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Parental benefits in EU anti-discrimination law: differentiation between the entitlements of parents on grounds of sex and for atypical families

Master's thesis
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Abbreviations

AG – Advocate-General in the Court of Justice of the European Union

CJEU – Court of Justice of the European Union

ECHR – European Convention of Human Rights

ECtHR – European Court of Human Rights

ETD – Equal Treatment Directive (Recast), Directive 2006/54

EU – European Union

EUCFR – Charter of Fundamental Rights of the European Union

Member States – member states of the EU

PLD – Parental Leave Directive, Directive 2010/18

PWD – Pregnant Workers Directive, Directive 92/85

States Parties – member states of the Council of Europe, States Parties to the ECHR

TFEU – Treaty on the Functioning of the European Union

TEU – Treaty on European Union

Introduction

Nowadays family models have developed to be more diverse due to the emergence of atypical families and due to the changing parental roles. The changes in parental roles include mainly more equal burden-sharing between mothers and fathers within the families, reflecting the development of women's equality rights and women's equal participation in the labour market. Along with the alterations of parental roles, the developments in the sphere of adoption rights of same-sex couples or single individuals have changed the perception of family models. Furthermore, novel methods for becoming a parent (e.g. via surrogacy¹ agreements) have become increasingly popular reflecting the rapid changes in the field of reproductive medicine. All these developments bring about the need to adjust the regime of parental entitlements to the changing circumstances, especially what concerns entitlements to measures facilitating the upbringing of children.

Among the listed family models, the legal position of the intended/commissioning parents² and their children born through surrogacy is the most uncertain. The problems relating to surrogacy are being further accentuated as commercial surrogacy has become an increasingly popular global service³ under international surrogacy agreements; the „receiving states“⁴ being more from the developed world and the „states of birth“⁵ consisting more of less developed states. While in the states of birth, surrogacy is permissible and regulated – with regulation in force regarding the acknowledgment of legal parentage of the intended parents – the practice and regulation varies significantly in the receiving states, having consequences on

¹ „**Surrogacy** occurs where the child is gestated (carried) by someone, namely the surrogate mother, who will not be (one of) the person(s) who raise(s) the child, namely the **intended parent(s)**.“ – E.C. di Torella, P. Foubert „Surrogacy, pregnancy and maternity rights: a missed opportunity for a more coherent regime of parental rights in the EU“ [2015], 40 *European Law Review* 1, p. 55.

² In the thesis, the term intended parent(s) (see footnote 1) will be used interchangeably with the term **commissioning parent(s)** that has an identical meaning. The term **gestational mother** will be used to refer to the woman that carried the child.

³ According to the available information (2014), „several thousand children are likely to be born each year as a result of international surrogacy arrangements to intended parents from all regions of the world“ which is probably even an underestimated data – see The Hague Conference on Private International Law, “A study of legal parentage and the issues arising from international surrogacy arrangements,” Preliminary Document No 3 C of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, accessible at https://assets.hcch.net/upload/wop/gap2014pd03c_en.pdf, para. 129, last accessed 29.04.2016.

⁴ See the list of receiving countries in: The Hague Conference on Private International Law, “A study of legal parentage and the issues arising from international surrogacy arrangements,” *op. cit.*, para. 132.

⁵ Commercial surrogacy service is legally provided e.g. in India, Russia, Georgia, Ukraine, Thailand, Mexico and in some US states (e.g. California and Illinois). States that have been also mentioned as States of birth, although less frequently, are: Armenia, Australia, Belgium, Brazil, Cambodia, China, Cyprus, Czech Republic, Greece, Israel, Italy, Indonesia, Kazakhstan, Kenya, Philippines, Poland, South Africa, Malaysia and Mexico (however, some of the latter states were mentioned as states of birth because the family member lived abroad, the surrogacy agreement being altruistic). - The Hague Conference on Private International Law, “A study of legal parentage and the issues arising from international surrogacy arrangements,” *op. cit.*, para. 130 to 131.

these families' daily arrangements, their entitlements to parental benefits⁶ and the interests of the children thereof due to the cross-border nature of commercial surrogacy agreements. Thus, while it is easy to establish e.g. the filiation of the intended parents and their children in the birth states, the situation becomes more complicated following the families' return to the receiving states.

There is currently no consensus among European states on whether, and on what conditions, surrogacy should be allowed/recognised as it raises complex ethical and social issues – the need to prevent „the exploitation of women and their reproductive functions, and the commodification of children“⁷ on the one hand, balanced against the interests of infertile couples on the other. In *Mennesson v France* the European Court of Human Rights (hereinafter ECtHR) noted that among the thirty-five member States of the Council of Europe⁸ (hereinafter also States Parties) studied for the purpose of establishing the existence or lack of consensus on the matter, surrogacy is expressly prohibited in fourteen of these states⁹; in ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain; surrogacy is authorised in seven of the States Parties and tolerated in four others.¹⁰ The lack of consensus among European states on the recognition of surrogacy has led to diverse outcomes on the recognition of filiation between the children and their parents and parental rights of the intended/commissioning parents. This in turn also touches upon the issue of equal treatment of the intended/commissioning parents *vis à vis* biological/gestational parents in the field of parental benefits and poses challenges in finding the right balance between protecting the interests of the children being raised in such families and defending the states' public policy on surrogacy.

Other problems in the field of parental benefits relate to the legislation concerning equal treatment for men and women. Namely, although parents have been gradually dividing their childcare obligations more equally, it has not been fully reflected in the European Union (hereinafter EU) legislation concerning the entitlements of mothers and fathers, leading to persisting discrepancies between the parents' involvement in childrearing matters. Hence, while one of the objectives of the EU gender equality strategy (2016-2019) is to promote

⁶ For the purpose of this thesis, „**parental benefits**“ should be understood as measures aiming to, fully or partially, facilitate the upbringing of children, e.g. maternity/parental leave and measures granted for the reason of having (had) children.

⁷ C. Achmad „Children's rights to the fore in the ECtHR's first international commercial surrogacy judgments“ [2014], *European Human Rights Law Review* 6, p. 639.

⁸ Council of Europe has 47 States Parties in total.

⁹ France, the respondent state was not included in the study. However, surrogacy is also prohibited in France.

¹⁰ Case of *Mennesson v France*, 26.06.2014, application no. 65192/11, para. 78.

„more equal sharing between men and women of time spent on care and household responsibilities and to improve possibilities for balancing caring and professional activities“¹¹, there still exist differences between the entitlements of men and women to parental benefits under the EU legislation aiming to facilitate achieving the listed aims. In the thesis it will be argued that the legislation in force in the field of parental benefits and the respective case law should focus more on parenting as a social task, aiming to secure the children’s welfare and aiming to promote substantive equality between men and women. Thus, there is a need for more inclusive regime regarding parental benefits, levelling the entitlements for men and women and providing more equal access to these benefits thereof.

In the thesis, it will be examined to what extent the legislation in force at the EU level as well as at the national level has reflected the developments of modern families. For this purpose, the thesis will examine the main directives and national legislation in force that regulate parental benefits within the meaning of this thesis¹², including the differential entitlements within the meaning of art 157(4) of the Treaty on the Functioning of the European Union¹³ (hereinafter TFEU). Further, the thesis will focus on the case law of the Court of Justice of the European Union (hereinafter CJEU), the ECtHR, national courts and equality bodies in this field. The thesis will aim to establish whether the EU legislation, as clarified by the CJEU fully adheres to the rights of the children growing up in atypical families, especially in families that have resorted to surrogacy, and whether the legislation is capable of fully advancing equality rights as envisaged in the Charter of Fundamental Rights of the European Union¹⁴ (hereinafter EUCFR) and the European Convention of Human Rights¹⁵ (hereinafter ECHR). In this regard it will be argued in the thesis that equality rights should include the intended parents’ and fathers’ rights to parental benefits insofar as these benefits are aimed to protect the children’s best interests, physical/mental and material welfare and relate to tasks performed in the parental capacity.

The relevance of the thesis at the EU level is that the thesis will try to propose ways of improving the protection of atypical families’ and fathers’ equality rights in a way that will reflect the relevance of human rights protection more adequately. The relevance of the thesis

¹¹ The European Commission Strategic Engagement for Gender Equality 2016-2019, accessible at http://ec.europa.eu/justice/gender-equality/document/files/strategic_engagement_en.pdf, p. 21, Annex 1, last accessed 29.04.2016.

¹² See footnote 6.

¹³ The Treaty on the Functioning of the European Union, OJ [2012] C 326/47.

¹⁴ The Charter of Fundamental Rights of the European Union, OJ [2012] C 326/391.

¹⁵ The European Convention on Human Rights, concluded 04.11.1950, entry into force 03.09.1953.

for Estonia is that the thesis will verify the minimum protection required under EU anti-discrimination law in the field of parental benefits and will examine whether Estonia's legislation and practice is in accordance with this level of protection and the aim of the respective directives.

The thesis will primarily be based on the respective EU and national legislation, the relevant articles of the ECHR and the case-law of the CJEU and the ECtHR. The thesis' focus will be on the case law and thus the thesis will make use of the legal literature in the field of EU anti-discrimination law (publications and textbooks) insofar as is necessary for clarifying the substance of equality rights and the interpretation of the respective EU legislation. Furthermore, in order to fully comprehend the the CJEU's case-law, the thesis will also cover the opinions of the Advocate-Generals of the CJEU (hereinafter AG) clarifying the case-law under scrutiny. Thus, the thesis will mainly include analytical and comparative methods for research.

The thesis is divided into two main chapters: the first chapter will introduce the legislation regulating entitlements to parental benefits for working parents and the instruments safeguarding equal access to these benefits under EU law and national law; the second chapter will examine the case law of the CJEU, the ECtHR and national equality bodies concerning equal access to parental benefits. The thesis will further compare the CJEU's case law and the ECtHR's case law to establish whether these courts enable equal level of human rights protection for different family models and for parents of different sexes and to verify to which extent the adjudication differs. Drawing from the comparison, the main conclusions will be presented on the basis of *de lege lata* as well as proposals will be made for *de lege ferenda* where appropriate.

I The framework safeguarding (equal) access to parental benefits in EU anti-discrimination law

1.1. Human rights instruments and the principle of equality in EU anti-discrimination law

In order to determine the relevance of human rights protection in EU anti-discrimination law, including the right not to be discriminated against and the protection of the rights of the child, it is necessary to briefly reflect on the main instruments safeguarding respect for human rights. Also, to understand the reach of EU anti-discrimination legislation, the scope of the principle of equality and the right not to be discriminated against will shortly be analysed.

Equality and respect for human rights as some of the values that the EU is founded on are listed in Art 2 of the Treaty on European Union¹⁶ (hereinafter TEU), and combating discrimination is set as one of the EU objectives in Art 3 TEU (with express mention of promoting equality between men and women). Also, the principle of equal treatment for men and women (including the principle of equal pay for men and women) enjoys primary law protection under Articles 8 and 157 TFEU. A number of grounds for combating discrimination can further be found in Art 10 TFEU, in Art 19 TFEU and in several other EU instruments, whereas the scope of non-discrimination clauses varies, depending on how the equality guarantee has been framed.

The main instrument safeguarding respect for human rights in EU law, listing the human rights catalogue in more detail, including respect for the principle of equal treatment is the EUCFR. Under Art 6(1) TEU the EUCFR has the same legal value as the Treaties¹⁷, which imposes an obligation for broad interpretation of the rights envisaged in the EUCFR, giving full effect to the EUCFR. For the purpose of the thesis, the EUCFR contains a number of articles safeguarding respect for family life (Art 7 EUCFR), establishing the principle of equality (Art 20 EUCFR), aiming to tackle discrimination more generally (Art 21 EUCFR), to ensure equality between men and women (Art 23 EUCFR), to safeguard the best interests of children (Art 24 EUCFR) and to protect family life (Art 33 EUCFR).

¹⁶ The Treaty on European Union, OJ [2012] C 326/13.

¹⁷ The term „Treaties“ refers to the EU primary law instruments (i.e. the treaties currently in force in EU law), such as the TFEU, the TEU, the EUCFR, the Treaty of Lisbon and the Treaty Establishing the European Atomic Energy Community.

The principle of equality can be found in Art 20 EUCFR and a broad non-discrimination clause can be found in Art 21 EUCFR, which prohibits any discrimination on any ground and provides a non-exhaustive list of specified grounds on which discrimination is prohibited. Based on the formulation of Art 21 EUCFR, “judges are given the discretion to extend the list according to a set of judicially construed principles, but judicial discretion is shaped by the existence of enumerated grounds.”¹⁸ Hence, with the kind of non-discrimination clause, the courts are in principle free to take into account the changing circumstances and to adjust the principle of non-discrimination to these circumstances.¹⁹ Consequently, the open-ended non-discrimination clause in Art 21 EUCFR in combination with the values and objectives of the EU as listed in Articles 2 and 3 TEU, Articles 8, 10 and 19 TFEU and in combination with the importance of human rights protection in EU law might leave the impression that the non-discrimination argument can be widely invoked to contest legislation differentiating between similar groups of people and to construe claims for equal treatment for groups that the challenged legislation fails to protect.

This impression, however, is not entirely accurate as the wider prohibition of discrimination under Art 21 EUCFR, as well as the possibility to review instruments in terms of human rights protection is limited under Art 51 EUCFR in a considerable way. Namely, Art 51(1) EUCFR makes it clear that “the institutions, bodies, offices and agencies of the Union are only bound by the EUCFR when implementing Union law,” whereas due regard to the principle of subsidiarity must be given. Art 51(2) EUCFR specifies further that the EUCFR “does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.” The specifications in Art 51 EUCFR make it clear that the scope of applicability of the EUCFR is somewhat limited and that Art 21 EUCFR cannot be viewed “as a source of or basis for positive action.”²⁰ Furthermore, Art 21 EUCFR “does not create any power to enact anti-discrimination laws in the areas [of Member States’ competences], nor does it lay down a sweeping ban of discrimination in such wide-ranging areas.”²¹

It follows that the EU anti-discrimination legislation still has to be based on specified (Treaty) grounds mandating the EU to act within its competences and that the open-ended clause of

¹⁸ S. Fredman “Discrimination Law. Second edition,” Oxford: Oxford University Press, 2011, p. 112.

¹⁹ *Ibid.*, p. 125.

²⁰ P. Craig, G. de Búrca “EU Law. Text, Cases and Materials. Fifth edition,” New York: Oxford University Press, 2011, p. 397.

²¹ B. Bercusson „European Labour Law. Second edition,“ New York: Cambridge University Press, 2009, p. 241.

non-discrimination in Art 21 EUCFR cannot be invoked to demand favourable action from the EU legislator. In that regard, the most relevant ground for legislative action in the field of EU anti-discrimination law is Art 19 TFEU, which enables the Council under special legislative procedure to enact measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Unlike Art 21 EUCFR, Art 19 TFEU contains an exhaustive list of specified grounds that can be combated in EU anti-discrimination law and the EU legislator is increasingly using Art 19 TFEU to enact legislation to protect the specified groups. However, despite the aforementioned, the EUCFR can still be invoked to argue for a more human-rights based approach in interpreting the legislation and instruments in force (especially for the purposes of adapting the legislation in force with the changing circumstances), providing the Union courts with a meaningful instrument of safeguarding people's fundamental rights. As has been explained by M. Bell, "locating equal treatment of persons within a context of constitutionally protected principles has provided the CJEU with a point of reference when considering how to exercise its discretion in interpreting anti-discrimination legislation."²² Furthermore, what concerns the "scope of EU law," it has, in the CJEU practice, not been so clear-cut what exactly triggers the application of EU law (see e.g. the notorious case law concerning EU citizenship²³). Thus, the EUCFR gives the CJEU considerable flexibility to adjudicate in cases in which non-discrimination arguments are put forward. However, the EUCFR is not the only human rights instrument relevant in EU law.

In addition to the aforementioned non-discrimination clauses and the position of the EUCFR, Art 6(3) TEU further stipulates that "fundamental rights as guaranteed by the ECHR /.../ shall constitute general principles of the Union law." By viewing fundamental rights within the meaning of the ECHR as general principles of EU law (which, at the same time are also deriving from the common national constitutional traditions of the EU Member States (hereinafter Member States) as general principles of EU law), the European courts should, in principle, take human rights arguments into account whenever they are interpreting or

²² M. Bell „The principle of equal treatment: widening and deepening“ in P. Craig and G. de Búrca (eds) „The Evolution of EU Law. Second edition,“ New York: Oxford University Press, 2011, p. 627.

²³ E.g. case C-135/08 *Janko Rottman v Freistaat Bayern* [2010], ECR I-01449, para. 41 to 45; case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011], ECR I-01177, para. 39 to 42; case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011], ECR I-03375, para. 45 to 48 *etc.* In all of these cases, inspired by the need to protect human rights, the CJEU found Art 20 TFEU to be applicable to the withdrawal of EU citizens' citizenship and deportation of EU citizens' family members, although according to the facts, the cases did not have a cross-border element necessary to trigger the applicability of EU law and notwithstanding that the in the field of withdrawing citizenship and deporting foreign nationals Member States have, in essence, exclusive competences.

implementing EU law. In that regard, the provisions of the ECHR are important to EU law for the following reasons: “1) those provisions of the EUCFR which are based on provisions of the ECHR are to have the “same” meaning as the ECHR provisions; 2) the ECHR is one of the main sources of inspiration for the general principles of EU law; 3) the provisions of the ECHR will eventually become formally binding on the EU, following its accession to the ECHR.”²⁴

Thus, under Art 6(3) TEU, the prohibition of discrimination as set out in Art 14 ECHR is also applicable in EU (anti-discrimination) law, presumably influencing the interpretation of Art 21 EUCFR as Art 14 ECHR was the main source of inspiration²⁵ for drawing the non-discrimination clause in the EUCFR. For this reason, Art 14 ECHR has the same structure as Art 21 EUCFR, hence it is also open-textured and can be complemented with novel grounds. As S. Fredman has noted, the ECtHR has frequently taken advantage of the outline of Art 14 ECHR, thus it has been rare for a case to be dismissed on the basis that it did not fall within a recognized ground.²⁶ Thus, when interpreting rights deriving from the ECHR in conjunction with Art 14 ECHR²⁷, the ECtHR’s flexibility in striking down discriminatory practices should be borne in mind.

Lastly, a variety of non-discrimination clauses can also be found in the main body of EU anti-discrimination law (i.e. outside the EUCFR), including Art 19 TFEU. These clauses, found in the Treaties and specified in the EU secondary legislation contain mainly exhaustive lists of grounds protected by EU instruments. With this model, the exhaustive set of grounds cannot in principle be extended by the judiciary, but only through legislation.²⁸ Nevertheless, it is possible for the judiciary to extend the boundaries of the list of protected grounds in cases where the delineation of groups protected and groups not falling under the specified grounds is not that clear-cut.²⁹ The CJEU has in its more progressive case law taken this approach, substantiating its decisions with the need to protect human rights and bringing new grounds of discrimination in the scope of EU secondary legislation, e.g. by ruling in *P. v S. and Cornwall County Council* that discrimination on ground of sex includes discrimination arising from gender reassignment of the person concerned, because “such discrimination is based,

²⁴ P. Craig, G. de Búrca, *op. cit.*, p. 389.

²⁵ *Ibid.*, p. 395, footnote 211.

²⁶ S. Fredman, *op. cit.*, p. 125.

²⁷ According to its wording, Art 14 ECHR is not a free-standing article, thus it needs to be invoked in conjunction with another article found in the ECHR.

²⁸ S. Fredman, *op. cit.*, p. 113.

²⁹ *Ibid.*

essentially if not exclusively, on the sex of the person concerned” and because “to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”³⁰ While in the same decision, the CJEU interpreted the principle of equality as a fundamental principle of EU law³¹, “giving the equality principle a much wider scope, akin to the US constitutional guarantee”,³² the CJEU has, as will be examined in this thesis, in other cases taken a more cautious approach towards extending the scope of application of EU anti-discrimination law, e.g. in the field of equal access to parental benefits.

In summary, although human rights protection and the principle of non-discrimination has a fundamental status in EU law, EU secondary law in the field of anti-discrimination law is still based on specified grounds. Thus, the main body of EU anti-discrimination law (contained in EU secondary legislation) is characterised by a piecemeal approach to the prohibition of discrimination – protection against discrimination accorded to different groups vulnerable to discrimination differs, with some of the groups being accorded less protection than the others and with protection against discrimination being enforced in specified spheres only (e.g. in labour law, access to services, access to education, housing etc). With the aforementioned in mind, it is necessary to clarify that the current thesis (with its focus on equal access to parental benefits) is mainly concentrated on issues relating to discrimination on grounds of sex in the field of parental benefits of the working population. Thus, the thesis will not contain an overview of most of the grounds protected under EU anti-discrimination law, but focuses mainly on the instruments aiming to promote equality between the sexes and instruments aiming to facilitate equal burden-sharing between the parents and the exercise of parental duties.

1.2. The prohibition of discrimination on grounds of sex in EU anti-discrimination law

The history of EU sex-equality law (i.e. prohibition of discrimination on grounds of sex) began as early as in 1957, when Art 119 of the Treaty Establishing the European Economic Community was introduced, requiring that men and women should receive equal pay for equal work.³³ The main focus of the 1957 Treaty, however, was purely economic, its primary

³⁰ Case C-13/94 *P v S and Cornwall County Council* [1996], ECR I-02143, para. 20 to 22.

³¹ *Ibid.*, para. 18.

³² S. Fredman, *op. cit.*, p. 115.

³³ H. Meenan (ed) “Equality Law in an Enlarged European Union. Understanding the Article 13 Directives,” Cambridge: Cambridge University Press, 2007, p. 11.

objectives including to establish a common market, to promote harmonious development of economic activities across the Community, to ensure undistorted competition etc.³⁴ With the economic objectives of the 1957 Treaty in mind, it is evident, that social concerns were not among the primary incentives to advance equality between men and women and to introduce the concept of equal pay for men and women. Namely, the principle of equal pay for men and women was introduced mainly to deal with the competition concerns of France³⁵ which at that time had enacted number of provisions favouring workers, including the requirement of equal pay for men and women.³⁶

Equality between the sexes and the principle of non-discrimination has gradually evolved from serving mainly economic ends to fulfilling the social objectives of the EU. Already in *Defrenne v SABENA*, the CJEU noted that the principle of equal pay for men and women (now Art 157 TFEU) pursues a double aim: “(i) first, to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay and (ii) secondly, to fulfil social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples.”³⁷ Thus, the CJEU gave a more significant meaning to the principle of equal pay for men and women, stretching its scope beyond its original aims and paving the way to more comprehensive equal treatment legislation for the sexes.

The principle of equal treatment for men and women has been given even more prominent role after the enactment of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community³⁸ (hereinafter the Lisbon Treaty). By giving the EUCFR the same value as the Treaties under Art 6(1) TEU, the Lisbon Treaty has made a significant impact in the field of social policy, which is also evident by the list of values of the EU recognised under Art 2 TEU (including the values of equality, respect for human rights,

³⁴ P. Craig, G. de Búrca *op. cit.*, p. 6.

³⁵ H. Meenan (ed), *op. cit.*, p. 11.

³⁶ C. Barnard “EU Employment Law. Fourth edition,” Oxford: Oxford University Press, 2012, p. 6.

³⁷ Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976], ECR 00455, para. 9 and 10.

³⁸ The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ [2007] C 306/1.

equality between men and women etc.).³⁹ Hence, the Treaties in force lay a strong ground for pursuing equality between the sexes and deconstructing traditional gender roles, as well as pursuing the objective to ensure a high level of human rights protection in the EU.

In summary, EU sex-equality law has historically been created to address the Member States' competition concerns in the field of labour law, aiming to level the cost of production in different Member States. This historical background still somewhat echoes in EU sex-equality law, as the most sophisticated body of law is focused on guaranteeing the equality of the sexes in the labour market. However, EU sex-equality law has developed far beyond its original objectives – it is no longer viewed as serving economic ends, but it is also considered to be a substantial part of EU social policy,⁴⁰ stretching to fields other than labour law (e.g. access to housing, education, goods and services etc.).

The main instruments safeguarding equal opportunities for the sexes in working life that relate to the object of the current study are Directive 2006/54⁴¹ (Equal Treatment Directive (recast) – hereinafter ETD), Directive 2010/18 (Parental Leave Directive⁴² – hereinafter PLD) and Directive 92/85⁴³ (Pregnant Workers Directive – hereinafter PWD). Also, positive discrimination measures within the meaning of Art 157(4) TFEU and Art 3 ETD can be enacted to enhance the career opportunities of the under-represented sex by introducing favourable treatment with a view of ensuring full equality in practice between men and women. In addition to the aforementioned instruments, there are several directives in force that protect atypical workers (including part-time workers) and some provisions on state guaranteed childcare are also enacted. However, since the focus of the thesis is mainly on examining equal treatment concerning the entitlements to maternity/parental leave and childcare instruments within the meaning of Art 23(2) EUCFR, Art 157(4) TFEU and Art 3 ETD, the thesis will not cover provisions protecting atypical workers nor will the special state guaranteed childcare instruments be analysed.

³⁹ C. Barnard, *op. cit.*, p. 27.

⁴⁰ P. Craig, G. de Búrca, *op. cit.*, p. 858.

⁴¹ 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.

⁴² 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.

⁴³ 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, OJ [1992] L 348/1.

1.2.1 Safeguards under the Equal Treatment Directive

The first instrument in EU anti-discrimination law, relating to the objective of the thesis, is the ETD. The aim of the ETD is to safeguard equal treatment for men and women at workplace in a comprehensive manner. Under Art 1(1) ETD, the ETD aims “to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation” in three major fields: “(a) access to employment, including promotion, and to vocational training; (b) working conditions, including pay; (c) occupational social security schemes” (Art 1(2) ETD). In the aforementioned fields, direct discrimination⁴⁴ (including harassment and sexual harassment) and indirect discrimination⁴⁵ based on the gender of the employees are strictly prohibited. In that regard, access to parental benefits which are capable of influencing working hours/working period⁴⁶, the right to take leave from work⁴⁷, the right to use facilities provided by the employer (e.g. nursery places)⁴⁸ etc is considered to fall under the sphere of “working conditions,” thus the prohibition of discrimination (direct and indirect) applies, in principle, to the granting of parental benefits as well.

Notwithstanding the prohibition of discrimination, positive discrimination within the meaning of Art 23(2) EUCFR and Art 157(4) TFEU (i.e. the introduction of measures “with a view of ensuring full equality in practice between men and women in working life providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”) is expressly allowed under Art 3 ETD. Hence, measures in the field of parental benefits that are introduced in view of securing full equality in practice between men and women in working life should, in principle, fall outside the prohibition of discrimination under the ETD. Such measures may lawfully be aimed „to eliminate the causes of women's reduced opportunities of access to employment and careers /.../ and to improve the ability of women to compete on

⁴⁴ According to Art 2(1)(a) ETD direct discrimination occurs where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.

⁴⁵ According to Art 2(1)(b) ETD indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

⁴⁶ See e.g. case C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010], ECR I-08661, para. 21.

⁴⁷ See e.g. case C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaiomaton* [2015], not yet published, para. 45.

⁴⁸ See e.g. case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002], ECR I-02891, para. 26.

the labour market and pursue a career on an equal footing with men.⁴⁹ Thus, measures aimed to guarantee substantive equality between men and women by giving advantages to one of the sexes only are allowed, subject, however, to the test of proportionality „which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.⁵⁰

The main importance of the ETD is that it provides a general means to attack discriminative measures introduced by employers from the public or private sector (Art 14 ETD). Also, the ETD consolidates some of the most important rights deriving from other EU instruments – e.g. the ETD reiterates the entitlement to equal pay for equal work or for work of equal value (deriving from the horizontally directly effective Art 157 TFEU, repeated in Art 4 ETD); the right to return to a job after maternity leave (Art 15 ETD and Art 10 PWD) etc. Lastly, and most importantly, the ETD necessitates the foundation of equality bodies designated to the defence and promotion of rights of the employees that are being discriminated against (Art 20 ETD) and sets the requirement to ensure that real and effective compensations or reparations that are dissuasive and proportionate would be introduced in the Member States’ legislation (Art 18 ETD).

In the field of parental benefits, recital 23 of the preamble to the ETD and Art 2(2)(c) ETD stipulate that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex prohibited by the ETD. Also, under Art 9(1)(g) ETD “suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer” is expressly listed as contrary to the principle of equal treatment; and Art 14 reiterates that women are entitled to return to their job or equivalent posts after being on maternity leave.

The ETD also makes a special provision for paternity or adoption leave, stipulating in Art 16 ETD that the ETD “is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been

⁴⁹ See e.g. case C-158/97 *Georg Badeck and Others* [2000], ECR I-01875, para. 54.

⁵⁰ See e.g. case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000], ECR I-00069, para. 23.

entitled during their absence.” As the CJEU has noted, however, Art 16 ETD offers only limited protection against discrimination on grounds of having taken paternity or adoption leave in the Member States that have recognised distinct right to paternity and/or adoption leave. Namely, regarding equal treatment under Art 14(1)(c) and Art 16 ETD, the CJEU has ruled that “read in conjunction with recital 27 in the preamble to [the ETD], the directive preserves the freedom of the Member States to grant or not to grant adoption leave, and the conditions for the implementation of such leave, other than dismissal and return to work, are outside the scope of that directive.”⁵¹ Therefore, following the reasoning of the CJEU, introducing differential conditions for obtaining the right to paternity/adoption leave on grounds of e.g. family status, does not come within the scope of the ETD.

According to recital 24 in the preamble to the ETD, the ETD applies without prejudice to the PWD and the PLD. As will be analysed further in the second chapter of this thesis, the CJEU has, in light of recital 24 in the preamble to the ETD, interpreted the instruments, especially the PWD separately from the ETD, sometimes even in cases where there have not been very good reasons to subsume the contested measures entirely under separate instruments and thus to exclude these measures from the scope of the ETD altogether.

1.2.1.1. Estonian legislation

Estonia has implemented the ETD by enacting the Gender Equality Act⁵². The Gender Equality Act has reiterated the definitions of prohibited discrimination (direct and indirect discrimination) and according to § 3(1)(3) of the Gender Equality Act direct discrimination based on sex includes also any “less favourable treatment of a person in connection with pregnancy and childbirth, parenting, performance of family obligations or other circumstances related to gender.” Thus, the Gender Equality Act contains a slightly broader prohibition of discrimination in comparison to the ETD as discrimination on grounds of parenting and performance of family obligations as circumstances related to gender are also, (in addition to discrimination on grounds of pregnancy and childbirth), expressly included in the notion of direct discrimination.

Likewise, as according to the ETD, discrimination on grounds of sex does not occur where the legislator has enacted “provisions concerning the special protection of women in connection

⁵¹ Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014], not yet published, para. 63.

⁵² The Gender Equality Act, RT I, 07.07.2015, 11.

with pregnancy and childbirth” (§ 5(2)(1) of the Gender Equality Act) and where the legislator introduces “specific measures that promote gender equality and give advantages to the less-represented sex or reduce gender inequality” (§ 5(5) of the Gender Equality Act). Hence, measures enacted to guarantee female workers’ rights within the meaning of the PWD and positive discrimination measures within the meaning of Art 23(2) EUCFR, Art 157(4) TFEU and Art 3 ETD, are outside the scope of the Gender Equality Act. The Gender Equality Act also lists equality bodies that are responsible for monitoring the compliance with the Gender Equality Act (§ 15 and § 22 of the Gender Equality Act) and enacts grounds for compensation claims (§ 13 of the Gender Equality Act).

In summary, Estonian legislation complies with the requirements of the ETD in terms of the scope and definitions of prohibited discrimination and the excluded fields from the prohibition of discrimination.

1.2.2. Entitlements under the Pregnant Workers Directive

Since only women can become pregnant and only women can suffer from hardships in working life relating to pregnancy and childbirth, EU anti-discrimination law has special legislation in place safeguarding women’s rights in working life, aiming to reduce women’s unequal opportunities relating to pregnancy and childbirth. One of the main instruments safeguarding women’s equal treatment during pregnancy and after childbirth is the PWD.⁵³

The preamble to the PWD considers pregnant workers, workers who have recently given birth or who are breastfeeding as a specific risk group whose safety and health must be ensured. According to Art 1(1) PWD, the directive is aimed to improve the safety and health at work of the abovementioned risk group. In addition to regulating the working conditions of pregnant workers, workers who have recently given birth and breastfeeding workers, the PWD gives women the entitlement to a continuous period of maternity leave of at least 14 weeks before and/or after childbirth (Art 8 PWD). Under Art 8(2) PWD maternity leave includes compulsory maternity leave of at least 2 weeks before and/or after childbirth. During maternity leave, the workers are protected from dismissal (Art 10 PWD). As an important guarantee for pregnant workers/working mothers, states have the obligation to provide these workers minimum income during maternity leave, equivalent at least to that which the worker

⁵³ See e.g. E. Ellis, P. Watson “EU Anti-Discrimination Law. Second edition,” Oxford: Oxford University Press, 2012, p. 328.

concerned would receive in the event of a break in her activities on grounds connected with her state of health (Art 11(3) PWD).

The CJEU has ruled in numerous cases that the aim of maternity leave is twofold. According to the CJEU “maternity leave of the kind provided for in [the PWD], is intended, first, to protect a woman's biological condition during and after pregnancy and, second, 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.”⁵⁴ Thus, maternity leave is granted mainly for health-related reasons, but also to reinforce the social role of being a mother (and to enable the mother to breastfeed her child). To ensure that this dual aim is achieved, women are accorded high level of protection during maternity leave which includes protection against dismissal on grounds of pregnancy or childbirth and also the obligation to maintain adequate pay during their absence from work.

As clarified in the practice of the CJEU, pregnancy in terms of the PWD implies that only women that are *de facto* pregnant can rely on the PWD, thus the PWD does not protect against discrimination on grounds that a woman is undergoing IVF treatment with a view of becoming pregnant,⁵⁵ however the situation is covered by the prohibition of discrimination on grounds of sex under the ETD.⁵⁶ Also, the CJEU has noted that the entitlement to maternity leave under the PWD is granted only to women that themselves have been pregnant⁵⁷, thus motherhood in terms of the PWD is, according to the interpretation of the CJEU, construed strictly on the basis of biological criteria. Based on the former case law, the PWD does not offer protection to mothering as a social role only (regardless of the dual aim of maternity leave, part of which is related to the protection of a mother-child relationship), neither does the protection under the PWD extend to women solely on breastfeeding grounds, if the women themselves have not been pregnant. The former case law of the CJEU has significance especially in matters concerning the intended parents’ claims to maternity leave.

It is also noteworthy that at the EU level, further amendments were proposed to the PWD in 2008, including increasing the minimum length of maternity leave from 14 to 18 weeks and

⁵⁴ Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007], ECR I-07643, para. 46. See also e.g. case C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984], ECR 03047, para. 25.

⁵⁵ Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008], ECR I-01017, para. 37 and 41.

⁵⁶ *Ibid.*, para. 50 to 54.

⁵⁷ Case C-363/12, *op. cit.*, para. 58 to 60.

establishing the principle of full pay during maternity leave.⁵⁸ The underpinning rationale was to enable the mother to breastfeed for a longer period than possible under the current legislation, especially as part of the maternity leave (6 weeks) was designed to be mandatorily granted after childbirth.⁵⁹ While the amendments did not gain enough support and are not reflected in the PWD, it can be borne in mind that there still might be incentives to review the PWD in the future.

1.2.2.1. Estonian legislation

Estonian legislation corresponding to Art 8 and Art 11 of the PWD can be found in the Employment Contracts Act⁶⁰ (provisions on the entitlement to maternity leave) and the Health Insurance Act⁶¹ (provisions on the remuneration during maternity leave). According to § 59(1) of the Employment Contracts Act, a woman has the right to pregnancy and maternity leave of 140 calendar days. According to § 54(1)(4) of the Health Insurance Act, in case of pregnancy and maternity leave, workers are entitled to a benefit that is equal to their average income per calendar day. Under § 58(1) of the Health Insurance Act “a pregnant woman has the right to receive maternity benefit on the basis of a certificate for maternity leave for 140 calendar days if her pregnancy and maternity leave commences at least 30 calendar days before the estimated date of delivery as determined by a doctor or midwife.” Hence, under the regulation women are stimulated to use part of their maternity leave during pregnancy and a minimum of 30 calendar days can be viewed as aiming to protect women’s health during their pregnancy. Under the current legislation, women are also encouraged to use maternity leave in full⁶², but that does not mean that maternity leave should be viewed as a mandatory leave. In that regard, Estonian Chancellor of Justice came to the conclusion that the legislation sets the maximum period of non-transferable maternity leave which cannot be viewed as a mandatory leave but can be waived if the woman chooses to do so.⁶³

⁵⁸ Commission of the European Communities „Roadmap for equality between women and men (2006-2010). 2009-2010 work programme,“ p. 8, para. 2.2.1., accessible at http://ec.europa.eu/justice/gender-equality/files/gender_roadmap_2009_2010_program_en.pdf, 29.04.2016.

⁵⁹ E. Ellis, P. Watson, *op. cit.*, p. 359.

⁶⁰ The Employment Contracts Act, RT I, 12.07.2014, 146.

⁶¹ The Health Insurance Act, RT I, 30.12.2015, 59.

⁶² See subchapter 2.3.1. of the thesis.

⁶³ Opinion of the Estonian Chancellor of Justice on the duration of maternity leave, 01.04.2011, no 6-3/102033/1101518 accessible at http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_margukiri_sunituslehe_kestuse_luhen_damine.pdf, p. 7, para. 14, last accessed 29.04.2016.

As to the purpose of maternity leave, the Estonian equality bodies have reiterated the position of the CJEU, listing health-related reasons as the primary reason for maternity leave⁶⁴ but also the aim to protect the special (emotional) bond between the mother and the child.⁶⁵ Nevertheless, it has been argued that the entire duration of maternity leave in Estonia cannot be viewed as aiming to protect mainly women's biological condition: namely, as a large part of maternity leave (70-110 days) could be taken after childbirth, it could be argued that some of the leave is aimed to simply facilitate childcare, the more so as the Estonian maternity leave scheme was enforced during the time where no other remunerated parental leave benefits were available.⁶⁶ The purpose of the Estonian maternity leave can thus be contested which could be relevant for substantiating fathers' claims for equal access to a part of the maternity leave.

In summary, Estonian legislation corresponds to the PWD as to the workers' entitlement to maternity leave, its remuneration and related safeguards, whereas the provisions on maternity leave in the Employment Contracts Act and the Health Insurance Act (as to the duration of maternity leave and the maintenance of full income during maternity leave) enable a considerably higher standard of protection in comparison to the minimum standard of protection required by Art 8 and Art 11 of the PWD. Similarly to the CJEU's interpretation of the purpose of maternity leave under the PWD, Estonian legislation on maternity leave follows the same rationale as to the aim of maternity leave.

1.2.3. Entitlements under the Parental Leave Directive

The third instrument relevant for the purpose of the thesis in the field of parental benefits is the PLD. The PLD is designed to be an instrument safeguarding equal opportunities for parents of both sexes to take leave in order to care for their child(ren) on equal footing. Thus, parental leave under the PLD is granted to parents in their capacity of a parent, i.e. on grounds unrelated to sex and should be viewed as a measure promoting substantive equality for the sexes. In that regard, AG Kokott has noted that the "objective of the [PLD] is to foster equality between men and women in the assumption of family responsibilities and, specifically, to encourage men to take parental leave. Consequently, both parents — and in

⁶⁴ E.g. the Gender Equality and Equal Treatment Commissioner, 22.09.2010, Cited in footnote 10 of the Praxis Centre for Policy Studies report „Eesti vanemapuhkuste süsteemi analüüs,“ 2013, p. 30. Accessible at <http://www.praxis.ee/wp-content/uploads/2014/03/2013-Vanemapuhkuste-susteem.pdf>, last accessed 29.04.2016.

⁶⁵ Opinion of the Estonian Chancellor of Justice on the duration of maternity leave, *op. cit.*, p. 6 to 7.

⁶⁶ The Praxis Centre for Policy Studies report „Eesti vanemapuhkuste süsteemi analüüs,“ 2013, *op. cit.*, p. 30.

particular men — should have the opportunity to be involved in the upbringing of their children without suffering occupational disadvantages or finding themselves obliged to give up work.”⁶⁷

Under Clause 2(1) PLD men and women workers are entitled to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child. According to Clause 2(2) PLD, parental leave shall be granted for at least a period of four months and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. In accordance with the aim of the PLD, Clause 2(2) PLD should be interpreted that where the leave is granted on a transferable basis, at least one of these four months should be non-transferable to encourage the take up of leave by both parents.⁶⁸ In accordance with the aim of the PLD (to enable both parents to be involved in childrearing matters), men’s access to parental leave should, in particular, be facilitated.

As has been established by the CJEU, parental leave under the PLD should be distinguished from maternity leave and consequently “each parent is entitled to parental leave of at least [now four months’] duration and that this may not be reduced when it is interrupted by another period of leave which pursues a purpose different from that of parental leave, such as maternity leave.”⁶⁹ Thus, parental leave can be interrupted by maternity leave (or any other leave) without it reducing the period of parental leave as the PLD grants an individual right to at least four months parental leave.

It is also noteworthy, that according to the clarifications of the CJEU, the right to parental leave is conferred solely on the parents in their capacity as workers, and not to the child and that Art 24 EUCFR cannot call that finding in question.⁷⁰ Namely, while under Art 24 EUCFR, children have the right to such protection and care as is necessary for their well-being, it “does not mean that children have to be acknowledged as having an individual right to see their parents obtain parental leave. It is sufficient for such a right to be conferred on the parents themselves. It is they who have both the right and the duty to bring up their children and who, for that purpose, can decide on how best to perform their parental responsibilities, in

⁶⁷ Opinion of AG Kokott in Case C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthroponon Dikaiomaton* [2015], not yet published, para. 38.

⁶⁸ E. Ellis, P. Watson, *op. cit.*, p. 351.

⁶⁹ Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxemburg* [2005], ECR I-03067, para. 33.

⁷⁰ Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010], ECR I-08489, para. 34 and 38.

choosing whether or not to have recourse to parental leave.”⁷¹ Thus, under the current EU legislation, parental leave is largely untied from the considerations of safeguarding the child’s right to have personal contact with its parents during the time following its birth, but is introduced mainly as an instrument safeguarding substantive equality of the sexes in childrearing matters.

In contrast to the level of protection during maternity leave under the PWD, Member States are left considerable discretion in introducing more detailed conditions of access to parental leave under Clause 3, provided that the minimum guarantees deriving from the PLD are respected. Furthermore, Member States are not obliged to provide income or social security during parental leave under the PLD. Matters regarding social security and income are left for the consideration and determination of the Member States, taking into account respectively (i) the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care and (ii) the role of income – among other factors – in the take-up of parental leave (Clause 5(5) PLD). Nevertheless, workers have the right to return to the same job after parental leave or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship (Clause 5(1) PLD).

Hence, it can be noted, that taking up (sex-neutral) parental leave can be associated with less guarantees deriving from the PLD (in terms of maintenance of income during parental leave and conditions for eligibility) in comparison with the minimum guarantees accorded to maternity leave under the PWD. Thus, Member States have a considerable margin of appreciation in deciding the extent of their family friendly policies under the PLD. As a consequence, Member States’ legislation on parental leave varies significantly to the detriment of mostly fathers that, as opposed to mothers, have no mandatory paternity leave under EU legislation made available for them.

1.2.3.1. Estonian legislation

Provisions on parental leave can be found in the Employment Contracts Act and the Parental Benefit Act⁷² (the latter concerning mainly the maintenance of income during parental leave). According to § 62(1) of the Employment Contracts Act a mother or a father has the right to parental leave until his or her child reaches the age of three years. Parental leave may be used

⁷¹ *Ibid.*, para. 39.

⁷² The Parental Benefit Act, RT I, 30.12.2015, 104.

in one part or in several parts every year (§ 62(2) of the Employment Contracts Act). Employees are entitled to remuneration in accordance with the Parental Benefit Act. According to § 3(1) of the Parental Benefit Act, the amount of the benefit per calendar month shall be calculated on the basis of the average income of the applicant for the benefit per calendar month. Under § 3(3) of the Parental Benefit Act, the amount of the benefit per calendar month shall be 100 per cent of the average income per calendar month. However, the remuneration is subject to specified minimum and maximum limits. Parental benefit is granted for the period of 435 days as of the date on which the right to receive the benefit arises (§ 4(4) of the Parental Benefit Act).

According to § 2(2) of the Parental Benefit Act a parent, adoptive parent, step-parent, guardian or caregiver raising a child with respect to whom a written foster care contract has been entered into has the right to receive the benefit. Under the same paragraph, part of the parental leave is reserved to the mother of the child; namely the mother of the child who is raising the child has the right to receive the benefit before the child attains seventy days of age. There are no similar provisions, though, for the father of the child. The Minister of Social Affairs has noted that the provisions on maternity leave and parental leave should be viewed integrally, as these regulations coherently constitute the main social protection scheme aiming to facilitate childcare following the birth of the child.⁷³ Thus, it can be assumed that by reserving a part of parental leave to women during the time following childbirth, the legislation aims to ensure that women that were not entitled to maternity leave would nevertheless be granted some time to recover after childbirth and hence 70 days could be viewed as part of mandatory protection for women following childbirth. However, the necessity of granting 70 days of non-transferable parental leave could still be contested.⁷⁴

In summary, Estonian legislation on parental leave is more generous (as to the length of the parental leave and the remuneration scheme) than the minimum standard required under the PLD. However, it can be noted that Estonian legislation on parental leave is inclined towards reinforcing the ties between the mother and the child, as mothers are entitled to a long maternity leave prior to gaining access to parental leave – parental leave can be taken by the parents only after the maternity leave comes to an end (§ 2(4) of the Parental Benefit Act) and in case the mother waives a part of her maternity leave, the father is not entitled to a full remuneration during the first 70 days of leave (§ 3(5¹) of the Parental Benefit Act).

⁷³ Opinion of the Estonian Chancellor of Justice on the duration of maternity leave, *op. cit.*, p. 7.

⁷⁴ See subchapter 2.3.1. of the thesis.

Furthermore, mothers that did not qualify for maternity leave (i.e. non-working mothers), have been granted non-transferable right to use some of the parental leave themselves (§ 2(2) of the Parental Benefit Act). As such, the legislation does not give incentives to the fathers to focus on their parenting tasks from the early stages of their children's development.

Furthermore, the Parental Benefit Act does not currently promote equal opportunities and substantive equality between men and women in the best possible way. Namely, the PLD requires that each of the parents should be entitled to four months of preferably non-transferable parental leave (Clause 2(2) PLD). In Estonia, however, although a father may choose to stay on parental leave (provisions on parental leave and the remuneration scheme under the Parental Benefit Act are sex-neutral), the initial period of parental leave is reserved for biological mothers and there is no non-transferable parental leave granted for biological fathers under the Parental Benefit Act.

Instead, according to the Estonian parental benefits schemes, fathers may choose to stay on paternity leave under § 60 of the Employment Contracts Act (a parallel entitlement to parental leave scheme) according to which “a father has the right to receive total of ten working days of paternity leave during the two months before the estimated date of birth determined by a doctor or midwife and during the two months after the birth of the child.” During paternity leave, fathers are entitled to remuneration on the basis of their average wages which cannot exceed the ceiling of three times the average gross monthly salary in Estonia. However, despite receiving remuneration for paternity leave and despite the relatively short duration of paternity leave, fathers in Estonia have not actively taken-up paternity leave – in 2013, only 38,8% of fathers chose to stay on paternity leave.⁷⁵ The main reason for the fathers' relatively low involvement in childcare matters (including low usage of paternity leave) can be explained by the fathers' attitudes towards childrearing matters that are influenced by traditional perception of roles in the family. In that regard, the system in force, whereby fathers may stay on paternity leave that fully coincides with the period of maternity leave, and whereby fathers have no non-transferable parental leave period under the Parental Benefit Act, does not meaningfully promote equal burden-sharing between the two parents.

Thus, the statement in the Eurydice and Eurostat 2014 report on childcare that “adequately compensated childcare leave largely comprising maternity leave commonly results in a gender

⁷⁵ Statistics Estonia, Indicators of gender equality, 01.12.2015, accessible at <http://www.stat.ee/268958/?highlight=vanemahüvitis>, p. 64, Table 1, last accessed 29.04.2016.

imbalance in the provision of care,”⁷⁶ is equally true for Estonia as e.g. in 2012 only less than 6% of fathers chose to stay on parental leave⁷⁷ and in 2013 the percentage of fathers staying on parental leave had dropped to 1,7%⁷⁸ and the same declining trend can be noted in respect of paternity leave as well⁷⁹. The gender imbalance issue concerning the take-up of childcare obligations in Estonia has also been brought out in the report by the Estonian Ministry of Social Affairs on gender equality.⁸⁰ Namely, it has been noted in the report that in practice fathers are discouraged to balance their obligations at work with their childcare obligations because the employers are used to perceiving fathers’ parental role as subsidiary to that of the role of mothers and also fathers’ own perception of their parental role coincides with the aforementioned attitude.⁸¹

In countries that are devoted to promoting substantive gender equality in the take-up of parental leave, the entitlements to parental leave differ significantly from Estonian legislation. E.g. in Sweden “a certain number of weeks is reserved for each parent. In Iceland and Norway, parental leave is divided into three parts: three months for each parent and three months’ joint entitlement. In Germany and Austria, parental benefits are extended if both parents take care of a child.”⁸² In these countries, fathers are also more willing to take up parental leave as e.g. in Sweden already in 2003 fathers’ participation in parental leave schemes extended to 67%.⁸³

Hence, although in Estonia, the entitlement to parental leave exceeds the minimum period required under the PLD and is adequately remunerated, the regulation does not comply with the aim of ensuring substantive equality for men and women by promoting more equal burden-sharing of childcare obligations. The latter aim could be achieved if parental leave would be divided into non-transferable periods of parental leave for each of the parents (of four months), as suggested under Clause 2(2) PLD, or, in case of introducing transferable

⁷⁶ European Commission Eurydice and Eurostat Report „Key Data on Early Childhood Education and Care in Europe. 2014 Edition,” p. 40. Accessible at <http://ec.europa.eu/eurostat/documents/3217494/5785249/EC-01-14-484-EN.PDF/cbdf1804-a139-43a9-b8f1-ca5223eeea2a1>, last accessed 29.04.2016.

⁷⁷ Praxis Centre for Policy Studies *op. cit.*, p. 82.

⁷⁸ Statistics Estonia, Indicators of gender equality, *op. cit.*, p. 65.

⁷⁹ See footnote 75.

⁸⁰ Estonian Ministry of Social Affairs report on gender equality, 2013, accessible at https://www.sm.ee/sites/default/files/content-editors/Ministeerium_kontaktid/Uuringu_ja_analuusid/Sotsiaalvaldkond/sooline_vo_monitooring_2013_veeb.pdf, p. 75, last accessed 29.04.2016.

⁸¹ *Ibid.*

⁸² European Commission Eurydice and Eurostat Report [2014], *op. cit.*, p. 40.

⁸³ European Commission Eurostat Statistical Books „Reconciliation between work, private and family life in the European Union. 2009 edition,” p. 102. Accessible at <http://ec.europa.eu/eurostat/documents/3217494/5705547/KS-78-09-908-EN.PDF/6180b5e6-e482-4d5f-a681-6a9bce05d733>, last accessed 29.04.2016.

parental leave scheme, by granting a period of non-transferable parental leave (with the minimum duration of one of the four months) to fathers only.

By failing to take meaningful action towards enforcing the parental role of fathers, the legislation in force is liable for perpetuating traditional views on parenting which in turn leads to further gender imbalance in the labour market. As has been noted by the Ministry of Social Affairs in its report on gender equality, “ideal worker” in the labour market is currently perceived as an individual who works full hours (being also capable of working overtime and during the week-ends, whenever necessary) and who does not have obligations unrelated to work during his/her time off work.⁸⁴ Based on the former description, it is clear that in a situation where women bear most of the childcare obligations, the “ideal worker” is mainly perceived as a male worker.⁸⁵ Thus, gender imbalance in childcare obligations within families will evidently further impede women’s participation in the labour market and will create the so-called “maternal wall” in advancing towards higher-ranking positions, a phenomenon very common to the Estonian labour market.

Hence, Estonian legislation on parental leave needs to be amended in order to fully comply with the aim of the PLD, namely the aim of promoting substantive equality between men and women and reconciliation of professional, private and family life. The aim could easily be achieved, if the parental leave scheme would stimulate fathers to take up more parental obligations, e.g. by granting a four months’ period of non-transferable parental leave to fathers, as suggested under Clause 2(2) PLD.

⁸⁴ Estonian Ministry of Social Affairs report on gender equality, *op. cit.*, p. 67.

⁸⁵ *Ibid.*

II A comparison of the case law of the CJEU and the ECtHR on granting parental benefits

The first chapter of the thesis presented a brief overview of the main instruments applicable to parental benefits relating to childcare and the instruments safeguarding equal access to these benefits both at the EU and national level. Also, the first chapter listed the main instruments necessitating human rights protection in EU law and reflected on their significance in EU law.

As can be concluded from the first chapter, the current EU legislation in the field of parental benefits distinguishes between maternity/paternity, parental leave and positive discrimination measures introduced to facilitate childcare or enacted taking into account childrearing concerns, aiming to ensure substantive equality for the sexes. Under the current EU legislation, the ETD covers discrimination in the field of equal access to parental benefits, however, measures enacted under the PWD, under the PLD and within the meaning of Art 23(2) EUCFR, 157(4) TFEU and Art 3 ETD ought to be examined separately, giving special regard to their purpose. Also, what concerns paternity/adoption leave, there are no provisions obliging the Member States to make paternity/adoption leave available for workers – the scope of EU anti-discrimination legislation in this field is thus limited.

Having in mind the main instruments safeguarding access to parental benefits in EU anti-discrimination law, the second chapter of the thesis will further focus on the case law of the CJEU in the field of equal access to parental benefits for parents of different sexes and for atypical families (i.e. families that have resorted to surrogacy). The second chapter will analyse the cases brought before the CJEU, reflect on the argumentation of the CJEU and will assess to what extent the CJEU has taken into account human rights arguments, e.g. equality rights, the rights of the child and the protection of family life. Further, the case law of the CJEU will be compared to that of the ECtHR concerning the access to parental benefits for fathers and parents in atypical families to verify whether the courts have interpreted the prohibition of discrimination in the same manner and whether the level of human rights protection accorded by the courts coincides in that field. In the end of the chapter, Estonian scarce practice in the field of equal access to parental benefits will be analysed.

2.1. Fathers' access to parental benefits under the case law of the CJEU and the ECtHR

2.1.1. Fathers' access to parental benefits under the case law of the CJEU

According to Art 23 EUCFR “equality between women and men must be ensured in all areas, including employment, work and pay.” The principle of equality for the sexes is further accentuated in Art 14 ETD, and, more specifically in the field of working conditions (including access to parental benefits) in Art 14(1)(c) ETD.

In a number of cases, the CJEU has been challenged with the question of fathers' equal access to parental/maternity/adoption leave or parental benefits introduced as positive discrimination measures. Namely, men that have taken greater responsibility for nurturing their children have faced several legislative obstacles which do not support taking a more active role in their families. In most Member States fathers do not receive adequate compensation for paternity leave⁸⁶ and over time countries have introduced measures relating to childcare which the fathers have not been entitled to. In some of the cases, these measures have been designed to offset disadvantages that women as the primary caretakers in the families have been subjected to. In others, these measures have been enacted based on the traditional perception of roles in the family and hence disregarding the principle of equality between the sexes. In the following section, it will be analysed how the CJEU has ruled on the cases concerning fathers' entitlements to parental benefits.

There have been several cases in which fathers that have taken primary responsibility of nurturing their children following the birth of their children have not been granted paid leave (comparable to that of maternity leave) to facilitate taking care of their children. As paternity leave is mainly not adequately compensated⁸⁷, fathers have strong incentives to argue that paid maternity leave extending the period necessary for the protection of a woman's biological condition after childbirth should equally be granted to men and women, especially so if the mother of the child has decided not to use maternity leave in full. Similarly, it could be argued that Member States which have introduced paid sex-neutral adoption leave (i.e. leave introduced to parents in their capacity as parents), are required to provide leave on the same conditions and for the same remuneration for biological fathers as well.

⁸⁶ See Figure B3 of the European Commission Eurydice and Eurostat Report [2014], *op. cit.*, p. 39.

⁸⁷ See footnote 86.

Among the first cases concerning equal treatment of men in the field of parental benefits to have reached the CJEU, was *Commission v Italy*,⁸⁸ a case in which the Commission aimed to strike down Italian legislation concerning adoption leave, alleging that the legislation was contrary to the principle of equal treatment for men and women under [now Art 14(1)(c) of the ETD]. Namely, the legislation introduced differential treatment for men and women as it foresaw compulsory adoption leave of three months for women only, excluding men from being entitled to such a benefit.⁸⁹ The Commission considered that the prohibition of discrimination under the [now ETD] was “intentionally broad and comprehensive in scope” and that the disputed law “discriminated against workers on grounds of adoption” amounting to discrimination in the field of working conditions.⁹⁰

However, the CJEU did not agree with the Commission but held that the distinction between men and women regarding their differential entitlements to adoption leave “is justified /.../ by the legitimate concern to assimilate as far as possible the conditions of entry of the child into the adoptive family to those of the arrival of a newborn child in the family during the very delicate initial period.”⁹¹ Thus, following this highly disputable argumentation, the CJEU found that the differential treatment between men and women did not amount to discrimination on grounds of sex under the now Art 14(1)(c) ETD in the field of working conditions. It is noteworthy that AG Rozès came to the opposite conclusion, finding that contrarily to maternity leave which is primarily intended to protect a woman’s physical condition after childbirth, “leave after adoption benefits the child above all in so far as it is intended to foster the emotional ties necessary to settle the child in the family adopting it /.../ and must be interpreted in the predominant interests of the child.”⁹² Since AG Rozès did not find that expanding paid three-months’ compulsory maternity leave to adoptive mothers but not to adoptive fathers was justified under special circumstances (such as pregnancy and childbirth), she concluded that the provision did come within the scope of the [now ETD] and was discriminatory in the field of working conditions.⁹³

In that regard, AG Rozès’ argumentation is far more sound, as it is difficult to see why mothers and fathers could not equally fulfil their social role as parents efficiently and in the

⁸⁸ Case C-163/82 *Commission of the European Communities v Italian Republic* [1983], ECR 03273.

⁸⁹ *Ibid.*, p. 03279.

⁹⁰ *Ibid.*, p. 03282.

⁹¹ *Ibid.*, para. 16.

⁹² Opinion of AG Rozès in case C-163/82 *Commission of the European Communities v Italian Republic* [1983], ECR 03291, p. 03297.

⁹³ *Ibid.*, p. 03297 to 03298.

best interests of the child, as there is no evidence to support the finding that during „the very delicate initial period“ only mothers are capable of assimilating the adoptive child into his/her new family. Concerning adoption leave, the parents are thus similarly situated as the underpinning rationale of granting adoption leave is that the child would receive parental care, which can be equally provided by both of the parents in the best interests of the child and there are no differences between the sexes in that regard that would justify their differential treatment. Thus, as can be noted, in its earliest case law concerning fathers' entitlements, the CJEU reinforced traditional gender roles in the families by taking a very biased attitude towards social parental roles.

The next case concerning the division of parental roles within a family and more specifically, a case concerning a father's entitlement to maternity leave was *Hofmann*.⁹⁴ In *Hofmann*, the plaintiff obtained from his employer unpaid leave of absence in the period between the expiry of the mother's statutory period of convalescence and the day on which the child reached the age of six months while the mother of the child returned to work.⁹⁵ The father of the child claimed that it was contrary to the principle of equal treatment under the current Art 1, Art 14(1)(c) and recital (24) of the preamble to the ETD that the legislation provided for paid maternity leave up to six months after childbirth only to working mothers while excluding working fathers from being entitled to such a benefit. The father argued that “there was no clear reason for treating fathers and mothers differently, that there was no ground specifically identifiable with sex which argued in favour of the mother's role being pre-eminent in caring for the child, provided that it enjoyed the permanent presence of a person to whom it might relate and that the aim [of maternity leave] /.../ was equally attained if the child was brought up by the father.”⁹⁶ The father also claimed that “maternity leave is a social benefit from the State which is intended to assist in the bringing up of the child” and that it also “serves as a measure of family policy, affording a period of leave intended to enable children to be cared for.”⁹⁷ Thus, the father insisted that maternity leave was not entirely excluded from the scrutiny of its correspondence with the principle of equal treatment for men and women under the now Art 14 ETD, as it does not aim only to protect the woman's biological condition after

⁹⁴ Case C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984], ECR 03047.

⁹⁵ Case 184/83, *op. cit.*, p. 03050.

⁹⁶ *Ibid.*, p. 03052.

⁹⁷ *Ibid.*, p. 03053 and 03054.

childbirth, but also to reinforce a woman's social role as a mother,⁹⁸ at least inasmuch what concerns the period exceeding statutory protection of women after childbirth.

The CJEU, however, did not agree with the father's claims and stated that the [now ETD] "is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents."⁹⁹ The CJEU continued that in its view it was "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; and 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."¹⁰⁰ In that regard, the CJEU found that "such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely."¹⁰¹ The CJEU thus came to the conclusion that the now ETD does not necessitate that fathers would equally be granted paid leave under the same conditions as applicable to maternity leave and that maternity leave serves to protect women only (i.e. their physical condition and their social role as a mother), regardless of whether maternity leave is divided into statutory/voluntary leave periods and regardless of its duration.

The opinion of AG Darmon sheds more light on the CJEU reasoning. Namely, AG Darmon brings out more clearly what, in his view, necessitates the special protection of women. AG Darmon is of the view that the objective considerations for mandatory maternity leave is "connected with a woman's special biological make-up"¹⁰² and that the possibility to take optional maternity leave is justified by the fact that mothers are "confronted by extra burdens at the end of the eight-week of leave, since the upkeep of the household and the resumption of employment are supplemented by the intensive care which an infant requires, especially during the early months. Moreover, that threefold burden is all the more difficult for the mother to bear because her state of health is, generally speaking, still precarious, which helps to explain the cases in which employment is given up."¹⁰³ Thus, AG Darmon saw additional

⁹⁸ *Ibid.*, p. 03054 and 03055.

⁹⁹ *Ibid.*, para. 24.

¹⁰⁰ *Ibid.*, para. 25.

¹⁰¹ *Ibid.*, para. 26.

¹⁰² Opinion of AG Darmon in case C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984], ECR 03077, para. 10.

¹⁰³ *Ibid.*, para. 11.

maternity leave (i.e. optional maternity leave after the compulsory maternity leave) as not a measure aimed to facilitate childcare as such (in which case safeguarding the best interests of the child would be the underpinning rationale) but prominently as a preventive measure aimed to protect women's delicate health condition after childbirth.

However, the rationale of protecting women's health during the optional maternity leave (which in case of *Hofmann*, could be up to four months after the compulsory leave of two months) does not seem as self-evident as the CJEU claimed it was and could be disputed. While it can be accepted that maternity leave is granted to protect women's health due to women's special biological functions related to pregnancy and childbirth (a position that is also evident under the preamble to the PWD), it can be still argued that maternity leaves, especially those with long duration are not only granted for health-related reasons. In that regard, AG Kokott, reiterating the case law of the CJEU, argued in *C.D. v S.T.*¹⁰⁴ that maternity leave does not only protect a woman's physical condition during pregnancy and after childbirth, but is partly intended to "protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, a position which is also consistent with Articles 24(3) and 7 of the EUCFR."¹⁰⁵ Thus, in AG Kokott's view, as maternity leave is, in part, granted to safeguard the children's personal contact with his/her parents and to protect the family as a unit, it is possible to divide maternity leave according to the twofold purposes of maternity leave.¹⁰⁶

Thus, provided that maternity leave pursues several objectives, not all of them relating to the protection of women's health but also aimed to facilitate adapting to a new parental role (as a social role, performed in the best interest of the child), it could also be argued that maternity leave period exceeding the period granted to protect women's health, could equally be claimed by both of the parents (including fathers). It is difficult to see why only women need special protection to adapt to their social role as a mother, but not men, especially so if a part of maternity leave under national legislation is detached from health-related concerns (e.g. by introducing part of maternity leave as an optional leave) and serves mainly the best interests of the child, namely facilitating the child's integration into its family. Thus, it could as well be claimed, especially in case of long maternity leaves, that reserving maternity leave in full only to mothers, that is granted, in part, to facilitate the upbringing of the child, does not conform with the principle of equal treatment for men and women under Art 14(1)(c) ETD as there are

¹⁰⁴ Opinion of AG Kokott in case C-167/12 *C.D. v S.T.* [2013], not yet published.

¹⁰⁵ *Ibid.*, para. 45.

¹⁰⁶ *Ibid.*, para. 75.

no weighty reasons to treat mothers and fathers that have assumed their parental roles differently. In that regard, it could be argued that the longer the maternity leave is provided (as a special protection accorded only to women), the weightier reasons, necessitating the exclusion of fathers, should be brought to find such measures acceptable. Furthermore, the longer the maternity leave is provided, the stricter the standard of scrutiny under the ETD should be as the ETD aims, according to recital (2) of the preamble to the ETD to advance not only formal, but also substantive equality between the sexes.

Regarding the substantive equality argument, by taking the position uttered in *Hofmann* that the ETD is not designed to alter the roles in a family the CJEU did not respect the aim of the ETD, namely the aim of guaranteeing substantive equality between the sexes. Hence, it could further be argued, as C. Barnard has noted, that creating an artificial distinction between the spheres of work and family life “further prejudices the many women who are not ‘well-assimilated’ to the male norm and denies them *de facto* equality.”¹⁰⁷ Thus, it would be desirable if the CJEU in its cases concerning equal access to maternity leave, would pay more respect to the principle of equality between the sexes within the meaning of Art 14(1)(c) ETD, the more so as the principle of equality has been given the status of a fundamental principle in EU law within the meaning of Art 20 EUCFR and with equality of the sexes being expressly guaranteed under Art 23 EUCFR. In that regard, however, the views of the CJEU concerning maternity leave, have not changed much, as can be seen from its recent case law.

The issue of equal treatment for men and women concerning maternity leave was again recently brought before the CJEU. In *Montull*¹⁰⁸ a father that took care of the couple’s baby after its birth claimed that he was entitled to maternity leave that exceeded the 6 weeks of compulsory maternity leave reserved for women. Under the contested legislation, the mother of the child could transfer the right to maternity leave to the father of the child in case both of the parents were employed, thus, the father of the child enjoyed a derivative right from the mother of the child.¹⁰⁹ As the mother of the child was a self-employed person, the father of the child was not granted maternity leave.¹¹⁰ In the national proceedings the plaintiff claimed that the refusal by the authorities to grant him the maternity benefit was not in accordance with the principle of equal treatment for the sexes in the field of working conditions as it

¹⁰⁷ C. Barnard, *op. cit.*, p. 290.

¹⁰⁸ Case C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* [2013], not yet published.

¹⁰⁹ *Ibid.*, para. 22.

¹¹⁰ *Ibid.*

introduced differential treatment between male and female workers concerning their entitlements to paid maternity leave; furthermore, the plaintiff argued that the contested legislation introduced differential treatment between biological fathers and adoptive fathers as in case of adoption or fostering the child, both of the parents enjoyed a primary right to maternity leave.¹¹¹

The CJEU, however, found that the measure did not encroach on fathers' rights, but that the Member States were under now recital (24) of the preamble to the ETD entitled to introduce measures in conformity with the PWD that aim to protect women's biological condition before and after childbirth. The CJEU found that the contested legislation was thus not covered by the ETD and that there was no prohibition to grant female workers (and not male workers) special benefits within the meaning of the PWD.¹¹² What concerns the plaintiff's second claim – the claim that the contested legislation discriminated unlawfully between biological fathers and adoptive fathers – the CJEU held that this claim did not come within the scope of EU law and refrained from taking a stand on this point as at the time of the facts in the proceedings, there was no prohibition in EU law of discrimination between the adoptive father and biological father in relation to maternity leave.¹¹³

The conclusion of the CJEU in *Montull* as regards equal treatment for the sexes under Art 14(1)(c) ETD can be contradicted. Namely, neither AG Wathelet in his opinion¹¹⁴ nor the Commission in its written observations shared the view of the CJEU. The Commission in its observations found that where the contested legislation “permits the father to benefit from a further period of 10 weeks, it detaches that period from the biological fact of maternity. /.../ that period is construed as a period for giving care and attention to the child to which both employed mothers and fathers are entitled.”¹¹⁵ Therefore, the Commission took the view that the now ETD was applicable to the voluntary leave period and that differential treatment for men and women on this point was not allowed.¹¹⁶ AG Wathelet took the same view, by stating that “unlike the /.../ leave immediately following the birth which, with a view to protecting her biological condition, the mother is required to take, the 10 weeks' leave at issue in the main proceedings cannot fall within the scope of [now recital (24) of the preamble to

¹¹¹ *Ibid.*, para. 23.

¹¹² *Ibid.*, para. 60 to 66.

¹¹³ *Ibid.*, para. 69 to 75.

¹¹⁴ Opinion of AG Wathelet in case C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* [2013], not yet published.

¹¹⁵ *Ibid.*, para. 46.

¹¹⁶ *Ibid.*, para. 47.

the ETD]. By providing that the mother may, at the beginning of the maternity leave, elect, after the first 6 weeks, for the father to take a designated and continuous part of the subsequent 10-week period of leave, the Spanish legislature detached those 10 weeks of leave from the mother's biological condition and, consequently, from the purpose of [now recital (24) of the preamble to the ETD]."¹¹⁷ Thus, AG Wathelet argues that the "leave in the present case is accorded to workers solely in their capacity as parents of the child"¹¹⁸ and that differential treatment for men and women was not justified.

The opinion of AG Wathelet is far more convincing concerning the period of optional maternity leave going beyond the protection of a woman's biological condition especially in the case where the leave is under the contested legislation, in principle, made available to both parents. Namely, as the measure could be applied to fathers, mothers and adoptive parents from both sexes, it strongly assumes that leave beyond the mandatory (health-related) maternity leave was not granted on sex-specific grounds and there was no reason to classify the measure as a measure aimed to grant special protection to women within the meaning of the PWD. Furthermore, considering parenting as a social function, there is no reason to suggest that men and women could not provide the same care in the best interests of their child in their capacity as parents, therefore it is not justified nor in accordance with the equal treatment principle to make a distinction between their entitlements.

While the CJEU's precautionary approach towards expanding the principle of equal treatment for men and women under the ETD to maternity leave enacted in accordance with the PWD, can be understood to some extent, it does not mean that the conditions of maternity leave should altogether be immune from scrutiny and that the ETD has no reach as it comes to maternity leave. Maternity leave should escape the principle of equal treatment for men and women in the field of working conditions inasmuch as it fulfils the aim of the PWD – the protection of women's biological condition and health, and, deriving from the case-law of the CJEU, also to a presumably far lesser extent the delicate relationship between the mother and her newborn. While it is difficult to establish when exactly maternity leave in fact becomes leave granted for parents solely in their capacity as parents, there are some indications in the PWD in that regard. Namely, Art 8(2) PWD clearly signals that 2 weeks of compulsory maternity leave should be viewed as the absolute minimum period of women's health protection and that the period necessary for recovery should optionally extend up to 14 weeks

¹¹⁷ *Ibid.*, para. 71.

¹¹⁸ *Ibid.*, para. 73.

(without determining the period of leave that should be taken before or after childbirth). However, logically, if maternity leave is designed to protect women's condition before and after childbirth, it is clear that some of the 14 weeks should be viewed as aiming to protect women's health during pregnancy as well and not all of the 14 weeks of maternity leave should be granted after the birth of the child. In that regard, the amendment proposals to the PWD were more indicative, as 6 weeks of maternity leave was introduced as the period of leave that would have to be taken after childbirth (for recovery and, optionally, for breastfeeding).

While the Member States are free to introduce measures enabling women greater protection under the PWD, measures vastly exceeding the protection required under the PWD, should still be more balanced in view of ensuring equality between men and women and should be more respectful to the choices that the parents make. Therefore, maternity leave periods extending to e.g. 6 months (as in *Hofmann*), should not in themselves be immune to scrutiny as to whether the right balance between the aim of protecting women's health-related interests and fathers' rights to participate in the upbringing of their children (in their capacity as parents) has been struck. Also, in Member States that have made a clear distinction between compulsory and optional maternity leave or have introduced some of the maternity leave as sex-neutral (as in *Montull*), the measures should not be viewed in the framework of the PWD at all, but to the extent that the leave is clearly unrelated to sex-specific concerns, the measure should fall under the ETD.

In its case law, the CJEU has made clear distinctions between (i) measures aimed to protect women's biological condition before and after childbirth and the special relationship between a mother and her child (i.e. maternity leave), (ii) positive discrimination measures within the meaning of Art 157(4) TFEU and Art 3 ETD aiming to reduce factual inequalities between the sexes, and (iii) benefits being granted to workers in their capacity as parents of the child. Depending on the classification of the measure, the CJEU has reached different outcomes regarding the necessity to expand the entitlements to fathers and the level of scrutiny of the measures' conformity with the principle of equal treatment for the sexes under the ETD has varied significantly. As can be seen from the previously examined case law, the CJEU has strongly refrained from interfering in the Member States' legislation concerning maternity leave on grounds of equal treatment for the sexes under Art 14(1)(c) ETD. However, the level of scrutiny has been slightly more profound in cases where positive discrimination measures

or benefits granted solely for parenting reasons have been challenged on grounds of equal treatment.

In *Commission v France*¹¹⁹ the Commission contested the legislation of France which reserved numerous special rights for women (e.g. “the shortening of working hours, for example for women over 59 years of age; the advancement of the retirement age; the obtaining of leave when a child is ill; the granting of additional days of annual leave in respect of each child”¹²⁰ etc.). The Commission contended that it was contrary to the principle of equal treatment for men and women under the [now Art 14(1)(c) ETD] to maintain special entitlements to women that do not fall within the exceptions of protecting women’s health (pregnancy and childbirth related reasons) nor under the allowed positive discrimination measures.¹²¹ The CJEU, in its argumentation agreed that “some of the special rights preserved relate to the protection of women in their capacity as older workers or parents — categories to which both men and women may equally belong”¹²² and thus found the legislation to be in violation with the principle of equal treatment for men and women. Hence, the CJEU acknowledged that in the field of parental benefits, where the benefit is accorded to workers on grounds of their status as parents only (e.g. measures such as obtaining of leave when a child is ill, the granting of additional days of annual leave in respect of each child), the benefit should, in principle, be made available to parents of both sexes.

In *Griesmar*,¹²³ the CJEU examined a measure relating to childcare which was purportedly introduced to offset occupational disadvantages for women. Namely, under the contested legislation, female workers were granted a service credit for the calculation of retirement pension per each child they had¹²⁴, whereas similar scheme was not available for male workers. The CJEU thus assessed whether the service credit was granted for the reason of women having been on maternity leave and consequently should be viewed as a measure aiming to offset the disadvantages caused by interruptions in their career¹²⁵ or whether the service credit was granted for the reason of taking care of children with the assumption that women had brought up the children. The CJEU came to the conclusion that “the situations of a male civil servant and a female civil servant may be comparable as regard the bringing-up

¹¹⁹ Case C-312/86 *Commission of the European Communities v French Republic* [1988], ECR 06315.

¹²⁰ *Ibid.*, para. 8.

¹²¹ *Ibid.*, para. 9.

¹²² *Ibid.*, para. 14.

¹²³ Case C-366/99 *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001], ECR I-09383.

¹²⁴ *Ibid.*, p. I-9422 to I-9423.

¹²⁵ *Ibid.*, para. 52.

of children. In particular, the fact that female civil servants are more affected by the occupational disadvantages entailed in bringing up children, because this is a task generally carried out by women, does not prevent their situation from being comparable to that of a male civil servant who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages.”¹²⁶ Thus, the CJEU found that the measure under scrutiny was discriminatory towards male workers and violated the principle of equal pay for men and women within the meaning of now Art 157 TFEU.

In *Griesmar*, it is hard to imagine a different outcome as the allegedly positive discrimination measure was manifestly disproportionate towards male workers that had assumed their duties as parents and thus did not fulfil its aim while respecting the principle of equal treatment for men and women. In a similar case, decided a year later, the CJEU came to an opposite conclusion, though.

In *Lommers*, the CJEU did not find that providing subsidised nursery places to female workers only (male workers having access to these nursery places in case of emergency only and in case male workers were bringing up their children on their own), would in principle infringe the principle of equal treatment for men and women.¹²⁷ Interestingly, the CJEU did not find that subsidised nursery places for women should be viewed as “pay”¹²⁸ and thus fall under the principle of equal pay for men and women within the meaning of now Art 157 TFEU, but decided the case under now Art 157(4) TFEU and Art 3 ETD, classifying the measure as falling in the sphere of working conditions.¹²⁹

The CJEU thus examined the measure under now Art 3 ETD and came to the conclusion that “such a measure belongs to that group of measures that are designed to eliminate the causes of women's reduced opportunities of access to employment and careers and intended to improve the ability of women to compete on the labour market and pursue a career on an equal footing with men.”¹³⁰ As to the proportionality of the measure, the CJEU found that considering the scarcity of nursery places and the fact that under the contested measure, men were not outright excluded from being entitled to the benefit (there was room for making exceptions in

¹²⁶ *Ibid.*, para. 56.

¹²⁷ Case C-476/99 *op. cit.*

¹²⁸ „Pay“ under Art 157(2) TFEU means the ordinary basic or minimum wage or salary and **any other consideration, whether in cash or in kind**, which the worker **receives directly or indirectly**, in respect of his employment, **from his employer** [emphasis added]. „Pay“ has also been given very wide scope under the case law of the CJEU, entailing supplementary occupational pensions, rail travel facilities etc.

¹²⁹ Case C-476/99, *op. cit.*, para. 28 to 31.

¹³⁰ *Ibid.*, para. 33.

case of emergency), the measure was proportionate to the aim sought.¹³¹ Hence, the CJEU found that the measure fell under the exception of Art 3 ETD and did not violate the principle of equal treatment for men and women under Art 14(1)(c) ETD.

However, the findings of the CJEU are not self-evident regarding whether a measure such as the one under scrutiny in *Lommers* is truly capable of advancing substantive equality between men and women and reduce inequality of opportunity. It might be argued that by making childcare facilities more easily available to women, the measure does nothing more than reinforce the traditional perception of distribution of the roles of men and women. Namely, by granting nursery places preferentially to women, men might be discouraged to engage themselves with childcare issues. In that regard, AG Jacobs in his opinion in *Marschall*¹³² noted that in his view “a gender-specific measure will not /.../ be proportionate to the aims of remedying specific inequalities faced by women in practice and promoting equal opportunity if the same result could be achieved by a gender-neutral provision.”¹³³ AG Jacobs went on holding that, in his view, “by restricting to women the benefit of measures concerning childcare in particular may even be seen as running counter to the goal of treating men and women as equal participants in the workforce since it reinforces the assumption that women should have primary responsibility for childcare.”¹³⁴ Indeed, as was also argued by the plaintiff in *Lommers*, the employer “had not demonstrated that the number of women staying in their jobs after taking maternity leave had increased as a result of the subsidised nursery places scheme”¹³⁵ and that most employers in the Member State did not differentiate between men and women as regards access to similar subsidised nursery places.¹³⁶ The arguments put forward clearly indicate that a gender-neutral scheme regarding access to subsidised nursery places could have been equally as effective and could have promoted equality of opportunity for women equally as efficiently and as such, the measure under scrutiny might not have fulfilled its purpose.

In *Roca Álvarez*¹³⁷ the question of expanding maternity related benefits to fathers was again brought before the CJEU. In *Roca Álvarez*, the father claimed leave from work to feed his child. However, the leave was only granted to fathers if the mother and the father of the child

¹³¹ *Ibid.*, para. 43 to 48.

¹³² Opinion of AG Jacobs in case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997], ECR I-06365.

¹³³ *Ibid.*, para. 43.

¹³⁴ *Ibid.*, footnote 45.

¹³⁵ Case C-476/99, *op. cit.*, para. 20.

¹³⁶ *Ibid.*, para. 20.

¹³⁷ Case C-104/09, *op. cit.*

were both employed¹³⁸ (i.e. a father's right to claim the leave depended on the mother's right to claim the leave). As the mother of the child was self-employed and thus not entitled to claim the leave, the father of the child was refused from taking the leave. Hence, the father filed a complaint against his employer and the referring court was confronted with the question whether the [now ETD] prohibits a measure "which provides that female workers who are mothers and whose status is that of an employed person are entitled, in various ways, to take leave during the first nine months following the child's birth, whereas male workers who are fathers with that same status are not entitled to the same leave unless the child's mother is also an employed person."¹³⁹

In that regard, the CJEU found that "the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child"¹⁴⁰ and went on to analyse whether the differential treatment of fathers was justified by objective reasons. The CJEU then distinguished the case from maternity leave related cases, more specifically from *Hofmann*, and found that "the fact that the leave at issue in the main proceedings might be taken by the employed father or the employed mother without distinction means that feeding and devoting time to the child can be carried out just as well by the father as by the mother. Therefore this leave seems to be accorded to workers in their capacity as parents of the child."¹⁴¹ Based on the foregoing argumentation, the CJEU did not find it convincing that the entitlement for fathers to claim leave for feeding the child should derive from the mothers as the holder of this right, but found that to hold that "a father with the same status [as the mother] can only enjoy this right but not be the holder of it, is liable to perpetuate a 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."¹⁴² Hence, the CJEU ruled that the principle of equal treatment for men and women necessitates that male workers should be entitled to claim leave for feeding the child in the same way as female workers.

Roca Álvarez thus was the first case in which the CJEU adjusted the entitlements to maternity related benefits to current parental roles and the needs of the family. It can only be agreed with the reasoning that while breastfeeding concerns might have been initially relevant in

¹³⁸ *Ibid.*, para. 10.

¹³⁹ *Ibid.*, para. 18.

¹⁴⁰ *Ibid.*, para. 24.

¹⁴¹ *Ibid.*, para. 31.

¹⁴² *Ibid.*, para. 36.

introducing the contested regulation, the advancement of fathers' participation in childrearing matters and alternative options for feeding and taking care of the child necessitated an approach based on the parity of men and women in childrearing matters. In that regard, *Roca Álvarez* constitutes a significant development in the case law of the CJEU, guaranteeing substantive equality between the sexes and safeguarding both parents' participation in childrearing matters in their capacity as parents.

It can be further noted that in the field of parental benefits, the CJEU has been the most equality-minded in cases concerning equal access to parental leave schemes (i.e. measures granted solely for parenting reasons). In *Konstantinos Maïstrellis*¹⁴³ the CJEU reviewed a national measure on parental leave under which male civil servants were entitled to parental leave in a situation where their wives did not work only where their wives were seriously ill or injured.¹⁴⁴ The applicant, whose situation did not comply with the provision, was hence refused parental leave. The applicant appealed on the decision and the referring court sought to clarify whether the provision was contrary to the principle of equal treatment for men and women under the ETD and/or disregarded the minimum requirements under the [now the PLD].¹⁴⁵

The CJEU found, referring to now Clause 2(1) and Clause 2(2) PLD, that as a minimum requirement each of the child's parents is individually entitled to parental leave for at least [now four] months and that Member States' legislation cannot derogate from this minimum standard by e.g. denying one of the parents the right to parental leave because of the employment status of his wife.¹⁴⁶ The CJEU also explained that the PLD is designed to "facilitate the reconciliation of parental and professional responsibilities for working parents,"¹⁴⁷ an objective complying with Art 33(2) EUCFR, and serves the objective of "promoting women's participation in the labour force' and that men should be encouraged to assume an 'equal share of family responsibilities', inter alia by taking parental leave."¹⁴⁸ Thus, any measures that would contravene these objectives would not be valid under the PLD. Moreover, the CJEU found, based on the findings of *Griesmar*, *Commission v France*, *Roca Álvarez*, that the contested measure which was awarded to civil servants in their capacity as a parent, did not comply with the ETD either, as the differential treatment of men and women

¹⁴³ Case C-222/14 *op. cit.*, not yet published.

¹⁴⁴ *Ibid.*, para. 15.

¹⁴⁵ *Ibid.*, para. 30.

¹⁴⁶ *Ibid.*, para. 33 to 36.

¹⁴⁷ *Ibid.*, para. 38.

¹⁴⁸ *Ibid.*, para. 40.

having the same parental status, amounted to direct discrimination on grounds of sex for which there was no justification.¹⁴⁹

Hence, it can be noted, based on the CJEU's findings in *Konstantinos Maïstrellis* that differing from maternity leave, parental leave should be viewed as leave that is granted solely on grounds of parental status. Thus, any differential treatment of men and women in terms of the conditions of parental leave that would unjustifiably work against the objective of ensuring men's more equal participation in childcare (i.e. guaranteeing substantive equality between the sexes in childrearing matters), would amount to direct discrimination on grounds of sex.

In summary, the CJEU's approach towards granting parental benefits for the father of the child on equal footing with the mother of the child, has evolved gradually and now entails a slightly more sophisticated view on equality between the sexes in childrearing matters. However, there are still considerable differences in the CJEU's decisions as the CJEU has been keen on distinguishing between different parental benefits adopted in accordance with separate instruments, such as the PWD, the PLD and positive discrimination measures under Art 157(4) TFEU and Art 3 ETD. Based on the case law, it can be inferred that the CJEU has been the most protective of Member States' legislation on maternity leave, although the contested measures have not always been clearly related to the protection of the women's biological condition and health (e.g. as in *Montull*). By viewing measures enacted under the PWD as entirely independent of the ETD, the CJEU has not been able to strike a fair balance between parents' needs, equality rights and the protection of health of pregnant women, women that have recently given birth and breastfeeding women. Positive discrimination measures have, on the other hand, been open to more scrutiny, although the CJEU has still rather rarely struck down positive discrimination measures in the field of parental benefits for being disproportionate in relation to fathers' entitlements. In the field of parental leave, though, the CJEU has been the most equality-minded.

Based on the selection of the CJEU's case law, analysed above, it can be noted that fathers still have altogether less access to benefits relating to childcare under EU anti-discrimination law and the CJEU has not been willing to compensate for the legislative discrepancies between the entitlements of fathers and mothers, securing women's primary role as caretakers in the family. It is noteworthy, that the CJEU in its practice has often failed to take account

¹⁴⁹ *Ibid.*, para. 46 to 53.

the substantive equality arguments and has interpreted the PWD and the ETD as entirely separate instruments, while the ETD should allow the CJEU to assess the necessity and function of measures enacted even under the PWD.

By drawing a distinction between the entitlements of mothers and fathers, the CJEU has, in many cases ignored the principle of equality of the sexes and the aim to achieve substantive equality for the sexes (Art 3 TEU). Based on the current trend towards more equal burden sharing, the EU legislation and the CJEU practice should support more substantive equality for the sexes and should be more focused on acknowledging parenting as a social role. As to the latter aim, the interpretative tools that the CJEU has (the need to advance fundamental rights as guaranteed under the EUCFR – the importance of the equality principle in EU legislation) should enable it to progress in its case law, in the direction better suited for parents' needs.

In summary, the parental benefits scheme under EU anti-discrimination legislation does not comply with the principle of equality for men and women in the best possible way. Thus, it would be desirable if the parental benefits schemes relating to childcare would become more equally accessible to both of the parents. Also, maternity leave under the PWD could offer more flexibility, especially in case of longer maternity leaves, by allowing women to return to work before the end of their maternity leave without their families having to suffer financial consequences thereof, e.g. by providing for transferable maternity leave periods which could equally be taken by the fathers as well. As paternity leave and parental leave schemes are not equally as generously remunerated as maternity leave, women might face unwanted pressure from their partners to stay at home until the end of their maternity leave, especially so in the Member States that have introduced longer maternity leaves. Hence, to the extent that maternity leave aims to protect the special relationship between a mother and her child, fathers should have more room to argue for equal access to such benefits.

Next, as a source of comparison, the case law of the ECtHR on fathers' claims will be analysed to verify to which extent the courts' rulings have coincided and to which extent the equality guarantees under EU anti-discrimination law and the ECHR differ.

2.1.2. Fathers' entitlements to parental benefits under the case law of the ECtHR

The ECtHR has also been confronted with the issue of equal treatment for men and women regarding parental benefits. As the rights envisaged in the ECHR constitute general principles

of the Union's law under Art 6(3) TEU and should be viewed coherently with similar rights enacted under the EUCFR, it is interesting to compare the case law of the CJEU to that of the ECtHR to verify to what extent the cases decided under EU anti-discrimination law follow the reasoning of the ECtHR.

The case law concerning fathers' access to parental benefits under the ECHR relates to the rights envisaged under Art 8 ECHR in conjunction with Art 14 ECHR. According to Art 8(1) ECHR, everyone has the right to respect for his private and family life, his home and his correspondence. Under Art 8(2) ECHR, there shall be no interference by a public authority with the exercise of this right except for on the grounds listed in Art 8(2) ECHR, i.e. on grounds related to the protection of public interests and the protection of rights and freedoms of others. Art 14 ECHR sets out the prohibition of discrimination on a non-exhaustive list of grounds, Art 14 ECHR is not a free-standing article, but can be invoked only in conjunction with another article of the ECHR, i.e. it is applicable according to its wording only in relation to "the enjoyment of the rights and freedoms set forth in [the ECHR]." The application of Art 14 ECHR does not necessarily presuppose the violation of the substantive rights guaranteed under the ECHR, but it is sufficient for the facts of the case to fall within the ambit of one or more articles of the ECHR.¹⁵⁰ In that regard, parental benefits fall within the ambit of Art 8 ECHR as „parental leave and related allowances promote family life and necessarily affect the way in which it is organised.“¹⁵¹ Hence, introducing differential access to parental benefits for the sexes ifalls within the prohibition of discrimination under Art 14 ECHR.

In *Petrovic v Austria*¹⁵² the ECtHR was confronted with the issue of equal treatment between the sexes in a case concerning parental leave allowances. The applicant, a father that took care of his newborn child while the mother of the child returned to work, was refused parental leave allowance that under the contested legislation was available only for women.¹⁵³ Thus, the applicant claimed that the legislation violated Art 8 and Art 14 of the ECHR, by introducing differential treatment for the sexes concerning the entitlement to parental leave allowance. The ECtHR acknowledged that unlike maternity leave which is granted for women to enable them to recover from childbirth, parental leave relates to the period after that and is intended to enable the parent to look after the child personally and that "so far as taking care

¹⁵⁰ See among many others, e.g. case of *Andrle v the Czech Republic*, 17.02.2011, application no. 6268/08, para. 27.

¹⁵¹ E.g. case of *Konstantin Markin v Russia*, 22.03.2012, application no. 30078/06, para. 45.

¹⁵² Case of *Petrovic v Austria*, 27.03.1998, application no. 20458/92.

¹⁵³ *Ibid.*, para. 7 to 9.

of the child during this period is concerned, both parents are “similarly placed.”¹⁵⁴ However, the ECtHR found no violation of Art 8 ECHR in conjunction with Art 14 ECHR in terms of the father’s equal access to the benefit as the ECtHR took the view that while the advancement of the equality of the sexes was a major goal for the States Parties, the State’s refusal to grant the applicant parental benefits came within the State’s margin of appreciation (during the time, there was no consensus among States Parties on the issue)¹⁵⁵.

In their joint dissenting opinion, judges Bernhardt and Spielmann came to the opposite conclusion. They brought out that “the discrimination against fathers perpetuates traditional distribution of roles and can also have negative consequences for the mother”¹⁵⁶ by influencing the mother to stay at home. Also, in their dissenting opinion, the judges accurately noted that if the States introduce parental benefits schemes, “traditional practices and roles in family life alone do not justify a difference in treatment of men and women” and that “a State, when opting for one system, is not permitted to grant benefits in a discriminatory manner.”¹⁵⁷ It is hard not to agree with this dissenting argumentation that has further been represented in the more progressive case law of the ECtHR concerning equal treatment for the sexes. Namely, once it is verified that the contested legislation constitutes direct discrimination on grounds of sex, very weighty reasons should be advanced to justify the difference of treatment. Concerning the justification of direct discrimination, it cannot be considered as sufficient to note that the practice of the States Parties is not advanced enough, as the kind of argumentation only leads to the levelling down of human rights protection which cannot be viewed as compatible with the ECHR. In its further case law, the ECtHR has been more advanced in combating discrimination on grounds of sex.

In *Weller v Hungary*,¹⁵⁸ the ECtHR adjudicated on a case in which a father applied for maternity benefit that under the contested legislation was only granted to mothers, adoptive parents and guardians of the child.¹⁵⁹ Following the authorities’ refusal to grant him the benefit, the applicant appealed, claiming that the contested regulation was discriminatory and violated Art 8 ECHR in conjunction with Art 14 ECHR.

The ECtHR assessed the conditions of granting the benefit and came to the conclusion that the “wide range of entitled persons proves that the allowance is aimed at supporting newborn

¹⁵⁴ *Ibid.*, para. 36.

¹⁵⁵ *Ibid.*, para. 37 to 43.

¹⁵⁶ *Ibid.*, dissenting opinion of judges Bernhardt and Spielmann.

¹⁵⁷ *Ibid.*

¹⁵⁸ Case of *Weller v Hungary*, 31.03.2009, application no. 44399/05.

¹⁵⁹ *Ibid.*, para. 9 and para. B.

children and the whole family raising them, and not only at reducing the hardship of giving birth sustained by the mother.”¹⁶⁰ Thus, the ECtHR found that the applicant was discriminated against on grounds of his parental status for which the ECtHR found to be no objective justification. While acknowledging the States’ autonomy to decide on the standard of protection under their social security system, the ECtHR held that “the lack of a common standard does not absolve those States which adopt family allowance schemes from making such grants without discrimination.”¹⁶¹ Hence, the State is tied with the principle of equal treatment whenever it chooses to introduce benefits facilitating childcare, regardless of the State’s margin of appreciation in introducing such a benefit overall.

Weller v Hungary thus marked a change in the ECtHR’s adjudication in matters relating to father’s equal access to parental benefits. Compared to *Petrovic v Austria*, it can be noted that while the ECtHR still acknowledged the States’ margin of appreciation in deciding on the level of protection granted under the States Parties’ social security system for parenting reasons, it nevertheless changed its position regarding to the States Parties’ freedom to introduce discriminatory measures when it decides to make parental benefits available.

It is also interesting to compare *Weller v Hungary* to the CJEU’s case law concerning equal access to maternity benefits, especially to the rulings in *Hofmann* and *Montull*. Namely, while the ECtHR has been willing to accept that maternity benefits, especially those that exceed measures necessary for the protection of a mother’s health (or are not clearly introduced for that purpose), do fall within the ambit of prohibition of discrimination, the CJEU has constantly held that paid maternity leave, in part, legitimately enables only the mother of the child to adjust to her parental role (including safeguarding the opportunity to breastfeed a child). Thus, the CJEU has seldom scrutinized Member States’ legislation on maternity leave from the viewpoint of equality of the sexes under the ETD but has been more prone to rule that maternity leave (and related benefits) fall outside the prohibition of discrimination under the ETD, regardless of the duration of maternity leave and regardless of the eligibility conditions to maternity leave.

As to the aim of maternity leave, the ECtHR has ruled e.g. in *Petrovic v Austria* that „maternity leave and the associated allowances are primarily intended to enable the mother to recover from the fatigue of childbirth and to breastfeed her baby if she so wishes.”¹⁶² Hence, the two courts have followed a similar line of argumentation as to the aim of maternity leave,

¹⁶⁰ *Ibid.*, para. 31.

¹⁶¹ *Ibid.*, para. 34.

¹⁶² *Petrovic v Austria*, *op. cit.*, para. 36.

however, the ECtHR (according to the rationale of *Weller v Hungary*) has viewed maternity leave foremost as aiming to protect women's health and has thus applied a more strict standard of scrutiny under Art 14 ECHR to maternity-related measures not clearly pursuing women's health protection. It is noteworthy that in *Montull*, the eligibility conditions to the maternity benefit were practically identical to those in *Weller v Hungary*¹⁶³ – however, the two courts reached entirely different outcomes in terms of striking down discriminatory practices. In that regard, the ECtHR has clearly taken the approach more consistent with the principle of equal treatment for the sexes.

The ECtHR has also been protective of the equal treatment for the sexes in parental leave cases. In *Konstantin Markin v Russia*, the ECtHR adjudicated on a case relating to a father's entitlements to parental leave. Namely, a father of three children applied for parental leave as he remained the sole caretaker of his three children after the birth of his third child. Under the contested legislation, women in military service could apply for three years' parental leave, but not men, who could only apply for a three months' parental leave.¹⁶⁴ The applicant thus argued that the refusal to grant him three years' parental leave violated the principle of equal treatment.

The ECtHR first held that while the States Parties enjoy a margin of appreciation “whether and what differences in otherwise similar situations justify differential treatment,”¹⁶⁵ „the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.”¹⁶⁶ The ECtHR further found that parental leave comes within the scope of Art 8 ECHR as “by enabling one of the parents to stay at home to look after the children, parental leave and related allowances promote family life and necessarily affect the way in which it is organised.”¹⁶⁷ Hence, parental leave must be accorded to the parents, respecting Art 14 ECHR.

With regards to the justification of unequal treatment between servicemen and servicewomen, the ECtHR contended that “contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children

¹⁶³ In *Weller v Hungary* mothers, adoptive parents and guardians were entitled to the maternity benefit that was granted during 180 days since the birth of the child with the exclusion of natural fathers; in *Montull* mothers and adoptive parents were entitled to the maternity benefit for 16 weeks with biological fathers enjoying a derivative right to the benefit after 6 weeks of the birth of the child.

¹⁶⁴ Case of *Konstantin Markin v Russia*, *op. cit.*, para. 48.

¹⁶⁵ *Ibid.*, para. 126.

¹⁶⁶ *Ibid.*, para. 127.

¹⁶⁷ *Ibid.*, para. 130.

and that men's caring role has gained recognition,"¹⁶⁸ thus the state's margin of appreciation in introducing differential treatment regarding parental benefits for servicemen had decreased. Neither did the ECtHR find convincing Russia's argumentation that the contested legislation aimed to reduce factual inequalities between men and women (i.e. that it constituted a positive discrimination measure), stating that "such difference has the effect of perpetuating gender stereotypes and is disadvantageous both to women's careers and to men's family life"¹⁶⁹ and that "States may not impose traditional gender roles and gender stereotypes."¹⁷⁰ Hence, the ECtHR found the measure to be discriminatory and in violation of Articles 8 and 14 ECHR.

In *Konstantin Markin v Russia*, the ECtHR thus sent a powerful signal that the advancement of gender equality is a major goal also for the Council of Europe, hence the States Parties' margin of appreciation in terms of differentiating between the entitlements to parental benefits for different sexes is limited and measures imposing different eligibility conditions to parental benefits can only be viewed as proportionate for very weighty reasons. J. Gerards has noted that in general, "the ECtHR applies a "very weighty reasons" test if it finds that a ground is commonly held suspect by the various [States Parties]" /.../ in those cases [the ECtHR] is very strict and a justification will hardly ever be accepted."¹⁷¹ Concerning parental leave, i.e. leave granted solely for men and women in their capacity as parents, it is very difficult to reliably justify differential treatment for the sexes. In that regard, the positions of the CJEU and the ECtHR coincide with both of the courts stressing the need to avoid reinforcing gender stereotypes in introducing parental leave schemes. Moreover, the CJEU has, e.g. in *Konstantinos Maïstrellis*, stressed the need to encourage men to take up parental leave (arguing for substantive equality) under the PLD. Thus, concerning parental leave schemes, the CJEU's standard of scrutiny coincides with that of the ECtHR and unequal treatment of the sexes is most likely to be struck down.

Similarly to the EU anti-discrimination law measures, positive discrimination is also allowed under Art 14 ECHR, which, however does not expressly authorize such measures, unlike e.g. Art 23(2) EUCFR, Art 157(4) TFEU and Art 3 ETD. In *Andrle v. the Czech Republic* the ECtHR scrutinized Czech legislation concerning the State's pension scheme. The plaintiff, a father of two children, argued that the contested legislation was discriminatory since under the

¹⁶⁸ *Ibid.*, para. 140.

¹⁶⁹ *Ibid.*, para. 141.

¹⁷⁰ *Ibid.*, para. 142.

¹⁷¹ J. Gerards „Discrimination grounds“ in D.Schiek, L.Waddington and M. Bell (eds) „Cases, Materials and Text on National, Supranational and International Non-Discrimination Law,“ Oxford: Hart Publishing, 2007, para. 1.2., p. 36.

legislation, women's pensionable age was determined by the number of children they had, while the pensionable age for men was not dependant on the number of children they had.¹⁷² Despite the difference of the pensionable age for men, the ECtHR ruled that the States are allowed under Art 14 ECHR to introduce measures designed for "treating groups differently in order to correct "factual inequalities" between them."¹⁷³ Although the ECtHR reiterated that "very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention,"¹⁷⁴ it was nevertheless willing to accept that the measure pursued a legitimate aim as it was enacted to compensate "for the factual inequality and hardship arising out of the combination of the traditional mothering role of women and the social expectation of their involvement in work on a full-time basis."¹⁷⁵ As to the proportionality of the measure, the ECtHR found that the States enjoyed a wide margin of appreciation to determine when the "the unfairness to men begins to outweigh the need to correct the disadvantaged position of women by means of affirmative action."¹⁷⁶ Thus, the ECtHR found the legislation lowering pensionable age only for women for reason of their childrearing obligations, was in conformity with the principle of non-discrimination under Art 14 ECHR.

Thus, similarly to EU anti-discrimination legislation, it is allowed under Art 14 ECHR to introduce positive discrimination measures to compensate for the factual inequalities that exist between men and women, subject to proportionality review of such measures. Concerning pensionable age more specifically, EU anti-discrimination legislation differs slightly, as under Art 7(a) of Directive 79/7/EEC¹⁷⁷ equal treatment for men and women in matters of social security cannot impair the Member States' right to determine the pensionable age. Thus, under EU anti-discrimination law the determination of pensionable age is outside the scope of scrutiny for its correspondence to the principle of equal treatment for the sexes. However, the methodologies implemented by both of the courts in reviewing positive discrimination measures coincide as to the strict proportionality test.

In summary, it can be concluded that there are many similarities between the rulings of the ECtHR and the CJEU in cases concerning equal access to parental benefits. In comparison to

¹⁷² Case of *Andrle v the Czech Republic*, *op. cit.*, para. 26.

¹⁷³ *Ibid.*, para. 48.

¹⁷⁴ *Ibid.*, para. 49.

¹⁷⁵ *Ibid.*, para. 53.

¹⁷⁶ *Ibid.*, para. 56.

¹⁷⁷ Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ [1979] L6/24.

the practice of the CJEU, the ECtHR has likewise distinguished between maternity leave (granted for women with the aim to protect their health and recovery from childbirth), parental leave (granted for both of the parents in their capacity as a parent) and positive discrimination measures, applying a slightly different standard of scrutiny to such measures. However, compared to the practice of the CJEU, the ECtHR in its case law has been more open to assess the purpose of and eligibility conditions to maternity benefits and has viewed the legitimate purpose of maternity leave primarily as connected to safeguarding women's health (not including the protection of the special relationship between a mother and her child, as advanced in the case law of the CJEU). Thus, under Articles 8 and 14 ECHR, fathers can more effectively challenge maternity-related measures that disproportionately restrict fathers' access to these benefits. In that regard, the wider purpose of maternity leave, as advanced by the CJEU does not guarantee equal treatment for the sexes as efficiently. Neither is the wider purpose of maternity leave as self-evident under the PWD either, as according to the preamble to the PWD, the PWD itself is mainly seen as measure aimed to protect workers' health for reasons of pregnancy, childbirth and breastfeeding.

Also, it can be noted that the non-discrimination principle in EU anti-discrimination law is applied more narrowly. In the case law of the ECtHR, it is required that the non-discrimination principle should be respected whenever States Parties wish to enact new legislation that is connected to the enjoyment of rights under the ECHR, e.g. in the field of parental benefits. Thus, whenever the States Parties grant new parental benefits, they must guarantee that access to these benefits would be granted on a non-discriminatory basis under Art 14 ECHR (i.e. an open-ended non-discrimination clause, capable of extending to unlisted grounds). In the practice of the CJEU, although the principle of non-discrimination has been viewed as one of the general principles of EU law¹⁷⁸, which should form an individual ground for review of the measure's compliance with EU law¹⁷⁹, it has not been given such significance in the field of equal access to parental benefits. E.g. in *Montull*, the CJEU refrained from taking a position concerning the differential access to entitlements of the adoptive parents and biological fathers, excluding discrimination on grounds of parental status from the scope of EU law. Thus, it still is necessary for the plaintiff to argue that the contested discriminatory practice is prohibited under a specific EU instrument and that the situation is covered by the protected grounds.

¹⁷⁸ See footnote 31.

¹⁷⁹ P. Craig, G. de Búrca, *op. cit.*, p. 389.

Also, curiously, neither of the courts has viewed the parents' entitlements to parental benefits as connected to the protection of the rights of the child. Although the rights of the child (e.g. in Art 23 EUCFR) necessitate that the child should develop a personal relationship and direct contact with both of his/her parents and that in all actions relating to children, the children's best interest should be taken into account, the courts have detached parental benefits from these considerations. In *Konstantinos Maïstrellis*, the CJEU expressly dismissed the argumentation that the rights of the child come into consideration what concerns e.g. parental leave. However, it could be argued that maternity/parental leave schemes also advance children's rights by providing them with the best possible care during the most delicate time after their birth and facilitating the integration of the child into its family. Thus, if the legislation disregards disproportionately and contrarily to the principle of equal treatment one of the parents' rights in terms of access to maternity/parental leave schemes, it necessarily influences the rights of the child as well, by disregarding the best interests of the child (Art 23(2) EUCFR) and to a lesser extent the right to a personal relationship and direct contact with both of his/her parents (Art 23(3) EUCFR).

2.2. Case law of the CJEU and ECtHR concerning access to parental benefits for atypical families

In the previous subchapter, fathers' equal access to parental benefits under the case law of the ECtHR and the CJEU was examined. However, not only do fathers have incentives to challenge measures introducing differential access to parental benefits. Namely, atypical families have an often uncertain position regarding their entitlements to state guarantees in the field of parental benefits. Among such families are families that have resorted to surrogacy.

The rapid development of reproductive medicine has introduced novel ways of having children and has thus enabled infertile couples to become parents by taking advantage of these methods. As a consequence of developments in the field of reproductive medicine, an alternative to adopting or bearing a child – surrogacy – has rapidly emerged.

Surrogacy is surrounded by controversies as it raises serious social and ethical issues. Some of the rights issues that have arisen in relation to surrogacy include concerns in relation to child abandonment and suspected child trafficking, doubts about the suitability of the intended parents and about the free and informed consent of surrogate mothers, the contractual terms of

the surrogate agreements and concerns in relation to unscrupulous intermediaries.¹⁸⁰ On the other hand, surrogacy serves the rights of infertile couples, enabling them to found a family despite their physical impediments. Hence, as surrogacy is related to controversial rights issues, there is no uniform approach to surrogacy within the Member States. The lack of consensus among European states on the recognition of surrogacy has also led to diverse outcomes on the recognition of parental rights of the intended/commissioning parents, which in turn also touches upon the issue of equal treatment of the intended/commissioning parents *vis à vis* biological/gestational parents. Namely, EU anti-discrimination law has been challenged with the question whether non-recognition of maternity/paternity rights (including non-recognition of entitlements deriving from EU legislation in the field of labour law, such as maternity/parental leave) of the intended parents amounts to unlawful discrimination.

2.2.1. Case law of the CJEU concerning commissioning parents' entitlements to maternity leave and adoption leave

The issue of equal treatment of the intended/commissioning mothers at workplace was recently brought before the CJEU in two cases – *C.D. v S.T.*¹⁸¹ and *Z. v A Government Department*.¹⁸² In both of these cases, the intended mothers who were awarded full parental responsibility, claimed that they were entitled to maternity/adoption leave, but were denied it by their employers.

In *C.D. v S.T.* the applicant filed a complaint against her employer after the latter's refusal to grant her maternity leave, claiming that she was discriminated against on grounds of sex, relying accordingly on the PWD and the ETD. Hence, in *C.D. v S.T.* the referring court sought to establish whether the PWD was also applicable in case where the commissioning mother (having full parental responsibility) had not been pregnant nor given birth to the child, but was breastfeeding the child since its birth.¹⁸³ Also, the referring court sought to establish whether the treatment of the plaintiff amounted to discrimination under Art 14, in conjunction with Art 2(1)(a) and/or (b) and/or 2(2)(c) of the ETD.¹⁸⁴

The CJEU considered the questions referred and found that as regards the applicability of the PWD, „it follows from the objective of [the PWD], from the wording of Art 8 PWD, which

¹⁸⁰ Hague Conference on Private International Law „The Parentage/Surrogacy Project: An Updating Note,“ Prel. Doc. No 3A, p. 10. Accessible at: <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf>, last accessed 29.04.2016.

¹⁸¹ Case C-167/12 *C.D. v S.T.* [2014], not yet published.

¹⁸² Case C-363/12, *op. cit.*

¹⁸³ Case C-167/12, *op. cit.*, para. 25.

¹⁸⁴ *Ibid.*

expressly refers to [childbirth], and from the case-law of the Court /.../, that the purpose of the maternity leave provided for in Art 8 PWD is to protect the health of the mother of the child in the especially vulnerable situation arising from her pregnancy.¹⁸⁵ The CJEU further clarified that as regards the objective of protecting the special relationship of a woman and her child, it „concerns only the period after 'pregnancy and childbirth.'¹⁸⁶ Thus, the CJEU found that the PWD does not necessitate Member States to grant maternity leave to women that have themselves not been pregnant nor given birth, however, Member States may, on their own initiative, enact more favourable legislation, covering intended mothers as well.¹⁸⁷

As regards the discrimination claim on grounds of sex under the ETD, the CJEU compared the entitlements of a commissioning mother to that of a commissioning father and found that as neither of the comparable groups were entitled to paid maternity leave, the contested refusal by the employer to grant maternity leave was not based on a reason that applies exclusively to employees of one sex.¹⁸⁸ Hence, the CJEU ruled that the prohibition of discrimination under the ETD was not infringed as the CJEU found no direct discrimination on grounds of sex and neither did the CJEU find evidence of indirect discrimination on grounds of sex.¹⁸⁹

In *Z. v A Government Department* the intended mother, similarly to *C.D. v S.T.* argued that she was entitled to leave equivalent to that of maternity or adoption leave, which the employer refused to grant her. The plaintiff argued that her employer's refusal to grant her paid leave constituted discrimination against her on grounds of gender, disability for having no uterus (although, it relates to an interesting sequel of case law in EU anti-discrimination legislation, this ground will not be analysed for the purpose of this thesis) and family status (the multiple grounds invoked relate also to multiple discrimination issues). The referring court thus wanted to clarify whether in light of Articles 21, 23, 33 and 34 EUCFR, it constituted discrimination on grounds of sex within the meaning of Articles 4 and 14 ETD if a „woman whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth is refused paid leave from employment equivalent to maternity leave and/or adoptive leave.¹⁹⁰

The CJEU, consistently with *C.D. v S.T.* chose the commissioning father as the comparator and came to the conclusion that the employer's refusal to grant the applicant maternity leave

¹⁸⁵ *Ibid.*, para. 35.

¹⁸⁶ *Ibid.*, para. 36.

¹⁸⁷ *Ibid.*, para. 40 to 42.

¹⁸⁸ *Ibid.*, para. 47.

¹⁸⁹ *Ibid.*, para. 47 to 50.

¹⁹⁰ Case C-363/12, *op. cit.*, para. 45.

did not constitute direct discrimination on grounds of sex under the ETD; neither did the CJEU find any evidence to suspect that the applicant had been indirectly discriminated against.¹⁹¹ The CJEU further reiterated that Member States are not obliged to grant maternity leave to a commissioning mother under the PWD as the entitlement to maternity leave derives from a mother's pregnancy and childbirth.¹⁹² Analysing the claim of unequal treatment as compared to adoptive parents under the ETD, the CJEU came to the conclusion that Art 16 ETD has limited scope – namely it „preserves the freedom of the Member States to grant or not to grant adoption leave, and that the conditions for the implementation of such leave, other than dismissal and return to work, are outside the scope of that directive.“¹⁹³ Hence, the CJEU found no discrimination neither on grounds of sex nor on grounds of family status.

It is noteworthy that AG Wahl in his opinion¹⁹⁴ and AG Kokott in her opinion¹⁹⁵ reached different outcomes regarding discriminatory treatment of the applicants and the possibility to extend the instruments to the cases. While AG Wahl supported the CJEU's later findings and interpreted the case strictly, AG Kokott laid more emphasis on the necessity to protect human rights as envisaged in the EUCFR and thus interpreted the provisions in light of EU primary law.

AG Wahl, while not ruling out the possibility that there had been discrimination on grounds of parental status *vis à vis* adoptive parents, in his concluding remarks explained his restrictive interpretation taken under the framework of the PWD and the ETD by stating that „it is not for the Court to substitute itself for the legislature by engaging in constructive interpretation that would involve reading into [the respective directives] something that is simply not there. That /.../ would amount to encroaching upon the legislative prerogative.“¹⁹⁶ However, engaging with teleological interpretation in light of human rights protection as necessitated by the EUCFR, has not been that uncommon in the case law of the CJEU. E.g. in *P v S and Cornwall County Council*, the CJEU expanded the notion of discrimination on grounds of sex to cover gender reassignment cases in light of human rights protection¹⁹⁷; in *Chatzi*, the CJEU found that Art 20 EUCFR necessitates that national legislator should have special regard to the needs of the parents of twins for the purpose of safeguarding the principle of equal

¹⁹¹ *Ibid.*, para. 51 to 54.

¹⁹² *Ibid.*, para. 58 to 60.

¹⁹³ *Ibid.*, para. 63.

¹⁹⁴ Opinion of AG Wahl in case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014], not yet published.

¹⁹⁵ Opinion of AG Kokott in case C-167/12, *op. cit.*

¹⁹⁶ Opinion of AG Wahl in case C-363/12, *op. cit.*, para. 120.

¹⁹⁷ See footnote 30.

treatment which is one of the fundamental principles of EU law,¹⁹⁸ in *Mangold* the CJEU proliferated discrimination on grounds of age, as an expression of the general principle of equal treatment, to the status of general principle of EU law¹⁹⁹ to rule against age discrimination etc. Thus, the CJEU has in its case law advanced the principle of equal treatment by engaging with human rights' argumentation.

Hence, laying emphasis on human rights protection, AG Kokott based her argumentation on Articles 24(3) and 7 EUCFR in conjunction with the relevant articles of the PWD. Art 7 EUCFR provides that „everyone has the right to respect for his or her private and family life, home and communications“ and Art 24(3) EUCFR provides 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.“ Furthermore, according to Art 24(2) EUCFR „in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.“ Thus, in light of the aforementioned articles, AG Kokott expanded the protection granted to working gestational mothers to commissioning mothers under the PWD, in case where the commissioning mother was breastfeeding the child.

As AG Kokott noted, Art 2(c) PWD lists workers who are breastfeeding as coming within the scope of the PWD. Moreover, the situation of a breastfeeding commissioning mother is comparable with the situation of a breastfeeding biological mother, also in terms of health risks necessitating special protection at workplace and in terms of time demands associating with childcare.²⁰⁰ Furthermore, as one of the aims of maternity leave is to protect the special relationship between a woman and her child following childbirth, a position consistent with Articles 24(3) and 7 EUCFR, this relationship should not be impaired by the mother's simultaneous pursuit of employment.²⁰¹

In that regard, AG Kokott even suggested that „the objective of protection based on the mother-child relationship even suggests that [the PWD] must apply generally to intended mothers irrespective of whether or not they breastfeed their child“²⁰² as similarly to a biological mother „she is faced with the challenge of bonding with that child, integrating it into the family and adjusting to her role as a mother.“²⁰³ AG Kokott thus took the view that

¹⁹⁸ Case C-149/10, *op. cit.*, para. 63 to 68.

¹⁹⁹ Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005], ECR I-09981, para. 75.

²⁰⁰ Opinion of AG Kokott in case C-167/12, *op. cit.*, para. 44.

²⁰¹ *Ibid.*, para. 45.

²⁰² *Ibid.*, para. 46.

²⁰³ *Ibid.*

Art 2 PWD „must be understood in functional rather than monistic biological terms“²⁰⁴ and that after assuming full responsibility and care for her newborn infant, the commissioning mother „takes the place of its biological mother, and from that point onwards she must have the same rights as would otherwise be conferred on the surrogate mother.“²⁰⁵ Namely, „if intended mothers were to be excluded from the scope of [the PWD], that would ultimately be to the detriment of children born to a surrogate mother and contrary to the basic idea expressed in Art 24 EUCFR, under which in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.“²⁰⁶

The view that AG Kokott took followed the logic that maternity leave enjoys EU primary law protection by being rooted in Articles 7 and 24 EUCFR and that maternity leave should be interpreted according to these articles. Hence, the CJEU could have taken into account that the commissioning mothers’ equal access to maternity leave schemes guarantees first and foremost the protection of the child’s best interests which the CJEU has duty to safeguard. In the light of the reason why childcare is provided, namely to ensure the welfare of the child,²⁰⁷ it could not be regarded as in the best interests of the child if he/she will be left without direct contact of either of his parents during the delicate period following his/her birth. Namely, under Art 24 EUCFR, it is the best interests of the child that have to be secured, thus Art 24 EUCFR does not merely necessitate to take the children’s interests into account but to ensure that in all measures concerning children, the interests of the children would be the primary consideration. While the duty to safeguard the children’s best interests is a very wide one and depends on the circumstances of the case, there are some factors that are given more weight than the others in deciding on the measures’ compliance with the best interests of the children. E.g. „the principles of non-discrimination, maximum survival and development, and respect for the child’s own opinions must all be relevant to determining what the best interests of a child are in a particular situation.“²⁰⁸ From the above-referred factors, the principle of non-discrimination of the children is the most relevant, as children should not be negatively influenced on grounds of their birth status²⁰⁹, hence parental benefits that facilitate the

²⁰⁴ *Ibid.*, para. 48.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, para. 52.

²⁰⁷ E.C. di Torella, P. Foubert, *op. cit.*, p. 61.

²⁰⁸ EU Network of Independent Experts on Fundamental Rights „Commentary of the Charter of Fundamental rights of the European Union,“ 2006, accessible at: http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, last accessed 29.04.2016, p. 212.

²⁰⁹ *Ibid.*, footnote 875.

integration of the children into their families' should not differentiate between the manner of conception and birth conditions of the children.

Regrettably the CJEU interpreted the directives restrictively, viewing motherhood only as a biological role, even when the commissioning mother had assumed the task of breastfeeding the child after its birth. Although, admittedly, during its drafting, the PWD did not echo the developments in the field of reproductive medicine, in view of the EUCFR, especially in light of Art 7 and 24 EUCFR, more emphasis could have still been placed especially on protecting the children's best interests and the family as a unit.

Also, in regard to the argumentation about unequal treatment of the commissioning parents *vis à vis* adoptive parents, the CJEU could have paid more respect for human rights arguments. Namely, Art 20 EUCFR establishes the principle of equal treatment which is to be given full effect when interpreting EU law and Art 21 EUCFR contains the prohibition of discrimination in EU law. Although, it can be agreed that under the ETD the intended/commissioning mothers were not directly discriminated against on grounds of sex (the comparator being a male commissioning parent), the principle of equal treatment could have been nevertheless given due regard when establishing discrimination of the commissioning mothers *vis à vis* adoptive mothers. The principle of equal treatment dictates that in cases where the Member States have in accordance with Art 16 ETD introduced adoption leave, it should be of uniform application to all similar parenting forms. Therefore, introducing differential treatment to similarly situated commissioning parents in comparison with adoptive parents, should amount to direct discrimination.

Thus, although there is currently no consensus among European states on recognition of surrogacy, the CJEU in *C.D. v S.T.* and *Z. v A Government Department* nevertheless failed to take into account the rights of the children born through surrogacy arrangement, ignoring that their rights are „acutely at risk due to the circumstances of their conception and birth in this manner.“²¹⁰ By not expanding the legal entitlement to maternity leave for the intended mothers, the CJEU failed to respect the delicate relationship between children born through surrogacy arrangements and their intended parents during the most sensitive time after birth. In that regard, it is interesting to compare whether the advancement of children's best interests are better represented in the ECtHR's case law on surrogacy.

²¹⁰ C. Achmad, *op. cit.*, p. 638.

2.2.2. Case law of the ECtHR on surrogacy and benefits granted to parents whose family ties with their children are legally not recognized

The ECtHR has been confronted with a few cases relating to surrogacy, namely cases concerning the states' margin of appreciation whether to acknowledge the ties between commissioning parents and their children. Although the ECtHR has not been called to adjudicate on matters concerning commissioning parents' entitlements to childcare benefits under Articles 8 and 14 ECHR, it has nevertheless examined a few cases concerning the entitlements to parental benefits of the adoptive parents and "illegitimate" parents (i.e. parents whose parental ties with their children have not gained legal recognition by the state), which can, on the basis of analogous facts, be relevant in possible similar commissioning parents' claims as well.

First, it is important to verify whether the families raising their children born under surrogacy agreements have gained recognition by the ECtHR. In *Mennesson v France*²¹¹ and *Labassee v France*²¹², the ECtHR was confronted with the question whether non-recognition of parental ties between commissioning parents and their children amounted to violation of Art 8 ECHR. In *Mennesson v France* and *Labassee v France*, the commissioning parents entered into a surrogacy agreement, under which the surrogate mother gave birth to children that were genetically related to one of the intended parents.²¹³ The French authorities, however, refused to enter the birth certificates of the children in the French central register of births, marriages and deaths under the "public policy clause" as the recognition of the children's birth certificate would have, in the authorities' view, been contrary to the French public policy.²¹⁴ The applicants appealed the decision and claimed that the decision did not respect the children's best interests and violated Art 8 ECHR independently, as well as in conjunction with Art 14 ECHR by disregarding the right to a stable legal parent-child relationship.

The ECtHR examined the alleged breach of Art 8 ECHR in *Mennesson v France* and found that, in principle, "the refusal of the French authorities to legally recognise the family tie between the applicants amounts to an "interference" in their right to respect for their family life."²¹⁵ The ECtHR then went on to test the proportionality of the measure in order to verify whether the interference of the applicants' rights under Art 8 ECHR amounted to a breach of

²¹¹ Case of *Mennesson v France*, 26.06.2014, application no. 65192/11.

²¹² *Affaire Labassee c France*, 26.04.2014, requête no 65941/11.

²¹³ Case of *Mennesson v France*, *op. cit.*, para. 8.

²¹⁴ *Ibid.*, para. 23.

²¹⁵ *Ibid.*, para. 48.

that article. The ECtHR found that the contested acts of the French authorities were based on the law that expressly viewed surrogacy agreements as contrary to public policy, and that the legislation pursued legitimate aims.²¹⁶ The ECtHR noted that, in accordance with Art 8(2) ECHR, the legislation was aimed to “deter [French] nationals from having recourse to methods of assisted reproduction outside the national territory that are prohibited on its own territory and aims /.../ to protect children and /.../ surrogate mothers.”²¹⁷

Thus, in principle, the ECtHR acknowledged that states enjoy a wide margin of appreciation when it comes to recognizing “a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents.”²¹⁸ Nevertheless, the margin of appreciation is reduced, as the legal parent-child relationship relates to “an essential aspect of the identity of individuals.”²¹⁹ Furthermore, when assessing the proportionality of such measures, States “must have regard to the essential principle according to which whenever the situation of a child is in issue, the best interests of that child are paramount.”²²⁰ Building on the argumentation, the ECtHR distinguished between the rights of the children and the rights of their parents under Art 8 ECHR, finding that as it was not made impossible for the family to live together in France and “in conditions broadly comparable to those of other families,”²²¹ the rights of the intended parents were not infringed under Art 8 ECHR. However, the protection of the best interests of the children necessitates that the children’s identity (nationality, legal parent-child relationship) would not be impaired by the State, even more so as one of the intended parents was the children’s biological parent.²²² Hence, the ECtHR found that the children’s rights under Art 8 ECHR were infringed²²³ and that the State ought to have recognized the family ties of the children and their parents to respect the right to identity of these children. The same outcome was also reached in *Labassee v France*.

The ECtHR’s judgements in *Mennesson v France* and *Labassee v France* were open-ended as to the question how much weight the fact, that the children were biologically related to one of the intended parents, carried in the findings of the ECtHR. The ECtHR’s judgement in

²¹⁶ *Ibid.*, para. 62.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*, para. 79.

²¹⁹ *Ibid.*, para. 80.

²²⁰ *Ibid.*, para. 81.

²²¹ *Ibid.*, para. 92.

²²² *Ibid.*, para. 97 to 100.

²²³ *Ibid.*, para. 102.

Paradiso and Campanelli v Italy,²²⁴ which has been referred to the Grand Chamber, may shed more light on this matter.

In *Paradiso and Campanelli v Italy*, the intended parents were not biologically related²²⁵ to their child, born as a result of a surrogacy agreement. The intended parents lodged a complaint against the Italian authorities after they failed to gain recognition of a Russian birth certificate, acknowledging the parent-child relationship between them and the child born under a surrogacy agreement and after the child had been removed from their care without proper investigation to the fact whether the child had been neglected.²²⁶ The ECtHR was thus called to address whether the applicants' rights under Art 8 ECHR were infringed by the authorities' acts.

In examining whether the family life under Art 8 ECHR was worthy of protection, the ECtHR noted that although the child was in the applicants' family for only approximately 6 months, "the applicants had acted as parents towards the child, [hence] there existed a *de facto* family life between the applicants and the child"²²⁷ and the case fell under Art 8 ECHR. The ECtHR further held that "the State had an obligation to take the child's best interests into account irrespective of the nature of the parental link, genetic or otherwise"²²⁸ which meant that the family life of the applicants could only be interrupted by removal of the child if the child would have been faced with immediate danger. As this was not the case, the ECtHR found that there had been an infringement of the applicants' rights under Art 8 ECHR. Furthermore, the ECtHR held that the States had the obligation "to ensure that a child is not disadvantaged on account of the fact that he or she was born to a surrogate mother,"²²⁹ thus the ECtHR was not convinced that by not granting the child identity (including citizenship) for more than two years, the State took into full account of the child's best interests.

Hence, it can be concluded that the ECtHR has been willing to grant recognition to families that have resorted to surrogacy agreements in order to have children. It is apparent after *Paradiso and Campanelli v Italy* that such families enjoy protection from the State's arbitrary interference in their family life from the early stages of their family life, irrespective of the fact whether the intended parents and their children are genetically linked or not. Furthermore, it follows from the judgement of *Paradiso and Campanelli v Italy* that the States have the

²²⁴ Case of *Paradiso and Campanelli v Italy*, 27.01.2015, application no 25358/12.

²²⁵ *Ibid.*, para. 22.

²²⁶ *Ibid.*, para. 51.

²²⁷ *Ibid.*, para. 69.

²²⁸ *Ibid.*, para. 80.

²²⁹ *Ibid.*, para. 85.

obligation to ensure that the child would be granted identity as early as possible, hence the States Parties have a limited margin of appreciation not to recognize the filiation of the children and their intended parents.

The case law of the ECtHR concerning the recognition of families that have resorted to surrogacy is thus consistent with its practice in similar cases concerning families which have not gained legal recognition to their family ties. E.g. in *Wagner and J.M.W.L. v Luxembourg*²³⁰ the ECtHR adjudicated in a case that concerned adoption which did not gain legal recognition in the respondent State, although being legally recognized in Peru. The ECtHR examined the case under Art 8 ECHR and noted that the States have positive obligations inherent in the „effective „respect“ for family life.“²³¹ In that regard, „where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and establish legal safeguards that render possible the child's integration in his family.“²³² Reiterating the necessity to protect the best interest of the child, the ECtHR found that the State „could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Art 8 ECHR“²³³ and that the State „could not reasonably refuse to recognise the family ties that pre-existed de facto between the applicants and thus dispense with an actual examination of the situation.“²³⁴ Thus, the ECtHR found that in light of the child's best interest, the rights of the applicants under Art 8 ECHR were violated and that full legal recognition should have been granted to the family ties.

It is interesting to note, however, that compared to the illegal adoption case, the ECtHR did not base its decisions in the surrogacy cases expressly on the reasoning that States have positive obligations to facilitate the enjoyment of family life under of Art 8 ECHR (the infringement of which the ECtHR did not establish neither in *Menesson v France* nor in *Labassee v France*). Rather, the case law concerning surrogacy and the enjoyment of family life has been built on the argumentation about negative obligations the States have (the obligation to refrain from arbitrary interference in the family life) and have been based on the necessity to protect the rights of the child and the child's identity under Art 8 ECHR. Hence, it may be noted that the ECtHR has been trying to take into account the States Parties'

²³⁰ Case of *Wagner and J.M.W.L. v Luxembourg*, 28.06.2007, application no. 76240/01.

²³¹ *Ibid.*, para. 118.

²³² *Ibid.*, para. 119.

²³³ *Ibid.*, para. 133.

²³⁴ *Ibid.*, para. 135.

concerns without expressly forcing them to acknowledge the legal status of these families, but reaching the same outcome by different means – by bringing the child to the centre of its argumentation.

The child-centred approach of the ECtHR in surrogacy matters corresponds to the reality of the phenomenon – namely surrogacy is aimed to produce a child whose position is often most vulnerable and often it is the child's rights which are least considered and protected in the course of their conception, birth and life thereafter.²³⁵ Hence, by acknowledging and focusing on the children's rights, the ECtHR has sent a powerful signal to States Parties to integrate children born through surrogacy in their societies and their families, a position constant with the aim to make child's best interests a primary consideration in all actions relating to children.

It is also noteworthy that the ECtHR has not touched upon the equal treatment of the intended parents and their family in regard to the hardships these families face in everyday matters in States Parties that do not legally recognize the family ties between commissioning parents and children born through surrogacy. However, if States Parties have, from the viewpoint of the ECtHR, reduced margin of appreciation regarding whether to recognize the legal parent-child relationship of the intended parents and their children, it logically follows that after recognizing such relationships, States cannot restrict such families from gaining equal access to benefits (including parental benefits) available for families which have gained legal recognition, especially so if the benefits are intended to guarantee the children's best interests and welfare. Thus, the principle of equal treatment should be applicable to families that have resorted to surrogacy, especially as the aim of granting parental benefits is not limited to securing the parents' position as a parent, but entails the protection of child's best interests too. Equal access to parental benefits should thus include, among other things, childcare benefits from the state as these benefits aim to protect the children's best interests and help the child integrate into its family, whereas the access to these benefits should be granted on equal footing regardless of the legal relationship extending to the family and birth conditions of the child, as evident from the judgement in *Topčić-Rosenberg v Croatia*.²³⁶

Namely, in *Topčić-Rosenberg v Croatia*, the ECtHR found that discrimination on grounds of adoptive mother status regarding access to maternity leave, was prohibited under Art 8 ECHR

²³⁵ C. Achmad, *op. cit.*, p. 643.

²³⁶ Case of *Topčić-Rosenberg v Croatia*, 14.11.2013, application no 19391/11.

in conjunction with Art 14 ECHR²³⁷. The ECtHR held that „the purpose of parental or maternity leave is to enable [the parent] to stay at home to look after her child in which respect [the adoptive mother] is in a similar situation to a biological parent“²³⁸ and that „the State should refrain from taking any actions which could prevent the development of ties between the adoptive parents and their child and the integration of the child into the adoptive family.“²³⁹ Hence, the ECtHR found that the authorities’ refusal to grant maternity leave to the adoptive mother amounted to a breach of Art 8 ECHR and Art 14 ECHR. Thus, the ECtHR has acknowledged that in any case, once a state grants recognition to a family, it cannot discriminate against such families’ entitlements, but must adhere to the principle of non-discrimination within the meaning of Art 14 ECHR.

In summary, compared to the practice of the CJEU, whereby the CJEU failed to take into account the children’s best interest and the equal treatment argument²⁴⁰, the ECtHR’s practice has been much more advanced concerning surrogacy-related cases. While it could be argued, that the ECtHR’s approach was taken in non-controversial surrogacy cases, as the cases were not, at first glance, connected to some of the most serious ethical and human rights issues that surrogacy can bring about²⁴¹ – “the potential for child trafficking; coercion and exploitation of women acting as surrogates; reproductive rights, autonomy and health of women; issues of global injustice between more and less-developed states”²⁴² – it is nevertheless hard to imagine a different outcome that would equally as well protect the children, having the most vulnerable position in surrogacy cases.

Namely, the states have in their reach alternative means to deal with surrogacy-related human rights concerns – e.g. by agreeing on standards applicable to surrogacy and by monitoring the surrogate mother’s condition and verifying her consent and by agreeing on effective penalties in case where children are abandoned or mistreated. Also, in case where the children are being mistreated in their families, states remain free to interfere in the families’ arrangements on grounds of protecting the children’s welfare whenever there is reason to believe that the children’s welfare is seriously threatened or acutely at risk. In summary, states have effective

²³⁷ *Ibid.*, para. 46 to 47 and 49.

²³⁸ *Ibid.*, para. 42.

²³⁹ *Ibid.*

²⁴⁰ Moreover, in the cases brought before the CJEU, both of the referring Member States had legally recognized the filiation of the intended parents and their children, thus the families were granted protection as a unit.

²⁴¹ The intended parents were heterosexual and married, there was no evidence of the surrogate mothers being coerced to surrogacy and in two of the cases, the birth state was the USA, i.e. a highly developed state adhering to the protection of women’s rights.

²⁴² C. Achmad, *op. cit.*, p. 642.

mechanisms to ensure that families would be oriented towards the child's best upbringing, e.g. by removing the children from the parents' custody where the children's best interests are being genuinely impaired. With these alternatives in mind, it is hard to justify bringing more hardship in everyday matters to the children born through surrogacy by negating their identities and equal opportunities. Children should remain the primary concern in surrogacy cases, both in terms of their identities and equal access to measures aiming to protect their welfare (including parental benefits), a position consistent with Art 24(2) EUCFR. In that regard, to safeguard the children's rights but also to provide protection to families as a unit, the prohibition of discrimination should equally apply to the intended parents' claims to parental benefits as well.

2.3. Estonian practice concerning parental benefits to fathers and commissioning parents

In the previous subchapters, the practice of the CJEU and the ECtHR concerning equal access to parental benefits for fathers and atypical families was analysed. Next, the Estonian practice will be assessed to verify to which extent the current practice and legislation complies with the position of the two courts.

2.3.1. Fathers' entitlements to parental benefits

To date, there has been no case law in the Estonian courts concerning discrimination on grounds of sex relating to fathers' equal access to parental benefits. However, there have been a few occasions where the Estonian equality bodies have interpreted the parental benefits system in response to petitions submitted to these organs.

In 2007, the Gender Equality and Equal Treatment Commissioner submitted her opinion in response for the governments' request for her analysis, regarding the provisions of the Parental Benefit Act that the Commissioner found to be discriminatory against fathers. Namely, according to § 2(2) of the Parental Benefit Act that was in force until 01.09.2007, mothers of the child were reserved non-transferable parental leave until the child reached the age of 6 months. In her opinion, the Gender Equality and Equal Treatment Commissioner noted that the aforementioned provision mandated direct discrimination of men on grounds of

sex for which the Commissioner found no justification.²⁴³ The Commissioner distinguished between maternity leave and parental leave, stating that the aim of maternity leave is to protect women's health in connection with pregnancy and childbirth and to transform the practice where women are often discriminated against on grounds of maternity; parental leave, on the other hand, is granted solely to facilitate childcare.²⁴⁴ Despite the aforementioned differentiation, the Commissioner nevertheless argued that it would be reasonable to reserve certain period of parental leave solely to mothers, namely the period corresponding to maternity leave (70 days) to which working mothers are entitled to, regardless whether the mother was employed before parental leave or not.²⁴⁵

The latter argumentation could, however, be disputed. Namely, if parental leave is granted solely to facilitate the upbringing of children, both parents should, in principle, have equal access to parental leave. In that regard, the Parental Benefit Act is applicable not only to gestational parents but also to adoptive parents, step-parents and guardians or caregivers (§ 2(2) of the Parental Benefit Act), indicating that parental care could as effectively be given by all of the parental groups, whereas the mandatory period of parental leave is only applicable to the gestational (unemployed) mother. Gestational mothers who were gainfully employed before childbirth, are, on the other hand, not entitled to parental leave before the date following the final date of the certificate for maternity leave (§ 2(4) of the Parental Benefit Act), normally after the child attains 70 days of age. Thus, § 2(2) of the Parental Benefit Act has only limited scope, applying exclusively to gestational mothers that were unemployed before childbirth. While taking into account the period of maternity leave for the purpose of calculation of the period of parental leave is justified (maternity leave is, in part, aimed to protect the special relationship between a mother and her child after childbirth, thus it entails a parental care element), reserving a certain period of parental leave solely to gestational mothers under § 2(2) of the Parental Benefit Act, while allowing adoptive and guardian families themselves to determine the division of parental leave between the parents, might not be justified. Namely, as opposed to working gestational mothers, unemployed mothers face no pressure to return to work prematurely after childbirth. Thus, in these families, parents should be granted the freedom to decide which of the parents should benefit from parental leave because there is no reason to believe that the mother of the child would

²⁴³ Overview of the activities of the Gender Equality and Equal Treatment Commissioner in 2007, accessible at <http://www.vordoigusvolinik.ee/wp-content/uploads/2014/03/Voliniku-tegevuse-ylevaade-2007.pdf>, p. 34, last accessed 29.04.2016.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.*

otherwise be coerced by her employer to return prematurely to work before her recovery from childbirth.

In 2011, similarly to the Gender Equality and Equal Treatment Commissioner, the Chancellor of Justice assessed the purpose of maternity leave, reiterating the position of the Minister of Social Affairs, that maternity leave is designed to protect the biological condition of women after childbirth, the health of the newborn and also to protect the (emotional) relationship between the mother and her child.²⁴⁶ The Chancellor of Justice solved the petition of a father who claimed that the situation where the legislation does not expressly allow mothers to waive their maternity leave before the maximum period of maternity leave has ended, violated women's rights under the constitution, namely the right to choose one's profession freely.²⁴⁷ The Chancellor of Justice, however, found that although the regulation enabled the interpretation that maternity leave was mandatory, it could more appropriately be interpreted as granting the right to maternity leave with maximum duration of 140 days, which the mother could waive.²⁴⁸ Thus, the Chancellor of Justice saw no violation of the constitution, as women are, under the current legislation free to return to work before the end of their maternity leave (which in Estonia lasts up to 140 days).

Regrettably, the Chancellor of Justice did not analyse whether the legislation which encourages women to use full period of maternity leave by e.g. giving healthcare providers instructions to issue the certificate for maternity leave for the maximum maternity leave period (according to § 7(3) of the decree no 114 of the Minister of Social Affairs²⁴⁹); paying for maternity leave in advance on the basis of its maximum duration (under § 53(6) of the Health Insurance Act); tying the entitlement to receive parental benefit for parental leave with the final date of the certificate for maternity leave; and reducing the parental benefit for parental leave to minimum monthly wage (maximum rate) in the case where the mother who has right to pregnancy and maternity leave or maternity benefit does not exercise the right to pregnancy and maternity leave or maternity benefit (§ 2(4) and § 3(5¹) of the Parental Benefit Act), corresponds with the principle of equal treatment for men and women. It could easily be argued that if a mother could lawfully waive the right to maternity leave and decides not to use it in full, giving rise for the father's entitlement to apply for parental leave and parental

²⁴⁶ Opinion of the Estonian Chancellor of Justice on the duration of maternity leave, *op. cit.*, p. 6 to 7.

²⁴⁷ *Ibid.*, p. 1 to 2, para. 1 to 3.

²⁴⁸ *Ibid.*, p. 7, para. 14.

²⁴⁹ Decree no 114 of the Minister of Social Affairs "Töövõimetuslehe andmekoosseis ja pabervorm ning töövõimetuslehe registreerimise, väljakirjutamise ja haigekassale edastamise tingimused ja kord," RT I, 22.12.2015, 37.

benefit prematurely (i.e. before the date set under § 2(4) of the Parental Benefit Act), the father should not lose out on the amount of parental benefit he would normally receive (i.e. in case the mother decides not to waive her right to maternity leave).

As parental leave is granted for parents in their capacity as a parent, there should be no unequal treatment for men and women in terms applicable to parental leave. Hence, the situation is comparable to that in *Roca Álvarez* and *Konstantinos Maïstrellis* as parental benefit for parental leave is granted to parents in order to facilitate childcare, not for reasons relating to a woman's pregnancy or childbirth. In their capacity as parents, men and women do not differ. Thus, while the PLD allows Member States to introduce the exact conditions for the take-up of parental leave (Clause 2(2) and Clause (3) PLD), it does not in any case allow for discrimination on grounds of sex, as the PLD is according to recitals (2) and (3) of the preamble to the PLD, expressly aimed to promote equality between men and women and reconciliation of professional, private and family life. Neither does it correspond with the aim of the PLD to introduce measures that discourage fathers' take-up of parental leave. As § 3(5¹) of the Parental Benefit Act, concerning the remuneration scheme for fathers that take parental leave early, inevitably discourages fathers to stay on parental leave in case the mother freely chooses not to use the maternity leave in full, the Chancellor of Justice could have found that the legislation amounted to direct discrimination on grounds of sex in terms of equal access to parental leave.

The aforementioned finding could have been further substantiated by the fact that in Estonia mothers are granted a relatively long period of non-transferable maternity leave which largely (70 to 110 days) can be (and in practice is) taken after childbirth. Thus, the aim of maternity leave in Estonia is not unequivocally set on the protection of a mother's biological condition and health, but can also, in part, relate to facilitating childcare.²⁵⁰ Thus, the legislation discouraging the fathers to stay on parental leave before the mothers have exhausted their right to a maximum period of maternity leave might be viewed as manifestly disproportionate, especially so if the mother freely chooses not to use the maternity leave in full. Namely, it is not reasonable to assume that mothers, in fact, would require up to 110 days for recovery of childbirth. In that regard, women's health protection could as efficiently be guaranteed without encroaching on fathers' right to take parental leave.

²⁵⁰ See subchapter 1.2.2.1. of the thesis.

It can be noted thus, that in Estonia, the equality bodies have broadly taken up the reasoning of the CJEU concerning maternity leave by interpreting maternity leave as pursuing a twofold aim – the protection of women’s health, as well as the special relationship between a mother and a child (in that regard, the Gender Equality and Equal Treatment Commissioner has stressed more the health-related concerns²⁵¹). What concerns the latter of the aims, the Estonian Chancellor of Justice has stressed that the special relationship between a mother and her child refers to emotional ties. In the rationale of the CJEU, it appears more related to breastfeeding concerns of the biological mothers, though, and to the necessity to protect women’s choices of whether to breastfeed her child or not.

In summary, what concerns the scarce practice on equal access to parental leave, the Estonian equality bodies have not advanced equal access for men and women to parental leave schemes, by maintaining that non-transferable leave for mothers and the discouraging remuneration scheme for fathers, complies with the principle of equal treatment for men and women. In that regard, it is doubtful whether that position entirely complies with the aim of the PLD, as uttered in *Konstantinos Maïstrellis* – namely to increase women’s participation in the workforce and encourage fathers’ take up of parental leave. By discouraging fathers to take up parental leave, especially in the case where the mother has waived her right to (a relatively long) maternity leave, fathers might not have the incentives to take up their parental responsibilities from the early stages of the child’s development. Hence, the Estonian practice has advanced more the role of a mother as a caretaker, contrarily to the aim of the PLD.

2.3.2. Commissioning parents’ entitlements to parental benefits

In Estonia, there have been no cases concerning surrogacy to have reached the court. According to the findings of the ECtHR, however, while surrogacy is prohibited under § 132 of the Penal Code²⁵², it is possible under state’s practice to obtain legal recognition of the family ties between the commissioning parents and their children born through surrogacy either by way of the exequatur procedure²⁵³ or by way of direct transcription of the foreign judgement or birth certificate into the civil register or by way of gaining recognition to the

²⁵¹ See Praxis Centre for Policy Studies *op. cit.*, p. 30, footnote 10.

²⁵² The Penal Code, RT I, 17.12.2015, 9.

²⁵³ The exequatur procedure is a term in private international law used to denote obtaining recognition to a foreign court decision. In Estonia, the procedure can be initiated under e.g. § 620 of the Code of Civil Procedure (RT I, 10.03.2016, 10).

family ties through the adoption procedure.²⁵⁴ It follows that the commissioning parents should, after gaining recognition to the family ties between them and their children, be equally entitled to the same parental benefits that are available to families in which the family ties that have gained legal recognition. Hence, it appears that the Estonian practice, compared to the practice of the CJEU, is far more oriented on safeguarding the best interests of the child, and complies with the practice of the ECtHR in that regard that the children born through surrogacy will be granted identity and citizenship without delay. Also, considering that after gaining recognition to the family ties between the intended parents and their children, the parents should be equally entitled to the same parental benefits that are available to families in which the family ties have gained legal recognition, the issue of unequal treatment of atypical families does not arise.

Nevertheless, Estonia has not enacted special provisions governing the procedure applicable to the recognition of family ties specifically in case of surrogacy, nor clearly formulated its public policy what concerns recognizing the family ties within the families that have resorted to surrogacy. As surrogacy is prohibited in Estonia, it should follow that under the Estonian public policy surrogacy is not tolerated, which in turn could influence the recognition of filiation between the intended parents and their children. However, considering the state practice referred to by the ECtHR, it can be assumed that Estonian public policy concerning the recognition of families that have resorted to surrogacy abroad is favourable to these families' rights.

Concerning the procedure applicable to the establishment of filiation between children born as a result of surrogacy agreements and the intended parents, there is no single applicable procedure to surrogacy cases under Estonian private international law, but there are multiple applicable procedures. Namely, filiation could be established under § 62 (special procedure concerning the establishment of filiation) or under § 63 (procedure governing adoption) of the Private International Law Act²⁵⁵ or by way of initiating the exequatur procedure under § 620 of the Code of Civil Procedure (obtaining recognition to the foreign court order recognizing the rights of the intended parents) or by obtaining a direct transcription of the foreign judgement or birth certificate into the civil register. Depending on the procedure, in turn, the conditions for obtaining recognition to the family ties of the intended parents and the children born as a result of surrogacy agreements vary. E.g. the procedure of obtaining a direct

²⁵⁴ *Affaire Labassee c France*, *op. cit.*, para. 33.

²⁵⁵ The Private International Law Act, RT I, 10.03.2016, 18.

transcript of the children's birth certificates to the civil register is confined only to formalities, thus it does not entail an assessment of the intended parents' suitability. In contrast to the former procedure, the law applicable to the adoption procedure is that of the state of residence of the adoptive parents (§ 63(1) of the Private International Law Act). Thus, under the adoption procedure, the adoptive parents' eligibility is assessed under Estonian law and couples that are denied the right to adopt a child under Estonian law could not obtain recognition to their filiation with the children either. In case of establishing filiation of the intended parents and their children under § 62 of the Private International Law Act, the procedure is, in turn, governed by the law of the state of residence of the child at the time of birth. Hence, the lack of a single procedure governing the recognition of filiation in cases of surrogacy, can lead to inconsistencies concerning the degree of scrutiny of the intended parents' suitability and the choice of applicable law.

In order to better formulate the conditions applicable to the recognition of filiation between the intended parents and their children in cases of surrogacy it would be recommendable for the Estonian legislator to adopt special legislation governing the procedure, e.g. in the example of the UK that is one of the first countries in Europe to have regulated the issue by adopting an accelerated adoption procedure applicable to such cases.²⁵⁶

²⁵⁶ See the UK regulation on the recognition of the family ties between the intended parents and their child(ren) in European Parliament Directorate-General for Internal Policies, "A comparative study on the regime of surrogacy in EU Member States," (L. Brunet, J. Carruthers, K. Davaki, D. King, C. Marzo, J. McCandless), May 2013, accessible at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf), p. 62, last accessed 29.04.2016.

Conclusion

The thesis aimed to establish whether the legislation in force at the EU level as well as at national level in the field of parental benefits has reflected the development of parental roles and the emergence of atypical families. The thesis focused on the question whether the distinctions between different parents' entitlements to parental benefits are justified in light of the principle of equality, the principle of equal treatment for men and women and in light of the protection of the rights of the child and the protection of family life as enshrined in Articles 7, 20, 21, 23, 24 and 33 EUCFR and Articles 8 and 14 ECHR. For the aforementioned purpose, the thesis compared the practice of the CJEU and the ECtHR and assessed the legislation in force at the EU level as well as at national level.

In summary, it can be noted that in the field of parental benefits (i.e. foremost concerning the right to maternity/parental leave and positive discrimination measures as analysed for the purpose of the thesis), the EU legislation differs significantly as to the entitlements of parents of different sexes. While the principle of equal treatment for men and women under Art 14 ETD should, in that regard, be an overarching principle in EU law in the field of parental benefits²⁵⁷, there are exceptions to the applicability of the ETD in the field of parental benefits. Namely, the ETD is without prejudice to measures taken under the PWD and the PLD and it is also possible to introduce positive discrimination measures under Art 3 ETD.

Depending on the nature of the measure (i.e. maternity-related, positive discrimination related etc), the CJEU has applied different standards of scrutiny in cases initiated by fathers concerning equal access to the contested measures. In that regard, the CJEU has shown the greatest reluctance in assessing the discriminatory nature of parental benefits introduced for pregnancy or maternity-related considerations, primarily maternity leave within the meaning of the PWD. The CJEU has ruled in numerous cases that maternity leave as guaranteed under the PWD, is designed to protect a woman's biological condition before and after childbirth and also to protect the special relationship between a mother and her child. Thus, maternity leave currently pursues a double aim – on the one hand it is introduced for health-related considerations and on the other it also facilitates the exercise of a mother's special parental role (which can be understood as protecting women's choice to breastfeed their children). As the CJEU has interpreted the aim of maternity leave widely, it has not engaged itself with the assessment whether maternity leave schemes could be regarded as measures granted, in fact,

²⁵⁷ Access to parental benefits for the working population is regarded as falling under the field of working conditions.

to mothers in their parental capacity, but has relied on the fact that measures enacted in compliance with the PWD are outside the scope of the ETD. Rulings such as *Hofmann* and *Montull* confirm that the CJEU has left the Member States a wide discretion in deciding on the access conditions (e.g. in *Montull*, adoptive parents and mothers enjoyed primary right to the leave with the sole exclusion of biological fathers who enjoyed a derivative right to leave) and duration of maternity leave (in *Hofmann*, the duration of maternity leave extended even to 6 months).

While it can be agreed that it is difficult to decide when maternity leave introduced under the PWD, in fact, exceeds the protection granted under the PWD inasmuch as to constitute a measure granted, in most part, for parenting reasons, it could still be argued that introducing longer maternity leaves exclusively for mothers should include weighty reasons for excluding fathers options to exercise their parental duties under similar conditions. Namely, introducing long maternity leaves almost immune to scrutiny by the CJEU is liable to perpetuate traditional parental roles in a family and thus it does not facilitate achieving substantive equality between the sexes. Hence, introducing long maternity leaves vastly exceeding the protection required under the PWD should be open to more scrutiny to ensure that the right balance is struck between securing women's interests for sex-specific reasons and fathers' equal treatment facilitating the exercise of their parental roles.

In that regard, the practice of the ECtHR seems more open to guaranteeing the parents' equal access to maternity benefits. Namely, the ECtHR has not interpreted the aim of maternity leave as widely as the CJEU, pointing out mainly health-related considerations.

On the other hand, the CJEU has been more prone to scrutinise measures introduced with a view to eliminate *de facto* inequalities between men and women under Art 3 ETD in the field of parental benefits. In the cases concerning positive discrimination measures, the CJEU employs the prohibition of discrimination under Art 14 ETD and assesses the proportionality of the contested measure more strictly. However, it does not follow that the CJEU has often struck down such measures for being discriminatory towards fathers. On the contrary, the CJEU has been rather cautious in expanding the entitlements to childcare measures introduced within the meaning of Art 3 ETD to fathers. In that regard, the practice of the CJEU has not been consistent with the aim of securing substantive equality for the sexes and striking down outdated perceptions of parental roles. It can be agreed with AG Jacobs that measures facilitating childcare should not be made available only to women as it presupposes that

women should have primary responsibility for childcare and as it reinforces the perception of women as primary caretakers within the families.

The most progressive case law of the CJEU concerning fathers' equal access to parental benefits has been in cases where parental benefits have been made available primarily with the aim to facilitate childcare for parents acting in their capacity as parents. In such cases, the CJEU has ruled that the exclusion of fathers from being entitled to parental benefits is not founded and such measures are more likely to be struck down for being discriminatory towards fathers on grounds of sex. Also, the CJEU's view on equal access to parental leave under the PLD has been advanced in that the CJEU has stressed the need to bring about more substantive equality for the sexes by encouraging especially fathers to take up parental leave, thus aiming to change the traditional perception of roles of men and women in a family.

In regard to positive discrimination measures the ECtHR, likewise, acknowledges the possibility to introduce such measures in correspondence with Art 14 ECHR, subject to such measures' proportionality review. Thus, the two courts' methodologies of judicial review in the field of positive discrimination measures correspond to each other. Also, in the field of parental leave the ECtHR has allowed States Parties a narrow margin of appreciation in deciding on equal access to benefits granted for parenting reasons, finding that advancing equality between the sexes is one of the priorities for States Parties. The ECtHR has thus noted that where a state decides to introduce parental benefits, it must do so adhering to the principle of equal treatment and very weighty reasons must be given to substantiate the exclusion of similarly situated groups from being entitled to the benefit.

Regarding access to parental benefits for atypical families (i.e. families that have resorted to surrogacy), it can be noted that the CJEU has taken a cautious approach ruling on their entitlements under EU anti-discrimination law. Namely, in the cases studied (*C.D. v S.T.* and *Z v A Government Department*), the CJEU ruled that neither the PWD nor the ETD apply to the discrimination claims of the intended parents. While AG Kokott stressed the importance of human rights protection, especially the protection of the best interests of the child and respect for family life, and came to the opposite conclusion what concerns the applicability of the PWD to intended mothers, the CJEU followed a strict line of argumentation ruling against the intended mothers' claims.

In comparison, the ECtHR has been bringing the rights of the child in the centrepiece of the surrogacy cases. The ECtHR has recognised that despite the wide margin of appreciation the

States Parties have in ethically sensitive areas, the best interests of the child should nevertheless be given primary concern, which in turn limits the states' margin of appreciation. Thus, in its first surrogacy cases the ECtHR has ruled that, having in mind the need to protect the children's best interests, States Parties have to protect such children's identity by recognizing their filiation with their intended parents. By acknowledging and focusing on the children's rights, the ECtHR has sent a powerful signal to States Parties to integrate children born through surrogacy in their societies and their families.

Based on the findings of the ECtHR, urging the States Parties to grant legal recognition to families that have resorted to surrogacy, it logically follows that after recognizing such relationships States Parties cannot restrict such families from gaining equal access to benefits (including parental benefits) available for families which have gained legal recognition, especially if the benefits are intended to guarantee the children's best interests and welfare. Thus, the principle of equal treatment should be applicable to families that have resorted to surrogacy, especially as the aim of granting parental benefits is not limited to securing the parents' position, but entails the protection of child's best interests too. Equal access to parental benefits should thus include, among other things, childcare benefits from the state as they aim to protect the children's best interests and help the child integrate into its family.

Concerning Estonian legislation and practice in the field of equal access to the examined parental benefits by fathers and atypical families, it can be concluded that Estonian legislation on maternity leave corresponds to the PWD. Also, Estonian legislation corresponds to the ETD in regard to the guarantees examined for the purpose of the thesis. However, Estonian legislation on parental leave needs updating to ensure its conformity with the aim sought by the PLD. While in Estonia, the entitlement to parental leave exceeds the minimum period required under the PLD and is adequately remunerated, the regulation does not comply with the aim of ensuring substantial equality for men and women by promoting more equal burden-sharing of childcare obligations. The latter aim could be achieved if parental leave would be divided into non-transferable periods of parental leave for each of the parents, as suggested under Clause 2(2) PLD, or in case of introducing transferable parental leave scheme, by granting a period of non-transferable parental leave to fathers only.

In the Estonian practice, the equality bodies have broadly taken up the reasoning of the CJEU concerning maternity leave by interpreting maternity leave as pursuing a twofold aim – the protection of women's health, as well as the special relationship between a mother and a child. What concerns the latter of the aims, the Estonian equality bodies have stressed that the

special relationship between a mother and her child refers to emotional ties. In the rationale of the CJEU, it appears more related to breastfeeding concerns, though, and thus to the necessity to protect women's choices of whether to breastfeed her child or not.

Concerning the scarce practice on equal access to parental leave, the Estonian equality bodies have not advanced equal access for men and women to parental leave schemes, by maintaining that non-transferable leave for mothers and the discouraging remuneration scheme of parental leave for fathers, complies with the principle of equal treatment for men and women. In that regard, it is doubtful whether the Estonian practice entirely complies with the aim of the PLD, as uttered in *Konstantinos Maïstrellis* – namely to increase women's participation in the workforce and encourage fathers' take up of parental leave. By discouraging fathers to take up parental leave, especially in the case where the mother has waived her right to (a relatively long) maternity leave fathers might not have the incentives to take up their parental responsibilities from the early stages of the child's development. Hence, the Estonian practice advances more the role of a mother as a caretaker, contrarily to the aim of the PLD.

According to the study of the ECtHR, the Estonian practice on equal access to parental benefits for families that have resorted to surrogacy is, however, more liberal than the practice of the CJEU. Namely, it is possible to gain full recognition to the family ties between the intended parents and their children, regardless of the prohibition of surrogacy. Hence, it follows that commissioning parents should, after gaining recognition to the family ties between them and their children, be equally entitled to the same parental benefits that are available to families in which the family ties that have gained legal recognition and that the issue of unequal treatment of atypical families does not arise. However, concerning the lack of single applicable procedure to the matter, it would be recommendable for the Estonian legislator to formulate its practice and conditions on recognition of filiation between the intended parents and their children by adopting special legislation to govern the procedure.

Kokkuvõte

Käesolevas töös "Õigus lapse hooldamisega seotud puhkustele ja hüvedele EL mittediskrimineerimisõiguses: lapsevanemate õiguste eristamine soo alusel ning atüüpiliste perede õiguste eristamine" uuritakse lapsevanemate õigusi lapse hooldamisega seotud puhkustele ja hüvitistele Euroopa Liidu (edaspidi EL) mittediskrimineerimisõiguse kontekstis. Töö eesmärgiks on tuvastada, mil määral EL mittediskrimineerimisõiguses eristatakse eri soost vanemate õigusi lapse hooldamisega seotud puhkustele ning hüvedele ning mil määral laieneb õigus kasutada lapse hooldamisega seotud puhkusi atüüpilistele peredele, esmajoones surrogaatemaduse teenuse abil lapsevanemaks saanutele. Töös hinnatakse, kas eri soost vanemate õiguste eristamine ning atüüpiliste perede õiguste eristamine lapse hooldamisega seotud puhkuste ning hüvede kontekstis vastab mittediskrimineerimise põhimõttele, samuti mil määral on selline praktika kooskõlas laste õiguste kaitsega ja pereelu kaitsega Euroopa Põhiõiguste Harta art 7, art 20, art 21, art 23, art 24 ja art 33 alusel ning Euroopa Inimõiguste Konventsiooni art 8 ning art 14 alusel. Sel eesmärgil käsitletakse töös ka Euroopa Kohtu ja Euroopa Inimõiguste Kohtu praktikat antud valdkonnas ning võrreldakse, kas kohtute seisukohad ühtivad selles küsimuses.

Käesolev töö põhineb eelkõige Euroopa Kohtu ja Euroopa Inimõiguste Kohtu lahenditel ning töö uurimisvaldkonnaga seotud EL direktiividel – direktiivil 2006/54 (nn võrdse kohtlemise direktiiv), direktiivil 92/85 (nn rasedate töötajate kaitse direktiiv) ja direktiivil 2010/18 (nn direktiiv vanemapuhkuse kohta). Töö fookusest tulenevalt on õiguskirjandusel (mittediskrimineerimisõiguse alased teatmikud ning artiklid) üksnes toetav roll, selgitamaks töös käsitletavate õigusaktide eesmärki ning mittediskrimineerimise põhimõtte allikaid ja kohaldamisala. Töö fookuses on kohtupraktika analüüs esmajoones seetõttu, et hinnata, kuidas töös käsitletavaid direktiive on tõlgendatud ning kuidas need õigusaktid omavahel praktikas suhestuvad. Kohtupraktika analüüsi ning kõrvutamise käigus hinnatakse, kuidas kohtud on inimõiguste kaitse argumenti õigusaktide tõlgendamisel arvesse võtnud. Samuti hinnatakse töös siseriikliku seadusandluse vastavust käsitletavate EL õigusaktide eesmärgile ning Euroopa Kohtu ja Euroopa Inimõiguste Kohtu praktikas toodud seisukohtadele.

Lapse hooldamisega seotud puhkused ning meetmed, millega soodustatakse lapse hooldamist ning mis oma olemuselt on võimelised mõjutama töötajate tööaega, töölt puudumist vm töötingimusi, kuuluvad töötingimuste valdkonda direktiivi 2006/54 tähenduses, millest tulenevalt laieneb lapse hooldamisega seotud puhkuste ja hüvede määramise tingimustele soolise diskrimineerimise keeld direktiivi 2006/54 art 14(1)(c) alusel. Kuigi direktiivi 2006/54

art 14(1)(c) alusel on võimalik vaidlustada meetmeid, millega ühele sugupoolele võimaldatakse eksklusiivselt lapse hooldamisega seotud puhkuseid ja hüvesid, on direktiivide 92/85 ja direktiivi 2006/54 art 3 ja art 157(4) ETL alusel lubatud üht sugupoolt kaitsvad erimeetmed. Selliste meetmetega võimaldatakse vastavalt rasedate töötajate, vastvalt sünnitanud ning imetavate töötajate kaitse (sh emaduspuhkus) ning positiivse diskrimineerimise valdkonda kuuluvad erimeetmed, mille eesmärgiks on soolise ebavõrdsuse vähendamine alaesindatud soole eeliste andmise kaudu.

Töös käsitletud kohtupraktika põhjal on võimalik järeldada, et Euroopa Kohtu praktikas on emaduspuhkuse eesmärki tõlgendatud laialt – emaduspuhkus ei ole suunatud üksnes rasedate töötajate, vastvalt sünnitanud töötajate ja imetavate töötajate tervise kaitsele, aga ka ema ja lapse vahelise erilise sideme loomisele. Emaduspuhkuse laia eesmärgi tõttu on Euroopa Kohus isade kaebusi lahendades olnud väga ettevaatlik emaduspuhkuse tingimuste hindamisel soolise võrdse kohtlemise aspektist ning asunud seisukohale, et emaduspuhkuse tingimused asuvad väljaspool direktiivi 2006/54 kohaldamisala. Euroopa Kohus on hoidunud emaduspuhkuse tingimuste hindamisest muuhulgas kaasuste puhul, milles siseriikliku seadusandluse alusel ei ole emaduspuhkuse eesmärk olnud täielikult seotud naiste tervise kaitse aspektiga, milles emaduspuhkus on jaotatud kohustusliku ning vabatahtliku puhkuse perioodideks aga ka eriliselt pikkade (nt 6 kuud) emaduspuhkuste puhul. Eelnevalt tulenevalt on isade kaebused emaduspuhkuse tingimuste vaidlustamisel soolise võrdse kohtlemise aspektist olnud edutud.

Ka Eesti seadusandja ning ebavõrdse kohtlemise kaebusi lahendavad institutsioonid (sotsiaalminister, õiguskantsler, soolise võrdõiguslikkuse ja võrdse kohtlemise volinik) on emaduspuhkuse eesmärki ja emaduspuhkuse laiendamise võimalust isadele hinnanud sarnaselt Euroopa Kohtuga. Euroopa Inimõiguste Kohtu praktikas seevastu on emaduspuhkuse eesmärki tõlgendatud kitsamalt naiste tervise kaitse aspektist, mistõttu isadel on olnud lihtsam vaidlustada emaduspuhkuse tingimusi soolise võrdse kohtlemise aspektist, mh juhtudel, kui emaduspuhkus teenib naiste tervise kaitse eesmärgi kõrval enam lapse hooldamise eesmärki.

Töö autor on seisukohal, et sugupoolte sisulise võrdõiguslikkuse tagamiseks peaks seadusandja tagama, et pikkade emaduspuhkuste puhul, mis teenivad naistöötajate tervise kaitsest enam lapse hooldamise eesmärki, oleks sugupoolte võrdse kohtlemise seisukohast vajalik, et ka isadele võimaldataks puhkust samadel tingimustel. Nimelt on isad vanemlikus rollis samaväärselt emadega võimelised last hooldama, mistõttu üksnes emadele pikkade

emaduspuhkuste võimaldamine toetab traditsiooniliste soorollide püsimist ega vasta soolise võrdse kohtlemise põhimõttele. Seetõttu peaks seadusandja pikkade emaduspuhkuste, mis ületavad märkimisväärselt direktiivi 92/85 alusel nõutavat miinimumkaitset, kehtestamise puhul püüdma enam arvesse võtta soolise võrdse kohtlemise argumenti.

Positiivse diskrimineerimise meetmete puhul on Euroopa Kohus seevastu hinnanud rangemalt lapse hooldamist soodustavate meetmete eesmärgipärasust ning selliste meetmete tingimuste vastavust proportsionaalsuse põhimõttele. Kuigi Euroopa Kohtu praktikas on kohus harva tunnistanud positiivse diskrimineerimise meetmeid ebaproportsionaalseks isade võrdse kohtlemise aspektist, läbivad sellised meetmed rangema proportsionaalsuse kontrolli võrreldes nt emaduspuhkusega (mille tingimused loetakse direktiivi 2006/54 kohaldamisalast välja jäävateks). Euroopa Kohtuga sarnaselt kasutab ka Euroopa Inimõiguste Kohus oma praktikas sama metoodikat. Samas on Euroopa Inimõiguste Kohus soolise diskrimineerimise kaasustes toonud välja, et soolist ebavõrdsust kinnistavad meetmed on õigustatud üksnes väga kaalukatel põhjustel. Seega on Euroopa Inimõiguste Kohus soolise võrdse kohtlemise kaasustes rakendanud väga ranget proportsionaalsuse kontrolli, võttes arvesse, et soolise võrdõiguslikkuse edendamine on Euroopa Inimõiguste Konventsiooni osalisriikide jaoks prioriteetne eesmärk.

Käesoleva töö autor toetab kohtujurist Jacobsi seisukohta, et lapse hooldamist soodustavate positiivse diskrimineerimise meetmete puhul ei peaks selliseid meetmeid (nt töandja poolt üksnes naistele lastehoiukohtade võimaldamine) põhimõtteliselt võimaldama üksnes emadele. Seda eriti juhtudel, kui samaväärne sooneutraalne meede viiks naiste tööhõive aspektist samadele tulemustele ehk juhul, kui meetme tõhusus ei ole tõendatud. Positiivse diskrimineerimise meetmed lapse hooldamist soodustavates küsimustes peaksid seega enam soodustama isade vanemliku rolli täitmist.

Euroopa Kohus on soolisele võrdõiguslikkusele enim rõhku pööranud aga vanemapuhkuse saamise tingimusi hinnates. Nimelt on Euroopa Kohus leidnud, et vanemapuhkuse eesmärk direktiivi 2010/18 mõttes on sugupoolte võrdõiguslikkuse sisuline tagamine ning seetõttu on eriliselt oluline soodustada isasid vanemapuhkust kasutama. Euroopa Kohtu praktikas on seega isade vanemapuhkuse saamist takistavaid tingimusi liikmesriikide seadusandluses peetud diskrimineerivaks sooga seotud asjaolude alusel.

Töö autor on seisukohal, et Eesti vanemahüvitise saamise tingimused direktiivi 2010/18 ning Euroopa Kohtu praktikas väljendatud eesmärki ei soodusta, kuivõrd vanemahüvitise seaduse

§ 2 lg 2 alusel on vaid (mittetöötavatel) emadel õigus vanemahüvitisele esimesel 70 päeval ning isadel samalaadset ainuõigust ei ole. Samuti makstakse vanemahüvitist vanemahüvitise seaduse § 3 lg 5¹ alusel lapsehoolduspuhkusele jäänud isale vaid miinimummääras, kui lapse ema ei ole soovinud rasedus- ja sünnituspuhkust maksimummääras (140 päeva) kasutada. Nimetatud tingimused ei soodusta isade osavõttu lapse hooldamisest lapse arengu varajastest staadiumitest alates ega täida isade võrdse kohtlemise eesmärki. Kuivõrd vanemapuhkus (ning sellega lahutamatult seotud vanemahüvitis) on meede, mis toetab esmajoonel vanemliku rolli täitmist, peaks vanemahüvitist võimaldama mõlemale sugupoolele võrdsetel alustel, mistõttu eeltoodud vanemahüvitise saamise tingimused on diskrimineerivad isade suhtes. Samuti on vanemahüvitis Eestis kehtestatud sooneutraalsena. Selleks aga, et soodustada isade aktiivsemat osavõttu lapse hooldamisest ning toetada sugupoole võrdõiguslikkust praktikas, oleks direktiivi 2010/18 eesmärki arvesse võttes soovitatav, kui Eesti seadusandja kehtestaks osa lapsehoolduspuhkusest ülekantamatu puhkusena üksnes isadele.

Atüüpilistele peredele lapse hooldamisega seotud puhkuste võimaldamise osas on Euroopa Kohus aga olnud kõige konservatiivsem, leides, et emaduspuhkus ei laiene surrogaatemaduse teenuse abil emaks saanud vanemale ka juhul, kui ema imetab oma last ning leidnud, et õigus saada emaduspuhkust laieneb üksnes bioloogilisele emale. Selline seisukoht ei taga töö autori hinnangul aga lapse õiguste kõrgetasemelist kaitset, nagu seda nõuab Euroopa Põhiõiguste Harta art 24(2). Nimelt tuleb Euroopa Põhiõiguste Harta art 24(2) alusel seada laste õiguste kaitse esikohale kõikide lapsi puudutavate meetmete rakendamise puhul, mis tähendab, et lastele tuleb tagada arenguks ning vanemlikuks kontaktiks samaväärsed võimalused, sõltumata nende sünniga seotud asjaoludest.

Euroopa Inimõiguste Kohus on seevastu laste õiguste kõrgetasemelise kaitse vajaduse toonud esiplaanile, leides, et surrogaatemaduse abil vanemaks saanute ning nende laste vahelisi sugulussidemeid tuleb õiguslikult tunnustada, rõhutades seega selliste laste integreerimise vajadust nende perekondadesse ja kohalikesse ühiskondadesse. Kuigi Euroopa Inimõiguste Kohus ei ole veel lahendanud surrogaatemaduse läbi vanemaks saanute õiguste küsimust lapse hooldamisega seotud meetmete, on Euroopa Inimõiguste Kohus teisi atüüpilisi peresid puudutavates kaasustes toonud välja riigi kohustuse laiendada lapse hooldamisega seotud meetmeid ka atüüpilistele peredele, kuna sellised meetmed aitavad last perekonda integreerida ning tagavad laste õiguste kõrgetasemelise kaitse eesmärki. Eelnevast tulenevalt, arvestades et riikidel on kohustus tunnustada surrogaatemaduse teenust kasutanud peresid ning arvestades Euroopa Inimõiguste Kohtu praktikas esile toodud laste õiguste kõrgetasemelise kaitse

vajadust ka surrogaatemaduse teenuse läbi sündinud laste puhul, võib sellest järeldada, et atüüpiliste perede kaasustes toodud järeldused lapse hooldamisega seotud hüvede suhtes kehtivad ühtviisi ka surrogaatemaduse teenust kasutanud peredele.

Eesti seadusandluses ei ole surrogaatemaduse teenust kasutanud peresid eristatud teistest riikliku kaitse all olevatest peredest, mistõttu Eestis surrogaatemaduse teenust kasutanud perede ebavõrdse kohtlemise küsimus ei tõusetu. Kuigi Eestis on surrogaatemadus keelatud, on Euroopa Inimõiguste Kohtus oma lahendis *Labassee v Prantsusmaa* välja toonud, et Eestis on võimalik saada selliste perede vanemate ja laste vahelistele sugulussuhetele õiguslik tunnustus. Samas ei ole kohalduvate seaduste alusel (tsiviilkohtumenetluse seadustik, rahvusvahelise eraõiguse seadus) kehtestatud ühtset protseduuri ja tingimusi surrogaatemaduse teenust kasutanud perede sisestele sugulussidemetele tunnustuse saamiseks ning erinevate protseduuride alusel tuleb sellistel peredel täita erinevaid tingimusi, mh võib erineda menetlusele kohaldatav õigus. Eelnevast tulenevalt oleks soovitav, et Eesti seadusandja kehtestaks ühtse menetluse surrogaatemaduse teenust kasutanud perede siseste sugulussidemete tunnustamiseks.

Bibliography

1. Books and articles

1. H. Meenan (ed) "Equality Law in an Enlarged European Union. Understanding the Article 13 Directives," Cambridge: Cambridge University Press, 2007.
2. D.Schiek, L.Waddington and M. Bell (eds) „Cases, Materials and Text on National, Supranational and International Non-Discrimination Law,“ Oxford: Hart Publishing, 2007.
3. B. Bercusson „European Labour Law. Second edition,“ New York: Cambridge University Press, 2009.
4. P. Craig, G. de Búrca "EU Law. Text, Cases and Materials. Fifth edition," New York: Oxford University Press, 2011.
5. S. Fredman "Discrimination Law. Second edition," Oxford: Oxford University Press, 2011.
6. P. Craig and G. de Búrca (eds) „The Evolution of EU Law. Second edition,“ New York: Oxford University Press, 2011.
7. C. Barnard "EU Employment Law. Fourth edition," Oxford: Oxford University Press, 2012.
8. E. Ellis, P. Watson "EU Anti-Discrimination Law. Second edition," Oxford: Oxford University Press, 2012.
9. C. Achmad „Children's rights to the fore in the ECtHR's first international commercial surrogacy judgments“ [2014], European Human Rights Law Review 6
10. E. C. di Torella, P. Foubert „Surrogacy, pregnancy and maternity rights: a missed opportunity for a more coherent regime of parental rights in the EU“ [2015], 40 European Law Review 1

2. Reports and analyses

1. The European Commission Strategic Engagement for Gender Equality 2016-2019, 2016, accessible at http://ec.europa.eu/justice/gender-equality/document/files/strategic_engagement_en.pdf, last accessed 29.04.2016.
2. The Hague Conference on Private International Law „The Parentage/Surrogacy Project: An Updating Note,“ 2015, Prel. Doc. No 3A. Accessible at:

- <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf>, last accessed 29.04.2016.
3. Statistics Estonia, Indicators of gender equality, 01.12.2015, accessible at <http://www.stat.ee/268958/?highlight=vanemahüvitis>, last accessed 29.04.2016.
 4. The Hague Conference on Private International Law, “A study of legal parentage and the issues arising from international surrogacy arrangements,” Preliminary Document No 3 C of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, accessible at https://assets.hcch.net/upload/wop/gap2014pd03c_en.pdf, last accessed 29.04.2016.
 5. European Commission Eurydice and Eurostat Report „Key Data on Early Childhood Education and Care in Europe. 2014 Edition“. Accessible at <http://ec.europa.eu/eurostat/documents/3217494/5785249/EC-01-14-484-EN.PDF/cbdf1804-a139-43a9-b8f1-ca5223eea2a1>, last accessed 29.04.2016.
 6. European Parliament Directorate-General for Internal Policies, “A comparative study on the regime of surrogacy in EU Member States,” (L. Brunet, J. Carruthers, K. Davaki, D. King, C. Marzo, J. McCandless), May 2013, accessible at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf), last accessed 29.04.2016.
 7. Estonian Ministry of Social Affairs report on gender equality, 2013, accessible at https://www.sm.ee/sites/default/files/content-editors/Ministeerium_kontaktid/Uuringu_ja_analuusid/Sotsiaalvaldkond/sooline_vo_monitooring_2013_veeb.pdf, last accessed 29.04.2016.
 8. Praxis Centre for Policy Studies „Eesti vanemapuhkuste süsteemi analüüs,“ 2013. Accessible at <http://www.praxis.ee/wp-content/uploads/2014/03/2013-Vanemapuhkuste-susteem.pdf>, last accessed 29.04.2016.
 9. Opinion of the Estonian Chancellor of Justice on the duration of maternity leave, 01.04.2011, no 6-3/102033/1101518 accessible at http://oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_margukiri_sunnituslehe_kestuse_luhendamine.pdf, last accessed 29.04.2016.
 10. Commission of the European Communities „Roadmap for equality between women and men (2006-2010). 2009-2010 work programme,“ accessible at http://ec.europa.eu/justice/gender-equality/files/gender_roadmap_2009_2010_program_en.pdf, last accessed 29.04.2016.

11. European Commission Eurostat Statistical Books „Reconciliation between work, private and family life in the European Union. 2009 edition“. Accessible at <http://ec.europa.eu/eurostat/documents/3217494/5705547/KS-78-09-908-EN.PDF/6180b5e6-e482-4d5f-a681-6a9bce05d733>, last accessed 29.04.2016.
12. Overview of the activities of the Gender Equality and Equal Treatment Commissioner in 2007, accessible at <http://www.vordoigusvolinik.ee/wp-content/uploads/2014/03/Voliniku-tegevuse-ylevaade-2007.pdf>, last accessed 29.04.2016.
13. EU Network of Independent Experts on Fundamental Rights „Commentary of the Charter of Fundamental rights of the European Union,“ 2006, accessible at: http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, last accessed 29.04.2016

4. Case-Law

a. CJEU case law

1. Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976], ECR 00455.
2. Case C-163/82 *Commission of the European Communities v Italian Republic* [1983], ECR 03273.
3. Case C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984], ECR 03047.
4. Case C-312/86 *Commission of the European Communities v French Republic* [1988], ECR 06315.
5. Case C-13/94 *P v S and Cornwall County Council* [1996], ECR I-02143.
6. Case C-158/97 *Georg Badeck and Others* [2000], ECR I-01875.
7. Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000], ECR I-00069.
8. Case C-366/99 *Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation* [2001], ECR I-09383.
9. Case C-476/99 *H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002], ECR I-02891.
10. Case C-519/03 *Commission of the European Communities v Grand Duchy of Luxemburg* [2005], ECR I-03067.
11. Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005], ECR I-09981.

12. Case C-116/06 *Sari Kiiski v Tampereen kaupunki* [2007], ECR I-07643.
13. Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG* [2008], ECR I-01017.
14. Case C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010], ECR I-08661.
15. Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010], ECR I-08489.
16. Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010], ECR I-01449.
17. Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011], ECR I-01177.
18. Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011], ECR I-03375.
19. Case C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* [2013], not yet published.
20. Case C-167/12 *C.D. v S.T.* [2014], not yet published.
21. Case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014], not yet published.
22. Case C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaiomaton* [2015], not yet published.
23. Opinion of AG Rozès in case C-163/82 *Commission of the European Communities v Italian Republic* [1983], ECR 03291.
24. Opinion of AG Darmon in case C-184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984], ECR 03077.
25. Opinion of AG Jacobs in case C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997], ECR I-06365.
26. Opinion of AG Wathelet in case C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)* [2013], not yet published.
27. Opinion of AG Kokott in case C-167/12 *C.D. v S.T.* [2013], not yet published.
28. Opinion of AG Wahl in case C-363/12 *Z. v A Government department and The Board of management of a community school* [2014], not yet published.
29. Opinion of AG Kokott in Case C-222/14 *Konstantinos Maïstrellis v Ypourgos Dikaiosynis, Diafaneias kai Anthropon Dikaiomaton* [2015], not yet published.

b. ECtHR case law

1. Case of *Petrovic v Austria*, 27.03.1998, application no. 20458/92.
2. Case of *Wagner and J.M.W.L. v Luxembourg*, 28.06.2007, application no. 76240/01.

3. Case of *Weller v Hungary*, 31.03.2009, application no. 44399/05.
4. Case of *Andrle v the Czech Republic*, 17.02.2011, application no. 6268/08.
5. Case of *Konstantin Markin v Russia*, 22.03.2012, application no. 30078/06.
6. Case of *Topčić-Rosenberg v Croatia*, 14.11.2013, application no 19391/11.
7. Case of *Mennesson v France*, 26.06.2014, application no. 65192/11.
8. *Affaire Labassee c France*, 26.06.2014, requête no 65941/11.
9. Case of *Paradiso and Campanelli v Italy*, 27.01.2015, application no 25358/12.

5. Legislation

a. Treaties

1. The European Convention on Human Rights, concluded 04.11.1950, entry into force 03.09.1953.
2. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ [2007] C 306/1.
3. Treaty on the Functioning of the European Union, OJ [2012] C 326/47.
4. The Charter of Fundamental Rights of the European Union, OJ [2012] C 326/391.
5. The Treaty on European Union, OJ [2012] C 326/13.

b. EU Directives

1. Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ [1979] L6/24.
2. 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, OJ [1992] L 348/1.
3. 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.
4. Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, OJ [2010] L 68/13.

a. Estonian legislation

1. The Employment Contracts Act, RT I, 12.07.2014, 146.

2. The Gender Equality Act, RT I, 07.07.2015, 11.
3. The Penal Code RT I, 17.12.2015, 9.
4. Decree no 114 of the Minister of Social Affairs “Töövõimetuslehe andmekoosseis ja pabervorm ning töövõimetuslehe registreerimise, väljakirjutamise ja haigekassale edastamise tingimused ja kord,” RT I, 22.12.2015, 37.
5. The Health Insurance Act, RT I, 30.12.2015, 59.
6. The Parental Benefit Act, RT I, 30.12.2015, 104.
7. The Code of Civil Procedure, RT I, 10.03.2016, 10.
8. The Private International Law Act, RT I, 10.03.2016, 18.

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