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Available online at <https://ejournals.lib.auth.gr/projustitia>**Regulating Surrogacy: Chances and Pitfalls**

Eleni Zervogianni*

*Assistant Professor of Civil Law,
Faculty of Law of Aristotle University of Thessaloniki***Abstract**

Surrogacy raises admittedly a series of concerns, but it is also a reality and, as long as there are persons who cannot have children in a different way, this will not change. Its prohibition at a global level is both unfeasible and unenforceable, while its non-regulation reads to legal uncertainty. Pragmatic considerations call for the regulation of surrogacy; not because pragmatism overrides ethics, but because a good regulation, one that balances the interests of all parties involved, not only on paper but also in practice, can successfully address most of the concerns about surrogacy. In 2002 Greece was the first European country to introduce a comprehensive regulatory scheme for surrogacy, followed by Cyprus in 2015 and Portugal in 2016.

Drawing mainly on these jurisdictions, the aim of this paper is to shed light into the alternative patterns of regulation of surrogacy and point out the chances and pitfalls of such an endeavour. I argue that the main points around which a surrogacy regulation should revolve are: allow for gestational surrogacy only; set eligibility criteria for both the intended parents and the surrogate; provide for monitoring mechanisms that oversee the whole process; establish legal parenthood of the intended parents already at birth. To ensure the success of the regulation, the lawmaker should stay clear of too restrictive or practicably unenforceable rules.

* Assistant Professor of Civil Law, Faculty of Law, Aristotle University of Thessaloniki. Greece. I would kindly like to thank all the participants of the conference on “Law and Practice of Surrogacy”, organized jointly by the Academy of European Law (ERA) and the Cambridge Family Law Centre, in Cambridge, June 25-26, 2018, for their fruitful comments.

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A. INTRODUCTION: WHY ADOPT A REGULATORY SCHEME?

I. Surrogacy as a controversial issue

Surrogacy is admittedly one of the most controversial forms of medically assisted reproduction. The concerns are numerous and vary from ethical objections to the use of a person as a means rather than as an end in itself and to the commodification of reproduction, to policy considerations on the protection of the vulnerable from exploitation and to difficulties of a psychological, or even practical, nature regarding the surrogate's obligation to hand over the child.¹

These concerns have led many countries to prohibit surrogacy. This choice though has given rise, inevitably, to fertility tourism, which in turn raises intractable problems of private international law.² Other jurisdictions, often on the basis of the very same concerns, refrain from the regulation of the issue and adopt a neutral stance.³ This, however, places the legal system equally under strain. Courts have shown creativity,⁴ but this is not always enough to tackle typical problems that may arise. What if the surrogate does not hand over the child to the intended parents? What if the intended parents no longer wish to take over the child? Such issues cannot be effectively regulated contractually, given that in most countries the provisions on descent and adoption consist of mandatory rules.

The case law of European Court of Human Rights makes one thing clear: the best interests of the children born from surrogates are always to be safeguarded. This may call for the recognition of the intended parents as legal parents of the child, at least if there exist genetic bonds.⁵ Apart from that, no agreement

¹ For a concise presentation of these concerns see L. Brunet/J. Carruthers/K. Davaki/D. King/C. Marzo/C. McCandless, A Comparative Study on the Regime of Surrogacy in EU States, Project Report. European Parliament Directorate General for Internal Policies, 2013, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf), pp. 22 ff. See also the (English) Report of the Committee on Inquiry into Human Fertilization and Embryology (Warnock report) 1984 (available at: http://www.bioeticacs.org/iceb/documentos/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf), paras. 8.10-8.12.

² This is the case e.g. in France and in Germany. See, among others, L. Perrreau-Saussine/N. Sauvage, 'France', in K. Trimmings/P. Beaumont (eds.), *International Surrogacy Arrangements*, Hart Publishing, Oxford 2013, p. 119 ff, and S.L. Gössl, 'Germany', *ibid.*, p. 131 ff.; T. Helms, *Künstliche Fortpflanzung und Internationales Privatrecht*, in in Dutta/D. Schwab/P. Gottwald/D. Henrich/M. Löhnig (eds.), *Künstliche Fortpflanzung und Europäisches Familienrecht*, Gieseking Verlag, Bielefeld 2015, pp. 59 ff.; K. Trimmings/P. Beaumont, *Parentage and surrogacy in a European perspective*, in J.M.Scherpe, *European Family Law*, Vol. 3. *Family Law in a European Perspective*, Edward Elgar, Cheltenham 2016, pp. 232 ff, at 271. See also see HCCJ, A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, Prel. Doc. n. 10, March 2012, esp. paras. 31 ff.

³ This is the case e.g. in Belgium and in the Netherlands. See G. Verschelden/J. Verhellen, 'Belgium', in K. Trimmings/P. Beaumont, fn. 2, pp. 49 ff.; W. Pintens, *Künstliche Fortpflanzung im belgischen und französischen Recht*, in Dutta/D. Schwab/P. Gottwald/D. Henrich/M. Löhnig, fn. 2, pp. 105 ff. at 121 and 125; I. Curry-Sumner/M. Vonk, in K. Trimmings/P. Beaumont, fn. 2, 'The Netherlands', pp. 273 ff.; P.M. Reuß, *Künstliche Fortpflanzung im niederländischen Recht*, in Dutta/D. Schwab/P. Gottwald/D. Henrich/M. Löhnig, fn. 2, pp. 127 ff. at 134 ff.

⁴ See W. Pintens, fn. 3 and P.M. Reuß, fn. 3; K. Trimmings/P. Beaumont, fn. 5, p. 270.

⁵ See the decision of the ECtHR of 26.6.2014 in *Mennesson v. France* and *Labassee v. France*, para. 100. The ECtHR followed the same line of argumentation in the judgments *Foulon v. France* and *Bouvet v. France* of 21.7.2016 as well as in *Laborie v. France* of 19.1.2017. Cf. *Paradiso and Campanelli v. Italy*, where no such biological bonds existed between the intended parents and the child. An explicit ruling on this issue is expected in the pending cases *Saenz and Saenz-Cortes v. France* and *Braun v. France*. See on this issue, however, the critical approach of C. Fenton-Glynn, *International Surrogacy before the European Court of Human Rights*, *Journal of Private International Law* 13 (2017), pp. 546-567.

seems to exist at an international and supra national level.⁶ In December 2015 the European Parliament in its Resolution “on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union’s Policy on the Matter” condemned (for profit) surrogacy.⁷ Less than a year later, the Parliamentary Assembly of the Council of Europe rejected, in a close vote, the draft Recommendation of the Committee on Social Affairs, Health and Sustainable Development on “Children’s rights related to surrogacy”,⁸ that suggested to “*consider the desirability and feasibility of drawing up European guidelines to safeguard children’s and women’s right in relation to surrogacy*”.⁹ Most recently, the Report of the UN Special Rapporteur 2018 “on the Sale and Sexual Exploitation of Children”, in effect draws parallels between surrogacy and the sale of children.¹⁰

II. The path to pragmatism

A market for surrogacy does exist and there are no reasons to believe this will stop being the case any time soon. A prohibition of surrogacy on a global level is both unfeasible and unenforceable. There can further be little doubt that a regulated market is preferable to a black market. Thus pragmatic considerations call for a comprehensive regulation of surrogacy, balancing the interest of all parties involved and especially safeguarding the interests of the surrogates and of the children born through surrogacy.

Drawn by such pragmatic concerns,¹¹ England was the first European country to introduce provisions on surrogacy, but the regulatory framework, which is currently under revision,¹² is far from comprehensive. It effectively permits altruistic surrogacy but does not set forth its conditions.¹³ What is closer regulated is the transfer of legal parenthood to the intended parents after the child has been born.¹⁴

The first EU country to introduce a comprehensive regulatory framework on surrogacy was, surprisingly enough, Greece. Notwithstanding remote reactions from the church, in December 2002, the Greek Parliament, voted unanimously for the Bill on Medically Assisted Reproduction that among others, regulated altruistic gestational surrogacy.¹⁵ As stated in the Explanatory Memorandum of the law, the

⁶ See also L. Brunet/J. Carruthers/K. Davaki/D. King/C. Marzo/C. McCandless, fn. 1, pp. 194 ff.

⁷ Resolution of 17.12.2015, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0344+0+DOC+PDF+V0//EN>, para. 114.

⁸ Doc 14140 available at <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnVvZD0yMzAxNSZsYW5nPUV0&xsl=aHR0cDovL3NibWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJIZi1XRC1BVCIYTUwYUERGlnhzbA==&xsltparams=ZmlsZWlkPTIzMDE1>.

⁹ Vote of 11.10.2016 (83 against - 77 in favour). The sentence quoted is as amended by the first amendment and sub-amendment. The initial version of the first amendment also condemned all forms of surrogacy. See <http://assembly.coe.int/nw/xml/XRef/Xref-AMDetails-EN.asp?FileID=23015&amid=23088&lang=EN>.

¹⁰ A/HRC/37/60 of 15.1.2018, esp. paras. 22 ff. and 41 ff.

¹¹ See esp. paras. 8.18-8.20 of the Warnock report 1984.

¹² The revision of the law on surrogacy has been included in the 13th Programme consultation. See <https://www.lawcom.gov.uk/surrogacy>.

¹³ See section 2 of Surrogacy Arrangements Act 1985 (c. 49), as amended by the Human Fertilisation and Embryology Act 2008.

¹⁴ See esp. section 54 of the Human Fertilisation and Embryology Act 2008 (c. 22) as well as the Embryology (Parental Orders) Regulations 2010 (SI 2010/985).

¹⁵ Law 3089/2002 on Medically Assisted Reproduction, Government Gazette, issue A, nr. 327 of 23 December 2002. Law 3089/2002 introduced a special chapter in the Greek Civil Code setting the conditions for medically assisted reproduction (Arts. 1455-1460 of the Greek Civil Code - hereinafter: GrCC), while it also amended accordingly the

regulation of surrogacy has been preferred to its prohibition, in the best interest of the children that would be born by surrogates anyway.¹⁶ Subsequent provisions complemented the relevant regulatory framework.¹⁷ On the basis of the number of court rulings that have authorized surrogacy procedures (as required by law in all cases of surrogacy)¹⁸ it is estimated that hundreds of children have been born by surrogates in the last 15 years, while there do not seem to exist many cases of surrogacy arrangements undertaken in other jurisdictions.¹⁹ The regulation is regarded as a success, social acceptance of surrogacy is high, and the main issue of controversy nowadays is whether single men should have access to it.²⁰

Few other jurisdictions in the EU have adopted a comprehensive regulatory scheme on surrogacy. In May 2015 Cyprus followed the example of Greece, but with more reluctant steps. The law provides that surrogacy procedures have to be authorized twice, by different bodies;²¹ its initial text has been already amended twice, while the provisions on surrogacy were suspended by law²² from December 2015²³ until September 2017.²⁴ Portugal followed the same road, but it has been a rocky one. After the President vetoed the initial version of the law, of May 2016, that permitted altruistic gestational surrogacy,²⁵ the Parliament voted a revised version in August 2016.²⁶ In July 2017 a Presidential Decree further concretized the

rules on maternal and paternal descent (Art 2 of Law 3089/2002 amended Arts. 1464, 1465, 1471, 1475, 1478 und 1479 GrCC).

¹⁶ See the Explanatory Memorandum of Law 3089/2002, available at www.hellenicparliament.gr/UserFiles/2f026f42-950c-4efc-b950-340c4fb76a24/i-human-eisig.pdf, point I 4 (p. 1).

¹⁷ Law 3305/2205 on Specific Issues of the Application of Medically Assisted Reproduction Methods, the Donation of Genetic Material and its Cryopreservation as well as on the Establishment and Operation of Medical Centres on Assisted Reproduction Government Gazette, issue A, nr. 17 of 27 January 2005; Code of Ethics of Medically Assisted Reproduction, Government Gazette issue B, nr. 293 of 7 February 2017.

¹⁸ See below section B V 1.

¹⁹ In published court decisions only one, very problematic, such case is documented. This is the decision 7013/2013 of the Single-member Court of First Instance of Thessaloniki, Efarmoges Astikou Dikaiou 2013, 337, commented by K. Pantelidou. In this, a woman, after the death of her son, commissioned two surrogates in Russia who, using the sperm of the deceased and their own ova, gave birth to four children in total. The intended mother (who was actually the genetic grandmother) then adopted the children and filed a request before a Greek court for the recognition of the relevant Russian court ruling. The Greek court denied the request on the grounds that the Russian judgment contravened the Greek *ordre public*. Indeed, the procedure followed in the case in question deviated considerably from basic principles of the Greek legislation on both surrogacy and for *post mortem* fertilization (for surrogacy see below; for *post mortem* fertilization see Art. 1457 GrCC).

²⁰ See in more detail below section B III 1 a i.

²¹ Law 69(I)/2015 on the Application of Medically Assisted Reproduction (Basic Law), Official Gazette nr. 4510 of 15 May 2015, was amended by Law 194(I)/2015, Official Gazette nr. 4545 of 17 December 2015 and Law 92(I)/2016 Official Gazette nr. 4573 of 29 July 2016. In what follows, reference is made to the revised version of the Basic Law, unless otherwise indicated.

²² See Art. 5 of Law 194(I)/2015 that amended Art. 53 of the Basic Law.

²³ A remarkable coincidence is that the Cypriot law that suspended the provisions on surrogacy was published in the Official Gazette on the very same day the European Parliament condemned surrogacy. See fn. 7 and 21.

²⁴ See Governmental Decision nr. 83.255 of 6 September 2017, published in the Official Gazette nr. 4548 of 15 September 2017.

²⁵ See, in English, <https://medicalxpress.com/news/2016-06-portuguese-vetos-surrogacy-law.html>.

²⁶ Law 25/2016, on the Regulation and Access to Surrogacy, Diário da República nr. 160/2016, series I of 22 August 2016 that amended Law 32/2006 on Medically Assisted Reproduction, Diário da República nr. 143/2006, series I of 26 July 2006. In what follows, reference is made to the revised version of Law 32/2006.

provisions of the law.²⁷ In April 2018, however, the Portuguese Constitutional Court declared some of the provisions unconstitutional.²⁸ In spite of the legal uncertainty that this brings about, it has been welcomed as good news in that the Constitutional Court accepted the permissibility of surrogacy in principle and declared unconstitutional only specific provisions.²⁹

The aim of this paper is to shed light into the alternative patterns of regulation of surrogacy, proceed to their evaluation and point out the chances and pitfalls of such an endeavor. The analysis draws mainly on the three aforementioned EU jurisdictions that have adopted a comprehensive regulation on surrogacy, i.e. Greece, Cyprus and Portugal.³⁰

B. MAPPING A COMPREHENSIVE REGULATORY SCHEME: A CRITICAL OVERVIEW OF THE ALTERNATIVES

I. General remarks

Once the lawmaker decides to regulate surrogacy, he/she has to confront two basic dilemmas: Altruistic or commercial surrogacy? Gestational or traditional surrogacy? These decisions set the main features of the surrogacy regime and are decisive for the conformation of the whole regulatory scheme. Hence their discussion precedes the rest of the analysis. I then identify the main areas of regulation within a comprehensive regulatory scheme on surrogacy as follows: The subjects of the procedure and the genetic material to be used, the agreement between the commissioning parents and the surrogate, the initiation of control mechanisms to ensure the regulation is correctly implemented, and the adoption of rules on the consequences of surrogacy, especially as to the legal parenthood of the children to be born. Given that surrogacy as a method of medically assisted reproduction also involves the performance of medical acts, the analysis would not be complete without a reference to the physician's obligation to inform the parties involved on the procedure. As in every comparative endeavour, it has not been possible to go into detail in all issues that arise, so I had to content myself with enough to paint the broader picture.

II. Types of surrogacy

1. Altruistic v. commercial surrogacy

Unlike commercial surrogacy, in altruistic surrogacy the surrogate does not receive remuneration for her services. All three EU jurisdictions with a comprehensive regulatory scheme on surrogacy opt for altruistic surrogacy³¹ and criminalize commercial surrogacy.³² Altruistic surrogacy could be somehow

²⁷ Regulatory Decree nr. 6/2017, Diário da República nr. 146/2017, Series I of 31 July 2017.

²⁸ Decision 225/2018 of 24 April 2018, Diário da República nr. 87/2018, Series I of 7 May 2018. See in more detail below, esp. sections B IV 2 and B VI.

²⁹ See T. Violante, (Not) striking down surrogate motherhood in Portugal, available at: <https://verfassungsblog.de/not-striking-down-surrogate-motherhood-in-portugal/>.

³⁰ Cypriot and Portuguese law have been taken into consideration to the extent possible, given that relevant literature on Cypriot law is scarce, while the same holds for Portuguese literature in English.

³¹ See for Greece Art. 1458 GrCC; for Cyprus see Art. 22 para. 1 of Law 69(I)/2015; for Portugal see Art. 8 para. 2 of Law 32/2006.

³² For Greece see Art. 26 para. 8 Law 3305/2005; for Cyprus see Art. 26 para. 6 of Law 69(I)/2015; for Portugal see Art. 39 of Law 32/2006. It is worth noting that the initial Greek draft of the Greek Law on Medically Assisted Reproduction did not explicitly prohibit commercial surrogacy. The relevant provision had been inserted during the discussions in the Parliament, while Law 3305/2005 criminalized it, almost two years after the initial regulation of surrogacy. Even so, though, there seemed to exist a consensus within the members of the Drafting Committee of the

safeguarded if surrogacy were permissible only in cases where the surrogate has been a close relative of the commissioning parents.³³ This possibility had been considered in Portugal, but did not prevail.³⁴ Indeed it would narrow down exceedingly the scope of application of the regulation.³⁵ Once the surrogate is not related to the intended parents, thorny issues arise as to her compensation.

All jurisdictions examined accept that within a regime of altruistic surrogacy there is room for compensation of the surrogate for any expenses she may incur.³⁶ This is evident as to her actual costs, such as medical or travel expenses. In an effort to preserve the altruistic character of surrogacy the Portuguese provisions are particularly strict on this point. The law explicitly states that only such expenses can be reimbursed, provided they are demonstrated by receipts, invoices or other relevant documents.³⁷

In Greece and Cyprus it is further accepted that the surrogate can be also compensated for her lost income during pregnancy and the first few weeks after birth, or even, in the case of Greece, for her hypothetical lost income, if she is currently unemployed.³⁸ The situation becomes thus more complex, since such provisions actually open the back door to commercial surrogacy.³⁹ In an effort to preserve the altruistic character of surrogacy, in Greece, the National Authority of Assisted Reproduction issued a decision according to which the amount granted to the surrogate as compensation cannot exceed 10.000 euros.⁴⁰ A

initial law, that commercial surrogacy contracts would be considered immoral and therefore void. See in more detail A. Hatzis, *From Soft to Hard Paternalism and Back: The Regulation of Surrogate Motherhood in Greece*, Portuguese Economic Journal 2009, 205-220, at 214-215.

³³ Such cases though (e.g. where a mother carries the baby for her daughter) may give rise to confusion and complications within the family. It is presumably on this basis that according to Israeli law it is prohibited for the surrogate to be related to the intended parents. See A. Benschushan/J.G. Schenker, *Legitimizing surrogacy in Israel*, Human Reproduction 1997, 1832-1834 at 1832; L. Ben-Nun, *Surrogate motherhood*, B. N. Publication House, Israel 2014, at 68.

³⁴ See V.L. Raposo, *The New Portuguese Law on Surrogacy - The Story of How a Promising Law does not Really Regulate Surrogacy Arrangements*, 21 JBRA Assisted Reproduction 2017, pp. 230-239, at 231.

³⁵ Greek statistics on surrogacy support this point. See P. Ravdas, 'Surrogate Motherhood in Greece: Statistical Data Derived from Court Decisions', *BIOETHICA* 2017/2, available online at: http://www.bioethics.gr/images/pdf/JOURNAL/BIOETHICA_Vol_3_Issue_2_FINAL.pdf, pp. 40-58 at 55, who notes that, from a total of 256 court rulings that authorized surrogacy in the years 2003-2016 and were assessed in this study, only in around 18% of the cases the intended mother and the surrogate were related.

³⁶ See also the definition of altruistic surrogacy in the Glossary annexed to the Preliminary Document 3b of the Hague Conference Project on Legal Parentage and Surrogacy of 2014 (Annex A), available at <https://assets.hcch.net/docs/6403eddb-3b47-4680-ba4a-3fe3e11c0557.pdf>, according to which altruistic surrogacy is "a surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her 'reasonable expenses' associated with the surrogacy". This definition is also shared by the UN Special Rapporteur in the 2018 Report, fn. 10, para. 39, that also adds that the expenses should be itemized.

³⁷ See Art. 8 para. 5 of Law 25/2016.

³⁸ For Greece see Art. 13 para. 4 of Law 3305/2005; for Cyprus see Art. 22 para. 6 of Law 69(I)/2015.

³⁹ As to the terminology, it is worth noting that the Glossary annexed to the Preliminary Document 3b of the HCCH Project on Legal Parentage and Surrogacy (fn. 36) has substituted the term 'commercial surrogacy' with the term 'for profit surrogacy'. As stated in the said document "it is often difficult to draw the line between what is an altruistic surrogacy arrangement and what is a for profit arrangement. For example, if a surrogate is unemployed prior to conception but can claim 'reasonable expenses', including loss of earnings, for the arrangement, is this arrangement still 'altruistic'?" This view is shared by the UN Special Rapporteur, fn. 10, para. 39, who also notes that the expensed should be itemized.

⁴⁰ See Art. 4 of the decision 36/2008 of the National Authority of Assisted Reproduction, Government Gazette, issue B, nr. 670 of 16 April 2008.

relevant decision is also awaited in Cyprus.⁴¹ In practice, though, there are sound reasons to believe that the amount actually paid to surrogates well exceeds the provision of the law.⁴² In Greece journalistic sources mention that the remuneration of surrogates is actually around 50.000 euros.⁴³ Such an agreement of the parties is undoubtedly void, but once the commissioning parents make the payment to the surrogate, usually in advance, they cannot claim it back, because the cause of the payment is considered immoral and the intended parents had their share in this immorality.⁴⁴

From a look into the Greek court rulings that authorize surrogacy, it can be seen that the commissioning parents often claim before the court that the surrogate is their “best friend”.⁴⁵ In many cases, though, this is doubtful. According to a recent empirical study on court rulings on surrogacy in around two thirds of the cases the surrogates are foreign nationals, especially eastern Europeans, who reside in Greece.⁴⁶ At the same time the courts do not exhibit any zeal in finding out the true nature of the relations of the parties of the agreement.⁴⁷

On this basis, in Greece the voices in favour of commercial surrogacy seem to become louder lately.⁴⁸ As it is convincingly stated, ethical arguments regarding the instrumentalization of the surrogate and psychological arguments referring to the bond between the surrogate and the child are equally valid against both altruistic and commercial surrogacy. If the lawmaker has overcome these issues and has decided to regulate surrogacy, there are no convincing arguments why this should be only in the altruistic form.⁴⁹ A surrogacy agreement does not become immoral just because a fee is granted to the surrogate for her services (not ‘for selling her child’).⁵⁰ In addition there can be little doubt that surrogates are less prone to exploitation when they are paid on a basis of a valid contract, controlled by a judge, rather than under the

⁴¹ Art. 22 para 7 α of Law 69 (I)/2015 provides that α maximum amount will be set by Ministerial Decree, after a proposal of the Cypriot Council of Medically Assisted Reproduction.

⁴² For Greece see on this issue Z. Papaligoura/D. Papadatou/T. Bellali, *Surrogacy: The Experience of Greek Commissioning Women, Women and Birth 2015*, 110-118 at 116.

⁴³ According to P. Tsimpoukis, *Surrogate Motherhood*, in the daily newspaper *Proto Thema* of 30.1.2016 (available at: <https://www.protothema.gr/greece/article/549154/sunehos-kerdizei-edafos-i-parentheti-mitrotita-stin-ellada/> - in Greek) the amount granted in Greece to the surrogate is between 50.000 and 70.000 Euros. According to the article of I. Fotiadi, ‘Greek Industry with surrogates’, in the daily newspaper *Kathimerini* of 13.04.2014 (available at: <http://www.kathimerini.gr/762582/article/epikairothta/ellada/ellhnikh-viomhchania-me-paren8etes-mhteres> - in Greek) this amount is between 20.000 and. 40.000 Euros.

⁴⁴ See Art. 907 GrCC.

⁴⁵ According to the study of P. Ravdas, fn. 35, p. 55 the intended mother and the surrogate claimed that they were best friends in almost 40% of the cases. These results are also confirmed by further relevant studies. See A. Hatzis, *The Regulation of Surrogate Motherhood in Greece, 2010*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689774, p. 11 as well as the study by Kokkinaki, referred to by D. Papadopoulou-Klamari, ‘Post Mortem Artificial Insemination and Surrogacy in Practice’ in *Assisted Reproduction in Europe: Social, Ethical and Legal Issues*, Sakkoulas, Athens/Thessaloniki 2015, pp. 117 ff. at 121 ff. (in Greek) at 123.

⁴⁶ See P. Ravdas, fn. 35, pp. 52 as well as A. Hatzis, fn. 45 and the study of Kokkinaki, referred to by D. Papadopoulou-Klamari, fn. 45.

⁴⁷ See also T. Vidalis, *Surrogacy “Tourism”*, pp. 113-118 (also available at <https://ejournals.lib.auth.gr/culres/article/download/4956/4921>) at 115.

⁴⁸ See esp. T. Vidalis, fn. 47, esp. at 117; A. Hatzis, fn. 32, at 216 ff.

⁴⁹ See T. Vidalis, fn. 47, at 116.

⁵⁰ See T. Vidalis fn. 47 at 117; A. Hatzis, fn. 32, at 209. Cf however, on this issue the report of the UN Special Rapporteur, fn. 10, para. 39 and 41 et seq., who nonetheless (in para. 72) acknowledges that commercial surrogacy does not necessarily amount to sale of children if it is properly regulated.

table. Finally, given the despair of the commissioning parents the surrogate is not necessarily the weak party of the agreement.⁵¹

2. Gestational v. traditional surrogacy

The difference between gestational and traditional surrogacy lies on the gametes used. If the embryo carried by the surrogate is genetically related to her, surrogacy is traditional,⁵² if not, gestational.⁵³ In medical terms, traditional surrogacy presents advantages over gestational surrogacy.⁵⁴ Ethically and also psychologically for the surrogate, however, the issues that arise in traditional surrogacy are clearly thornier, since the child to be born is also genetically the child of the surrogate.

While in certain jurisdictions, such as England and California,⁵⁵ traditional surrogacy is a legal option, all European jurisdictions with comprehensive regulation of surrogacy examined opt for gestational surrogacy.⁵⁶ This choice can be linked to the regulation of the legal consequences of surrogacy. Unlike England, where the intended parents become legal parents only once they acquire a parental order, with the consent of the surrogate, after the child has been born,⁵⁷ in Greece, Cyprus and Portugal, intended parents are the legal parents of the child already at birth.⁵⁸ Such a rule presents undeniable advantages⁵⁹ but can be indeed considered morally justifiable and psychologically bearable only when the surrogate provides no more than child-bearing services.⁶⁰ Along these lines, if the surrogate is the genetic mother of the child, the legal motherhood of the intended mother can be challenged, under Greek and Cypriot law, but no such provision exists in Portugal.⁶¹

III. The persons and the gametes

1. Subjects of the procedure

a. Commissioning parents

⁵¹ See T. Vidalis, fn. 47 at 117.

⁵² In traditional surrogacy natural conception is also possible. Such instances can be traced back to biblical times. See in brief on this issue HCCH, Preliminary Report, fn. 2, para. 4 fn. 17.

⁵³ See also the relevant definitions in the Glossary annexed to the Preliminary document 3b of 2014, fn. 36.

⁵⁴ See, among others, D. Beeson/A. Lippman, *Gestational Surrogacy: How safe?*, in M. Davies (ed.), *Babies for Sale. Transnational Surrogacy, Human Rights and the Politics of Reproduction*, Zed Books, London 2017, pp. 82-104, esp. at 83.

⁵⁵ For England see, instead of others, the information provided by the Human Fertilisation and Embryology Authority, at <https://www.hfea.gov.uk/treatments/explore-all-treatments/surrogacy/>. For California see among others D.M. Goodmann, *Parentage*, in T.B. Haet/J.E. Heywood, *Practice under the California Family Code*, CEB 2017, p. 414 as well as M. Kinley, *The Requirement for a Valid Surrogacy Parentage Contract in California*, available at <http://californiahealthcarelaw.com/?p=526>.

⁵⁶ For Greece see Art. 1458 sent. 1 GrCC; for Cyprus see Art. 22 para. 1 and 23 para. 1 of Law 69(I)/2015; for Portugal see Art. 8 para. 3 of Law 32/2006.

⁵⁷ See Art. 54 of the HFEA 2008.

⁵⁸ See in more detail below section B VI 1.

⁵⁹ *Ibid.*

⁶⁰ See on this issue in more detail T. Trokanas, *Human Reproduction. Private Autonomy and its Limits*, Sakkoulas, Athens/Thessaloniki 2011, pp. 372-373 (in Greek), with further references.

⁶¹ See in more detail below, section B VI 1.

i. Personal status of persons being granted access to surrogacy

All jurisdictions examined provide access to surrogacy to heterosexual couples, married or not, as well as to single women, although the latter is still rather unclear in Portugal.⁶² When it comes to same-sex couples, the regulation is generally less favourable. Both Greece and Cyprus finally recognized legally same-sex couples in 2015,⁶³ but did not grant them parental rights as a couple. In other words, Greek and Cypriot law does not accept the possibility of same sex parents.⁶⁴ In Portugal, on the other hand, same-sex couples have the right to marry since 2010 and can adopt children since 2016.⁶⁵ Female same-sex couples may also proceed to surrogacy unlike male same-sex couples or single men.⁶⁶

The question whether single men can proceed to surrogacy has been long debated in Greece, since the law does not explicitly regulate the issue.⁶⁷ In two cases of single men the courts approved surrogacy on the grounds of non-discrimination on the basis of sex.⁶⁸ This approach finds also strong support in the legal

⁶² For Greece see Art. 1458 GrCC, in combination with Art. 1456 GrCC; for Cyprus see Art. 22 of Law 69(I)/2015, interpreted in accordance to Art. 21 para. 5 of the same law, as amended by Art. 6 (b) Law 92(I)/2016. See on this issue T. Trokanas, *The Cypriot Law of Medically Assisted Reproduction*, Sakkoulas, Athens/Thessaloniki 2016, p. 131 (in Greek). In Portugal, Art. 6 of Law 32/2006 grants single women access to medically assisted reproduction, but the provisions on surrogacy (Art. 8 of the same law, as amended) refer only to couples. This is an issue of the interpretation of the law that has still not been answered by case law. See V.L. Raposo, fn. 34, at p. 231.

⁶³ See the Greek Law 4356/2015, Government Gazette, Issue A, nr. 181 of 24 December 2015, and the Cypriot Law 184(I)/2015, Official Gazette nr. 4543 of 9 December 2015 respectively, on registered partnerships.

⁶⁴ It is worth noting, though, that in Greece, according to Art. 8 para. 1 of Law 4538/2018 on Foster Care and Adoption, Government Gazette, issue A, nr. 85 of 16 May 2018, same-sex couples can act as foster parents. For Cyprus see T. Trokanas, fn. 62, pp. 84-85.

⁶⁵ See Laws 9/2010, Diário da República nr. 105/2010, Series I of 31 May 2010 and 2/2016 Diário da República nr. 41/2016, Series I of 29 February 2016 respectively.

⁶⁶ See V.L. Raposo, fn. 34, at 231.

⁶⁷ In the Explanatory Memorandum of Law 3089/2002, Point II 1 (p. 3) though, there is a relevant reference of the possibility of widowers to proceed to assisted reproduction through surrogacy, with the ova of their late wives, provided that the conditions for *post mortem* reproduction set by law are fulfilled. On these conditions, see Art. 1457 GrCC and in more detail in English see P. Agallopoulou, 'Assistant Reproductive Technology: Forcing a Rethink of Parenthood in Greek Law' in B. Feuillet-Liger, K. Orfali and T. Callus (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the World*, Bruylant, Brussels, 2014, pp. 116 ff. at 133-134.

⁶⁸ See decisions 2827/2008 of the Single-member Court of First Instance of Athens, *Chronika Idiotikou Dikaiou* 2009, 816 and 13707/2009 of the Single-member Court of First Instance of Thessaloniki, *Chronika Idiotikou Dikaiou* 2011, 267.

literature.⁶⁹ In one of these cases though, the States Attorney brought an appeal.⁷⁰ The Court of Appeals then quashed the decision of the Court of First Instance that had granted authorization to surrogacy arguing that the goal of the regulation of surrogacy is to redress medical problems that lead to the impossibility of pregnancy and not to override nature.⁷¹ According to the Court of Appeals, namely, since a man has neither ova nor a uterus, the reason he is unable to achieve a pregnancy does not constitute a medical problem. The afore-mentioned argument though does not really qualify as convincing, since also a single woman, who, according to the law, may commission a surrogate, if she is unable to bear a child herself, overrides nature to the extent that in such a procedure she is necessarily provided with the element she is missing due to her biology, namely with the sperm of a man.⁷² In Cyprus, the answer to the question is pretty straightforward; an amendment of the initial law in 2016 provided access to medically assisted reproduction to single persons, without differentiating on the basis of their sex. Hence there is now little doubt that single men are also granted access to surrogacy.⁷³

⁶⁹ See I. Spyridakis, *The New Regulation of Artificial Reproduction and Kinship*, Ant. N. Sakkoulas, Athens/Komotini 2003, p. 29 (in Greek); *idem*, *Family Law*, Ant. N. Sakkoulas, Athens/Komotini 2006, p. 414 (in Greek); T. Papachristou, 'Comment to the Decision 2827/2008 of the Single-member Court of First Instance of Athens', *Chronika Idiotikou Dikaiou* 2009, 818 (in Greek); N. Koumoutzis in Ap. Georgiades and M. Stathopoulos (eds.), *Commentary of the Civil Code*, Vol. VII, 2nd ed., P.N. Sakkoulas - Dikaio kai Oikonomia, Athens 2007, Art. 1457-1458 nr. 77 (in Greek); *idem*, 'The Artificial Reproduction of the Single Man', *Chronika Idiotikou Dikaiou* 2011, 316 ff. (in Greek); *idem*, 'The Artificial Reproduction of Single Persons and the European Convention on Human Rights' in *Assisted Reproduction and Alternative Forms of Family*, Sakkoulas, Athens/Thessaloniki 2014, pp. 25 ff., esp. p. 37 (in Greek); E. Kounougeri-Manoledaki, *Family Law*, 6th ed., Vol. II, Sakkoulas, Athens/Thessaloniki, 2016, pp. 57-58 (in Greek); *idem*, 'Medically Assisted Reproduction: Redefining the Notion of Family' in *Medically Assisted Human Reproduction. 10 Years Application of Law 3089/2002*, Sakkoulas, Athens/Thessaloniki 2013, pp. 35 ff. at 47-48 (in Greek); T. Trokanas, fn. 60, p. 222; V. Peraki, in Ap. Georgiades (ed.), *Brief Commentary of the Civil Code*, Vol. II, P.N. Sakkoulas – Dikaio kai Oikonomia, Athens 2013, Art. 1458 nr. 21; P. Agallopoulou, 'Surrogacy' in M. Kanellopoulou-Boti and F. Panagopoulou-Koutnatzi (eds.), *Medical Liability and Bioethics. Contemporary Approaches and Future Perspectives*, Paschalidis, Athens 2014, pp. 173 ff. at 180 (in Greek); cf. *Explanatory Memorandum of Law 3089/2002*, Point II 1 (p. 3); cf. also. I. Androulidaki-Dimitriadi, 'The Contract for Medically Assisted Reproduction' in *Essays in Honour of Apostolos S. Georgiades*, Vol. I, Ant. N. Sakkoulas, Athens/Komotini, pp. 27 ff. at 31-31 (in Greek). Contra: D. Papadopoulou-Klamari, *Kinship. Establishment, Registration, Protection*, Ant. N. Sakkoulas, Athens/Komotini 2010, pp. 220 ff, esp. at. 224 (in Greek); K. Pantelidou, 'Non-Discrimination and Medically Assisted Human Reproduction', in *Essays in Honour of Penelope Agallopoulou*, Vol. II, Ant. N. Sakkoulas, Athens/Komotini 2011, pp. 1095 ff., esp. at pp. 1099-1100 (in Greek); P. Nikolopoulos, 'Comment on the Decision 3357/2010 of the Athens Court of Appeals', *Nomiko Vima* 2012, 1440 (in Greek); A. Koutsouradis, 'Entwicklungen des griechischen Familien- und Erbrechts 2013-2014', *Zeitschrift für das gesamte Familienrecht* 2014, 1509 ff. at 1509.

⁷⁰ See Art. 761 of the Greek Code of Civil Procedure (hereinafter: GrCCP) according to which in non-adversarial proceedings the State Attorney of the Court of First Instance may appeal the decisions of the Court.

⁷¹ See decision 3357/2010 of the Athens Court of Appeals, *Nomiko Vima* 2012, 1437. See also the recent decision 8641/2017 of the Court of First Instance of Thessaloniki, published in *Efarmoges Astikou Dikaioi* 2017, 925, that followed the same argumentation and did not authorize surrogacy for a single man.

⁷² See esp. N. Koumoutzis, 'The Artificial Reproduction of Single Persons and the European Convention on Human Rights' in *Assisted Reproduction and Alternative Forms of Family*, Sakkoulas, Athens/Thessaloniki 2014, pp. 25 ff., esp. pp. 35-36 (in Greek).

⁷³ See fn. 62.

ii. Medical necessity of surrogacy and health screening

A common principle running through all three European jurisdictions with a comprehensive regulation on surrogacy is its subsidiary character: Surrogacy is an option only for persons who cannot have a child in the natural way, due to a medical condition, ruling thus out surrogacy for convenience.⁷⁴ While the Greek and Cypriot law do not further concretize the type of conditions that could lead to surrogacy,⁷⁵ the Portuguese provision seems more restrictive in that it specifically refers to women without uterus or with an injury or disease of the uterus that hinders pregnancy in an absolute and definite way, or in other clinical situations that justify surrogacy.⁷⁶

In addition to this, Cypriot law provides that the intended parents shall undergo a psychological testing.⁷⁷ Similarly in Portugal the National Council of Medically Assisted Reproduction may order such evaluation, if it is considered necessary.⁷⁸ In Greece no such provision exists, while part of the Greek literature confronts such provision with scepticism on the grounds that there is a thin line between a psychological evaluation and social control.⁷⁹

iii. Age

Following the general provisions on medically assisted reproduction, the age limit for such procedures is set by the age until which reproduction in the natural way would be possible. Greece and Cyprus set this limit for women, including intended mothers, at fifty years,⁸⁰ while no such limit is provided for men. Unlike Greek law, Cypriot law provides the possibility to women older than fifty to proceed to methods of medically assisted reproduction, including surrogacy, provided that the competent board grants them a special permission.⁸¹ Age restrictions mean to ensure the parents' capability to take good care of the child that will be born. This corresponds to the child's best interests, which according to the law are always to be taken into account.⁸² The recent experience with elderly parents in England, who had a child born by a surrogate, just to be taken away from social services a year later, justifies this approach.⁸³

⁷⁴ See for Greece Art. 1458 sent. 2 GrCC for surrogacy and Art. 1455 para. 1 sent. 1 GrCC for medically assisted reproduction in general; for Cyprus Art. 23 para. 3 (a) on surrogacy and Art. 16 para. 1 for medically assisted reproduction in general. For Portugal see Art. 8 para. 2 of Law 32/2006.

⁷⁵ This could be e.g. uterine anomalies of the intended mother or her suffering from a serious condition or disease which could be transmitted to the fetus, such as HIV. On this issue see Ap. Georgiades, Family Law, Sakkoulas, Athens/Thessaloniki, 2nd ed. 2017, § 25 nr. 23 (in Greek).

⁷⁶ See fn. 74.

⁷⁷ See Art. 23 para. 3 στ of Law 69(I)/2015. This condition is also provided in the Israeli regulation of surrogacy. See A. Benshushan/J.G. Schenker, fn. 33, p. 1833.

⁷⁸ See Art. 2 para. 9 of Regulatory Decree 6/2017.

⁷⁹ See T. Trokanas, fn. 62, at 139-140 with further references.

⁸⁰ See Art. 4 para. 1 of Law 3305/2005 for Greece and Art. 21 para. 2 of Law 69(I)/2015 for Cyprus.

⁸¹ See Art. 21 para. 2.

⁸² See Art. 1 para. 2 of Law 3305/2005 und also in detail A. Koutsouradis, 'Issues on Surrogacy, especially after the Law 3305/2005', Nomiko Vima 2006, 337 ff., esp. pp. 355 ff. (in Greek); T. Trokanas, 'The Application of Methods of Assisted Reproduction and the Best Interests of the Child Born' in T. Papachristou/E. Kounougeri-Manoledaki (eds.), Family Law in the 21st Century, Sakkoulas, Athens/Thessaloniki 2012, pp. 135 ff. (in Greek). Similarly for Cyprus see Art. 16 para. 5 of Law 69(I)/2015 and T. Trokanas, fn. 62, at 71-73.

⁸³ See <http://www.dailymail.co.uk/news/article-5670651/Britains-oldest-parents-using-surrogate-mother-child-taken-away-social-services.html>.

iv. Other criteria

In all jurisdictions under examination, the nationality of the commissioning parents is irrelevant. According to the law of Cyprus, though, the commissioning parents should be domiciled in Cyprus.⁸⁴ Moreover, Cypriot law provides an additional criterion for the eligibility of intended parents; they should not have been condemned for a sexual crime, such as child pornography, rape etc.⁸⁵

v. The profile of commissioning parents in Greece

Statistical information on surrogacy in Cyprus and Portugal do not exist yet, since the regulation on surrogacy entered into force just a couple of years ago (and in Cyprus it was suspended until September 2017). In Greece a particularly interesting study was performed on the basis 256 court decisions that granted authorization to surrogacy (as required by law in all cases of surrogacy)⁸⁶ in the years 2003-2016.⁸⁷ According to this study the mean age of intended mothers was 40 years old, more than 90% were married and more than 95% did not have children of their own.⁸⁸ Moreover, 82% of the intended mothers were Greek nationals. This can be explained by the fact that until July 2014 a condition for surrogacy in Greece was that both the surrogate and the intended parents were domiciled in Greece, discouraging thus fertility tourism.⁸⁹ The situation can be expected to change in the years to come. This tendency can be already seen from a small sample, namely from the decisions of the Court of First Instance of Thessaloniki in 2017, where 9 out of the 12 authorizations of surrogacy were granted to non-Greek nationals.⁹⁰

b. Surrogate

i. Eligibility criteria

The main criterion for the eligibility of the woman acting as a surrogate is that she is in the physical and psychological condition that allows her to bear a child. In all jurisdictions examined the fulfilment of this condition is controlled by medical experts on a case to case basis.⁹¹

In Greece since February 2017, when the (binding) Code of Ethics of Medically Assisted Reproduction entered into force,⁹² it is explicitly provided that a woman is eligible as a surrogate if she has already had a child of her own and has not undergone more than two caesarean sections.⁹³ While the latter is clearly a precaution for the surrogate's physical health, the former means to safeguard the surrogate's self-determination, since a surrogate who has already experienced pregnancy and birth has a better understanding of the agreement she enters into. The advantage of this solution has been also pointed out in the Portuguese and Cypriot literature as well.⁹⁴

⁸⁴ On this issue see in detail below section B III 1 c.

⁸⁵ See Art. 23 para. 3 η of Law 69(I)/2015.

⁸⁶ See below section B V 1.

⁸⁷ See P. Ravdas, fn. 35.

⁸⁸ See P. Ravdas, fn. 35 pp. 46-48.

⁸⁹ See in more detail below section B III 1 c.

⁹⁰ Information based on unpublished decisions of the court. I would like to thank Prof. Koutsouradis for granting me access to these decisions.

⁹¹ For Greece see Art. 13 para. 2 of Law 3305/2005; for Cyprus see Art. 23 para. 3 β and σ τ of Law 69(I)/2015; for Portugal see Art. 2 para. 9 of Regulatory Decree 6/2017.

⁹² See fn. 17.

⁹³ See Art. 9 para. 1 of the Code of Ethics of Medically Assisted Reproduction.

⁹⁴ For Cyprus see T. Trokanas, fn. 62, p. 141-142; for Portugal see V.L. Raposo, fn. 34, at p. 237. It is worth noting that the first jurisdiction that introduced this condition as an eligibility criterion for the surrogate is Israel, but due to the fact that, according to the same regulation, the surrogate should be also single, the number of potential surrogates

The physical condition of the surrogate is also contingent upon her age. In Cyprus and Portugal the law does not explicitly foresee age limits for the surrogate. In Greece, according to Art. 9 of the Code the surrogate should be between 25 and 45 years of age.⁹⁵ This provision, however, in its rigidity has been subject to criticism, since it is practically no longer possible for a mother to act as surrogate for her daughter.⁹⁶ A more flexible solution providing the possibility to introduce exceptions to this rule under strict conditions would be preferable.

In all jurisdictions examined, any woman would be in principle eligible as surrogate, irrespective of her relations to the commissioning parents.⁹⁷ A special negative condition for the surrogate is provided in Portugal, where the law bars a woman who stands in an employment relation or economic subordination to the commissioning parents from acting as a surrogate for them.⁹⁸

The marital status of the surrogate is not relevant in any of the three jurisdictions under examination.⁹⁹ However, Greek and Cypriot law state explicitly that, if she surrogate is married or has concluded a registered partnership, her spouse or partner has to consent to the surrogacy arrangement.¹⁰⁰

Further special negative conditions for the surrogate are provided in Cypriot law. Namely, the non-conviction for a sexual crime is an eligibility criterion, not only for the intended parents,¹⁰¹ but for the surrogate as well.¹⁰²

ii. The profile of the surrogate in Greece

According to the aforementioned study performed on court decisions that granted authorization to surrogacy in the years 2003-2016,¹⁰³ the mean age of women acting as surrogates was almost 35 years old. Almost half of them were married and more than half had already children of their own. In addition, about two thirds of them were foreign nationals, coming mostly from countries of Eastern Europe. It is worth noting that the Greek surrogates were in mean older and to greater percentage married, compared to the surrogates of foreign nationality. As regards their relations to the intended parents, in around a quarter of cases the surrogate has been a relative of the intended mother (usually sister or mother), with the rest being either “close friends” of the intended mother¹⁰⁴ or previously employed by her (usually as household help or nurse).

has been excessively limited. See the critical approach to the Israeli regulation by I. Rosenblum, *Israel’s Double Game on the Surrogacy Issue*, *The Jerusalem Post*, 8.5.2015, available at <https://www.jpost.com/Opinion/Israels-double-game-on-the-surrogacy-issue-402477>. The concern behind this restriction is that otherwise the impregnation of the surrogate with an embryo that is not genetically related to her husband could be considered as adultery. See A. Benshushan/J.G. Schenker, fn. 42, at 1832; J. Hand, *Surrogacy in Israel: A Model of Comprehensive Regulation of New Technologies*, *Santa Clara Journal of International Law*, 2006, pp. 111-116 at 114 and 115.

⁹⁵ See Art. 9 para. 1 of the Code of Ethics of Medically Assisted Reproduction.

⁹⁶ According to P. Ravdas, fn. 35, p. 55, it was in 4,5% of the cases that a mother carried the child for her daughter.

⁹⁷ See also above section B II 1 and fn. 33.

⁹⁸ See Art. 8 para. 6 of Law 32/2006.

⁹⁹ For Israel see above, fn. 94.

¹⁰⁰ See Art. 1458 GrCC, in combination with Art. 12 of Law 4356/2015, in case of registered partnership. For Cyprus see Art. 22 para. 1 of Law 69(I)/2015, in combination with Art. 4 of Law 184(I)/2015, in case of registered partnership.

¹⁰¹ See above section B III 1 a (v).

¹⁰² See Art. 23 para. 3 η of Law 69(I)/2015.

¹⁰³ See P. Ravdas, fn. 35, p. 52.

¹⁰⁴ See on this in more detail fn. 45.

c. Territorial constraints in particular

Cypriot law is the only one that currently foresees territorial restrictions as to surrogacy. Namely according to Art. 23 para. 3 (ε) of Law 69(I)/2015, both the intended mother and the surrogate shall have a domicile or habitual residence in Cyprus. The rationale of this rule is to avoid reproductive tourism. Law 92(I)/2016 introduced an exception to this rule, with a rather limited scope,¹⁰⁵ if it is not possible to find a surrogate in Cyprus and after a special permission has been granted by the competent board. Even in this case, the surrogate must stay in Cyprus from the 28th week of pregnancy until the birth of the child, unless this is impossible for medical reasons. Time will show whether this condition is workable in practice.

In Greece the initial version of the law included a similar provision. It stipulated, namely, that both the surrogate and the intended parents should be domiciled in Greece.¹⁰⁶ This provision, though, was proven to be rather ineffective, since courts were pretty lenient as to the proof of domicile. A residence in Greece for a few months, sometimes evidenced by a leasehold agreement, was often considered sufficient.¹⁰⁷ In July 2014 this restriction was abolished. It is now enough that either the surrogate or the intended mother has a domicile or a temporary residence in Greece.¹⁰⁸ This development should be embraced, since it acknowledges the reality that reproductive tourism is unavoidable,¹⁰⁹ as long as the legal framework of medically assisted reproduction, and of surrogacy in particular, is in most other countries more restrictive than in Greece.¹¹⁰

Notwithstanding the reservations as to the efficacy of such a condition, legal consideration also arise, as to its compatibility with EU law. It is namely questionable whether a law that exempts persons not residing in a specific EU country from making use of services provided in another EU country aligns well with the freedom to provide services.¹¹¹ In *Luisi and Carbone*¹¹² the European Court ruled that medical services fall within the freedom to provide services, which is guaranteed not only to service providers but also to the recipients of services, even when they have to travel to the country where the services are provided in order to enjoy them. It has also stated that persons receiving medical treatment are to be

¹⁰⁵ See Art. 7 of Law 92(I)/2016, that amended Art. 23 para. 3 (ε) of Law 69(I)/2015.

¹⁰⁶ See the original version of Art. 8 of Law 3089/2002 und also P. Agalopoulou and A. Koutsouradis (eds.), ‘Medically Assisted Human Reproduction. The Law 3089/2002. ’ Preparatory Works - Discussions in the Parliament’, Sakkoulas, Athens/Thessaloniki 2004, p. 238.

¹⁰⁷ See esp. P. Ravdas, ‘Surrogacy: The Legislator’s Expectations under the Challenge of Statistical Data’ in T. Papachristou and E. Kounougeri-Manoledaki (eds.), fn. 82, p. 98 (in Greek); K. Rokas, ‘Greece’ (Chapter 9), in K. Trimmings and P. Beaumont (eds.), *International Surrogacy Agreements*, Hart Publishing, Oxford 2013, pp. 143 ff. at 157. Cf also K. Davaki, *Surrogacy Arrangements in Austerity Greece: Policy Considerations in a Permissive Regime*, in M. Davies (ed.), fn. 54, pp. 142–159, at p. 146.

¹⁰⁸ See Art. 8 of Law 3089/2002 has been amended by Art. 17 of Law 4272/2014, *Government Gazette*, Issue A, nr. 145 of 11 July 2014.

¹⁰⁹ An indication of the existence of reproductive tourism in Greece is that many medical centers of assisted reproduction have internet sites in English, French or German.

¹¹⁰ See E. Zervogianni, ‘Künstliche Fortpflanzung in Griechenland’ in A. Dutta/ D. Schwab/P. Gottwald/D. Henrich/Löhnig (eds.), fn. 2, pp. 205 ff. at p. 217-218. Cf. A. Grammaticaki-Alexiou, ‘Fertility Tourism, European Law and Conflict of Laws Issues’ in *Essays in Honour of Professor Ioannis Voulgaris*, Vol. I, Ant. N. Sakkoulas, Athens/Komotini 2011, pp. 87 ff. at 95.

¹¹¹ See already A. Koutsouradis, ‘Issues on Surrogacy, especially after Law 3305/2005’, *Nomiko Vima* 2006, 337 ff. at 343 ff. (in Greek), who criticized the relevant Greek provision. This issue is also discussed extensively in L. Brunet/J. Carruthers/K. Davaki/D. King/C. Marzo/C. McCandless, fn. 1, pp. 142 ff.

¹¹² Cases C-286/82 and C-26/83 respectively.

regarded as recipients of services. Moreover, as the ECJ ruled in the *Grogan* case,¹¹³ the prohibition of a specific treatment (termination of pregnancy in the case in question) in one member state does not place this service out of the scope of the freedom to provide services. Nowadays Directive 2011/24 on the freedom of movement of patients explicitly guarantees the said freedom. The issue that still remains open when it comes to surrogacy is rather its legal framing. Who is the patient and who is the service provider? While an extensive analysis of this issue exceeds the scope of this paper,¹¹⁴ I believe that the physician performing the ivf procedure is the service provider and the intended mother the patient. The use of the surrogate forms in this respect part of the treatment of the intended mother's inability to carry the child herself.

2. The genetic material to be used

Once surrogacy is permitted, no further questions arise when the gametes to be used are those of the intended parents. If this is no longer the case, a series of additional problems are posed. Can the surrogate provide her own gametes? In the legal orders where only gestational surrogacy is permitted this is not an option.¹¹⁵ If this is not possible, can the ova be provided by a third woman? Greece, Cyprus and Portugal provide for ovum donation and answer this question to the affirmative. But what if neither the sperm of the intended father cannot be used? Can the intended parents be genetically totally unrelated to the child born by the surrogate? It is at this last point that the regulations of the examined jurisdictions diverge.

Portuguese law explicitly states that surrogacy is possible only if the genetic material of at least one of the commissioning parents is used.¹¹⁶ No such restrictions apply in Greek and Cypriot law. The letter of Cypriot law is rather straightforward on this point, at least as to the ova.¹¹⁷ In Greece the issue was debated, but according to the opinion that finally prevailed no genetic bond is needed between the commissioning parents and the child.¹¹⁸ Thus sperm, ova and embryo donation are a legitimate option, if the genetic material of the intended parents cannot be used due to medical reasons. It is therefore possible that five persons are somehow connected to the birth of the child: the two commissioning parents, the two genetic parents and the surrogate. In practice though such cases are seldom.¹¹⁹

An objection that could be raised to the permissibility of surrogacy when the genetic parents have no genetic bonds with the child is that there is no social need for such a possibility, since adoption appears as

¹¹³ C- 159/90 esp. paras. 16 ff.

¹¹⁴ See in more detail L. Brunet/J. Carruthers/K. Davaki/D. King/C. Marzo/C. McCandless, fn. 1, pp. 142-143.

¹¹⁵ See above section B II 2.

¹¹⁶ See Art. 8 para. 3 of Law 32/2006. Cf. Israel, where the law provides that the sperm of the intended father must be always used. See A. Benshushan/J.G. Schenker, fn. 42, at 1832; J. Hand, fn. 94, at 115.

¹¹⁷ See Art. 23 para. 3 γ of Law 69(I)/2015. On this issue see also T. Trokanas, fn. 62 at 134-135.

¹¹⁸ See E. Kounougeri-Manoledaki, fn. 82, p. 54; T. Papachristou, *Family Law*, P.N. Sakkoulas – Dikaio kai Oikonomia, Athens 2014, p. 218; N. Koumoutzis in Georgiades/Stathopoulos (eds.), fn. 69, Art. 1457-1458 nr. 38-40; D. Papadopoulou-Klamari, fn. 69, pp. 96 and 207; T. Trokanas, fn. 60, p. 375; Ap. Georgiades, fn. 75, § 25 nr. 18; cf. P. Agallopoulou, fn. 69, p. 176. This opinion is also followed by case law. See below fn. 119 for the relevant statistics. Contra: A. Koutsouradis, fn. 82, at 350, according to whom surrogacy with donated ova is not permitted. See further idem, 'Zum Aktuellen Stand des griechischen Abstammungsrechts' in A. Spickhoff/D. Schwab/D. Henrich/P. Gottwald (eds.), *Streit um die Abstammung. Ein europäischer Vergleich*, Gieseking Verlag, Bielefeld 2007, pp. 205 ff., at p. 245 fn. 113; A. Kotzampasi, 'The Right to Reproduction: Between the Freedom of Natural Reproduction and the Legally Provided Right of Artificial Reproduction' in A. Kotzampasi, *Views and Ideas on Issues of Interpretation of Civil Law*, City Publish, Thessaloniki 2006, pp. 245 ff. at p. 265-266 (in Greek).

¹¹⁹ This has been actually the case in the two instances where courts granted authorisation to single men to proceed to surrogacy. See above section B III 1 a. According to the study of P. Ravdas, fn. 35, p. 51, donated ova were used in around 14% of cases of surrogacy, whereas donated sperm was used in less than 4 % of the cases.

a comparable alternative. Setting aside the main conceptual difference between the two options, which is that, unlike adoption, in surrogacy the will of the intended parents is the very reason that the child is brought to existence, this allegation does not hold true nowadays due to practical reasons. In Western countries the children put up for adoption are few while at the same time the number of children that are available for international adoption is constantly decreasing.¹²⁰

IV. The surrogacy agreement

1. The type and form of the surrogacy agreement

There can be little doubt that the agreement between the commissioning parents and the surrogate is a *sui generis* contract of a strictly personal nature.¹²¹ It comes thus a no surprise that, in the jurisdictions that regulate surrogacy, special rules are in place as regards the surrogacy agreement. In all three countries examined the contracts should be concluded in writing.¹²² Further provisions regulate particular issues of the arrangement, such as its content, the parties that are eligible to enter into such an agreement and the gametes to that can be used.¹²³ General contract law rules are applicable to the extent no special provision exists and provided they are compatible with the nature of the contract. Surprisingly enough, contrary to a common belief that the surrogacy agreement is the first step that sets surrogacy in motion, Cypriot and Portuguese law, unlike Greek law, provide that the contract is concluded after surrogacy has been authorized by the competent body.¹²⁴

2. Contents of the agreement

The parties that enter the contract, namely the commissioning parents and the surrogate, agree that the latter will carry a child for the former. Depending on the jurisdiction, the law may include further rules on the contents of the agreement.

Setting aside the issue regarding the payment of the surrogate, that has been addressed above,¹²⁵ the parties can draw, in the surrogacy agreement, their rights and obligations in more detail. Unlike Greek law, Portuguese and Cypriot law entail specific rules on the minimum content of the agreement. The diversity of these provisions illustrate the different concerns that prevailed in the two countries when enacting the law on surrogacy. More concretely:

Cypriot law focuses mainly on three specific issues: First, it provides that the parties shall state in the contract that the surrogate will be obliged to hand over the child to the commissioning parents, who will be the legal parents of the child and are therefore obliged to take it home, once he/she is born.¹²⁶ This provision appears as rather peculiar, since the interpretation of Cypriot law rather suggests that the decisive element for the establishment of legal parenthood is the authorization of surrogacy by the court and not the agreement of the parties.¹²⁷ Second, it explicitly foresees that the agreement shall include provisions on the

¹²⁰ See the international adoption statistics of the HCCH for the years 2004-2016 at <https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf>.

¹²¹ See T. Trokanas, fn. 69, p. 370, with further references.

¹²² For Greece see Art. 1458 GrCC; for Cyprus see Art. 25 of Law 69(I)/2015; for Portugal see Art. 8 para. 10 of Law 32/2006.

¹²³ For these issues see above section B III.

¹²⁴ See for Cyprus Art. 25 of Law 69(I)/2015 and for Portugal Art. 8 para. 4 of Law 32/2006.

¹²⁵ See section B II 1.

¹²⁶ See Art. 25 para. 2 α-γ of Law 69(I)/2015.

¹²⁷ See Art. 22 paras. 2 and 3 of Law 69(I)/2015 and in detail T. Trokanas, fn. 62, pp. 148 ff.

costs of the procedure. Namely, it should be stipulated that the commissioning parents cover all pregnancy and birth-related expenses, as well as the costs of any post-natal complication. To cover these, the intended parents assume the obligation to issue in advance, before the embryo transfer, a letter of credit to the surrogate as security.¹²⁸ Third, to avoid complications of Private International Law, the parties have to include in their contract the term that the surrogate will remain in the Republic of Cyprus from the 28th week of pregnancy until the birth of the child, unless this is not possible due to medical reasons.¹²⁹

In Portugal, the President of the Republic vetoed the initial bill of the law on surrogacy on the grounds that it did not sufficiently specify the rights and obligations of the parties.¹³⁰ In this light, Portuguese law now explicitly states that the parties shall set out in the contract their rights and obligations and, in particular, the way they agree to deal with exceptional contingencies. In this respect it specifically provides that the parties shall include provisions in the contract for cases in which the child is diagnosed with a malformation or a disease as well as on voluntary abortion.¹³¹ Nevertheless, the Portuguese Constitutional Court ruled that the said provisions fail to set appropriate limits to what can be agreed upon by the parties and are therefore unconstitutional.¹³² Art. 3 of the Regulatory Decree 6/2017 includes further detailed rules on the contents of the surrogacy agreement, that stipulate, among others, that the contract shall state the right of the surrogate to choose the doctor that will deliver the baby as well as the place and type of birth; include information on the potential risks of the procedure and the changes in the way of life that this brings about; recognize the surrogate's right to psychological support, not only during pregnancy, but also after birth; foresee the way to resolve disputes that may arise. In addition, it provides that the intended parents assume the obligation to provide health insurance for the surrogate.

In all jurisdictions examined it is accepted that the contract cannot impose rules that restrict the surrogates freedom and dignity exceedingly.¹³³ Thus the surrogate cannot assume the obligation to live with the commissioning parents, follow a specific diet or refrain from any activity the commissioning parents disapprove of, if this is not considered necessary due to medical reasons. On this basis, it should be also accepted that she cannot relinquish her right to decide whether or not to have a (lawful) abortion or undergo other medical examinations.¹³⁴

3. The enforceability of the contract

Unlike English law,¹³⁵ (lawful) surrogacy agreements are considered fully binding in Greece, Cyprus and Portugal. Nevertheless, given their strictly personal nature and the fact that for their performance at least one party (the surrogate) has to undergo medical treatment, certain particularities arise as to their enforceability.

¹²⁸ See Art. 25 para. 2 δ-ε of Law 69(I)/2015.

¹²⁹ See Art. 25 para. 2 στ of Law 69(I)/2015. See also Art. 23 para. 3 ε of the same law.

¹³⁰ See above section A II.

¹³¹ See Art. 8 para. 10 of Law 32/2006.

¹³² See decision 225/2018, fn. 28. For a brief presentation of the main points of the decision in English see T. Violante, fn. 29.

¹³³ See for Greece Art. 179 GrCC (general provision) and in Portugal Art. 8 para. 11 of Law 32/2006 referring to surrogacy contracts in particular. In Cyprus, though, this is not straightforward, taking also into consideration the fact that the law provides that the court may impose terms to the surrogate to ensure the success of the procedure. See on this issue T. Trokanas, fn. 62, pp. 143-144.

¹³⁴ See also below section B IV 3.

¹³⁵ Surrogacy Arrangements Act 1985, section 1A, inserted by section 36 (1) of Human Fertilisation and Embryology Act 1990.

First, in Greece it is accepted that any party can withdraw from the surrogacy contract without bearing liability any time before the embryo transfer.¹³⁶ In Portugal the same point of view has been expressed in the literature, in the absence of a specific legal provision on this issue.¹³⁷

Second, despite the binding character of the surrogacy agreement, the surrogate cannot be forced to undergo medical acts against her will. This stems directly from the generally accepted principle that no medical act can be lawfully performed on a person without his/her informed consent, which is meant to ensure the protection of the patient's autonomy.¹³⁸ It should be thus accepted that it is up to the surrogate to decide to (legally) abort or to not abort the embryo.¹³⁹ For the very same reasons, this should also hold as to the performance of pre-natal tests, especially, but not only, of those of invasive nature, such as amniocentesis. While a claim for damages against the surrogate is not excluded, if her decision is found to be in breach of the contract (e.g. unreasonable decision to abort a healthy embryo),¹⁴⁰ there is no room for specific performance.

After the child is born the surrogate has to hand it over to the commissioning parents. Nevertheless, in the European jurisdictions that regulate surrogacy in a comprehensive way this obligation does not derive from the surrogacy agreement itself, but from the legal provisions that establish legal parenthood.¹⁴¹

4. The informed consent of the parties in particular

The performance of the surrogacy contract presupposes that medical acts will be performed to the surrogate. Jurisdictions with a comprehensive regulation on medically assisted reproduction have typically special provisions on the consent of the parties to the relevant procedures.¹⁴² Specifically as to surrogacy, the Greek regulation is particularly comprehensive.

More concretely, the Code of Ethics of Medically Assisted Reproduction refers in length to the information that shall be provided to the persons who wish to have a child using the methods of medically assisted reproduction or participate in a method of medically assisted reproduction, the latter being the surrogate. This information is not restricted to medical issues, such as the description of the procedure to be followed and its risks, but extends to the social, ethical and psychological consequences of the procedures to be followed as well.¹⁴³ Foreigners shall be additionally informed on the Greek legal framework on surrogacy. It is only after this information has been provided that the consent of the participants is given in

¹³⁶ See Ap. Georgiades, fn. 75, § 25 nr. 19 who bases this result on the provisions of the contract of mandate (Art. 725-726 GrCC), in combination with Art. 1456 GrCC, that refers to the possibility of the intended parents to revoke their consent to medically assisted reproduction.

¹³⁷ See V.L. Raposo, fn. 34, p. 232 and 233.

¹³⁸ See among many others, N. Forgó, *Law and Ethics of Informed Consent*, C.H. Beck/Hart/Nomos, Munchen/Oxford 2013.

¹³⁹ For Greece see, A. Tsalidis, *Surrogate Motherhood and Voluntary Termination of Pregnancy*, in *Assisted Reproduction and Alternative Family Forms*, 2014, pp. 63-64 (in Greek) with further references. For Portugal see above fn. 131-132, as well as V.L. Raposo, fn. 34, p. 233.

¹⁴⁰ See above fn. 139.

¹⁴¹ See for Greece Art. 1464 GrCC; for Cyprus see above fn. 127; for Portugal see Art. 8 para. 7 of Law 32/2006. See also below section B VI 1.

¹⁴² For Greece see Art. 1456 GrCC and in more detail below. Cyprus see Art. 16 para. 4 of Law 69(I)/2015; for Portugal see Art. 14 of Law 32/2006. See also the model consent form prepared by the Portuguese Authority of Medically Assisted Reproduction (*Conselho Nacional de Procriação Medicamente Assistida*), available at: http://www.cnpma.org.pt/cnpma_documentacao.aspx.

¹⁴³ See Art. 5 of the Code of Ethics.

writing.¹⁴⁴ A special consent of the surrogate is necessary regarding the number of embryos that will be transferred to her, after she has been informed about the risks of multiple pregnancy.¹⁴⁵

While all abovementioned provisions are undoubtedly in the correct direction, I believe that the interests of all parties would be best safeguarded, if the relevant information were not provided by the doctor that will perform the relevant medical procedure, but by an independent party.¹⁴⁶

V. Control mechanisms

The preceding analysis has shown that countries that do proceed to a comprehensive regulation of surrogacy make its permissibility contingent upon many conditions. In order to ensure that these conditions are fulfilled, and in general in order to monitor the relevant practices, they provide for control mechanisms. In what follows, I refer to three common elements in the jurisdictions under examination, namely, to the authorization of surrogacy by a competent body, to the establishment of a national authority that oversees medically assisted reproduction and to the criminalization of procedures that do not satisfy the conditions of the law. While the first of these elements constitutes a particularity of jurisdictions that regulate surrogacy, the second and third are present in most jurisdictions that regulate medically assisted reproduction in general, irrespective of their stance as to surrogacy and are therefore presented briefly.

1. Authorization of surrogacy by a competent body

Although all jurisdictions examined provide for the authorization of surrogacy by a competent body prior to the embryo transfer,¹⁴⁷ the regulations differ in their particulars, especially as to the complexity of the procedure and the scope of control.

In Greece the commissioning parents apply for a court order that authorizes surrogacy. The procedure is non-adversarial and the judge is bound to authorize surrogacy if he/she is satisfied that all the conditions set by the law are met.¹⁴⁸ Thus the court screens not only medical necessity but also the age of the commissioning parents, the suitability of the surrogate and the agreement of the parties.

In Portugal and in Cyprus the authorization procedure is rather complex, involving two bodies. In Portugal the law provides that the surrogacy arrangement is authorized by the National Council of Medically Assisted Reproduction, which, before deciding, has to get the non-binding opinion of the Portuguese Association of Doctors.¹⁴⁹ The Regulatory Decree 6/2017 provides further details for this procedure.¹⁵⁰ Given the deadlines set in this regulation the authorization procedure can take up to 6 months. The fact that authorization of surrogacy is granted before the conclusion of the contract on surrogacy, concerns may raise concerns as to the protection of the interests of the surrogate, given that the contents of

¹⁴⁴ See Art. 6 para. 1 and 2 of the Code of Ethics.

¹⁴⁵ See Art. 6 para. 3 of the Code of Ethics. Special rules are in place to limit such instances: Art. 6 of Law 3305/2005 defines the number of embryos that may be transferred to a woman depending on her age. Art. 12 of the Code of Ethics describes the measures the IVF unit shall undertake to minimize the number of multiple pregnancies.

¹⁴⁶ Cf. in this respect §7962 (b) of the 2017 California Family Code that stipulates that “*Prior to executing the written assisted reproduction agreement for gestational carriers, a surrogate and the intended parent or intended parents shall be represented by separate independent licensed attorneys of their choosing*”.

¹⁴⁷ For Greece see Art. 1458 GrCC; for Cyprus see Arts. 23 and 24 of Law 69(I)/2015 and for Art. 8 para. 4 of Law 32/2006.

¹⁴⁸ See Art. 799 GrCCP. According to Art. 744 GrCCP, the Court has the power to investigate *ex officio* if the conditions of surrogacy are fulfilled.

¹⁴⁹ See Art. 8 para. 4 of Law 32/2006.

¹⁵⁰ See Art. 2 of Regulatory Decree 6/2017.

the contract are not controlled *ex ante*. The law explicitly stipulates, however, that the National Council of Medically Assisted Reproduction oversees the whole procedure.¹⁵¹

The Cypriot legislation provides a more intense control on surrogacy. The intended parents have to apply for surrogacy first to the Council of Medically Assisted Reproduction.¹⁵² If their application is successful, they then have to apply for a court order.¹⁵³ The court grants the permission, if the conditions of the law are met. In addition, it can impose specific terms to the surrogate to in order to ensure the success of the procedure.¹⁵⁴ It is only after this court ruling that the surrogate and the commissioning parents can conclude the surrogacy agreement.¹⁵⁵ Setting aside the evident delays in the procedure that arise because of the double authorization of surrogacy, the Cypriot approach can be criticized in that the final arrangement between the commissioning parents and the surrogate does not actually undergo any review. As it has been correctly pointed out, the court ruling should be the last, rather than the middle, step in the relevant procedure.¹⁵⁶

The Portuguese and Cypriot regulations, despite their complexity, present an advantage over the Greek one, in that specialists from fields other than just law, such as doctors and psychologists participate in the authorization procedure itself.¹⁵⁷

2. Establishment of a national authority that oversees medically assisted reproduction

The establishment of a special statutory authority overseeing medically assisted reproduction is a wide-spread option in most countries with a relevant regulation.¹⁵⁸ A common characteristic of these authorities in the three jurisdictions examined is their multidisciplinary composition, including among others, lawyers, doctors and psychologists.¹⁵⁹ What differs are their competences. In Greece, for instance, the National Authority of Assisted Reproduction, is an independent authority, the main responsibilities of which lie on the oversight of the implementation of the legal framework on medically assisted reproduction, the issue of regulations on special issues, as well as the submission of proposals for the amendment of the current provisions.¹⁶⁰ In Cyprus and in Portugal the relevant council may also authorize, and in case of Portugal also oversee, individual medical procedures, such as surrogacy.¹⁶¹

¹⁵¹ See Art. 8 para. 4 of Law 32/2006.

¹⁵² See Art. 23 of Law 69(I)/2015.

¹⁵³ See Art. 24 of Law 69(I)/2015.

¹⁵⁴ Ibid. On this issue see also T. Trokanas, fn. 62, pp. 143-144.

¹⁵⁵ See Art. Art. 25 of Law 69(I)/2015.

¹⁵⁶ See T. Trokanas, fn. 62, pp. 147-148.

¹⁵⁷ See below section B V 2, referring to the composition of Cypriot and Portuguese Authorities of Medically Assisted Reproduction.

¹⁵⁸ It is worth noting that the UK has been the first country to establish such a statutory authority, namely the Human Fertilisation and Embryology Authority. In France this body is the Biomedical Agency (*Agence de la biomédecine*) and in Spain the National Commission of Assisted Human Reproduction (*Comisión Nacional de Reproducción Humana Asistida*).

¹⁵⁹ For Greece see Art. 21 of Law 3305/2005; for Cyprus see Art. 5 para. 2 of Law 69(I)/2015; for Portugal see Art. 31 of Law 32/2006.

¹⁶⁰ See Arts. 19 and 20 of Law 3305/2005.

¹⁶¹ See above section B V 1.

3. Criminalization of procedures

The intense criminalization of medically assisted reproduction procedures that do not comply with the legal provisions is a usual complement to the regulation of surrogacy¹⁶² and can be seen as a sign of weakness in the enforcement of the relevant legal framework. That notwithstanding, the efficacy of this approach can be questioned, since in practice in many jurisdictions seem reluctant to actually apply the criminal provisions. In Greece in particular no relevant published judgment could be retrieved.

VI. Consequences of surrogacy

1. Legal parenthood at the time of birth

When it comes to the legal parenthood of the child at the time of birth, the lawmaker who drafts regulation of surrogacy is confronted with two options: The first one is to hold on to the roman rule “*Mater semper certa est*”, in which case the surrogate is the legal mother of the child, while the intended parents can acquire parental rights by means of a subsequent legal act, similar to adoption, such as the parental order of English law.¹⁶³ In this option the balance is evidently tipped in favour of the surrogate. It protects the surrogate’s interests if she does not wish to give up the child, while it renders the intended parents vulnerable to the possibility of exploitation. The latter concern is addressed in Israeli law by means of a special provision, according to which as soon as the child is born, he/she is placed under legal guardianship, and it is the guardian, and not the surrogate, who grants the necessary consent for the adoption.¹⁶⁴ Another problem that may arise in cases the surrogate is the legal mother of the child at the time of birth is that intended parents can escape the obligations that arise out of the surrogacy arrangement if they no longer wish to take care of the child, as it may be the case if he/she suffers from serious health conditions. The Baby Gammy case¹⁶⁵ is just an illustration of the severity of the problems that may arise.

The second option is to allow for the assignment of the child to the intended parents already at the time of birth. This option does away with legal uncertainty, since no transfer of parenthood takes place. The rights and obligations of the intended parents as legal parents of the child arise already at birth. The surrogate is not faced with a dilemma as to whether to hand the child over to the commissioning parents or not. This option is often confronted with scepticism.¹⁶⁶ Nevertheless, in gestational surrogacy, performed under a regulatory framework that ensures *ex ante* the protection of the surrogate’s interests, and if the interests of the child born are also thrown into the equation, I believe this solution is preferable. Indeed the Greek, Cypriot and Portuguese legislator adopted this option.¹⁶⁷

Specifically in Greece the legal parenthood of the intended parents is contingent upon the court ruling that has authorized surrogacy. If such a ruling exists, the intended mother becomes by law the mother of the child.¹⁶⁸ This is also decisive for the establishment of legal fatherhood.¹⁶⁹ The same seems to be the case in Cyprus, although, according to the law, provisions on parenthood are also included in the contract between

¹⁶² See e.g. above fn. 32.

¹⁶³ See above fn. 57.

¹⁶⁴ See A. Benshushan/J.G. Schenker, fn. 33, p. 1833; L. Ben-Nun, fn. 33, p. 69.

¹⁶⁵ See, for instance, <https://www.theguardian.com/world/2014/aug/04/baby-gammy-conflicting-reports-about-baby-boy-abandoned-in-thailand>.

¹⁶⁶ See the Report of the UN Special Rapporteur, fn. 10, esp. para. 72.

¹⁶⁷ See above fn. 141 and in more detail below.

¹⁶⁸ See Art. 1464 GrCC.

¹⁶⁹ See Arts. 1465 ff. GrCC and in more detail E. Zervogianni, *The Changing Concept of Family and Challenges for Family Law in Greece*, in J. Scherpe (ed.), *European Family Law*, Vol. 2, Edward Elgar, Cheltenham 2016, pp. 86 ff., at pp. 96-98.

the commissioning parents and the surrogate.¹⁷⁰ Finally, in Portugal the law explicitly stipulates that the intended parents are the legal parents of the child.¹⁷¹ The phrasing of the provision seems to imply that this is the case even if the surrogacy arrangement is void.¹⁷² Currently though, the legal situation in Portugal is uncertain, because the Constitutional Court declared unconstitutional the provision that grants legal parenthood directly to the commissioning parents already at the time of birth, on the grounds that it does not grant the surrogate the possibility to reconsider, after the child is born.¹⁷³

Unlike Portugal, in Greece and in Cyprus legal motherhood can be contested within 6 months from birth, if it is proved that the ovum that has been actually fertilized has been of the surrogate.¹⁷⁴ This instance may arise either due to natural reasons, if the surrogate had sexual relations with a partner around the time of embryo transfer, or be the result of traditional surrogacy, against the provisions of the law. If the claim of the surrogate is accepted, then the only possibility for the intended parents to become legal parents of the child is through adoption. In this case a practical and a legal problem may arise. First, adoption requires the consent of legal parents of the child to be adopted, so it is in practice highly questionable whether a surrogate who has contested legal motherhood would grant her consent to adoption. Irrespective of this, the legitimacy of adoption itself could be challenged in such cases on the grounds that it in effect would constitute an evasion of the law.¹⁷⁵ Nevertheless, in Greece the rather prevailing opinion in the literature accepts adoption as a legitimate option, arguing that this undoubtedly serves best interests of the child.¹⁷⁶

2. Right to contact?

Greek law, and presumably also Cypriot law, do not provide for any right of the surrogate over the child, such as the right to contact.¹⁷⁷ Even if a relevant provision had been inserted in the surrogacy

¹⁷⁰ See above fn. 127.

¹⁷¹ See Art. 8 para. 7 of Law 32/2006.

¹⁷² See V.L. Raposo, fn. 34, p. 231, referring to the Interpretive Statement of CNPMA of July 2016 available at: http://www.cnpma.org.pt/Docs/CNPMA_DeclaracaoInterpretativa_SET2016.pdf.

¹⁷³ Decision 225/2018, above fn. 28. On this issue in English see T. Violante, fn. 29. For relevant considerations prior to the decision of the Constitutional Court see V.L. Raposo, fn. 34, pp. 232 ff., esp. pp. 233-234.

¹⁷⁴ For Greece see Art. 1464 para. 2 GrCC; for Cyprus see Art. 25 para. 5 of Law 69(I)/2015 as well as Art. 22 para. 2 a of the same law. See also T. Trokanas, fn. 62, pp. 151-152 on the legal issues that arise because of the rather unfortunate phrasing of the Cypriot provision.

¹⁷⁵ On this issue, referring to Greek law see T. Papachristou, *Artificial Reproduction in the Civil Code*, Sakkoulas, Athens/Thessaloniki 2003, pp. 75-76 (in Greek); cf. F. Skorini-Paparrigopoulou, *Comment to the Decision 31/5803/176/1999 of the Multi-member Court of First Instance of Heraklion, Nomiko Vima* 2000, 495 ff, at. 498 (in Greek); K. Pantelidou, 'Issues of the New Institution of "Surrogate" Motherhood', *Harmenopoulos* 2004, 977 ff., 984 (in Greek).

¹⁷⁶ See Decision 122/2008 of the Single-member Court of First Instance of Heraklion, *Legal Database Intrasoft-Nomos*; F. Skorini-Paparrigopoulou in Ap. Georgiades and M. Stathopoulos (eds.), fn. 69, Art. 1463-1464 nr. 50; E. Pournaras, in Ap. Georgiades (ed.), *Brief Commentary of the Civil Code*, fn. 69, Art. 1463-1464 nr. 9; I. Spyridakis, *Family Law*, fn. 69, p. 431 fn. 2; E. Kounougeri-Manoledaki, fn. 69, pp. 99 ff.; idem, *Artificial Reproduction and Family Law*, 2nd ed., Sakkoulas, Athens/Thessaloniki 2005, pp. 110-111 (in Greek); Ap. Georgiades, fn. 75, § 28 nr. 3; cf. P. Agallopoulou, 'Surrogacy', *Digesta* 2004, 1 ff. at 12 (in Greek).

¹⁷⁷ For Greece see K. Rokas, fn. 107, p. 151.

arrangement, it is questionable if it would be deemed enforceable, since the legal parents have the sole competence to make decisions on the upbringing of their child.¹⁷⁸

From the perspective of the child, in Greece and in Cyprus there exist no specific rules granting the child the right to access the information on surrogacy. The child's right to acquire such information could be grounded on the right to know one's genetic origins.¹⁷⁹ Both the Greek and Cypriot legislator, though, have opted for the anonymity of donors of genetic material. It thus seems, that, upon deciding this issue, they apparently concluded that the protection of the so-called 'social family' outweighs the child's right to gain knowledge over his/her genetic origins.¹⁸⁰ In Greece this legislative choice has been rightly criticized in the literature¹⁸¹ but has not been legally challenged before any court yet.

A similar approach had been initially adopted in Portugal, but the Constitutional Court¹⁸² declared the legal provisions on the anonymity of donors and of the surrogate¹⁸³ unconstitutional.¹⁸⁴ It further maintained that the relations between the surrogate and the child do not discontinue after surrogacy. Contact could be limited, however, taking into account possible risks of psychological nature to the child. Moreover, the Court ruled that the right of the child to know the identity of the surrogate is derived from his/her rights to personal identity and to free development of personality.¹⁸⁵

C. CONCLUSIONS: THE CHANCES AND THE PITFALLS

Surrogacy is a reality and as long as there are persons who cannot have children in a different way, this will not change. Social acceptance of surrogacy is growing but the lawmakers in most countries are reluctant to introduce a relevant regulatory scheme. Certainly surrogacy raises various concerns, but,

¹⁷⁸ This is definitively so in Greece. See Art. 1510 ff. GrCC on the right of parental care. On the contents of this right see in detail P. Agalopoulou in Ap. Georgiades and M. Stathopoulos (eds.), *Commentary of the Civil Code*, Vol. VIII, 2nd ed., P.N. Sakkoulas - Dikaio kai Oikonomia, Athens 2003, Art. 1510 nr. 80 ff. (in Greek).

¹⁷⁹ See K. Rokas, fn. 107, p. 150.

¹⁸⁰ For Greece see Art. 1460 GrCC. For Cyprus see Art. 33 of Law 69(I)/2015.

¹⁸¹ See Ch. Stampelou's opinion in P. Agalopoulou/A. Koutsouradis (eds.), fn. 106, p. 59 (in Greek); *idem*, in Ap. Georgiades and M. Stathopoulos, above fn. 69, Art. 1460 nr. 6 ff.; *idem*, 'The Anonymity of the Donor of Genetic Material' in *Current Tendencies in Family Law*, Nomiki Vivliothiki, Athens 2013, p. 16 ff., esp. p. 31 (in Greek); P. Agalopoulou, 'Medically Assisted Human Reproduction and Anonymity of the Third Donor of Genetic Material' in *Essays in Honour of Michael P. Stathopoulos*, Vol. I, Ant. N. Sakkoulas, Athens/Komotini 2010, pp. 1 ff., at p. 19 (in Greek); cf. A. Kotzampasi, 'The Anonymity of the Donor in Artificial Reproduction as a Legal and Moral Question', *Harmenopoulos* 2000, 710 ff. at 716 (in Greek); G. Lekkas, 'Medically Assisted Reproduction and Kinship in Greek Law. Introduction of 'Social-Emotional Kinship or Reproduction without Kinship?' in T. Papachristou and E. Kounougeri-Manoledaki (eds.), fn. 82, pp. 65-66 (in Greek); E. Zervogianni, above fn. 110, at p. 227-228. *Contra* (in favour of anonymity); K. Fountedaki, 'The Information of the Child that has been Born by Heterologous Artificial Reproduction about his Descent' in *Artificial Reproduction and Genetic Technology: The Moral-Legal Dimension*, Publications of the Association of Jurist of North Greece, Vol. 48, Thessaloniki 2003, p. 129 ff., esp. p. 138 (in Greek); E. Kounougeri-Manoledaki, above fn. 69, pp. 86-87; T. Papachristou, above fn. 118, p. 222; cf. also T. Vidalis, *Life without a Face*, Ant. N. Sakkoulas, Athens/Komotini 2003, pp. 153 ff., esp. at p. 159 (in Greek).

¹⁸² See above fn. 28.

¹⁸³ See Art. 15 Law 25/2016 of Law 32/2006.

¹⁸⁴ See on this point also the conclusions of the Report of the UN Special Rapporteur, fn. 10, para. 73.

¹⁸⁵ Cf. on this point also the English Guidelines on Surrogacy, addressed to intended parents, published by the Department of Health and Social Care, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684259/surrogacy-guidance-for-healthcare-professionals.pdf, at point 7, call on relevant research and advise parents to inform the child that he/she has been born through surrogacy.

equally certainly, the lack of legislative initiative in this field leads to a series of thorny problems. A comprehensive regulation of surrogacy is the way forward; not because pragmatism overrides ethics, but because a good regulation, one that balances the interests of all parties involved, not only on paper but also in practice, can successfully address most of the concerns about surrogacy.

In my opinion, the main points around which such a regulation should revolve are given by the structure of the preceding analysis itself: allow for gestational surrogacy only,¹⁸⁶ in cases of medical necessity; set eligibility criteria for both the intended parents and the surrogate; provide for monitoring mechanisms that oversee the whole process; do away with uncertainty as to legal parenthood.

Specifically, to best safeguard the interests of the surrogate, it is essential to place emphasis on the *ex ante* aspects of the regulation, namely on the conditions of surrogacy. Detailed provisions on the characteristics of the surrogate (her age, physical and psychological well-being, understanding of the obligations she is assuming, which can be guaranteed when she has already had children of her own) can serve greatly to this aim. It is also essential that the surrogate is duly informed on all steps of the procedure. The authorization of the surrogacy arrangement by a competent authority is also of utmost importance. In order to safeguard the interests of the child, it is necessary to set criteria regarding the eligibility of the parents. While the question whether surrogacy is commissioned by couples or single persons, as well as their sex, seems to me immaterial, provisions especially on the age of the commissioning parents are of relevance.

A central feature of a comprehensive regulatory scheme on surrogacy should be the establishment of the legal parenthood of the intended parents already at the time of birth of the child. The adoption of this approach presents the undeniable advantage of legal certainty. Moreover, it serves best the interest of all parties involved, and not only of the intended parents. The child is prevented from becoming the object of a dispute, or even of a transaction, while also the surrogate, from the beginning, can come to terms with the fact that she will have to hand over the child. Besides, the justification of rules that make the handing over of the child to the commissioning parents contingent upon the decision of the surrogate after birth is seems inadequate in case of gestational surrogacy, especially if there exist genetic bonds between the child and (at least one of) the commissioning parents.

All jurisdictions with a comprehensive regulatory scheme for surrogacy examined in this paper, address these points quite similarly and could be used as patterns. In my opinion, the Greek regulation, though not perfect, is the more balanced one and, being in force for more than 15 years, has already a success story to tell. Hundreds of children have been born by surrogates, while surrogacy itself is well accepted by the Greek society, without substantial objections of moral, religious, political or other character.¹⁸⁷ The Cypriot and Portuguese regulations have surely enriched the analysis with interesting ideas in particular issues, especially as to the contents of the contract.

Finally, when drafting the regulatory framework of surrogacy the lawmaker should stay clear of the following pitfalls:

First, a regulation that is too restrictive (e.g. because it permits surrogacy only among relatives or because of too complicated authorization procedures) is ineffective, since it may work as a covered

¹⁸⁶ The reason I plead for gestational surrogacy only is interrelated with legal parenthood of the intended parents already at the time of birth. See above section B VI 1.

¹⁸⁷ See on this point the empirical study of K. Panagos, *Surrogacy. Greek Legal Regime and Criminological Extensions*, Sakkoulas, Athens/Thessaloniki 2011, p. 133 ff. (in Greek), performed on 120 students of Aristotle University of Thessaloniki. Cf. however Z. Papaligoura/D. Papadatou/T. Bellali, fn. 42, at 117 that mention that, although the birth of the child through the surrogate is very welcomed in the family, surrogacy is still associated with social stigmatization.

prohibition of surrogacy, providing intended parents with incentives to travel abroad for reproductive purposes. The Cypriot and Portuguese raise some concerns in this respect, but it is the experience in practice that will show whether they are workable or not

Second, the legislator should ensure the applicability of the rules set. Practically unenforceable rules, such as rules on the altruistic character of surrogacy, drive surrogacy arrangements to the black market, where no control, and thus no protection of the parties, is possible. As stated above,¹⁸⁸ it is better to allow for an agreement granting a reasonable compensation to the surrogate for her services, which will be controlled by a competent authority and will be enforceable, than prohibit it, rendering vulnerable either the surrogate, if she has received her compensation upfront, or, in the reverse case, the intended parents. The same concerns hold also for territorial restrictions, which seem to be anyway incompatible with the freedom of (medical) services in the European Union.

In an overall assessment, I believe that the introduction of a comprehensive regulatory scheme is the globally responsible way to deal with surrogacy. The costs of the lawmakers' inertia at a national level in Western countries are externalized to the surrogates in developing countries as well as to the children born out of these procedures. The enactment of a well-balanced regulation can put a stop to exploitation and this is a step a democratic society should proceed to.

¹⁸⁸ See section B II 1.