

Regulating international surrogacy arrangements - state of play

Surrogacy is a very sensitive topic, which raises a number of ethical concerns and is regulated in various ways in different EU Member States. Some jurisdictions – e.g. France, Germany, Italy and Sweden – ban both altruistic and commercial surrogacy, while others – e.g. Greece and the UK – allow the practice as long as it is not commercial, and still others have adopted either very limited legislation or none at all on the topic. A substantial account of these variations is to be found in the 2013 study commissioned by the Policy Department on Citizens' Rights and Constitutional Affairs of the European Parliament, '[A comparative study on the regime of surrogacy in EU Member States](#)'. Beyond ethical and legal discussions, the practice of international surrogacy arrangements¹ is developing, raising a number of issues of private international law and fundamental rights which have a direct impact on the lives of citizens. These issues include the determination of parentage, the civil status of the child, the child's nationality, the right to family life, and the merchandising of the human body and the commodification of the child. While family law in general and surrogacy in particular are mainly matters of national competence, the EU is empowered to act on those aspects having cross-border implications (see Article 81(3) of the Treaty on the Functioning of the European Union (TFEU)). Accordingly, the present briefing focuses on the legal consequences of the developing social practice, and aims to provide avenues for reflection on possible solutions at EU level.

The 2013 study pointed out three major aims to be pursued should an EU legislation be adopted: certainty as to the legal parenthood of the child; the child's entitlement to leave the country of origin; and the child's entitlement to reside permanently in the receiving country. The possible need for EU action was discussed earlier in a study published by the Policy Department in 2010 ('[Recognition of Parental Responsibility: Biological Parenthood v. Legal Parenthood, i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for EU Action?](#)').

More recently, the JURI committee asked the Policy Department to organise a Policy Hub on this topic: this took place on 16 June 2016. The present briefing builds on discussions held on that occasion, and aims to take stock of, firstly, current cross-border legal issues in the field, and, secondly, possible avenues to tackle these, both from an academic point of view and, more practically, by looking at current regulatory work carried out at international level.

I- Legal issues raised by international surrogacy arrangements

Legal issues stem mainly from the refusal to recognise foreign birth certificates. The lack of international regulation on international surrogacy arrangements has left it to the judges to solve the consequent issues, either before national jurisdictions² or international ones. Indeed, several refusals to recognise cross-border surrogacy arrangements and the various consequences entailed have been challenged before the European Court of Human Rights (ECtHR) on the grounds of the violation of the child's **right to respect for private and family life** (article 8 of the [European Convention on Human Rights](#)). Striking examples from the ECtHR of such inconvenient consequences are the [Mennesson](#) and [Labassée](#)³ cases on the one hand, and the [Paradiso and Campanelli](#)⁴ case on the other.

A. Determination of the child's nationality

Prohibitionist states' refusal to recognise foreign birth certificates stemming from international surrogacy arrangements imply that children born in such circumstances are denied the right to apply for their State of residence's nationality. Such a refusal to register the child's birth in the national civil register has several '**domino effects**' which are detrimental to the child itself. It was indeed underlined with regard to the *Menesson* and *Labassée* cases that this refusal entailed for the child an inferior status in French inheritance law⁵ as well as practical difficulties regarding social security and schooling. The ECtHR, following its previous jurisprudence dictated by the overriding **principle of the child's best interest**, affirmed that a child born through a surrogate arrangement should not be disadvantaged because of the way he or she was born. The judges found that such consequences arising from a refusal to grant nationality amounted to a violation of the child's right to private life. This ruling was recently confirmed in the *Foulon and Bouvet* case⁶, in which the applicants complained that their children were not entitled to open a bank account in France because they had been denied French nationality.

B. Determination of the child's legal parents

Here, a legal vacuum is concerned which leaves open the question of legal parenthood. Who are the legal parents of the to-be-born child: the surrogate and her partner? the genetic parents when the child was conceived through gamete donors? the commissioning parents? Since prohibitionist states are faced with a legal loophole, they apply their own legislation regarding parentage. In both cases at stake, France and Italy refused to establish legal parentage between the child and the commissioning parents in application of their own national law. The ECtHR consequently ruled that the child's right to respect for private life had been violated since the lack of filiation would have a negative impact on the formation of the child's **identity** and on the child's right to preserve that identity, thus being incompatible with the child's best interests.

This also raises the question of the child's right to establish the details of its 'basic identity' and its right to be able to access such information⁷, as reaffirmed by the judges in the *Paradiso and Campanelli* decision. This leaves open the question of establishing details about the surrogate and genetic parents as well as the commissioning ones. The issue here is pinpointed by Richard Blauwhoff and Lisette Frohn⁸: 'everyone must be able to establish the substance of his or her identity and ... this identity encompasses (*de minimis*) the *legal* parent-child relationship and nationality'.

C. Removal of children from their family environment

One of the major issues raised in *Paradiso and Campanelli* was the child's removal from its family environment, following the Italian State's refusal to recognise the child's birth certificate. According to ECtHR case law, the existence of a family life within the meaning of Article 8 depends primarily on the presence of *de facto* ties. In consequence, even though the commissioning parents were not considered *de jure* by the Italian authorities as the child's legal parents, they were seen as its *de facto* **social parents**. The ECtHR thus found that there was a violation of the child's **right to family life**, since it considered the decision to remove the child from its family environment to be an extreme measure which the state authorities should only have used as a last resort. Furthermore, it was stressed that even the right to private life entails to some extent the right of an individual to establish relationships with 'fellow human beings'.

According to ECtHR case law, the refusal to recognise the foreign birth certificates of surrogate children amounts to a violation of the child's fundamental right to private and family life because of the consequences it entails. The status quo, in the current absence of an international or EU regulatory framework, leads to legal uncertainty and raises a number of issues, including limitation of free movement and violations of fundamental rights. The following avenues for regulatory solutions are therefore proposed for consideration.

II- Avenues for regulatory solutions

Is there a need for regulatory action at supranational level? Some experts argue that the only action needed is to adapt the existing framework for international adoption to cases of international surrogacy arrangements, while for others there is a case for developing a separate international instrument dedicated to surrogacy (A). Meanwhile, some work has already been undertaken in international fora such as the Hague Conference on Private International Law (intergovernmental organisation) or International Social Service (NGO) (B).

A. Avenues proposed by academia

1. Adapting existing instruments on international adoption

As argued by Chris Thomale⁹, one possible answer to the issues raised by international surrogacy arrangements would be to resort to international adoption and adapt the existing 1993 Hague Convention on Intercountry Adoption. According to Thomale, 'the adaptation of adoption procedure to surrogacy arrangements should be the main focus of the legal reform'. This author indeed believes that **fast-track procedures** should be put in place, either when surrogacy children's genetic descent from the commissioning parents can be ascertained or when the legal parentage of *one* intended parent is already established independently. Commissioning parents may also be put on top of the applicants' list or be given special consideration in the adoption process. Reformed adoption procedures would thus guarantee the preservation of the child's best interest, since a thorough examination would be carried out as to whether it really lies in the child's best interest to have the commissioning parents as its legal parents.

Under this approach, EU intervention would be limited to a mere supporting role, for instance by working on a model adoption law or adoption guidelines for Member States and thus holding back on regulating the issue. This idea of developing 'soft law measures' is also supported by Michael Wells-Greco, who advocates complementary approaches for the EU, including review and monitoring of national legislations, exchange of practices and information, guidance on best practices, judicial and international cooperation, and the development of EU instruments, possibly on recognition¹⁰.

2. Developing a new international instrument on surrogacy

By contrast, a large majority of legal opinion is calling for the adoption of a private international law instrument.

In 2013, Katarina Trimmings and Paul Beaumont published *International Surrogacy Arrangements : Legal Regulation at the International Level*¹¹, a book considered as a key reference for the doctrinal debate on international surrogacy arrangements. In their arguments, the authors presented what would be, to their minds, the ideal convention on international surrogacy arrangements, aiming at harmonising private international law in the field. According to them, 'the primary goals of the Convention should be: 1) to develop a system of legally binding standards that should be observed in connection with international surrogacy arrangements; 2) to develop a system of supervision to ensure that these standards are observed; 3) to establish a framework of cooperation and channels of communication between jurisdictions involved.'¹² The aforementioned convention would embrace the idea of surrogacy as a commercial transaction, since it would provide for compensation and remuneration of the surrogate mother. In case of dispute over the child's custody, it should be for national authorities to determine whether the surrogacy agreement is to be enforced or not in the light of the child's best interest, thus adopting a non-interventionist approach. The authors also suggest that non-accredited bodies should be restricted and payments made in excess firmly prosecuted on the grounds of child trafficking. Finally, they argue that the convention should clearly state the right of all surrogate children to information on their origins.

Further, according to Blauwhoff and Frohn¹³, a private international law instrument should 1) take into account the best interest of the future child, and 2) prescribe certain procedural standards as to the establishment of the parents' identity (intended, genetic or surrogate parents), the free and informed consent of the surrogate mother, her remuneration and her diet and health. Blauwhoff and Frohn believe that international surrogacy arrangements raise classic private international law problems that need to be answered by a global regulation: the determination of the competent court, the applicable law regarding the establishment of legal parentage, the applicable law governing the contract itself as well as the competent forum, etc. They highlight that the determination of legal parentage must be based solely on the child's best interest and that the parties' autonomy is to be strictly excluded, since it is a matter of **public order**. The authors go further by proposing, should the procedural standards and the child's best interest be met, the issuing of **certificates of conformity** by a central authority.

B. Avenues pursued by international organisations

1. The Hague Conference Parentage/Surrogacy project

The Hague Conference on Private International Law (HCCH), an intergovernmental organisation having 80 members, including all EU Member States as well as the EU itself, recently decided to set up an expert group to consider the 'feasibility of advancing work' on the 'private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements'¹⁴. Whether or not to develop a multilateral instrument is still under discussion by HCCH members as no consensus could be reached on this point. The expert group is currently working on the question of **recognition** and will report to the organisation's governing body in spring 2017. The Hague Conventions on private international law may provide solutions in four areas: jurisdiction (which state's authorities are competent to decide matters in cross-border situations), applicable law, recognition and enforcement, and legal cooperation through a central authority. The organisation stresses that the Hague Conventions build bridges between different legal systems and provide 'road signs' that are needed in cross-border situations, while also respecting different legal systems and ethical traditions.

2. Development of non-binding principles by the International Social Service

Another interesting project to note is the current development of non-binding principles by the International Social Service (ISS), a Swiss-based global foundation created in 1924 to help families facing cross-border challenges¹⁵. In the belief that there is an 'urgent need' to act in the field and in the light of the difficulties encountered in reaching a consensus on a binding global legal instrument, the ISS has set up an expert group to draft some key principles. Interestingly, many of the experts involved here are also participating in developments at the HCCH.

The 20 international principles so far established refer to the main international instruments on the rights of the child and fundamental rights, recalling that children are individual rights holders and need special safeguards and reflecting principles including human dignity, the primacy of the best interests of the child, non-discrimination, the prevention of sale and trafficking of the child, the right to registration of birth and nationality and access to one's origins, and clear standards as to what would happen in case of breach of the international surrogacy arrangement, abandonment of the child, etc.

Possible conclusions for action at EU level

As noted above, the EU – both directly and through its Member States – is involved in the work of the HCCH towards the possible development of common rules that would enable the different national legislations to operate in cross-border situations while respecting citizens' fundamental rights and ensuring legal certainty. This work at global level is necessary and relevant, as international surrogacy arrangements may imply relations between EU and third-country citizens, as well as conflicts of laws and jurisdictions with third countries. In

the strict EU context though, the issue of respecting the right to free movement adds to the reflection.

Without taking a position in favour or against international surrogacy arrangements, the EU could deal with the legal consequences of the status quo and work on improving the legal framework for its citizens, including its children. As indicated above and raised at the Policy Hub, EU action may not need to be regulatory but could also take the form of 'soft law' instruments and support action at national level. As for the legislative and policy framework, EU action could both develop within and supplement work carried out in international organisations. The EU could also allow conflicts of law concerning civil statuses but coordinate their effects, as in the area of succession or that of parental responsibility, and could even make mutual recognition of family statuses compulsory. Cross-border recognition of domestic cases, along the path currently being explored by the European Parliament in the field of adoption, could also be considered. Given the current sensitivity of family law issues at EU level, this could, however, have to go through enhanced cooperation.

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Further reading

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[Mennesson v. France, ECtHR, application No 65192/11, 26 June 2014](#)

[Labassée v. France, ECtHR, application No 65941/11, 26 June 2014](#)

[Paradiso and Campanelli v. Italy, ECtHR, application No 25358/12, 27 January 2015](#)

[Foulon v. France, ECtHR, application No 9063/14, 21 July 2016](#)

[Bouvet v. France, ECtHR, application No 10410/14, 21 July 2016](#)

¹ See definition in the glossary annexed to [Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference](#), The Hague: 'A surrogacy arrangement entered into by intending parent(s) resident in one State and a surrogate resident (or sometimes merely present) in a different State. Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State. Such an arrangement may be a traditional or gestational surrogacy arrangement and may be altruistic or commercial in nature.'

² e.g. see X & Y (Foreign Surrogacy) [2008] EWHC 3030

³ Mennesson v. France, ECtHR, application No 65192/11, 26 June 2014

Labassée v. France, ECtHR, application No 65941/11, 26 June 2014

⁴ Paradiso and Campanelli v. Italy, ECtHR, application No 25358/12, 27 January 2015

⁵ Contrary to the ECtHR's ruling in Marckx v. Belgium, application No 6833/74, 13 June 1979

⁶ Foulon v. France, ECtHR, application No 9063/14, 21 July 2016

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⁷ Gaskin v. United Kingdom, ECtHR, application No 10454/83, 7 July 1989

⁸ Richard Blauwhoff and Lisette Frohn, 'International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law', in *Fundamental Rights in International and European Law – Public and Private Law Perspectives*, Asser Institute, 2016, 211-241

⁹ Chris Thomale, *State of play of cross-border surrogacy arrangements – Is there a case for regulatory intervention by the EU?*, transcript by the author of an oral statement presented at the European Parliament's Policy Hub 'Cross-border surrogacy arrangements – A need for EU Action?', held on 16 June 2016. Many of the arguments presented are laid out in more detail in Chris Thomale, *Mietmuttertschaft*, Tübingen 2015, ISBN 978-3-16-154239-8.

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¹¹ See also under 'Further reading'.

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¹³ Blauwhoff and Frohn (2016).

¹⁴ See Conclusions and Recommendations of the Council on General Affairs and Policy ('Council') of the Hague Conference of March 2015, para. 5(a) to (c): 'The Experts' Group should meet in early 2016 and report to the 2016 Council; the Experts' Group should be geographically representative and be composed in consultation with Members; and Members are invited to keep the Permanent Bureau updated regarding significant developments in their States in relation to legal parentage and surrogacy'.

¹⁵ See http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2016.pdf

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Contact: Poldep-Economy-Science@ep.europa.eu

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