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Fertility Tourism: The legal side of this phenomenon without borders

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Abstract

Fertility, reproductive or procreative tourism are all new terms which designate a growing trend of the 21st century, namely the movement of people to other countries in order to undergo fertility treatment. Thus, this phenomenon implies multiple legal, bioethical, sociological issues and more, which need to be taken into consideration both by the national policymakers and by the ones seeking for such treatments abroad. This review article will try to offer a bigger picture by focusing on the particularities of the national laws on medical assisted reproduction of four representative EU countries, namely Germany, Austria, Italy and France and on interpreting how the restrictions in one state could boost the fertility tourism industry in other ones. The situation in each country will be depicted in a comparative manner, tackling the legislation, regulations and even relevant domestic jurisprudence on topics such as gamete donation and its anonymity regime, post-mortem reproduction, surrogacy services and cryopreservation. Moreover, it will be determined who is entitled to have fertility treatment in each of the countries subject of the analysis and how do these states fund the procedures. Furthermore, the most popular non-EU countries of destination will be presented and why one would prefer to undergo fertility treatment there. In the end, the review article will reflect if there are indeed real chances of creating strong national, European or international policies regarding fertility treatments.

Keywords: fertility tourism, medical assisted reproduction, legislation, cross-border reproductive care, IVF.

Αναπαραγωγικός Τουρισμός: Η νομική πλευρά ενός φαινομένου χωρίς σύνορα

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Περίληψη

Ο τουρισμός γονιμότητας (ή αναπαραγωγής) είναι όρος που δηλώνει μια αυξανόμενη τάση του 21ου αιώνα, δηλαδή τη μετακίνηση ανθρώπων σε άλλες χώρες προκειμένου να υποβληθούν σε θεραπεία γονιμότητας. Το φαινόμενο αυτό αναδεικνύει νομικά, βιοηθικά και κοινωνιολογικά ζητήματα, τα οποία πρέπει να ληφθούν υπόψη τόσο από τους εθνικούς φορείς χάραξης πολιτικής όσο και από εκείνους που αναζητούν τέτοιες θεραπείες στο εξωτερικό. Αυτό το άρθρο περιγράφει μια ευρύτερη εικόνα, εστιάζοντας στις ιδιαιτερότητες των εθνικών νόμων για την ιατρικώς υποβοηθούμενη αναπαραγωγή τεσσάρων αντιπροσωπευτικών χωρών της ΕΕ, συγκεκριμένα της Γερμανίας, της Αυστρίας, της Ιταλίας και της Γαλλίας και αναλύοντας πώς οι περιορισμοί σε ένα κράτος θα μπορούσαν να ενισχύσουν τη βιομηχανία τουρισμού γονιμότητας σε άλλα. Η μελέτη είναι συγκριτική, με αναφορές στη νομοθεσία, τους κανονισμούς και τη νομολογία, σε θέματα όπως η δωρεά γαμετών και το καθεστώς ανωνυμίας, η μεταθανάτια αναπαραγωγή, οι υπηρεσίες παρένθετης μητρότητας και η κρυοσυντήρηση γαμετών ή εμβρύων. Εξετάζεται, τέλος, εάν υπάρχουν πραγματικές πιθανότητες να δημιουργηθούν ισχυρές εθνικές, ευρωπαϊκές ή διεθνείς πολιτικές σχετικά με τις θεραπείες γονιμότητας.

Λέξεις κλειδιά: αναπαραγωγικός τουρισμός, ιατρικώς υποβοηθούμενη αναπαραγωγή, νομοθεσία, διασυνοριακές υπηρεσίες αναπαραγωγής, εξωσωματική γονιμοποίηση.

I. Introduction

Fertility, reproductive or procreative tourism are all new terms which designate a growing trend of the 21st century, namely the movement of people to other countries in order to undergo fertility treatment. This could be regarded as a part of the globalisation process which occurs in all aspects of the society. The wish of hopeful heterosexual or same-sex couples, as well as of single women, to have a child, knows no limits. Having this in mind, prospective parents are in constant search for the best option for them in order to achieve their goal, even if it implies travelling to the other side of the globe, circumventing homeland's restrictions or natural biological barriers. This phenomenon highlights once again how different the states are and how national policies are capable of influencing people's lives.

This research report will focus on mainly two aspects: firstly, on presenting the particularities of the national laws on assisted reproduction of four representative EU countries, namely Germany, Austria, Italy and France, which are considered to have in place rather strict regulations and, secondly, on comparing the regulations in the most popular non-EU countries of destination. Alongside, there will be explanations about how the restrictions could boost the fertility tourism industry and why one would prefer to undergo treatment outside the European Union.

II. Current situation

First of all, the main laws on medical assisted reproduction (hereinafter MAR) are: Embryo Protection Act 1990 (Germany), Law 275/1992 (with changes) (Austria), Law 40/2004 (Italy), Law 1017/2021 (France).

a) Beneficiaries[1]

When tackling a complex issue, the starting point should be the basic question "who?", namely who is entitled to have access to MAR in each of the countries subject of this analysis. In this regard, there are three main aspects to be taken into consideration: the marital status, the gender and the age of the prospective parent/-s. The most permissive laws are in Austria and France. In Austria, the beneficiaries of fertility treatment can be both heterosexual and lesbian couples, the latter under the condition of living in civil partnerships and excepting IVF/ICSI with donated embryos. The minimum age limit for both women and men is 18 years and for women there is an undefined maximum age criterion, referred as "natural cycle available". Alongside is France, which adopted recently a new MAR-related law which legalizes the fertility treatments for all women under the age of 45 - lesbian, single or in a heterosexual relationship.[2] This major change comes after almost two years of lively debate on the matter.[3]

At the opposite pole stands Germany, which grants access to MAR only to those heterosexual

[1] Calhaz-Jorge C, De Geyter C, Kupka MS, Wyns C, Mocanu E, Motrenko T, Scaravelli G, Smeenk J, Vidakovic S, Goossens V. Survey on ART and IUI: legislation, regulation, funding and registries in European countries. The European IVF-monitoring Consortium (EIM) for the European Society of Human Reproduction and Embryology (ESHRE). Hum Reprod Open 2020, 2020: hoz044, https://doi.org/10.1093/hropen/hoz044, Table I.

[2] 45 years is the limit for the woman, unmarried or within the couple, who is intended to carry the child. For the other member of the couple the age limit is 60 years. See: Decreet n° 2021-1243 from 28 September 2021

[3] BBC News. French lesbians and single women to get IVF rights [online] 29.6.2021, URL: French lesbians and single women to get IVF rights - BBC News [accessed: 14.7.2021].

couples which are married. With regard to the same-sex couples there is a legal vacuum, as no regulation covers this aspect, although same-sex marriage is legal. In Italy, only heterosexual couples have access to fertility treatments, irrespectively of their marital status. The rule is that fertility procedures can be performed only for those patients which present a "Certificate of Infertility". This can only be obtained after a specialist has assessed the patient's physiological and psychological health status and confirmed that the nature of the infertility cannot be remedied by other therapeutic means, but, as an exception, also fertile couples who carry a transmissible genetic disease are entitled to have access to MAR. Moreover, the Italian law imposes an age limit for women, namely the maximum age is 46 years (except from one region which allows ART up to 50 years). In this country, access for single women and same-sex couples is explicitly forbidden.

According to a 2009 study,[4] over 70% of the people from Italy and Germany, who are seeking cross-border reproductive care, are married couples. In France, the situation is slightly different: half of the fertility tourism patients are cohabiting partners, whereas almost 40% of them are homo-/bisexual. The destination countries that are at the top of the preferences list are Spain, Czech Republic, Belgium, Greece, but also Cyprus, Ukraine and Russia.

b) Reimbursement of costs

Being legally entitled to access fertility treatments is not sufficient, unless there is also some state support regarding the costs of such procedures, as they can get very pricey and can be, therefore, an additional burden for the intended parents, let alone the emotional rollercoaster that artificial conception implies.

The most supportive policy is conducted by France, as fertility treatments are fully funded. The public funding is not combined with a clinical policy and does not depend on a success rate. Moreover, all ART (assisted reproductive technology) techniques are publicly funded, including fertility preservation[5] and donation. However, there are some limits that constrain the number of people that are eligible. Firstly, the law imposes a maximum age limit both for men – undefined, `reproductive age`- and for women - defined, 43 years. Secondly, the state covers only a limited number of treatments, namely 6 intrauterine inseminations (IUI) and 4 in vitro fertilizations with embryo transfer (IVF-ET) per couple. Additionally, if the first treatment is a success, then there are 4 more cycles publicly funded for a second child.[6]

It is worth mentioning that health insurance will reimburse treatment received abroad depending on the person requesting fulfilling three conditions: he/ she meets the eligibility criteria in France, that treatment is not delivered in France with the same level of success and the treatment is appropriate for his/ her condition.[7]

In Germany, the state supports at least 50 percent of the treatment and drug costs for a total of: eight cycles of insemination in spontaneous cycles, three cycles of insemination with hormonal stimulation and three cycles of an

[4] Shenfield F, De Mouzon J, Pennings G, Ferraretti AP, Nyboe Andersen A, De Wert G, Goossens V. Cross Border Reproductive Care in Six European Countries. Hum Reprod (Oxford, England) 2010, 25: 1361-8. https://doi.org/10.1093/humrep/deq057, Table III.

[5] However, self-preservation storage costs are to be borne by the person. For explanation see: Supiot E. Loi de bioéthique: les grandes lignes d'une réforme attendue. Dalloz [online] 7.9.2021, URL: Loi de bioéthique : les grandes lignes d'une réforme attendue - Famille - Personne | Dalloz Actualité (dalloz-actualite.fr) [accessed: 7.12.2021].

[6] Calhaz-Jorge C et al, *op. cit.*.

[7] ESCHRE. A policy audit on fertility: Analysis of 9 EU countries, 2017: 22.

IVF/ICSI treatment.[8] Additional, some federal states, such as North-Rheine Westphalia, Saxony or Thuringia, contribute with up to 25 percent of the remaining private costs. Anyhow, same sex couples and single women are not eligible for reimbursement. Since 2016, non-married couples can receive up to 12.5% reimbursement from federal and state governments for their private contributions for their first 3 attempts and up to 25% for their 4th attempt, depending on co-participation at federal level. However, this is only possible in 6 out of 16 federal states currently.[9] Health insurance companies may not reimburse non-married couples, according to a judgment by the Federal Social Court in November 2014.[10] However, for couples to qualify for coverage they must fulfil also specific age criteria: both women and men should be at least 25 years old, respectively women cannot be older than 40 and men than 50 years. If a child is born due to treatment, there is a new claim to all services.

It is crucial that the principle person applies, namely a health insurance company reimburses only those costs that arise for the treatment of its insured member. Nevertheless, cryopreservation of fertilised ova, sperm, or testicular tissue is not a service covered by statutory health insurance companies, nor are the treatment costs of heterologous treatment with donor semen (this ones not even by private health insurance). The heterologous treatment with donated ova is forbidden by the Embryo Protection Act (ESchG), so, logically, no such procedure can be reimbursed.

On the other hand, private insurance provides full coverage if there is at least 15% chance of success of the treatment, then the costs will be fully reimbursed no matter the number of attempts or the marital status.[11] It is based on the costs-by-cause principle or causation principle, which implies that in a couple the insurance of the person who is considered "responsible" for the fertility problems has to cover the full costs.[12]

Apart from the health insurance regulations, there are also tax laws and rulings of the Federal Finance Court that establish slightly different rules, taking into consideration the needs of a wider range of beneficiaries. Precisely, both married heterosexual couples and women in a same-sex partnership or even single are entitled to deduct the treatment's expenditures from their taxes as special expenses for 'extraordinary charges' in their income tax return.[13] This is to be explained through the fact that not the marital status of the person is relevant but her illness that needs to be cured. Moreover, even the costs for artificial reproduction procedures done abroad can be considered eligible reasons for the tax reduction,

[8] Dortmund Fertility Center. Billing and insurance. Available at: Billing and insurance - Kinderwunschzentrum [accessed: 25.11.2021].

[9] ESCHRE report, *op.cit*, p.27.

[10] *Ibidem.* See also: Deutsches IVF Register. Available at: https://www.deutsches-ivf-register.de/suche.php?kategorie=seite&suche=Bundessozialgericht [accessed: 25.11.2021].

[11] Dortmund Fertility Center, *op.cit.* .

[12] Trappe H. Assisted Reproductive Technologies in Germany: A Review of the Current Situation. In: Kreyenfeld M, Konietzka D (eds) Childlessness in Europe: Contexts, Causes, and Consequences. Demographic Research Monographs (A series of the Max Planck Institute for Demographic Research). Springer, 2017: 273.

[13] Germany: Court Rules Costs for In Vitro Fertilization of Infertile Woman in Same-Sex Partnership Are Tax-Deductible. 2018. Web Page. https://www.loc.gov/item/global-legal-monitor/2018-01-25/germany-court-rules-costs-for-in-vitro-fertilization-of-infertile-woman-in-same-sex-partnership-are-tax-deductible/ [accessed: 25.11.2021].

as long as the undergone procedure is legal in Germany as well.[14]

The Austrian public funding system covers up to 4 cycles per couple/ single women but only if there is a medical indication (bilateral tubal defect, endometriosis and/or polycystic ovary syndrome and/or male factor infertility). Moreover, patients are supported with 70% of the expenses, whereas the rest has to be paid on their own. Anyhow, there is also the age limit condition, namely 39 years for women and 49 years for men. In order to establish contracts with the public funding system, centres must have a minimum success rate of 23% per embryo transfer. Similarly to Germany, there is the possibility for tax deductions for expenses resulting from ART.[15]

Italy's MAR-related policy sets the following limits and conditions for benefitting from the public funding: women cannot be older than 46 years,[16] there is a limit of 3 IVF/ICSI cycles/ couple and obtaining „the certificate of infertility" is a prerequisite for accessing reimbursed treatment.[17] As a particularity, public funding is not combined with clinical policy and does not depend on a success rate. As well, there is the possibility for tax deductions for expenses resulting from ART (up to 19%).[18]

As of 2017, the national health system reimburses all ART techniques, as stated through "Livelli essenziali di assistenza" (LEA) - 'Essential levels of care'. However, with costs varying by region, a unique practice has immersed called *inter-regional health tourism*. Costs range from approximately 500-1500 EUR per cycle of treatment. Most regions cover the MAR expenses upon receipt of a co-payment fee, while a few regions, such as Lombardia, provide public treatments without a co-payment fee.[19]

Starting with 2016, a number of regions such as: Puglia, Sicily, Basilicata and Campania have exhausted their funds for MAR treatments, resulting in a discontinuation of services, leaving many to pay 100% of treatment costs out-of-pocket and fuelling even more the inter-regional migration phenomenon for medical purpose. As an additional consequence, the number of couples resorting to private providers is rising and therefore, proportionally, also the tariffs, which range from 3500-5500 EUR. A recent national survey estimates that approximately one third of couples choose private MAR centres.[20]

Overall, none of the countries cover the costs for PGT-M and PGT-A. Additionally, as presented in a 2009 survey[21], the reimbursement rate for fertility treatments done abroad was rather low: Italy- no reimbursement (74,9%), partial (10,7%), total (0,3%); Germany- no reimbursement (81,9%), partial (8,5%), total (2,3%); France- no reimbursement (77,6%), partial (12,2%), total (3,7%).

c) Anonymity[22]

Health issues usually are a private matter and the ones related to fertility are even more sensitive both for the intended parents and the prospective child. Therefore, anonymity of donors and recipients is an important aspect to be taken into consideration by the legislators when

[14] Wucherpfennig A. Dein Kinderwunsch: Finanzielle Unterstützung durch Staat & Länder. Fertilly [online] 23.9.2021, URL: Kinderwunschbehandlung: finanzielle Unterstützung Staat & Länder (fertilly.com) [accessed: 24.11.2021].

[15] Calhaz-Jorge C et al, *op.cit.*, p. 9-12.

[16] *Idem*, Table II; The authors mention that in one of the regions fertility procedures are permitted for women up until 50 years.

[17] ESCHRE report, *op. cit.*, p. 28-30.

[18] Calhaz-Jorge C et al, *op.cit.*, p. 12.

[19] ESCHRE report, *op. cit.*, p. 28-30.

[20] *Ibidem.*

[21] Shenfield F et al, *op. cit.*, Table VI.

[22] Calhaz-Jorge C et al, *op.cit.*, Supplementary table SII (Anonymity regimen in third-party donation).

regulating in this area. Although donors have no legal parental rights, nor obligations towards the offspring born through ART, knowing their identity, their social and medical background could be of use in the later life of the child. The clinch between the adult's need for privacy and secrecy, on the one hand, and the need of having an evidence of the medical history or simply the need of the child to discover his/ her biological roots, is the reason why the policies of states regarding this subject are split. Italy and France impose strict anonymity for third-party gametes donation and France as well as for embryos donations.[23] Though, strict anonymity applies in France only for donations made before September 2022, when the provisions of the new bioethics law will be completely applicable. Thus, the new system implies mandatory storage of donor's identifying and non-identifying data (age, physical traits, social status etc.) at the Agency for Biomedicine, information which could be accessed by the child born through ART after turning 18. Anyhow, already donated gametes can still be used and previous donors can retroactively consent to revealing their identity.[24] In Austria the situation is similar, the recipient and the donor do not know their respective identities, but the born children above 14 years of age have the possibility to access the donor's identity. However, Germany opted for strict anonymity for third-party embryos donation and a mixed system for third-party sperm donation, namely anonymous and non-anonymous. German couples can even bring their own donor.[25] Despite of a 2015 ruling of the German Federal Court, which stated that there is no age limit for children to access information about their biological descent under the condition of proving that the child asks for disclosure of the information and that the private life of the donor is taken into consideration,[26] the more recent Sperm Donor Registry Act adopted by the German Parliament in 2017 allows children born from 2018 onwards to access their donors' information once they reach 16 years of age. Parents may also claim this information on behalf of their children if they are less than 16. Registry data will be stored at the German Institute for Medical Documentation and Information (DIMDI) in Cologne for 110 years, after which it will be deleted.[27]

d) Gametes and embryos donation

Egg donation[28] is permitted in almost all countries subject of the analysis, except for Germany which explicitly forbids this procedure through the Embryo Protection Act. The other states allow oocytes donation but set specific age limits for donors, as well as a limited number of donations per person. Thus, the donors cannot be older than 37 years in France and 35 years in Austria and Italy, whereas the latter defines also a minimal age of 20 years. As for the number of infants that can be conceived using the gametes of the same donor, both France and Italy allow 10 successful treatments, whereas Austria only three. Moreover, only two donations per person are permitted in France.

Unlike egg donation, sperm donation[29] is legal in all four countries. The maximal age for

[23] Embryo donation is prohibited in Italy.
[24] Supiot E. *op. cit.*.
[25] *Idem*, p. 9.
[26] Magaldi K. German Supreme Court Grants Children Of Sperm Donation To Learn Father's Identity At Any Time. Medical Daily [online] 30.1.2015. URL: German Supreme Court Grants Children Of Sperm Donation To Learn Father's Identity At Any Time (medicaldaily.com) [accessed: 27.11.2021].
[27] Griessner L. German Parliament passes the Sperm Donor Registry Act. BioNews [online] 30.5.2017, URL: German Parliament passes the Sperm Donor Registry Act - BioNews [accessed: 27.11.2021].
[28] Calhaz-Jorge C et al, *op.cit.*, Tabel III (Legal limits in third-party donations, where permitted).
[29] *Ibidem.*

donors is 40 years in Germany and Italy (but at least 18 years old), whereas France raises the bar at 45 years. Austria does not have any limitations in this regard. Additionally, Germany requires a written declaration of consent by the future parents and the sperm donor.[30] As for the number of infants that can be conceived using the sperm of the same donor, like in the case of oocytes donations, both France and Italy allow 10 successful treatments, whereas Austria only three.

Austria and Italy prohibit embryo donation, while in Germany and France it is allowed.[31]

e) Surrogacy

The surrogacy services are on the list of the most requested procedures among the couples which cannot conceive naturally, but also one of the most controversial solutions for the fertility issues. Anyhow, surrogacy is predominantly explicitly forbidden in most European countries and so is the case also for the states that are being analysed. Yet, it is of importance to know which legal status the child will have when coming back to the country of origin after the parents benefitted from surrogacy services abroad. In Germany, the birth certificate of the foreign country is not recognised and a new birth certificate has to be emitted by the embassy according to German law.[32] Austrian citizenship is to be acquired by children born abroad through surrogacy services only in exceptional situations, as stated in the Austrian Citizenship Act (par. 7 (3)). This is the case only if two conditions are met, namely if, according to the law of the country where the child was born, an Austrian citizen is the mother or the father of the child, and if the child would be stateless unless it acquired the Austrian citizenship in this manner at birth.[33] The Italian rules are even stricter, as creating, organising or even advertising surrogacy is regarded as a criminal offence. The parental orders obtained abroad by Italian intended parents are recognised by Italian authorities only rarely, when they comply with the 'public order',[34] whereas the chances are higher if there is a genetic linkage between the child born through surrogacy and the prospective parent. Howsoever, there is the alternative of 'adoption in peculiar cases'[35].[36] Finally, the French legislation prescribes that the parents have to request the transcription of the birth certificate emitted by the foreign authorities in the French Civil Registry, in order for the child to become a French citizen. Unfortunately, the practice is that such requests are often rejected or partially denied, whereby only the name of the biological parent appears. Anywise, despite of a favourable ruling of the Court of Cassation from 13.1.2021,[37] the new MAR law makes it clear that the reality of the filiation declared in the record must be assessed in the light of French law, which prohibits surrogate mother

[30] Trappe H, *op. cit.*, p. 272.

[31] Calhaz-Jorge C et al, *op.cit.*, Tabel I (Legislation on ART in European countries—third-party donation).

[32] Sukhanova A. Surrogacy in Germany. Pons Medical Research [online] 11.3.2019, URL: Surrogacy in Germany - Pons Medical Research .Programs overseas (surrogacybypons.com) [accessed: 27.11.2021].

[33] Palmer E. Austria: Reform of Citizenship Law. Library of congress [online] 13.8.2013, URL: Austria: Reform of Citizenship Law | Library of Congress (loc.gov) [accessed: 27.11.2021].

[34] Law 218/1995 Article 64 - 68 Letter g.

[35] Law 184/1983 Article 44 Letter d.

[36] Atkinson C, Dindo V. Surrogacy across international borders: England and Italy. Kingsley Napley Blog [online] 6.1.2021, URL: The legal position of international surrogacy in England and Italy and the recognition of foreign parental orders | Family Law Blog | Kingsley Napley [accessed: 27.11.2021]; see also: ochr.org. Associazione Luca Coscioni, Certi Diritti, CGIL Nuovi Diritti, Famiglie Arcobaleno, Science for Democracy. Surrogacy in Italy: Joint Submission. May 2019.

[37] Judgment No. 135 FS-D of the Court of Cassation, 13.1.2021.

agreements and which, apart from the exceptions that it determines, attaches maternal filiation to childbirth and does not allow, apart from adoption, the establishment of a double paternal filiation.[38] The situation is even more complicated if surrogacy is performed in a country where the *ius soli* principle is not applicable, as the stateless newborn can be legally brought back to France only if the parents apply for a consular pass.[39]

f) Cryopreservation[40]

Freezing and storing gametes and gonadal tissue for a later use is rather a sensitive subject which requires special measures that need to be followed thoroughly. Each country regulates slightly different the conditions under which cryopreservation can be performed. In Germany, Italy and France, cryopreservation of gametes and gonadal tissue for medical conditions, as well as non-medical oocyte freezing is performed. The first two have no specific legislation in place, whereas the new French bioethics law permits explicitly self-preservation as personal choice within a specific age limit.[41] With regard to embryo cryopreservation, it is not permitted in Italy, whereas in Germany it is allowed only at the two-pronuclear stage. Austria allows cryopreservation of gametes, gonadal tissue and embryos for medical conditions, but not non-medical oocyte freezing.

In this context, a follow up of the situation of transgender individuals becomes particularly important if they cryopreserved their genetic material before the operation. The collected data[42] show that Austria, France and Italy allow ART access to transgenders and even using previously cryopreserved gametes and/or gonadal tissue, but for the latter two states only after the person obtains a formal recognition upon completion of the transition and is part of a heterosexual couple at the moment of the treatment. However, Italy does not publically fund the procedure using cryopreserved material in this case. In spite of being legal to undergo a gender reassignment operation, Germany does not have in place a legislation regarding MAR for transgenders.

g) Post-mortem reproduction

Another procedure that arises interesting issues in practice is post-mortem reproduction. Although it is banned in all four countries, it can get problematic when one of its citizens chooses to have performed this procedure in another country where it is legal. Thus, national courts shed a light on this matter with extraneous elements. It becomes clear that the prior consent of the deceased (the usual hypothesis, the man) plays a crucial role when courts have to analyse whether to allow or not the gametes transfer to another country with the scope of posthumous reproduction. If the man explicitly gave his consent for using his sperm for conception after his death, the court could be more indulgent in its decision, but only if there is a consensus with the best interests of the (prospective) child.[43] Moreover, an aspect worth being noted is that courts have regarded gametes as a *'thing'* that

[38] Supiot E. *op. cit.*.

[39] Courduriès J. At the nation's doorstep: the fate of children in France born via surrogacy. Reproductive Biomedicine & Society Online 2018, 7: 47-54, https://doi.org/10.1016/j.rbms.2018.11.003 via https://www.sciencedirect.com/science/article/pii/S2405661818300443 .

[40] Calhaz-Jorge C et al, *op.cit.*, Supplementary Table SIII (Preservation of fertility potential).

[41] Vie publique. Loi du 2 août 2021 relative à la bioéthique [online] 29.9.2021, URL: Loi 2 août 2021 bioéthique, PMA | Vie publique.fr (vie-publique.fr) [accessed: 7.12.2021].

[42] *Idem*, Supplementary Table SV (Gender reassignment).

[43] Thomas V. Life after death: regulating posthumous reproduction. The Regulatory Institute's Blog [online] 17.4.2019, URL: Life after death: regulating posthumous reproduction - How to regulate? .

can be the object in a deposit contract or object of a rei vindicatio procedure.

Further, some representative cases will be presented, in order to better understand the view of the national instances towards this procedure and its cross-border implications.

g.1) In the case presented by Cordiano,[44] the question on which the Italian Supreme Court ruled with judgment no 13000 on 3 May 2019 arose from a case of post-mortem fertilization with the late husband's cryopreserved gametes, pursuant to Article 8 of Law 40/2004. In fact, the widow has resorted to post-mortem IVF in Spain and conceived this way the minor L., who was born in Italy. When the child's birth report was filed, the mother had requested the registration of the girl using the paternal surname, submitting her husband's consent both to medically assisted procreation and to post-mortem IVF.

Thus, the Italian Supreme Court had to decide which one of the two parallel systems for regulating filiation should be applicable in such a situation, namely the one prescribed by the Civil Code or the one by the Law 40/2004. More precisely, the options were the application of the paternity presumption, common for biological parenting, or the rules for assisted procreation (social parenting). The issue with applying the Civil Code's regime was that more than three hundred days had passed since the dissolution of the marriage and the birth of the child, which meant, according to the Italian law, that the offspring could not be considered as born within marriage anymore. Giving away the solution, the Italian Supreme Court ruled in favour of the application of the MAR law. Therefore, a new rule was established, namely that the consent of the husband or partner to a procreation technique, if not withdrawn, is an adequate basis to attribute to the child the legal status of legitimate or recognized child, even if the husband or partner has died and more than three hundred days have passed since his death.

As Cordiano translates the ruling, the reasoning behind was that "it is reasonable to conclude that, when the partner dies after giving his consent to assisted procreation and before the formation of the embryo with the previously cryopreserved seed, the child is to be considered born during the marriage of the couple. Therefore, although the requirement for the existence of all subjects at the time of fertilization of the ovule is lacking, once the birth has taken place, fatherhood must be attributed to the husband or partner who expressed his consent, thus setting in time his decision to assume parenthood."

g.2) A French case related to posthumous procreation was brought to the European Court of Human Rights.[45] The petitioner was a French citizen whose only son passed away in January 2017 because of a cancer that had been diagnosed in 2014. Previously, the son expressed his will to have his own children and took action towards reaching this aim, by depositing sperm to a French bank. After her son passed away, Ms. Petithory Lanzmann wanted to proceed to post-mortem insemination at an Israeli clinic and requested, therefore, the transfer. Her request was denied, a decision which she challenged in court. The administrative court of Paris rejected her petition, and she appealed to the Conseil

[44] Cordiano A. Post-Mortem Homologous Fertilization: Parental Patterns in the Dialectical Comparison Between the Constraints of Biology and Rules on Consent. The Italian Law Journal 2020, 1: 341-62.

[45] PETITHORY LANZMANN c. FRANCE (coe.int); for the explanation of the case in English: Boring N. France: European Court of Human Rights Upholds French Refusal to Transfer Deceased Man's Sperm Abroad for Medically Assisted Reproduction. Library of the Congress [online] 31.1.2020, URL: France: European Court of Human Rights Upholds French Refusal to Transfer Deceased Man's Sperm Abroad for Medically Assisted Reproduction | Global Legal Monitor (loc.gov) [accessed: 28.11.2021] .

d'Etat, France's supreme jurisdiction for issues of administrative law, but she was unsuccessful once again. Thus, Ms. Petithory Lanzmann petitioned the European Court of Human Rights on April 25, 2019 addressing a violation of article 8 of the Convention. In its decision, the European Court of Human Rights stated that neither prohibitions on post-mortem procreation, nor the refusal to authorize the export of gametes on behalf of a deceased person, are necessarily violations of article 8 of the Convention. Additionally, the Court ruled that the deceased son's right to decide when and how to become a parent is non-transferable, and therefore Ms. Petithory Lanzmann could not claim to be a victim of an article 8 violation on her son's behalf. Furthermore, the Court explicitly stated that even though the desire for genetic continuity was a respectable personal aspiration, article 8 of the Convention did not include a right to become a grandparent.

However, in an older case,[46] a French court accepted even a tacit consent of the deceased in the situation in which the man decided to store his semen after being informed that he suffered from cancer. Nevertheless, jurisprudence on allowing the export of cryopreserved gametes is not uniform.[47]

g.3) In a German case brought to the Neubrandenburg court,[48] the parties were arguing about the restitution of the claimant's cryopreserved egg cells, whose husband had deceased in the meantime. Still in his lifetime, the married couple had decided to undergo IVF and, therefore, the wife had several egg cells extracted at a fertility clinic (the defendant) in spring of 2008, which were injected with the man's sperm and stored for cryopreservation. In the summer of the same year, the man died unexpectedly, leaving the woman alone in pursuing their dream of having a child. After the death of her husband, the widow demanded implantation of the egg cells, but received a negative answer from the clinic. Consequently, the woman filed a complaint in order to claim the gametes. The case was unsuccessful at the first instance court, but succeeded in appeal. On 7th of May 2010 the Rostock Court sentenced the defendant, based upon the claim for restitution of property according to the German Civil Code (*rei vindicatio*), to hand over the egg cells. Eventually, the plaintiff collected the egg cells from the clinic and was able to store them in a Polish clinic.

h) Pre-implantation genetic testing (PGT)

As science evolves continuously, PGT procedures help to detect various genetic disorders of the prospective child from a young stage of development, preventing the baby and the mother from serious health harm. Though, because such techniques are more complex, they are permitted only under certain circumstances and they are predominantly only available for an additional cost. Polar body diagnosis and elective single embryo transfer (eSET) are legally permitted in Germany, but only within strict limits. The procedure in connection with IVF is permitted only in specially authorised centres, and only after the couple has filed an application which has been approved by an interdisciplinary ethics panel. To qualify for a PGT procedure, the couple must be able to show

[46] Eduardo D, Raposo VL. Legal aspects of post-mortem reproduction: a comparative perspective of French, Brazilian and Portuguese legal systems. Med Law 2012, 31(2):181-98. p. 186-189.

[47] Collard G, Streb B. "Post-mortem" reproduction at issue. Alliance Vita [online] 14.10.2016, URL: "Post-mortem" reproduction at issue - Alliance VITA [accessed: 28.11.2021].

[48] Krüger M. The prohibition of post-mortem-fertilization, legal situation in Germany and European Convention on human rights. Revue internationale de droit pénal 2011, 82: 41-64. https://doi.org/10.3917/ridp.821.0041.

that they carry a serious genetic disease, or that the woman is likely to die or miscarry if she becomes pregnant.[49] PGT-A (pre-implantation genetic testing for aneuploidy) is not permitted in Germany and France.[50] On the contrary, PGT-A is allowed in Italy and Austria (but only in specific cases - e.g. after three or more unsuccessful IVF cycles, after three miscarriages, or when there is an increased risk of a miscarriage or genetic disease due to the genetic predisposition of a parent).[51] PGT-M/SR (pre-implantation genetic testing for monogenic disorders/chromosome structural rearrangements) is not prohibited in any of the four countries, unlike embryo sex selection (except PGT-M for sex-linked diseases).[52]

III. Analysis

Having an overview regarding the current legislative position towards MAR, it will be analysed further how the existing rules impact the fertility tourism and what is the possible explanation for some of the states' regulation, referring to data collected in a 2009 survey[53].

Firstly, it is worth mentioning that the full extent of cross-border reproductive care in Europe is not precisely known because many national treatment registries do not record the patient's country of origin. In spite of that, it is estimated to around 5%. The survey analysed 1230 questionnaires that were submitted in 1 month, representing around 12 000–15 000 cycles. Starting with this information, one can approximate that there are about 24–30,000 cycles of cross border fertility treatments within Europe each year, involving 11–14,000 patients.

The predominant reason for opting for cross-border reproduction services is the legal aspect in the case of German (80,2%), Austrian, Italian (70,6%) and French (64,5%) citizens, as some important procedures are prohibited in their home country. 43,4% of the Germans in the survey have had a past failure before deciding to go abroad. Also the quality of the treatments abroad is a strong motive for choosing foreign clinics.

Concerning the beneficiaries, all four countries offer fertility treatments to heterosexual couples (married or not). For the other categories of people, only Austria and France make ART accessible also for lesbian women. Single women can treat their infertility issues only in France (after the recent legislative change).[54] Consequently, these restrictions do not let other option available for same-sex couples and single women than to seek solutions abroad. The age limit is as well contributing to limiting the access to MAR in Italy.

One of the biggest burdens of fertility treatments is the financial part, so, without consistent state support, accessing MAR is not even an option. On principle, Germany supports through public insurance half of the costs of the treatments (although not all kind of procedures), but is very restrictive regarding the beneficiaries imposing both marital status (only married couples) and age limit for males and females. This excludes once again an easy access for some people to MAR. Cohabiting couples are poorly funded, this being a possible reason to opt for treatments abroad, if they cannot afford the ones in Germany. Austria covers with one cycle more than Germany, whereas the private costs of

[49] Trappe H, *op. cit.*, p. 272.
[50] Calhaz-Jorge C et al, *op.cit.*, Supplementary Table SI (Legislation on ART in European countries – special cases).
[51] *Ibidem.*
[52] *Idem*, p. 3.
[53] Shenfield F et al, *op. cit.*

[54] Also clinics in Berlin perform infertility treatment for lesbians and single women are allowed to have infertility treatment. See: The Fertility Talk. Fertility Law: Germany [online] URL: Fertility Law: Germany — Untitled (thefertilitytalk.com) [accessed: 28.11.2021].

the patients are reduced to only 30%. In this country there is a maximum age limit for men and women only in order to benefit from the public funding. As Austria, Italy as well covers the costs only if there was issued a Certificate of Infertility. Although Italy is an active funder of fertility treatments, as some regions have exhausted their funds, the citizens who are left without any support, may consider going abroad for cheaper services. However, the age limit for women is higher in comparison to the other countries. France is fully funding fertility treatments setting the age limit for females only at 43 years. The age limitations can probably be justified by the fact that the state does not want to encourage elder women to undergo fertility treatment and, thus, to protect them from exposing themselves and the offspring to unnecessary risks. Moreover, this being also a kind of 'investment', younger women have higher chances of successful procreation.

Moreover, in these 4 countries compensation for gamete donation is usually low or inexistent (France). No commercial or industrial scope is permitted and, corroborating with the aforementioned idea, this combination is a possible inhibitor for gamete donation. In France there are lengthy waiting lists for oocyte donation in some regions of the country (2-5 years). Sperm donation is permitted in all four states. As in Germany egg donation is banned, it is obvious that many Germans would choose to cross borders exactly for this procedure.[55]

It is curious how sperm donation is allowed in Germany, but egg donation is not. The reasons, although not sufficiently convincing for those claiming this difference to be discriminatory, are the child's wellbeing and the mother's health. On the one hand, it is explained that the child born through such a procedure could face identity issues, as the social mother is not the genetic mother (*split motherhood*) and because it is hard to accept that there would be a physical contribution of two women at the birthing. Following this idea, it is surprising how come that embryo donation is allowed, the essential difference being that it is a last resort manner to save surplus embryos that would otherwise die. On the other hand, it is said that German legislators wanted to protect potential donors because a female donor would have to undergo a long hormone treatment and there are risks during the operation, which takes place under anesthesia, let alone the risk for the gestational women to be overwhelmed by the foreign DNA. However, critics explain that medicine evolved considerably and the risks are not that high anymore. This would be another argument why the 30-year old ESchG is out-dated. The Free Democratic Party (FPD) is a constant supporter of the legalisation of egg donation in Germany. Howsoever, it has not been scientifically proven that egg donation puts the child's wellbeing at a higher risk than is the case with sperm donation. But, due to the more invasive nature of ovarian hyperstimulation and follicular puncture, the health risks for the egg donor must be weighed up appropriately.[56]

[55] Bergmann S. Reproductive agency and projects: Germans searching for egg donation in Spain and the Czech Republic. Reproductive biomedicine online 2011, 23(5): 600–608. https://doi.org/10.1016/j.rbmo.2011.06.014.

[56] Schmidt F. German doctors want human egg donations to be legalized. DW [online] 4.6.2021, URL: German doctors want human egg donations to be legalized | Science | In-depth reporting on science and technology | DW | 04.06.2019 [accessed: 28.11.2021]; See also: Eizellenspende - erlaubt oder verboten? Gesetzliche Verbote und Lücken, Auswege im Ausland, Rechtsfolgen und Strafbarkeit. Rose&Partners [online] URL: Eizellenspende - erlaubt, verboten? Das ist die Rechtslage (rosepartner.de); Purrio L. Eizellspende: Darum sind Eizellenspenden in Deutschland verboten. Familie.de [online] 9.3.2020, URL: Darum sind Eizellenspenden in Deutschland verboten (familie.de).

Moreover, from a social science perspective, it was shown that ambiguity about the identity of the father of a child has long been tolerated, whereas uncertainty about the identity of a child's mother has not.[57] In addition, the ban intends also to hinder the commercialization of human egg donations.

When it comes to gametes and embryo donations, anonymity is an important factor for over 40% of the French people going abroad for MAR. The share is lower for Germany (25,4%) and Italy (14,1%). The result for France is somehow unexpected, taking into consideration that also the French law imposes strict anonymity (for the time being), so this condition would apply to procedures in their country as well (the result could be different considering the novel legislative change). In contrast, Germany changed its policy in 2015 and ruled that sperm donation should no longer be anonymous. Therefore, in case of Germany and Austria it would be more explicable why people would be motivated to cross the borders in order to benefit from completely anonymous services, without any possibility of disclosure of the donor's identity at a later time.

Because surrogacy is banned in all four countries, it is one of the most popular procedures when it comes to fertility tourism both for heterosexual infertile couples and homosexual couples that have no other alternative in their home country. Nevertheless, it is also one of the most problematic procedures from a legal point of view, raising issues regarding paternity, maternity, citizenship of the offspring etc.

Cryopreservation and pre-implantation genetic testing (PGT) are permitted under strict conditions which is a big step in the evolution of the legislations of these countries, but usually the costs of PGT have to be covered by the patients on their own and this may lead to accessing these kind of services in countries where they are more affordable, but equally qualitative.

IV. Comparison between the regulations of preferred non-EU countries of destination[58]

Non-EU countries do not follow the EU Tissue and Cell Directive and GDPR, but lower costs of services abroad are an incentive, as is the opportunity to bypass either a service waiting list or a domestic legal impediment to service. Examples of such countries are USA, Russia, Ukraine, Barbados, Thailand, India or Mexico. Additionally, many of the popular non-EU fertility tourism destinations have regulations in place, qualitative services and state-authorised clinics with a large range of treatments that can be provided, in contrast to EU countries (e.g. surrogacy, larger limits/ no limits for gametes storage). These clinics have lower costs, but the same high-quality services. Actually, the strongest argument which is advertised by almost all clinics abroad is the one concerning the costs, pointing out the low prices in comparison to other preferred reproductive care destinations (most-mentioned: USA), anyway, not neglecting expertise in favour of affordability. In terms of traceability of donors, few of these countries have a registry. Most Europeans decide to try fertility treatments abroad after having had unsuccessful experiences in their home countries.

Consequently, what all preferred countries have in common are more liberal MAR regulations, allowing different procedures that are not performed in most European countries (like sex-selection,[59] surrogacy,[60] post-mortem

[57] Trappe H, *op. cit.*, p. 272.

[58] The comparison is based on the information found on https://www.fertilityclinicsabroad.com/.

[59] E.g. Barbados (for medical reasons), SUA, Mexico.

insemination[61] etc.). However, Turkey derogates from this rule, having a restrictive legislation (third-party gametes and embryo donations are prohibited, as well as surrogacy), but offering instead high quality healthcare facilities at half of the price in UK, for instance.[62] All in all, international clinics provide high levels of treatment and customer care. Fertility clinics abroad offer various additional services such as transfers to and from the airport, online/skype consultations, travel and accommodation, bespoke personal services and so on.

A further advantage of non-EU fertility tourism destinations is that a bigger circle of people have access to MAR. Ukraine and Russia can be the last hope of having a child for the parents over 50 years. Lesbian couples and single women often choose USA, Barbados, Russia, Ukraine or Mexico. In addition, prospective parents have the right to select the donor in some non-EU countries, like USA, Russia or Barbados. They offer a lot more information about the donor than anywhere else, such as physical appearance, family history, religion, social status, hobbies etc. Moreover, the large range of donor's races available abroad could attract people to have fertility treatments outside their home country. For example, in Russia, Ukraine and Georgia the donors are mostly of Caucasian origin or of Indian descent in India, whereas African-American, or Afro-Caribbean donors are most often available in the USA or Barbados. This mix of cultures could be an advantage or a disadvantage depending on what the intended parents are looking for. Most fertility tourism destinations have a significant number of gametes donations also because they offer compensation to the donors.[63]

The costs are a very important factor in decision making process of crossing the border for fertility treatment or not. Most non-EU states have lower costs but the same rate of success and same quality of the care. Nevertheless, USA is an exception because it is still an appealing option for many Europeans, despite being the most expensive country in terms of fertility treatment packages. A possible explanation could be the permissive laws it has on egg donation, same-sex couples' access and because of the amount of information it offers about the donors.[64]

The movement of people in search of better or more accessible infertility treatments is not a phenomenon without consequence. The bright side is that the countries of destination get more visibility from the world (e.g. Georgia) and most of them benefit from a significant economic development (e.g. India), both by paving the way to a new fruitful business area and by boosting the tourism in their country, as many patients choose to combine treatment with vacation. The downside of this is that popular destinations tend to get too busy, resulting in shortage of donor gametes, available surrogate mothers or even exploitation of donors or trafficking of ova and sperm in order to keep up with the high demand. Thus, unfortunate experiences with international patients, like the *"baby Gammy"* case in Thailand[65] or exploitation of surrogate mothers

[60] E.g. India (is the world champion in providing commercial ART), Ukraine, Russia (including commercial surrogacy), USA, Mexico (including commercial surrogacy), Georgia.

[61] E.g. Israel, India.

[62] Fertility Clinics Abroad. IVF Turkey [online] URL: IVF Turkey | Fertility Treatment in Turkey | IVF Laws (fertilityclinicsabroad.com) [accessed: 28.11.2021].

[63] The compensation in Ukraine is about 250€; egg donors in Russia receive compensation between 1,200-1,500 Euros; US donors may get between 6,000$ to 18,000$ compensation for egg donation.

[64] Some registries store even pictures and recordings with the voice of the donor.

[65] "Baby Gammy" was one of the twins conceived by an Australian couple with the help of a surrogate in Thailand. Because the baby was diagnosed with Down's syndrome,

in India[66], forced the states to restrict the access to selected procedures for foreigners.

V. Conclusion

In the light of the aforementioned aspects, it is obvious that fertility tourism has an even bigger breadth than one can imagine. It is difficult harmonize the needs of the intended parents, their financial possibilities, ethical values, the rights of the offspring, the state's perspective on demography and many more colliding interests. That is why professionals in the domain of medicine, law, bioethics, national policy, sociology etc. should pay more attention to this phenomenon and work together towards creating a strong policy on fertility issues. An interesting opinion on the topic was highlighted by another author, which summarizes the challenges of fertility tourism: "Indeed 'at present, the movements by patients to other countries can be seen as a form of civil disobedience, which intends to change the existing legislation' but which also 'may have the opposite effect: politicians may accept the movements of some citizens to clinics abroad as a safety valve which decreases the pressure for law reform internally."[67] All in all, as seen in this analysis, national MAR legislators have been very active in recent years and the trend is to loosen the restrictions. Nevertheless, this is an ongoing improvement process and taking into consideration the differences that exist between countries (from vast MAR regulations to almost non-existing), drafting a uniform regulation at European or international level would be a real challenge both writing- and implementation-wise.

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2. BBC News. French lesbians and single women to get IVF rights [online] 29.6.2021, URL: French lesbians and single women to get IVF rights - BBC News [accessed: 14.7.2021].

the couple rejected the baby and took only his healthy sister back to Australia. The "international outcry" determined the subsequent changes in Thai surrogacy. Although the intended parents had supposedly asked the surrogate to abort Gammy, she had refused, invoking her Buddhist antiabortion beliefs. Moreover, investigations have revealed that the father was actually a child abuser, having been in prison for several years for this crime. Nevertheless, the Australian judge which analysed the case, decided that the baby was in fact not abandoned, but the surrogate mother got attached to the children she carried and would not want to give them anymore. Additionally, in regard with the request of the surrogate mother to be given the girl back (after finding out that the father is a sex offender), it was rejected, explaining that there was a "low risk of him abusing the girl"; See: BBC News [online] 20.2.2015, URL: Thailand bans commercial surrogacy for foreigners - BBC News [accessed: 29.11.2021]; ABC.net News [online] 14.4.2016, URL: Baby Gammy: Surrogacy row family cleared of abandoning child with Down syndrome in Thailand - ABC News [accessed: 29.11.2021]; BBC News [online] 14.4.2016, URL: Australian couple 'did not reject Down's baby' Gammy - BBC News [accessed: 29.11.2021].

[66] India has closed its borders to international patients in 2015, except those of Indian descent. Being a poor country, there is often the case that women consider being a surrogate mother not by will, but by necessity; Jackson E, Millbank J, Karpin I, Stuhmcke A. Learning from Cross-Border Reproduction. Medical law review 2017, 25(1): 23–46. https://doi.org/10.1093/medlaw/fww045 .

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