

## Healthcare & Life Sciences - Austria

### New rules on reproductive medicine

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#### Introduction

In a December 10 2013 decision,<sup>(1)</sup> the Constitutional Court repealed parts of the Act on Reproductive Medicine which had prohibited female civil partners and female life partners from availing of all permitted methods of medically assisted reproduction. Due to the continuing prohibition on surrogacy, this decision relates only to women in civil partnerships or life partnerships. The repeal came into force on January 1 2015.

On November 3 2011 the European Court of Human Rights (ECHR) ruled<sup>(2)</sup> that the act's prohibition on *in vitro* fertilisation through third-party sperm donation conformed with the European Convention on Human Rights at the time of the complaint. In its decision, the ECHR held that the general prohibition on egg and sperm donation for *in vitro* fertilisation had not contravened Article 8 of the convention when the complaint was lodged in 1999. However, according to the ECHR, the field of artificial reproduction is subject to dynamic scientific and legal developments; thus, the need for reform must be continually monitored. In addition, the Bioethics Commission held that the different treatment of sperm donations for *in vivo* fertilisation and *in vitro* fertilisation was unjust and recommended that sperm donations be allowed for *in vitro* treatments.

Further, the Austrian prohibition on pre-implantation genetic diagnosis was deemed unjust due to discrepancies with regard to pre-natal diagnostic testing. In an August 28 2012 decision<sup>(3)</sup> the ECHR held that prohibitions on pre-implantation genetic diagnosis provide a specific protection for embryos, although pregnancies can be terminated in the case of disabilities. Since pregnant women face far greater risks compared to the risks associated with the implantation of an embryo, the prohibition on pre-implantation genetic diagnosis creates unnecessary suffering, which constitutes a disproportionate interference on the right to privacy and family life (Article 8 of the European Convention on Human Rights).

Shortly before the Constitutional Court's decision to repeal the act's provisions came into effect, the Justice Ministry and Health Ministry circulated a draft amendment that not only reacted to the ECHR's decisions by amending the act in respect of provisions for lesbian couples, but also sought to bring the act closer into line with the European mainstream.

#### Amendments

Under the amended act, homosexual women and heterosexual individuals will have equal access to medically assisted reproduction. However, with regard to homosexuals, this expanded coverage is available only for women living in civil partnerships or life partnerships. Homosexual men may not use surrogate mothers in order to become parents.

Further, the restrictions on reproduction techniques have been relaxed: the use of third-party sperm and eggs is now permitted for *in vitro* fertilisation. The same rules apply to sperm donations for *in vitro* fertilisation as to *in vivo* fertilisation. *In vivo* and *in vitro* fertilisation can be performed only at certain hospitals. Further, sperm and eggs may be donated only at permitted hospitals. Sperm and egg donors must be examined before their sperm or eggs are used in order to ensure that they are capable of reproduction and do not present a health risk to the prospective mother or child. Egg donors must be between 18 years old and 30 years old. The prospective mother must be under 45 years old.

Children who are artificially conceived can learn who their genetic mother is at the age of 14.

Under the old act, pre-implantation genetic diagnosis was permitted in limited cases. The amendment provides that pre-implantation genetic diagnosis is permitted:

- after three or more failed attempts at artificial reproduction;

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- after at least three abortive or still births; or
- where the genetic disposition of at least one parent creates a serious risk of an abortive or still birth, or of a congenital disorder.

Eligible congenital disorders are limited to disorders:

- that are present during pregnancy or after birth;
- that can be treated only by continuous application of advanced medical techniques or of other medical or curative means which limit quality of life or result in severe brain damage or pain which cannot be treated effectively; and
- whose cause cannot be treated.

The amendment was published in the *Federal Law Gazette* on February 23 2015 and entered into force retroactively on January 2 2015.<sup>(4)</sup>

### Comment

The amendment is an overdue step in the right direction. However, by circulating the draft only a few weeks before the Constitutional Court's deadline, the legislature missed the opportunity for broad discussion and maintained a rather restrictive approach to this dynamic field of medicine and ethics.

The amendment still prohibits surrogacy and embryo donation. In addition, single women have no access to medically assisted reproduction. Methods of social egg freezing which allow women and couples to plan when they will have children are not permitted. Moreover, the amendment still permits different treatment of male and female homosexual couples.

With regard to pre-implantation genetic diagnosis, the amendment addresses a complex topic, since pre-implantation genetic diagnosis always faces criticisms regarding choice and the selection of viable cells. The amendment considers these implied dangers by applying restrictive preconditions to apply for pre-implantation genetic diagnosis. However, the amendment also considers the difficult situation that prospective parents – in particular, prospective mothers – face.

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### Endnotes

- (1) G16/2013, G44/2013.
- (2) Complaint 57813/00, *SH/Austria*.
- (3) Complaint 54270/10, *Costa and Pavan/Italy*.
- (4) BGBl I 35/2015.

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