Picture source:
http://www.biopoliticaltimes.org/article.php?id=5393

EU INTEGRATION & ETHICS

Surrogacy (3rd session)

Co-funded by the
Erasmus+ Programme
of the European Union

Agenda – 3rd session

3rd session (online): surrogacy| 17:00 - 19:15h

- Getting started
- The Single European Market: idea, fundamental freedoms, geographical scope (incl. economic facts)
- Medical perspective: discussion of 'guest-speech video'
- CJEU case Mayer
- *Break*
- CJEU cases Z and D
- Human dignity and discussion of its meaning

Source: EU in slides (2015)

EU fundamental freedoms | overview

Concerning	Fundamental freedom	Dependence	Duration
Persons	Freedom of establishment	self-employed	long term
	Freedom of services	self-employed	short term
	Free movement of workers	employed	long term
	Posting of workers Directive 96/71/EG, Link; Enforcing Directive 2014/67/EU, Link	*employed*	*short term*
Products	Free movement of goods		
Capital	Free movement of capital and payments		

EU fundamental freedoms | definitions

- Who defines these notions and how?
  - Defined by **CJEU**
  - Terms have always to be interpreted in the sense of EU law
    - That means that derogations have to be interpreted in a narrow sense
    - Other terms in a very **broad** sense
  - Goods: “products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions“
  - Worker: “for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration ”
  - **Services**
    - **Active** services: service **provider** crosses the border
    - **Passive** services: service **receiver** crosses the border
    - Service provider **and** service receiver cross the border together: e.g. tour group
    - **Only the service** crosses the border: e.g. broadcast and television, eHealth, etc.

Single European Market | EU

– 28 **Member States (MS)**

Source: EU in slides (2015)

Single European Market | EU and beyond

Source: EU in slides (2015)

- 28 **Member States**
- **EEA**: Norway, Iceland and Liechtenstein
- **Turkey**
- etc.

Commission Notice — The 'Blue Guide' on the implementation of EU products rules 2016, OJ 2016 C 272, p. 1 (excerpt)

- European Economic Area

The Agreement on the European Economic Area, in force since 1 January 1994, **covers all Union harmonisation** legislation to which this Guide is applicable. Thus, Union harmonisation legislation covered by this Guide also applies to the so-called EEA EFTA States: **Iceland, Liechtenstein and Norway**.

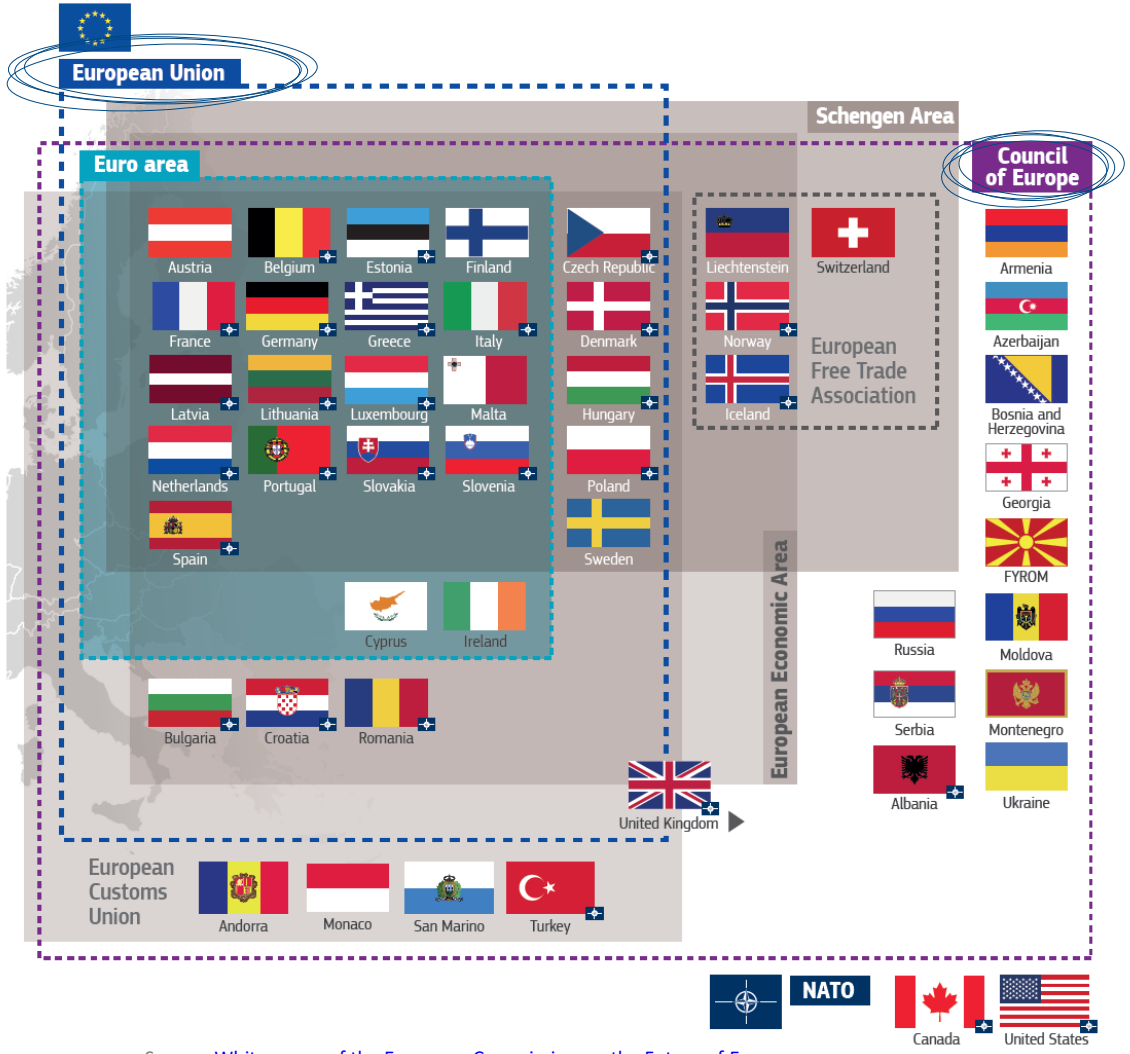
The **objective** of the EEA Agreement is to establish a dynamic and homogeneous European Economic Area, based on **common rules** and equal conditions of competition. **Rights** conferred and obligations imposed upon the Member States, or their public entities, undertakings, or individuals in relation to each other, are, according to the EEA Agreement, understood to be conferred or imposed in the **same way also upon the EEA EFTA States**.

- Turkey

Turkey and the EU established a **Customs Union** in 1995 (Decision 1/95 of the EU-Turkey Association Council, 96/142/EC). The Customs Union Decision covers trade **in manufactured products** and **processed agricultural products** between Turkey and the EU, and entails alignment by Turkey with all EU product legislation. The Agreement aims to ensure the **free movement** of **manufactured** products and **processed agricultural** products between the EU and Turkey, by eliminating import controls at the EU-Turkey border on such products.

No "freedom for Turkish nationals who are the **recipients** of services to visit a Member State in order to obtain services"; CJEU judgment in *Demirkan*, C-221/11, EU:C:2013:583, para. 63

EU and Council of Europe



Source: White paper of the European Commission on the Future of Europe

Questions

For-profit **surrogacy** arrangements are **defined** by the HCCH in the following way (see appended glossary):

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

Source: Parliamentary Assembly of the Council of Europe. (2016). *Children's rights related to surrogacy*. Retrieved from http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23015&lang=en
N.B. HCCH = Hague Conference on Private International Law

Picture credits: http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP

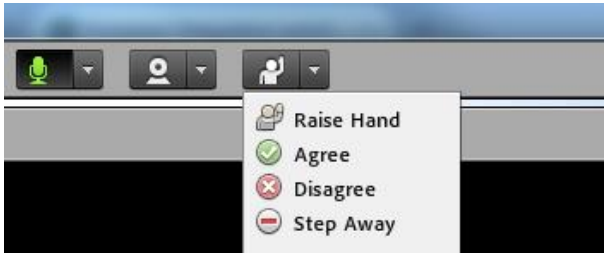
- Are there EU rules (directives, regulations, etc.) on surrogacy (positive integration)?
- Does surrogacy qualify as a service under EU law?
- Suppose your country prohibits surrogacy, could you argue against this prohibition by relying on EU law, i.e. the freedom of services? (negative integration)
- Ought there to be rules on surrogacy?

Let`s find out more on this topic!

Legal perspective | Q&A

Adobe Connect Chat, or mike

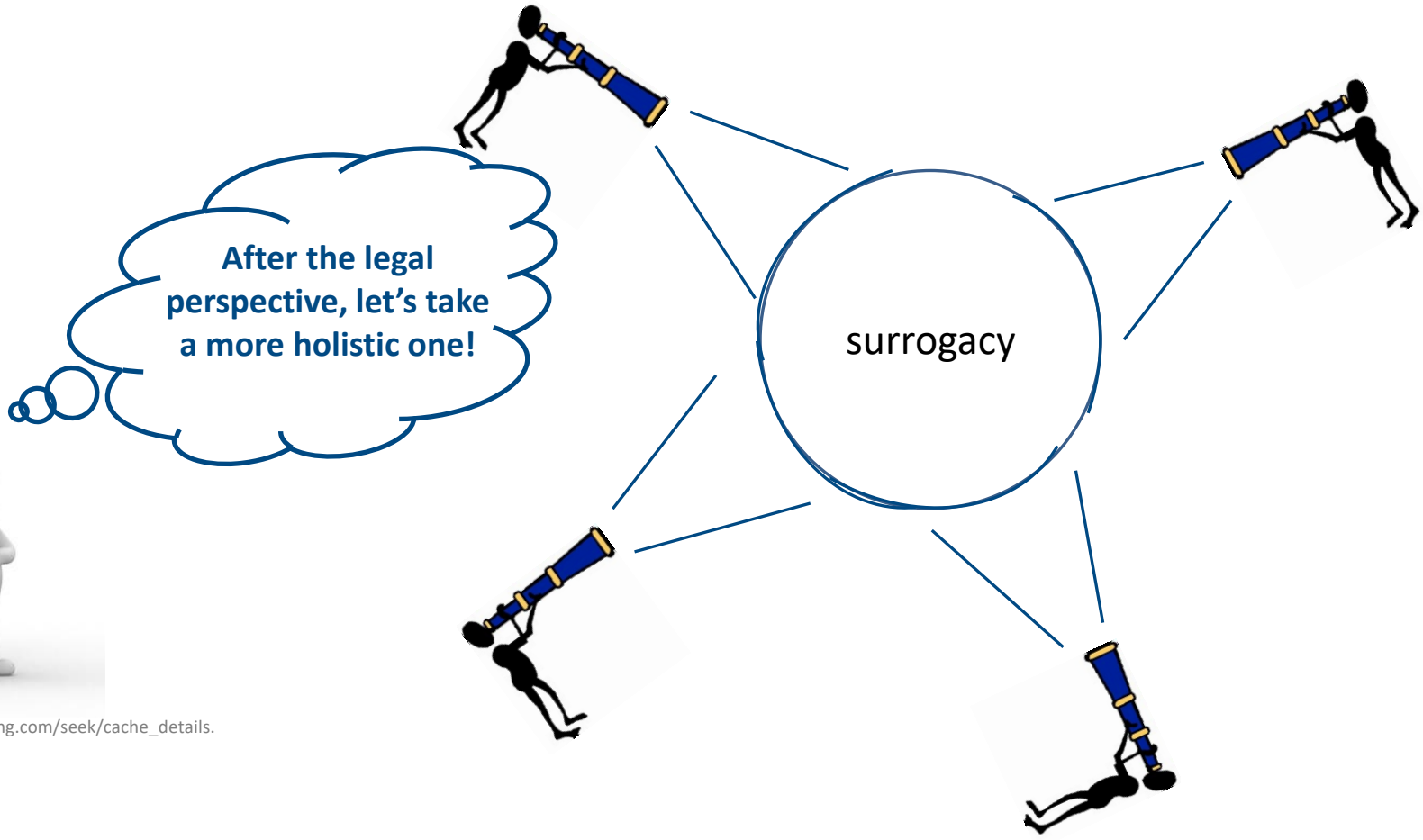
Picture credits: http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP



- All invited to participate
- If you have a question, just raise your hand, and I will 'hand over the microphone'

Holistic perspective

Picture credits:
http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP



Vertical distribution of competences (repetition)

- **Exclusive competence EU (Art. 3 TFEU)**
  - customs union;
  - the establishing of the competition rules necessary for the functioning of the internal market;
  - monetary policy for the Member States whose currency is the euro;
  - the conservation of marine biological resources under the common fisheries policy;
  - common commercial policy.

- **Support, coordination, supplementation (Art. 6 TFEU)**
  - protection and improvement of human health
  - industry;
  - culture;
  - tourism;
  - education, vocational training, youth and sport;
  - civil protection;
  - administrative cooperation.

- **Shared competences EU / MS (Art. 4 TFEU)**
  - internal market;
  - social policy, for the aspects defined in the TFEU;
  - **economic, social and territorial cohesion;**
  - agriculture and fisheries, excluding the conservation of marine biological resources;
  - environment;
  - consumer protection;
  - transport;
  - trans-European networks;
  - energy;
  - area of freedom, security and justice;
  - common safety concerns in public health matters, for the aspects defined in the TFEU.

Vertical distribution of competences (repetition)

– **Shared competences EU / MS (Art. 4 TFEU)**

– **economic, social and territorial cohesion;**

TITLE XVIII

ECONOMIC, SOCIAL AND TERRITORIAL COHESION

Article 174

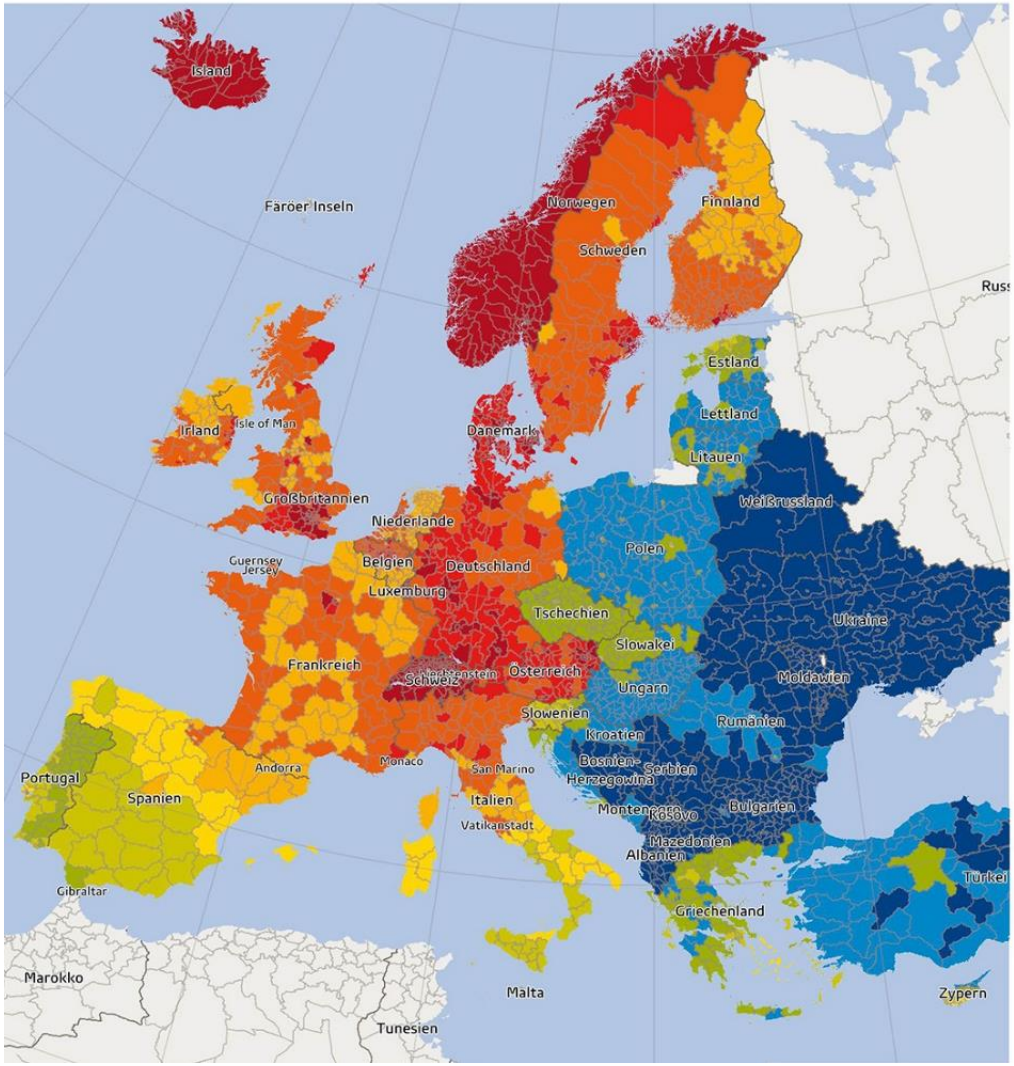
(ex Article 158 TEC)

In order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion.

In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.

Among the regions concerned, particular attention shall be paid to rural areas, areas affected by industrial transition, and regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, cross-border and mountain regions.

Economic | Single (or diverse?) European Market



GfK Kaufkraft Europa 2017

– **economic, social and territorial cohesion?**

purchasing power

Kaufkraftindex je Einwohner
in den 2-stelligen PLZ-Gebieten

gering — hoch

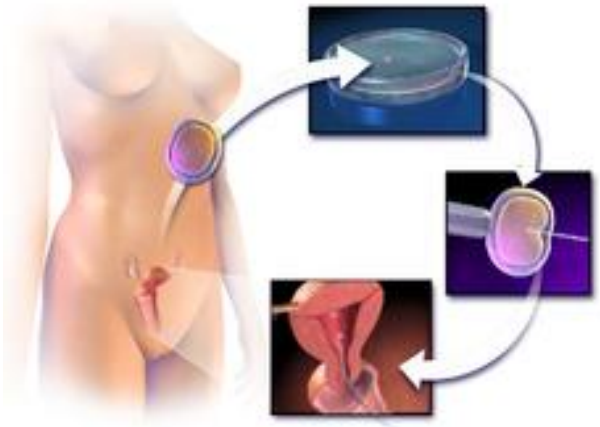
keine Angabe

Staatsgrenze

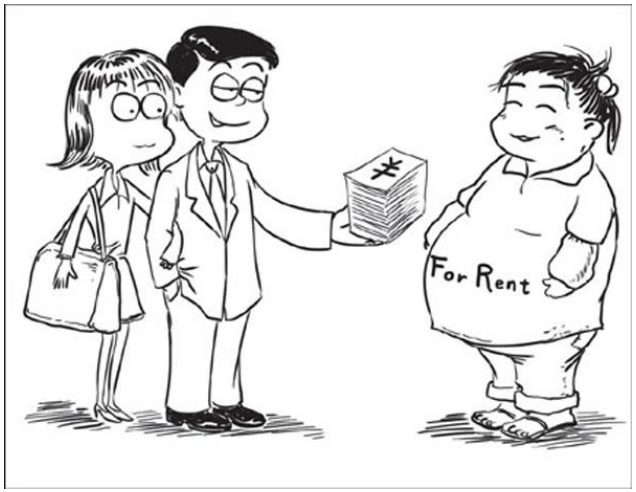
PLZ-Gebietsgrenze

Source: http://www.gfk.com/marktdaten

Medical | surrogacy and IVF | short overview



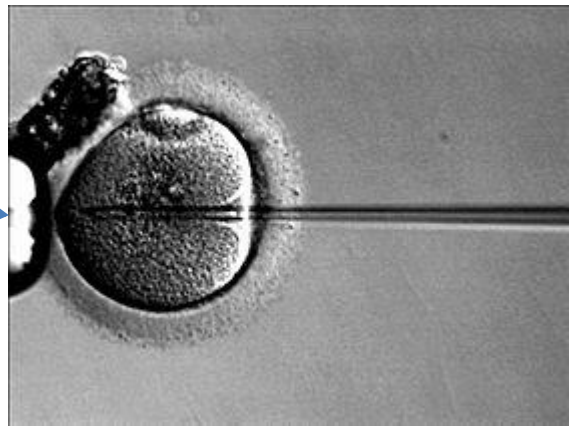
Picture source: https://en.wikipedia.org/wiki/In_vitro_fertilisation



Picture source: http://www.biopoliticaltimes.org/article.php?id=5393

In vitro fertilisation (IVF)

- Homologous (from partner) or heterologous (“donation”)
- Egg- and/or sperm donation
- „normal“ (petri dish) or via intracytoplasmic sperm injection ICSI
- Maybe including genetic testing on genetic disorders / sex selection



Picture source: https://en.wikipedia.org/wiki/Intracytoplasmic_sperm_injection

Medical | IVF | payment

"But the price tag is hefty, ranging from $2,000-3,000 per cycle in **India** to $12,000-15,000 in **America**. In **England** the National Institute for Health and Care Excellence, a government body, says the state should offer infertile couples three cycles of IVF. But **tight budgets** mean that over half of IVF patients pay out of pocket. In **America**, where insurers rarely pay for IVF, only a quarter of couples who need it to conceive actually get it, by one estimate. Globally, the figure is less than a tenth."

Source: The Economist (August 27th-September 2nd 2016). An arm and a leg for a fertilised egg. *The Economist*, p. 16.

Medical | surrogacy | payment

The gift of life

Carrying a child for someone else should be celebrated—and paid

Restrictive rules are in neither the surrogate's interests, nor the baby's

Print edition | Leaders ›
May 13th 2017

THE earliest known description of surrogacy is an ugly biblical story: in Genesis, the childless Sara sends her husband to bed with her maidservant, Hagar, and takes the child as her own. It is this exploitative version of surrogacy that still shapes attitudes and laws today. Many countries ban it outright, convinced that the surrogate is bound to be

- "By pushing surrogacy to the legal fringes, they make it both **more dangerous** and more costly, **and** create **legal uncertainty** for all, especially the newborn baby who may be deemed parentless and taken into care."
- "Getting surrogacy right matters more than ever, since **demand is rising**"
- "To **protect the surrogate**, it should demand that she obtain a doctor's all-clear and **enjoy good medical care**. And to avoid disputes, both parties should sign a **detailed contract that can be enforced** in the courts, setting out in advance what they will do if the fetus is disabled, the surrogate falls ill or the commissioning parents break up."
- "Laws should also let the surrogate **be paid**."

Source: The Economist, The gift of life, May 13th-19th 2017, p. 10. (Link)

Medical and other reasons to go abroad

France, the Netherlands, Italy and Germany. Studies of Italian patients have reported a growth in overseas travel from Italy since legislative changes in 2004 (Bartolucci, 2008; Ferraretti *et al.*, 2010).

Commentators have suggested a range of possible motivations for cross-border travel, including legal restrictions on access to certain forms of treatment (e.g. third-party-assisted conception); restrictions on the availability of treatment for certain categories of people (e.g. single women or same-sex couples); high cost of treatment in the home country; a desire for donor anonymity; a desire for identifiable donors; sex or trait selection; a desire for treatments considered too experimental to be provided in the home country; a lack of expertise in the home country; shortage of gamete (especially oocyte) donors; long waiting times; a desire for culturally sensitive care; perceived higher success rates or higher quality of care abroad; the pull of active marketing in the global medical tourism sector (Pennings, 2004; Blyth and Farrand, 2005; Ferraretti *et al.*, 2010; Inhorn and Shrivastav, 2010; Pennings and Mertes, 2010).

Results

Demographic profile

The socio-demographic profile o
Forty-one women and 10 men to
total of 41 'cases'. A 'case' is de
couple seeking treatment togeth
took part in the study. Cases th
women in a couple, but participatir
ual couples where both partners
sexual women; and 1 woman in
part on her own. The majority
abroad at the time of the intervi
the remaining seven cases, firm
made at the time of participatior

Source: Culley L and others, 'Crossing borders for fertility treatment: motivations, destinations and outcomes of UK fertility travellers' (2011) 26(9) *Human Reproduction* 2373–2381 (2374).

Biomedical perspective: video guest speech

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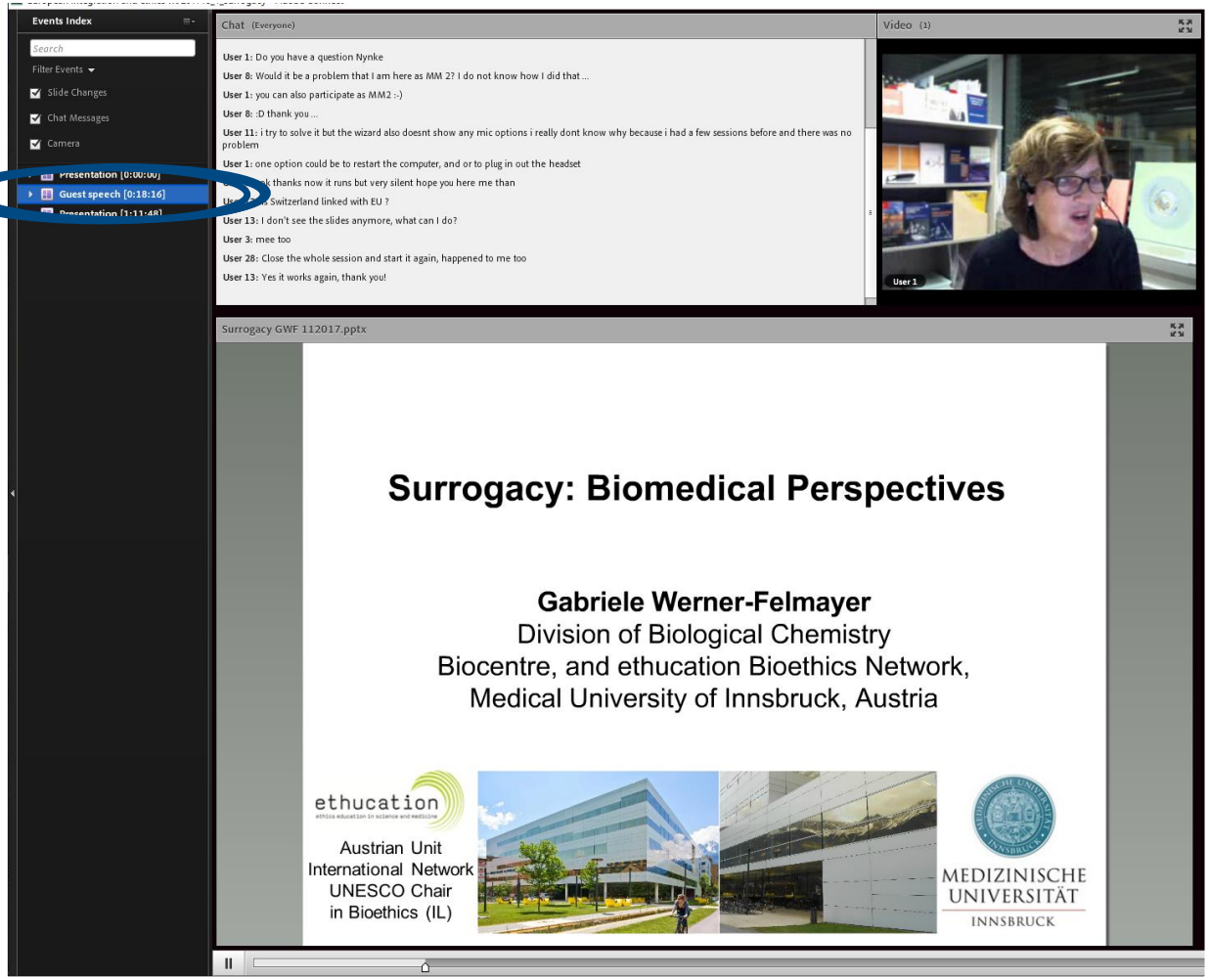
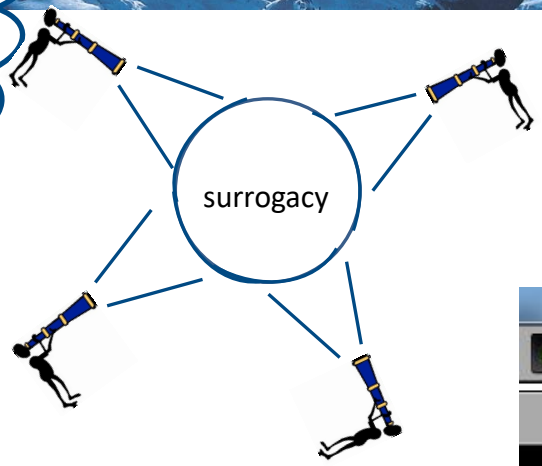


ethucation
ethics education in science and medicine

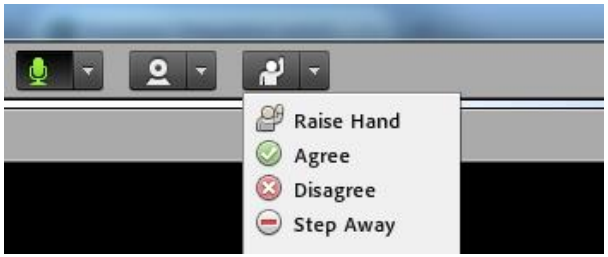
Medical | Q&A

Picture credits: http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP

Do you have questions on this medical perspective?



Adobe Connect Chat, or mike



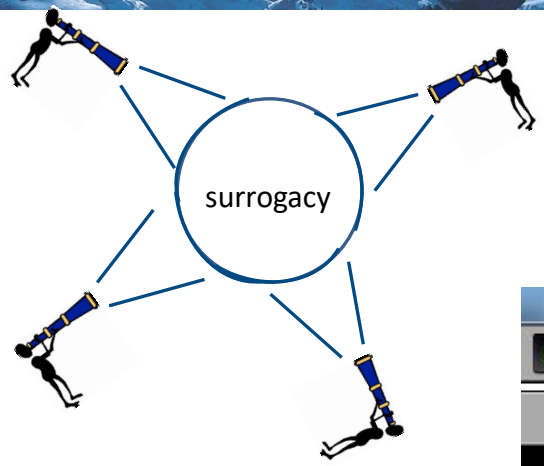
- What are non-medical conditions?
- What is gestational surrogacy?
- What is fragmented parenthood?
- Is surrogacy allowed throughout Europe?
- Why is surrogacy as a medical process described as ‘intensive’?
- In which way does abortion play a role in surrogacy?
- Is the rate of C-section higher?
- In which way can warranty play a role in this context?

- age, LGBTQ
- IVF
- father, mother (social vs. genetic), gestational mother, partners and children
- No: only commercial (or all) prohibited; or not regulated
- eight steps
- In case of twins, triplets, etc.
- Yes, plus potential health risk for child
- Parents not wanting disabled child

Video | Q&A

Picture credits:
http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP

Do you have questions on this video?



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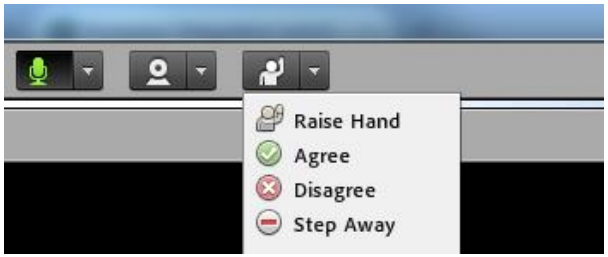

- Shifting human evolution – now one that strikes to the essence of creation
- Almost 4 million babies from IVF
- “J-8161”: “a little bit big”, she has 57 kilos
- Fertility tourism: sperm from Israel, egg cell from South Africa, and two surrogate mothers in Thailand (carrying 3 children of this combination)
- Social exclusion

Agenda – 3rd session

3rd session (online): surrogacy| 17:00 - 19:15h

- Getting started
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- *Break*
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Source: EU in slides (2015)

AonQ

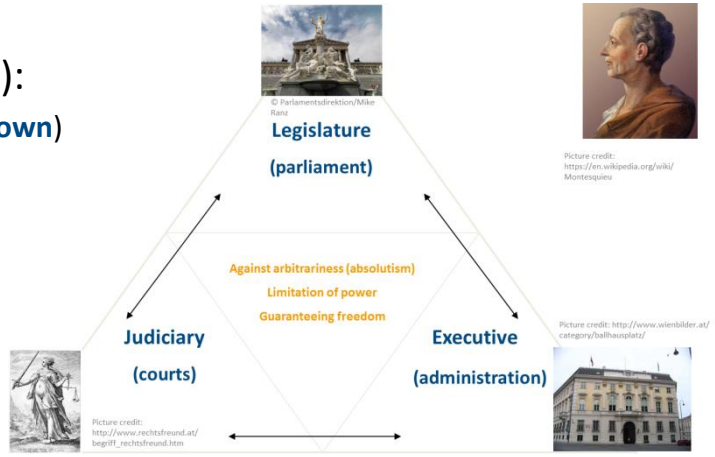
- Are there EU rules (directives, regulations, etc.) on surrogacy (positive integration)?
- Does surrogacy qualify as a service under EU law?
- Suppose your country prohibits surrogacy, could you argue against this prohibition by relying on EU law, i.e. the freedom of services? (negative integration).
- Ought there to be rules on surrogacy?

- *Let`s see.*
- **Basically, yes, due to a very broad definition.**
- *Still to be answered.*
- **Cf. video guest lecture**

Case-law and policy (repetition)

- EU citizenship & fundamental freedoms (negative integration)
  - Non discrimination based on **citizenship**
- Harmonization of national law (positive integration)
  - No discrimination based on **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**"

- Case-law vs. policy
  - Negative integration (i.e. application of fundamental freedoms):
    - By national courts (**bottom-up**) and CJEU (supporting national courts with interpretation of EU law)
    - Judiciary
  - Positive integration (i.e. harmonization of national law):
    - By EP and Council, based on a proposal of the Commission (**top-down**)
    - Legislative
    - **Maybe followed by court cases, if necessary**



Case-law (and repetition)

Picture credits:
http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP

Discrimination | criteria (repetition)

- Harmonization of national law (positive integration)

Article 19 para. 1 TFEU: "[…] combat discrimination based on **sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**"

Grounds / Field	Race	Religion	Disability	Age	Sexual orientation	Sex
Employment & vocational training	Yes + Equality body	Yes	Yes	Yes	Yes	Yes + 2006/54/EC
Education	Yes + Equality body	No	No	No	No	No
Goods and services	Yes + Equality body	No	No	No	No	Yes + 2004/113/EC
Social protection	Yes + Equality body	No	No	No	No	Yes + 2006/54/EC

2000/43/EC

2000/78/EC

Source: SEC(2008) 2181 final 2.7.2008, p. 3

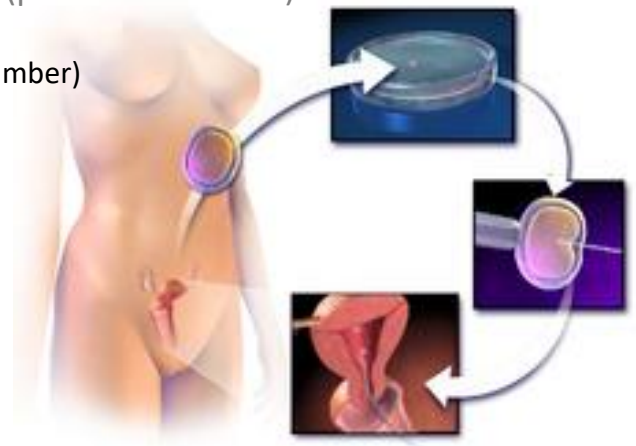
Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final 2.7.2008

CJEU case Sabine Mayr

Picture credits: Link

- Facts of the case
  - Council **Directive** 92/85/EEC of 19.10.1992 (*N.B: not mentioned so far*) 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
  - At the date, Ms. Mayr was given notice of her **dismissal** (10.3.2005), the ova taken from her had **already** been **fertilised** with her partner's sperm cells and, therefore, *in vitro* fertilised ova already existed on that date (para. 20)
  - **Three days after** Ms. Mayr had been informed of her dismissal (i.e. on 13.3.2005), two fertilised ova were **transferred into her uterus** (para. 21)
  - She therefore argues, that she was entitled to the protection against dismissal, as of the date on which the *in vitro* fertilisation of her ova took place (paras. 22 i.c.w. 13)

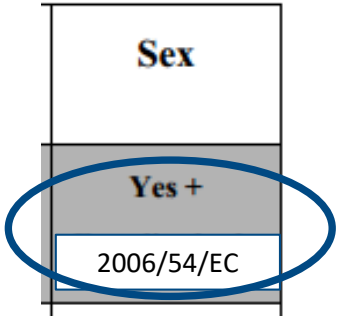
CJEU judgment in ***Sabine Mayr***, C-506/06, EU:C:2008:119 (N.B. Grand Chamber)



Picture credits: Wikipedia Link

CJEU case Sabine Mayr

- CJEU's approach
  - **Sensitive issue**, multiple traditions and value systems in the Member States (MS), …
  - … therefore **not** solution from an **ETHICAL**, **but from a purely LEGAL** (objective of this directive) **perspective** (para. 38)
- Solution
  - Possibility to store fertilized ova, before transfer into the uterus of the woman concerned (here even up to 10 years) –
    > **no** protection under this Directive (92/85/EEC) (para. 42)
  - **But** possible protection according to Directive for equal treatment of men and women in working conditions etc. (76/207/EEC, now 2006/54/EC) (para. 54)



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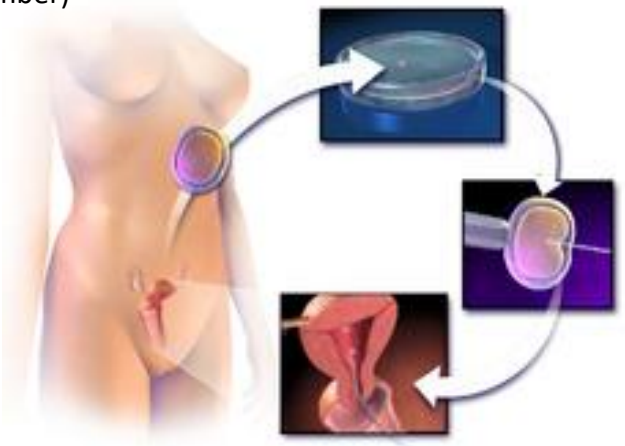
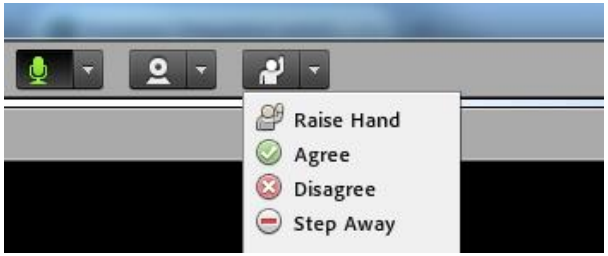


Picture credits: Wikipedia Link

Q&A

Adobe Connect Chat, or mike

Picture credits: http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP



- All invited to participate
- If you have a question, just raise your hand, and I will 'hand over the microphone'

Agenda – 3rd session

3rd session (online): surrogacy| 17:00 - 19:15h

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- The Single European Market: idea, fundamental freedoms, geographical scope (incl. economic facts)
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- CJEU case Mayer
- ***Break***
- **CJEU cases Z and D**
- Human dignity and discussion of its meaning

Source: EU in slides (2015)

CJEU cases Z and D | your task

MCI MANAGEMENT CENTER INNSBRUCK

Individual work

Try to find answer the following questions related to these two cases!
(10 min. time)

Picture credits:
http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP

- Individual work
- Same task for everyone
- At the end, one participant (having a functioning microphone) should be able to present the answers to these questions (on the following slide).

CJEU cases Z and D | your task -> questions

- Case D
  - Surrogacy is regulated in the UK: Yes □ No □ (para. …)
  - In this case the partner's sperm was used: Yes □ No □ (para. …)
  - In this case the woman's eggs were used: Yes □ No □ (para. …)
  - Has she (Ms D) been pregnant herself? Yes □ No □ (para. …)
  - What was the legal problem in this case? …… (para. …)
- Case Z
  - Surrogacy is regulated in Ireland: Yes □ No □ (para. …)
  - Surrogacy is regulated in California (US): Yes □ No □ (para. …)
  - Where did IVF / the egg transfer take place? …… (para. …)
  - In this case the partner's sperm was used: Yes □ No □ (para. …)
  - In this case the woman's eggs were used: Yes □ No □ (para. …)
  - What was the medical problem in this case? …… (para. …)
  - What was the legal problem in this case? …… (para. …)
  - Which additional legal problem was addressed in this case? …… (para. …)

CJEU cases Z and D | answers

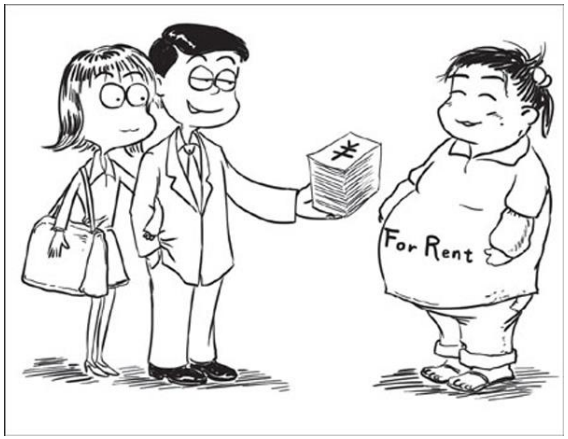
- Case D
  - Surrogacy is regulated in the UK: Yes x No □ (para. 12)
  - In this case the partner's sperm was used: Yes x No □ (para. 18)
  - In this case the woman's eggs were used: Yes □ No x (para. 18)
  - Has she (Ms D) been pregnant herself? Yes □ No x (para. 18)
  - What was the legal problem in this case? No maternity leave (paras. 21-4)
- Case Z
  - Surrogacy is regulated in Ireland: Yes □ No x (paras. 25, 37)
  - Surrogacy is regulated in California (US): Yes x No □ (para. 35)
  - Where did IVF / the egg transfer take place? Ireland / California (para. 36)
  - In this case the partner's sperm was used: Yes x No □ (para. 37)
  - In this case the woman's eggs were used: Yes x No □ (para. 37)
  - What was the medical problem in this case? Ms Z has no uterus (para. 35)
  - What was the legal problem in this case? No paid maternity leave (paras. 41-2)
  - Which additional legal problem was addressed in this case? Discrim. b/o disability (para. 44)

CJEU cases Z and D

- These two cases on surrogacy are comparable in the way that the CJEU dealt with them in a rather technical (i.e. legal) way.

  CJEU judgment in *Z*, C-363/12, EU:C:2014:159; CJEU judgment in *D*, C-167/12, EU:C:2014:169
  (N.B. both Grand Chamber)

Religion	Disability	Age	Sexual orientation	Sex
Yes	Yes	Yes	Yes	Yes +
	2000/78/EC			2006/54/EC



Picture source: http://www.biopoliticaltimes.org/article.php?id=5393

Summary overview cases on IVF & surrogacy

examples	country/ countries	reproductive element	problem	question
CJEU *Mayr*	Austria	IVF: **her** ova, **partner's** sperm, transferred into her uterus	**dismissal from work**	What counts as **beginning of pregnancy**: fertilization of ova, or transfer into uterus?
CJEU *D*	UK (regulated)	surrogacy contract (compliant with UK law); partner's sperm; **third woman's** eggs (para. 18)	no **maternity leave** or pay	• Right to **maternity leave** for commissioning mother acc. to Dir 92/85/EEC (protection of pregnant workers)? • Refusal to provide maternity leave for commissioning mother as **discrimination on grounds of sex** acc. to Directive 2006/54/EC (equal treatment of men and women)?
CJEU *Z*	Ireland / USA (California) • not regulated in Ireland (paras. 25, 37) • but regulated in California (para. 35)	surrogacy contract (**her** egg; husband's sperm) (para. 37) IVF in Ireland, surrogacy in California	• factual: she has healthy ovaries and is fertile, but has **no uterus** (para. 35) • legal: no maternity leave or pay	• *same question as above* • refusal to provide maternity leave for commissioning mother as discrimination on grounds of **disability** acc. to Dir 2000/78/EC?

Summary overview cases on IVF & surrogacy

examples	country/ countries	reproductive element	solution
CJEU *Mayr*	Austria	IVF: **her** ova, **partner's** sperm, transferred into her uterus	• beginning of pregnancy in terms of Dir 92/85/EEC (protection of pregnant workers): **transfer into uterus** (not already fertilization of ova) • **no right against dismissal** acc. to Dir 92/85/EEC • but possible protection acc. to Dir 76/207/EEC (now Dir 2006/54/EC; equal treatment of men and women) (CJEU, Mayr, 2008) • in the end no protection granted (OGH, *Mayr*, 2008)
CJEU *D*	UK	surrogacy contract (compliant with UK law); partner's sperm; **third woman's** eggs	• **no right to maternity leave** for commissioning mother acc. to Dir 92/85/EEC (protection of pregnant workers), even (para. 40) if she breath feeds the baby; as it requires pregnancy (para. 37) • also no discrimination acc. to Dir 2006/54/EC (equal treatment of men and women); as also commissioning father nor rights (para. 47) • (CJEU, *D*, 2014)
CJEU *Z*	Ireland / USA (California)	surrogacy contract (**her** egg; husband's sperm)	• ***no discrimination** acc. to Dir 2006/54/EC (as above) (para. 55)* • in case of a commissioning **mother without an uterus**, also **no discrimination** acc. to Dir 2000/78/EC (**disability**) (para. 82) • (CJEU, *Z*, 2014)

AonQ

- Are there EU rules (directives, regulations, etc.) on surrogacy (positive integration)?
- Does surrogacy qualify as a service under EU law?
- Suppose your country prohibits surrogacy, could you argue against this prohibition by relying on EU law, i.e. the freedom of services? (negative integration).
- Ought there to be rules on surrogacy?

- **No, not really; at least not tailored ones as we have seen from the just mentioned cases.**
- **Basically, yes, due to a very broad definition.**
- *Still to be answered.*
- **Cf. guest lecture**

Agenda – 3rd session

3rd session (online): surrogacy| 17:00 - 19:15h

- Getting started
- The Single European Market: idea, fundamental freedoms, geographical scope (incl. economic facts)
- Medical perspective: discussion of 'guest-speech video'
- CJEU case Mayer
- *Break*
- CJEU cases Z and D
- **Human dignity and discussion of its meaning**

Source: EU in slides (2015)

Next step

Picture credits:
http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP

Remember? EU values

- EU values

> Article 2 TEU
> The Union is founded on the values of respect for **human dignity**, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.
>
> These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, **justice**, solidarity and equality between women and men prevail.

- What do you understand by these values?
- Are they defined?

Montag, 13. Februar 2017 | Nummer 44

Im Bikini zu Polizeiauto geführt

Gegen die Menschenwürde war laut Landesverwaltungsgericht ein Polizeieinsatz in einem Hallenbad. Von dort wurde ein weiblicher Badegast halbnackt in den Streifenwagen verbracht.

Von Reinhard Fellner

Innsbruck – Ein Polizeieinsatz

Picture source: Tiroler Tageszeitung, April 13th 2017, p. 5

Air rage

Police drag a man from a United Airlines plane

An ugly incident provokes a social-media storm

Audra D. Bridges

Picture source: The Economist, April 15th–21st 2017, p. 56

Human rights

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

TITLE I

DIGNITY

Article 1

Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2

Right to life

1. Everyone has the right to life.

2. No one shall be condemned to the death penalty, or executed.

Article 3

Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.

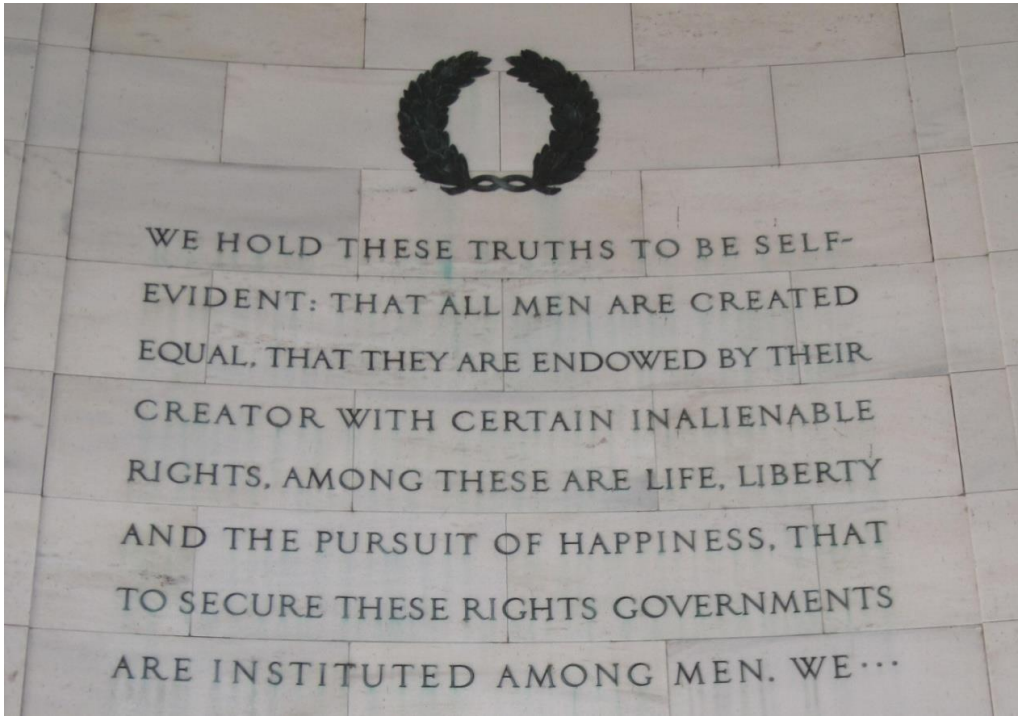
2. In the fields of medicine and biology, the following must be respected in particular:

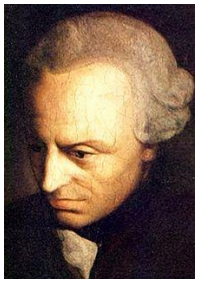
(a) the free and informed consent of the person concerned, according to the procedures laid down by law;

(b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;

(c) the prohibition on making the human body and its parts as such a source of financial gain;

(d) the prohibition of the reproductive cloning of human beings.





Jefferson Memorial, Washington D.C.
(3rd president of the USA; co-author of the "Declaration of Independence")
(picture source: Frischhut)

Picture source: https://en.wikipedia.org/wiki/Immanuel_Kant

Discussion

Adobe Connect Break Out Session

Time for discussion:
(15-20 min. time)

Picture credits:
http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP

- 8 groups (à approx. 5 participants)
- Same task for all groups
- At the end, one participant (having a functioning microphone) should be able to present the bottom line of the discussion.
- One group can be randomly chosen by lecturer
- To be presented at the end: main conclusions in four sentences

- Should there be EU rules on surrogacy (if yes, on which questions)?
- Should surrogacy qualify as a service under EU law?
- Which of the EU's values are of relevance for surrogacy?
- What should be the meaning of these values, and what should it mean for surrogacy?

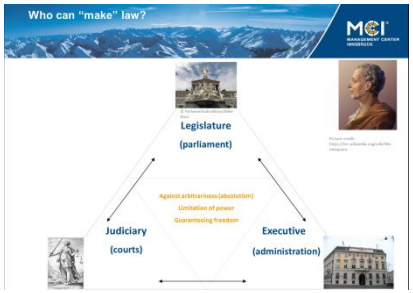
Summary

- Are there EU rules (directives, regulations, etc.) on surrogacy (positive integration)?
- Does surrogacy qualify as a service under EU law?
- Suppose your country prohibits surrogacy, could you argue against this prohibition by relying on EU law, i.e. the freedom of services? (negative integration).
- Ought there to be rules on surrogacy?

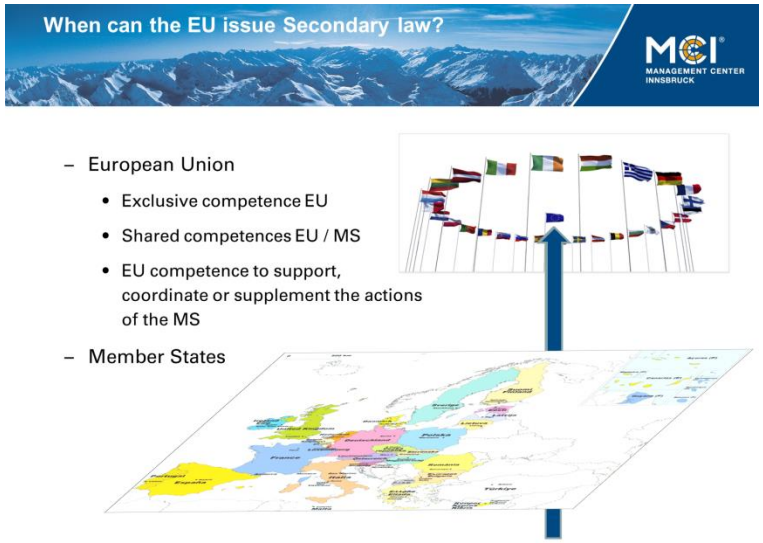
- **Yes, but no rules specifically tailored for surrogacy.**
- **Basically, yes, due to a very broad definition.**
- **Depending on the notion of "human dignity", bur rather not.**
- **Yes.**

Summary

- Question if surrogacy should be allowed **at all**, …
- … or **under which circumstances**?
- Who should be **recognized** as the children's parents?
  - Case D: Ms. D and her partner – according to UK law (para. 26)
  - Case Z: Ms. Z and her husband – according to Calif. Law (para. 37)
- Should **courts** decide those sensitive issues? CJEU: No (i.e. judicial self-restraint)



- Although it refers to the legal sphere, also in the fields of ethics, it is rather the MS who have the **competence** for ethics (at least at the moment, with the EU values to play a more important role in the future).
- This goes in line with the CJEU's statement that in some cases (Case *D*, para. 42) EU law only provides for a **minimum harmonization**, which means that MS can provide more beneficial rules for commissioning parents.



Law | soft law (repetition)

"Let the term '**law**' refer to **positive** law (as opposed to natural law), i.e. to **existing systems of social rules** that require and (in many cases) **enforce** compliance and **punish** non-compliance."

- "rules for the regulation of **human** conduct that is backed up by **sanctions**"
- "the existence of a legal system requires that compliance with its […] rules will be **generally enforced**, but not necessarily compliance with every single rule"
- "[…] the rule of recognition. This rule specifies the criteria of legal validity that any rule, be it primary or secondary, has to meet in order to **be valid** law in the respective legal system", "typically embodied in the written constitution"
- "In principle, **even grossly unjust norms** may be **valid** law in a given legal system if the established rule of recognition does not contain any provisions to the contrary."

Source: Hinsch, 2013, pp. 18-19

- Treaty on European Union (*EU Member States [MS]*)
- E-Commerce Act (*Austrian Parliament*)
- Law on air pollution (*Tyrolean Parliament*)
- *Fictitious example (might be law, but unmoral?)*
- *Fictitious example (might be law, but unmoral?)*
- Directive on electronic commerce (*European Parliament and Council of the EU*)
- Possibility of sending State Secretaries to the Council of the EU (*Customary law*)
- Codes of conduct (***soft law***)
- Ethical Principles for Medical Research Involving Human Subjects (*World Medical Association*)
- General Terms and Conditions of Business (*MCI*)
- House rules (*MCI*)

Soft law | statement of EP (EU)

MCI MANAGEMENT CENTER INNSBRUCK

"treating children as commodities and the instrumentalisation of women's bodies also constitute an affront to human dignity"

European Parliament

MOTION FOR A RESOLUTION 132k 58k

14.5.2015 PE558.894v01-00 B8-0524/2015

pursuant to Rule 133 of the Rules of Procedure

on surrogacy

Marie-Christine Arnautu, Nicolas Bay

Motion for a European Parliament resolution on surrogacy B8-0524/2015

The European Parliament,

– having regard to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine;

– having regard to Rule 133 of its Rules of Procedure,

A. having regard to the principle of the inalienability of the human body, the purchase, sale or hiring of which are diametrically opposed to respect for its dignity;

B. whereas treating children as commodities and the instrumentalisation of women's bodies also constitute an affront to human dignity;

C. whereas there are no legal provisions in international or European law that prohibit surrogacy, and whereas surrogacy creates grotesque family situations and leads to a serious loss of identity for children;

1. Calls on the European Union to support the ban on surrogacy;

2. Calls on the Commission to reaffirm in European legislation the principles of the inalienability of the human body, and of the protection of life and of the child;

3. Instructs its President to forward this resolution to the Commission, the Council and the Member States.

Soft law | statement of EP (EU)

"115. **Condemns** the practice of **surrogacy, which undermines** the **human dignity** of the woman since her body and its reproductive functions are **used as a commodity**; considers that the practice of gestational surrogacy which involves reproductive **exploitation** and use of the human body **for financial or other gain**, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments;"

Texts adopted 472k 174k

Thursday, 17 December 2015 - Strasbourg — Final edition

Annual report on human rights and democracy in the world 2014 and the EU policy on the matter — P8_TA(2015)0470 — A8-0344/2015

European Parliament resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI))

The European Parliament,

– having regard to the Universal Declaration of Human Rights (UDHR) and other United Nations (UN) human rights treaties and instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted in New York on 16 December 1966,

– having regard to the UN Convention on the Rights of the Child and to the European Parliament resolution of 27 November 2014 on the 25th anniversary of the UN Convention on the Rights of the Child[1],

– having regard to the Charter of Fundamental Rights of the European Union,

– having regard to the European Convention on Human Rights,

– having regard to Articles 2, 3, 8, 21 and 23 of the Treaty on European Union (TEU),

– having regard to the EU Strategic Framework and Action Plan on Human Rights and Democracy as adopted by the Foreign Affairs Council on 25 June 2012[2],

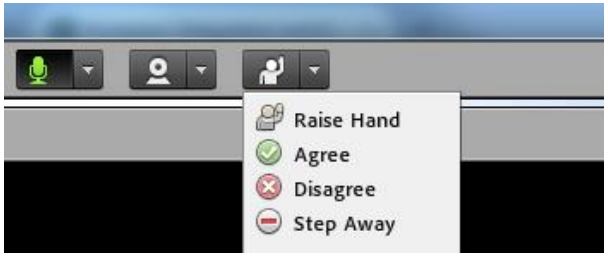
Soft law | statement of Pa. Ass. (CoE)

- *consider the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to surrogacy arrangements;*
- *collaborate with the Hague Conference on Private International Law (HCCH) on private international law issues surrounding the status of children, including problems arising in relation to legal parentage resulting from international surrogacy agreements, with a view to ensuring that the views of the Council of Europe (including those of the Parliamentary Assembly and the European Court of Human Rights) are heard and taken into account in any multilateral instrument that may result from the work of the HCCH.*

Final question

Can you provide a content related solution on how to determine "human dignity"?

Picture credits:
http://www.geocaching.com/seek/cache_details.aspx?wp=GC30GNP

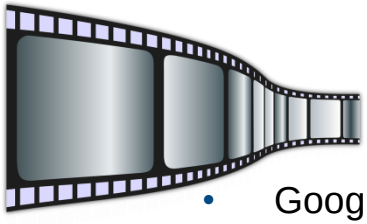


- All invited to participate
- Same task for everyone
- If you have a good contribution, just raise your hand

Follow-up (some more food for thought)

- What would be a utilitarian (“the greatest good for the greatest number”) answer to surrogacy?
- Do we need to assess these questions rather from the intended parents, the surrogate mother’s, or from the children’s perspective?
- What would be an answer following the idea of “distributive justice”?

Further reading (etc.)



- Google Baby; https://www.youtube.com/watch?v=pQGlAM0iWFM

- Frischhut, M. (2017). Legal and Ethical Issues of Cross-Border Reproductive Care from an EU Perspective: Chapter 17. In M. K. Smith & L. Puczkó (Eds.), *The Routledge Handbook of Health Tourism* . Abingdon, Oxon: Taylor & Francis.

Picture credits:
- https://pixabay.com/de/film-kino-video-motion-picture-158157/
- https://www.flickr.com/photos/brenda-starr/5076790282

Co-funded by the Erasmus+ Programme of the European Union

Thank you for your attention!

EU & ETHICS
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mentoring the motivated.