Care in Family Relations

The Case of Surrogacy Leave

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Abstract

The advance of reproductive technologies, like surrogacy arrangements, confronts courts with new demands and dilemmas. This contribution analyses the potential of EU law towards a better and more balanced reconciliation of work, private and family life when no national law applies. In two recent cases of the Court of Justice of the EU on leave for surrogacy mothers, the Advocates General Kokott and Wahl published diverging opinions on similar prejudicial questions of national courts. These opinions illustrate some difficulties in applying the EU concept of equality and interpreting the scope of relevant EU law on leaves. The Court followed a cautious approach, which is not surprising given the lack of consensus on surrogacy arrangements in the member states and their legal implications. Developments in society and technologies in relation to motherhood, fatherhood and parenthood give rise to new legal questions. However, the existing EU legal instruments in this field were not designed to address questions such as for example surrogacy leave for commissioning mothers and fathers. A modernisation of the EU instruments in the light of societal, technological and legal developments in the member states would provide an opportunity to remedy some gaps in the existing EU legal framework on reconciliation issues. In a society where participation in the labour market of both women and men is increasing and getting more balanced, the need to address care of children, older people and disabled people becomes more urgent.

Keywords: EU law, case law, surrogacy, leaves, reconciliation of work.

A Introduction

Family relations are often characterized by care relations because much care is provided within families or by relatives. Parents care for their children and/or their parents, step-parents care for children of their spouse or partner and family members often care for ill, elderly and/or disabled relatives. In a society where little or decreasing care facilities are offered by institutions organized or subsidized by the state, such as child care, care for elderly or disabled people, the urgency of

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caring for family members, neighbours and/or friends is often most felt by women.

In the European Union, women spend on average 26 hours a week on care and household activities, compared to 9 hours for men. Women not only take more care responsibilities than men, but they increasingly participate in the labour market at the same time. The female employment rate has reached 63% compared to the 75% male employment rate.[1] Reconciling family life and private life with work therefore becomes increasingly important and demanding, and law can potentially facilitate such reconciliation. A key question in this context is whether law – in particular EU law – contributes to a more balanced division of work and care between men and women, which is one of the aims of the EU in the field of gender equality.[2]

The advance of reproductive technologies, like surrogacy arrangements, gives rise to new ethical, medical and legal questions. Courts are confronted with new demands and dilemmas, sometimes relating to care. In this article, the potential of EU law towards a better and more balanced reconciliation of work and family life is analysed in relation to two recent cases of the Court of Justice of the EU (hereafter CJEU or Court) on leave for surrogacy mothers. It will become clear that the impact of EU law in relation to care in case of surrogacy is rather limited at the moment. However, at the national level member states might further develop reconciliation policies for carers in relation to surrogacy.

B Regulation of Surrogacy in EU Member States

The central question in the two recent cases decided by the Grand Chamber of the CJEU on the same day and discussed here – case C-167/12 *C.D.* and case C-363/12 *Z.*[3] – is whether a commissioning (or intended) mother who takes care of the child right after its birth is entitled to maternity leave. In these cases not the intended mother, but the surrogate mother gave birth to the child. Legislation on surrogacy varies greatly in the member states of the EU. In some member states, surrogacy is legally regulated (for example in Austria, Finland and Sweden);[4] in some member states, commercial surrogacy[5] is forbidden (for example in Belgium, Denmark, Greece, Hungary, Ireland, Latvia, The Netherlands and the

1 European Commission, *Progress on equality between women and men in 2013. A Europe 2020 initiative*, European Union 2014, p. 3 and p. 9.

2 *See* for example the Resolution of the Council of 29 June 2000 on the balanced participation of women and men in family and working life, OJ 2000 C 218/2.

3 Case C-167/12 *C.D. v. S.T.* and Case C-363/12 *Z. v. A. Government Department*, judgements of 18 March 2014, not yet published.

4 *See* for example W. van Hoof & G. Pennings, 'Extraterritorial Laws for Cross-Border Reproductive Care: The Issue of Legal Diversity', *European Journal of Health Law*, 2012, pp. 187-200.

5 *See* on international commercial surrogacy for example: Y. Ergas, 'Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy', *Emory International Law Review*, Vol. 27, 2013, pp. 117-188 and J. Tobin, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?', *International and Comparative Quarterly*, Vol. 63, No. 2, 2014, pp. 317-352.

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UK) and in some member states, surrogacy was not yet regulated in 2013 (for example in Cyprus, the Czech Republic, Estonia, Lithuania, Luxembourg, Poland, Romania, Slovakia and Slovenia).[6]

The two cases discussed here concern prejudicial questions from the UK Employment Tribunal Newcastle upon Tyne (the *C.D.* case) and from the Irish Equality Tribunal (the *Z.* case). In Ireland surrogacy is unregulated, while in the UK surrogacy is permitted under certain conditions. Both countries lack legislation on maternity leave for surrogate mothers. The main question at stake in both cases was therefore whether a right to such a leave can be derived from EU law.

C Relevant EU Law

Both primary and secondary EU law is applicable to these cases. In the first place, the Pregnancy Directive 92/85 is relevant.[7] According to Article 8 of this Directive, member states have to ensure that women enjoy a period of at least 14 weeks maternity leave. During this period, their employment rights must be ensured and they are entitled to payment being maintained and/or an adequate allowance. The personal scope is defined in Article 2: the Directive applies to pregnant workers, workers who have recently given birth and workers who are breastfeeding. In addition, Article 15 of the Recast Directive 2006/54 entitles a woman at the end of her maternity leave to return to her job or to an equivalent post on terms and conditions which are not less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled.[8] The prohibition of direct and indirect sex discrimination can also apply. Any less favourable treatment of a woman related to pregnancy or maternity leave amounts to discrimination and is prohibited in for example pay, access to employment and working conditions, including dismissal.[9]

The CJEU interpreted both Directives 92/85 and 2006/54 in the *C.D.* and *Z.* cases. In addition, the question whether the prohibition of discrimination on the ground of disability was infringed (Directive 2000/78, the so-called Framework Directive) was at stake in the *Z.* case.[10]

Some rights of the EU Charter of Fundamental Rights were also relevant in these cases. This was for example the case for Article 7 (respect for private and

6 European Parliament, DG for internal policies, *A Comparative Study on the Regime of Surrogacy in EU Member States*, Brussels, 2013, p. 15-16.

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

8 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), OJ 2006 L 204/23.

9 *See* in particular the Articles 2(2)(c), 4 and 14 of Directive 2006/54.

10 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303/16.

family life), Article 24 (rights of the child) and Article 33 (family and professional life). Article 24(3) stipulates that "every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests". Articles 7 and 24 of the Charter were considered relevant by AG Kokott in her Opinion on the *C.D.* case, who considered Article 24(3) of particular importance for an infant in relationship to his mother,[11] but these two provisions were not addressed by the CJEU. Article 33(2) explicitly addresses maternity leave in relation to reconciliation issues: "To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child". In the *Z.* case, some prejudicial questions concerned the validity of the Recast Directive in the light of this Charter provision in addition to provisions on equality (in particular Articles 21 and 23 of the Charter).

D The Facts of the Cases and Prejudicial Questions

I The C.D. Case

In the *C.D.* case, Ms C.D. was the commissioning mother and worked at the National Health Service Foundation, an emanation of the state. The surrogacy agreement was in conformance with UK legislation. The sperm of her partner, but no ovum from Ms C.D. was used. Ms C.D. was therefore not the genetic mother of the child, was at no material time pregnant herself and did not give birth to the child. However, she began mothering and breastfeeding the child one hour after birth. She breastfed the child for three months and she and her partner received a parental order and full and permanent responsibility for the child and thus were the legal parents of the child. Ms C.D. requested, even before the child was born, paid time off 'for surrogacy' under the adoption leave policy of her employer. This request was first denied, but later granted. Ms C.D. nevertheless started proceedings with regards to the first refusal, claiming that not granting her paid maternity leave was a breach of the prohibition of discrimination on the grounds of sex and/or pregnancy and motherhood.

The prejudicial questions of the UK Employment Tribunal concerned the interpretation of Directives 92/85 and 2000/54. The main question was whether a commissioning mother is entitled to maternity leave on the ground of Article 1(1) (purpose) and/or Article 2(c) (personal scope) and/or Article 8(1) (maternity leave) and/or Article 11(2)(b) (employment rights) of Directive 92/85 and whether it was relevant or not that the commissioning mother did breastfeed the child after its birth. The UK court also asks whether the refusal by an employer to provide maternity leave to a commissioning mother is a breach of Article 14 of Directive 2006/54.

11 At para. 60.

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II The Z. Case

The *Z.* case concerned a woman who was also employed by an emanation of the state. She had no uterus and could therefore not support a pregnancy. She and her husband opted for surrogacy through a specialist agency in California, where a detailed regulation exists on surrogacy pregnancies and birth. After an *in vitro* fertilization took place in Ireland, the egg was transferred to the surrogate mother in California. The child is the genetic child of both parents, the identity of the surrogate mother was not mentioned on the birth certificate and the commissioning parents took care of the child since its birth. Just as in the *C.D.* case, the request to enjoy maternity leave was refused as Ms Z. had not been pregnant and could not give birth to a child and therefore did not fulfil the requirements for taking maternity leave. Adoptive leave was denied as well, as the child had not been adopted. No right to surrogate leave exists in UK law and the employment contract did not specify such a right either. Ms Z., however, enjoyed unpaid leave and parental leave. She claimed that given the refusal to grant her paid leave equivalent to maternity or adoptive leave, she had been subject to discriminatory treatment on the grounds of gender, family status and disability.

In de *Z.* case, the prejudicial questions of the Irish Equality Tribunal concerned the prohibition of discrimination. The Tribunal asked whether the refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who, as a commissioning mother, has had a baby through a surrogacy arrangements constitutes discrimination based on sex (in particular in the light of Articles 4 and 14 of Directive 2006/54). If this is not the case, the Tribunal asked whether Directive 2006/54 is valid in the light of Articles 3 TEU, Articles 8 TFEU and 157 TFEU and Articles 21, 23, 33 and 34 of the Charter. The Tribunal asked similar questions in relation to Directive 2000/78, in addition to the interpretation of the obligation to provide reasonable accommodation (Article 5). The prejudicial questions also concerned the validity of Directive 2000/78 in relation to the Charter, in case the refusal to grant paid leave equivalent to maternity and/or adoptive leave is not contrary to the Directive. In addition, prejudicial questions addressed the validity of Directive 2000/78 with the UN Convention on the Rights of persons with Disabilities, which was approved by the EU.[12]

E Diverging Opinions of AG Kokott and AG Wahl

AG Kokott and AG Wahl took quite different views on the similar questions at stake in these cases on pregnancy and maternity leave for commissioning mothers in case of surrogacy.[13] In the *C.D.* case, AG Kokott explored the personal scope of Directive 92/85. She considered the situation of the biological mother and the commissioning mother different with regards to pregnancy and birth but compa-

12 Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention of the Rights of Persons with Disabilities, OJ 2010 L 23/35.

13 Opinion of AG Kokott in Case C-167/12 (*CD*) and opinion AG Wahl in Case C-363/12 (*Z.*), 26 September 2013.

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rable in relation to breastfeeding. In both situations, there are health risks, for example in the case of occupational exposure to chemicals or under certain working conditions.[14] AG Kokott emphasised the importance of care by a commissioning mother and took the *Hofmann* case as a starting point. In the German *Hofmann* case of 1984, the issue at stake was the extent of the protection of the health of mothers after birth and the rights of the father who has acknowledged paternity of a child.[15] The Court considered that "first, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment."[16] AG Kokott submitted that a commissioning mother should fall under the personal scope of the Pregnancy Directive, even if she is not breastfeeding. This follows from the necessary protection of the special relationship between the mother and child. In her view, precisely because the commissioning mother was not pregnant, it is a challenge for her to build up a relationship with the child, include it in the family and to get used to her role as mother. This situation is in her view not comparable to adoption, where generally speaking the building up of the relationship with the child does not begin at the birth of the child. AG Kokott did not pay any attention to the role of the father in case of surrogacy. She concluded that the Directive applies to a commissioning mother who is a worker and is thus entitled to maternity leave. Both the surrogate and the commissioning mother have a right to a minimum of two weeks (Article 8(2) of Directive 92/85). The remaining leave (minimum 10 weeks) should be shared between the two women. AG Kokott considered the following criteria relevant: the protection of the pregnant woman, the protection of the woman who has given birth and the interest of the child. In this case, AG Kokott adopted a broad interpretation of the personal scope of Directive 92/85, putting emphasis on care by (commissioning) mothers.

AG Wahl followed quite a different approach. In his view, the protection of the special relationship between mother and child is closely related to the birth of the child. The scope of the Directive should not be interpreted as applying to the protection of motherhood, or even parenthood. A broad interpretation of the personal scope of the Directive would have the effect that a commissioning mother worker would be entitled to paid (maternity) leave, but that an adoptive mother or the father involved in a surrogacy arrangement for example would not have such right.[17] AG Wahl thus emphasised the role of (commissioning) mothers much less than AG Kokott. The consequence is that intended mothers have no specific maternity leave rights that could be based on existing EU law. Clearly the

14 Para. 44.

15 Judgment of 12 July 1984 in *Case 184/83Ulrich Hofmann/ Barmer Ersatzkasse* [1984] ECR p. 3047.

16 Para. 25. This case law has been confirmed in subsequent cases.

17 Para. 51.

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member states have the competence to adopt measures on parental leave in case of surrogacy arrangements.

According to AG Wahl, there is in this case no sex discrimination in relation to pregnancy or the IVF treatment Ms Z. has undergone. This distinguishes the present situation from the *Mayr* case.[18] AG Wahl recalled that in case of pregnancy or maternity discrimination no comparator is required, but in case of sex discrimination, AG Wahl considered it necessary to point at a male comparator.[19] In his view, the difference of treatment in this case occurs between a commissioning mother and a woman who has given birth or an adoptive mother. A male parent of a child born through surrogacy would receive the same treatment as a commissioning mother; there is thus no sex discrimination. A comparison between a commissioning mother and an adoptive mother who has not given birth to the child would be in his view more appropriate. He finally considers that the provisions of the Charter can be taken into account for the interpretation of secondary EU law but cannot extend the material scope of Directive 2006/54 or affect the validity of the Directive in this case.[20]

F The Judgements of the Court

The Court followed the approach suggested by AG Wahl on the interpretation of Article 2 (personal scope) and Article 8 (pregnancy and maternity leave) of Directive 92/85 in both cases. In the *C.D.* case, the CJEU (Grand Chamber) considered that the aim of this Directive in the light of existing case law (*e.g. Hofmann* and the more recent case *Betriu Montull*)[21] is the protection of the biological condition of the pregnant woman and the especially vulnerable situation arising from her pregnancy. The protection of the special relationship of the mother and the child only applies to the period after the pregnancy and the confinement. The Court thus mentioned once again the twofold goal of the pregnancy and maternity leave Article 8 of the Pregnancy Directive presupposes that the worker entitled to maternity leave has been pregnant and has given birth. The Court considers that member states are not required to provide maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even if she may breastfeed the baby following the birth or when she does breastfeed the baby. However, member states might adopt more favourable provisions. In addition, the Court ruled in *C.D.* that the employer's refusal to grant maternity leave to a commissioning mother who has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex. The com-

18 Judgment of 26 February 2008, *Case C-504/06, Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG* [2008] ECR I-1017. In this case, the Court considered that if it is established that a dismissal is essentially based on the fact that a woman has undergone IVF treatment, the dismissal is contrary to Directive 76/207 (now repealed by Directive 2006/54).

19 Paras. 55-59.

20 Paras. 69-76, at 73.

21 *See* para. 34; *Case C-5/12, Marc Betriu Montull v. Instituto Nacional de la Seguridad Social (INSS)*, of 19 September 2013, nyr.

parison is made between the surrogate mother who was pregnant and has given birth and the commissioning mother, both women. There is no indirect discrimination either; the Court considers that there is nothing in the file to establish that the refusal to grant leave puts a female worker at a particular disadvantage compared to a male worker. There is also no less favourable treatment in relation to pregnancy or maternity leave in the meaning of Article 2(2)(c) of Directive 2006/54 as the commissioning mother has not been pregnant and has no right to maternity leave.

In the *Z.* case, the Court follows the Opinion of AG Wahl regarding the application of Directive 2006/54 and concludes that there is no direct or indirect sex discrimination at stake.[22] Sex discrimination in relation to the denying of adoptive leave does not fall under the scope of the Directive, as the member states have the freedom to grant adoption leave or not.[23] Given the fact that the situation of a commissioning mother as regards the grant of maternity or adoptive leave does not fall under the scope of this Directive, the questions regarding the validity of that directive with primary law provisions do not have to be addressed. Finally, the Court considers that in this case, the disability to have a child does not prevent the mother of participating fully and effectively in professional life on an equal basis with other workers.

In both cases, neither of the commissioning parents were entitled to rights derived from EU law.

G Critical Assessment

The outcome of the cases is not surprising. If the Court would have followed the reasoning of AG Kokott, this would have had meant that the rights of the surrogate mother would have been limited (as the leave should have to be shared between the surrogate and the commissioning mother) and the personal scope of Directive 92/85 would have been extensively broadened.[24] In the light of the fact that there is little consensus yet on surrogacy arrangements in the member states and their legal implications, and given the ethical and moral questions related to surrogacy, it seems reasonable that the Court refrained from such broad interpretation of the scope of this Directive.[25] It is however surprising that some aspects related to surrogacy played no role in the Court's considerations. This concerns, for example, questions whether a commercial surrogacy is at stake or not and whether the parents or one of the parents are/is the genetic parent of the child. Legal parenthood or the lack of it has neither been considered (at least explicitly) by the Court. It would seem that the surrogacy agreement in itself was decisive.

22 Paras. 51-57.

23 Paras. 61-63.

24 Michèle Finck, University of Oxford, welcomes the reasoning of AG Kokott in her comment: *see* <http://eutopialaw.com/2014/03/21/case-comment-cd-v-st-and-z-v-a-government-department-ors-c-16712-and-c-36312/>.

25 *See* also: M. Cousins, 'Surrogacy Leave and EU Law', *Maastricht Journal of European and Comparative Law*, Vol. 21, No. 2, 2014, pp. 476-486, at 485.

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The Court also did not consider the Directive applicable to a commissioning mother who breastfeeds the child. The reference in Article 8 to the period before or after 'confinement' seems decisive. The use of the criterion 'breastfeeding' as a condition for granting paid maternity leave to a commissioning mother would have the effect that a commissioning mother who does not or cannot breastfeed the child is denied maternity leave. Such unequal treatment between commissioning mothers does not seem desirable either. A side effect could even be that commissioning mothers would breastfeed the child simply in order to be entitled to maternity leave.

AG Kokott puts quite some emphasis in her Opinion on the special relationship between the (commissioning) mother and the child in the light of the Court's case law starting with *Hofmann* in 1984. In doing so, AG Kokott stresses the need of protection and the caring role of (commissioning) mothers. Such an approach might imply that rights of fathers are denied, as was the case in *Hofmann* and more recently in *Betriu Montull*. In this recent case, the Court underlined once more the especially vulnerable situation of pregnant workers and workers who have recently given birth.[26] The approach taken by the Court in *Hofmann* and in some subsequent cases was criticised for perpetuating a motherhood ideology.[27] However, in the case law of the Court there are also examples where fathers were entitled to leave in such a way that traditional gender stereotypes on caring roles between women and men were not perpetuated.[28] AG Wahl paid attention, in his Opinion, to the position of the commissioning father, who also can take care responsibilities for the child. In my view, parenthood is indeed a better ground for granting rights such as leaves in relation to care for children. Sex discrimination can then be avoided and such an approach can contribute to a more balanced division of work and care between men and women (see for example the cases *Hill*, *Gerster* and *Álvarez*[29]). In *Hill* and *Gerster*, the Court observed that: "Community policy [...] is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the member states as being the natural corollary of the equality between men and women, and which is recognised by Community law".[30] In *Álvarez*, the Court considered that when only a mother who is employed qualifies for the leave at stake, whereas a father with the same status can only enjoy this right but not be the holder of it, this "is liable to perpetuate a

26 Para. 49.

27 *See* for example C. McGlynn, 'Ideologies of Motherhood in European Community Sex Equality', *European Law Journal*, Vol. 6, 2000, pp. 29-44.

28 *See* for example E. Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union', *European Law Journal*, Vol. 20, No. 1, 2014, pp. 88-106 and S. Burri, 'Challenging Perspectives on Work/Life Balance Issues in EU and Dutch Law', *in Employment and Social Rights: An Evolving Scenario*, Marco Biagi Foundation, forthcoming.

29 Judgments *Case C-1/95 Hellen Gerster/Freistaat Bayern*, [1997] ECR p. I-05253 of 2 October 1997; *Case C-243/95, Kathleen Hill and Ann Stapleton/The Revenue Commissioners and Department of Finance* of 17 June 1998 [1997] ECR p. I-03739 and *Case C-104/09, Pedro Manuel Roca Álvarez v. Sesa Start España ETT SA* of 30 September 2010 [2010] ECR p. I-8661.

30 Para. 38 in *Hill* and para. 42 in *Gerster*.

traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties."[31] The aim of the leave period after confinement is indeed in the first place meant for recovery for the mothers. And indeed, mothers more than fathers still have more care responsibilities in practice. When this is the case, the concept of indirect sex discrimination can be invoked in order to address disadvantages that affect women disproportionately, such as in the *Danfoss* case.[32] The Court recognised in this case, back in 1989, that if the criterion of mobility was understood to include "the employee's adaptability to variable hours and varying places of work, the criterion of mobility may also work to the disadvantage of female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly".[33] But a care relation with the child does not have to be exclusive.

If the pending proposal aiming at amending Directive 92/85 would be adopted, fathers would receive more specific rights, such as paternity leave. There is however little chance that the proposal will be adopted.[34] This gives the European Commission the opportunity to draft a new proposal on reconciliation of work, private and family life, which might embrace a more holistic approach. EU law now only provides minimum standards in relation to pregnancy and maternity leave, parental leave and time off (Directive 2010/18)[35] in addition to the prohibition of direct and indirect sex discrimination.[36] EU provisions on adjustment of working time and working hours are very weak. Some situations are not addressed by the Pregnancy Directive, such as the right to leave of pregnant workers who lose their child during their pregnancy. If they did not give birth and giving birth to a child is the relevant criteria for being entitled to (maternity) leave, a limited interpretation of the scope of the Directive might have the consequence that such workers are denied a right to leave, unless pregnancy is the relevant reference point. There is another group who most probably did not come into the mind of the drafters of Directive 92/85: trans men who get pregnant and give birth to a child.[37] Many countries no longer require sterilisation in case of

31 Para. 36.

32 *Case 109/88 Handels- og Kontorfunktionærernes Forbund I Danmark/Dansk Arbejdsgiverforening, acting on behalf of Danfoss* of 17 October 1989 [1989] ECR 3199.

33 Para. 25.

34 COM (2008)637. The member states have not reached an agreement, and if no agreement is reached before mid-2015, the proposal will be withdrawn according to the Commission's work program 2015: COM (2014) 910 final, p. 12.

35 Council 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, OJ 2010 L 68/13.

36 *See* for an overview for example: A. Masselot, E. Caracciolo di Torella & S. Burri, *Fighting Discrimination on the Grounds of Pregnancy, Maternity and Parenthood. The application of EU law and national law in practice in 33 European countries*, European Commission 2012, <http://ec.europa.eu/justice/gender-equality/files/your_rights/discrimination__pregnancy_maternity_parenthood_final_en.pdf>.

37 A famous example is Thomas Beatie, who gave birth to three daughters: *see* <http://en.wikipedia.org/wiki/Thomas_Beatie>.

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gender reassignment for the legal recognition of the reassignment. Men who have given birth can, in addition, be the legal parent of their child. However, it is not clear whether they would fall under the personal scope of Directive 92/85, given the text of Article 2, which reads: "worker who informs *her* employer of *her* condition" (*italics added, SB.*). At first sight, men who have been pregnant and/or given birth and/or breastfeed would be excluded from the personal scope of this Directive, unless the CJEU, confronted with such questions, would consider that trans men fall under the scope of the Directive.

H Conclusion

For the commissioning mothers who take care responsibilities for the child in surrogacy cases and are nevertheless not entitled to paid maternity (or adoptive) leave, this case law is undoubtedly disappointing. In some member states (for example the Netherlands), adoptive leave is possible for surrogacy parents who fulfil certain conditions.[38] Parental and/or child care leave might also be available to (legal) commissioning parents in some member states. Developments in society and technologies in relation to motherhood, fatherhood and parenthood give rise to new legal questions which the CJEU is required to answer. However, the existing EU legal instruments in this field were not designed to address questions such as surrogacy leave for commissioning mothers and fathers. The Court will probably be confronted in the future with new legal questions on the significance of pregnancy, birth and care in family relations which are not explicitly or sufficiently addressed by the existing relevant EU law. A modernisation of these instruments in the light of societal, technological and legal developments in the member states would provide an opportunity to remedy some gaps in the existing EU legal framework on reconciliation issues.

It is submitted that a more comprehensive EU approach to leaves, working time adjustments and care facilities should include more rights to be able to take caring responsibilities, not only for mothers and fathers but also for other relatives. In a society where participation in the labour market of both women and men is increasing and getting more balanced, the need to address care of children, older people and disabled people becomes more urgent. In the author's view, the issue of care should therefore be more prominent on EU's social agenda than up to now.

38 *See* for example District Court The Hague, 10 December 2007, ECLI:NL:RBSGR:2007:BC5651.