couples, which could mean that, in certain circumstances, this could be problematic. Such an issue with stepchild adoption happened in *D.B. and Others* v *Switzerland*. In that case, the intended parents were a **same-sex couple** in a **registered partnership**. At the time, Switzerland did not provide for stepchild adoption for same-sex registered partnerships and reserved this for (different-sex) married couples. In accordance with the ECtHR judgment in *Gas and Dubois* v *France*, this restriction was also allowed, as long as the registered partnership would still have the same adoption rights as unmarried different-sex couples (*X and Others* v *Austria*). Nevertheless, the Court considered that this led to a general and absolute impossibility of obtaining recognition of the relationship between the child and the intended parent for a significant period of time (by the time Switzerland allowed stepchild adoption, the child was 7 years and 8 months). It thus constituted a disproportionate interference with the child's right to respect for a private life. The case did not overturn – or in fact mention – *Gas and Dubois*. This has been interpreted as an implicit over-ruling or as confirmation that *Gas and Dubois* applies only to domestic adoptions, while the stepchild adoption procedure should be available in the case of international surrogacy.[3]

In *K.K.* v *Denmark*, the stepchild adoption had been refused by the authorities since the surrogate mother had been paid. This refusal, in essence, was based on rules derived from the Intercountry Adoption Convention. The Court considered that, adoption aside, domestic law did not provide for other possibilities of recognition of a legal parent-child relationship with the intended mother and, therefore, violated the ECHR.

In *A.M.* v *Norway* a different-sex couple had a gestational surrogacy in the United States in which the intended father's gametes were used. The intended parents' relationship broke down and the

intended father refused to let the intended mother adopt the child and blocked her from contacting the child. She sued for contact rights (but did not bring this up at last instance, so it was inadmissible at the ECtHR) and to have the adoption finalised. The Court considered that, while it was clear the applicant had been put in a difficult situation, it nonetheless required an examination of the interests of all the parties involved, and to some degree also a balancing of conflicting interests. That balancing exercise was, in the Court's assessment, also meticulously carried out by the national court. The ECtHR therefore considered that the outcome must be considered to fall within the margin of appreciation afforded to domestic authorities.

EU action relating to surrogacy

Substantive family law is an exclusive competence of the Member States. Consequently, it is for the Member States to decide on the rules of whether, and if so in what form, surrogacy is permitted on their territory. However, cross-border aspects do fall within the competence of the EU.

Parenthood regulation proposal

According to the case law of the Court of Justice of the European Union, the parenthood established in one Member State has to be recognised in the other Member States for the purpose of enabling free movement. This recognition is, however, limited, and thus does not fully avoid limping legal relationships.

For this reason, in 2022 the Commission proposed a draft regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European certificate of parenthood. The draft regulation would harmonise the private international law rules of the Member States as to parenthood. It would not affect the substantive family law of the Member States.

Children born in the EU as a result of surrogacy would be included within the scope of this regulation. Their exclusion – as was pointed out by a study prepared for the European Parliament – would be contrary to Article 7 of the Charter of Fundamental Rights, which has the same scope as Article 8 ECHR, which requires some form of recognition or regularisation, as shown above. Exclusion would, furthermore, constitute direct discrimination on grounds of birth, which is prohibited by Article 21(1) of the Charter. Consequently, exclusion would constitute a ground for challenging the validity of any future regulation.

The discussions on surrogacy in the Council are about two separate issues:

- the applicable law concerning the establishment of parenthood, with regard to which Member States do not want to be in a situation of having to apply the law of another Member State relating to surrogacy (domestic surrogacy). There are considerations that justify requiring multiple cumulative connecting factors;
- recognition of the parenthood established abroad. This discussion is especially about whether there should be an explicit public policy mention concerning surrogacy and, if so, whether this should be solely in the preamble or also in the articles.

During the Belgian presidency in the Council, following examination of a discussion paper the majority of Member States considered the public policy option the most suitable. This would allow Member

States to refuse recognition, but would then require them to fall back on national law to provide for a means to regularise the limping parenthood relationship in accordance with ECtHR case law.

Anti-trafficking Directive

Directive 2024/1712 on preventing and combating trafficking in human beings and protecting its victims, amending Directive 2011/36/EU, identified, for the first time, the **exploitation of surrogacy** explicitly as a form of **human trafficking**. It also identified illegal adoptions explicitly in this context. The references to exploitation of surrogacy and to illegal adoptions were introduced by the European Parliament during the legislative process.

According to the preamble, the directive targets those who coerce or deceive women into acting as surrogate mothers.

Eurojust considers that there are still practical challenges, in particular the following:

- It is difficult to determine whether a crime was committed and who should be treated as an offender, witness or victim.
- It is difficult to establish whether the surrogate mothers are exploited and have become victims of trafficking and whether the children are subject to abuse or exploitation once they are handed over to the intended parent/s.
- Issues of double criminality can arise when the facts do not constitute a criminal offence in all the countries involved.

Main references

De Groot, D., The many faces of civil status recognition: A legal analysis in the light of EU citizenship and the case law of the European Court of Justice and the European Court of Human Rights, PhD thesis, Bern, 2021.

Endnotes

1 See for example in the Bible, Genesis 16:2 and Genesis 30:3.

2 Hague Conference on Private International Law (HCCH), Private international law issues surrounding the status of children, including issues arising from internationalsurrogacy arrangements, 2011, p. 6.

3 It should be noted that technically speaking, the adoption procedure to regularise the parenthood established abroad would be a domestic adoption.

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