

Note on the Italian law of October 16 2024 for the universal offence of surrogacy.

Executive summary

On 16 October 2024, the Italian Senate definitively approved the bill, which provides for a criminal sanction from three months to two years and a fine from 600,000 to one million euros that punishes Italian citizens that outside of Italy, in any form, realises, organises or advertises the surrogate motherhood with imprisonment (so-called *Varchi Bill*). Until now such criminal sanctions were in force only for such acts inside the Italian territory. The bill is now waiting for the signature of the President of the Republic, who has the power to send it back to the Parliament.

It entails:

- the prohibition for single Italian citizens or couples of Italian citizens to have recourse to surrogacy everywhere in the world even if it is allowed by local legislation and including other EU Member States;
- the prohibition for Italian female citizens to carry out a surrogacy abroad in favour of Italian citizens or in favour of citizens of other States;
- a prohibition for Italian nationals providing services for surrogacy (doctors, nurses, clinics owners, lawyers, psychologist, etc.) to provide their services in any State either for the benefit of Italian nationals or for the benefit of nationals of different citizenships, including other EU Member States;
- an obstacle to nationals of other States (including other EU Member States) who intend to carry out surrogacy using the services of Italian nationals established in a State other than Italy and which allows such a practice and an obstacle to nationals of other States (including other EU Member States) who provide services falling within the surrogacy process to supply their services for the benefit of Italian nationals in a State other than Italy and which permits such a practice.

Summary

1. The bill	1
2. Impact.....	2

1. The bill

On 16 October 2024, the Italian Senate definitively approved the bill AC 887, which provides for an expansion of the sanctioning perimeter of art. 12, paragraph 6, of law no. 40/2004, which today provides a criminal sanction that punishes: “anyone who, in any form, realises, organises or advertises the commercialisation of gametes or embryos or surrogate motherhood shall be punished with imprisonment from three months to two years and a fine from 600,000 to one million euros” (so-called *ddl Varchi – Varchi Bill*).

EDGE APS

www.edge-qlbt.it

Piazza Cavour 17 – 00193 Roma

email info@edge-qlbt.it – PEC edge@pec.edge-qlbt.it

P.IVA: 13279031002 - C.F.: 97704100581

In particular, the proposal provides that if the aforementioned facts are committed abroad, the Italian citizen is still punished according to Italian law. During its first approval by the Chamber of Deputies, the fact situation was restricted to 'surrogate motherhood' letting aside the commercialisation of gametes or embryos.

The purpose of the proposal is to extend the criminal liability of Italian citizens for the offence provided for by Law 40 of 19 February 2004 even in the case of conduct committed entirely abroad in a State that allows and regulate it.

2. Impact

Currently, the practice of surrogacy is carried out abroad by a significant number of Italian persons, mainly heterosexual couples but also homosexual and lesbian couples (with a prevalence of male couples) and single persons of both sexes.

The effect of the proposal would be to apply to the offence referred to in Article 12 of Law no. 40/2004 the provisions of Article 7(1)(5) of the Penal Code, which provides that 'a citizen [...] who commits in the territory [...] any other offence for which special legal provisions or international conventions establish the applicability of Italian criminal law shall be punishable under Italian law'.

The bill would make punishable

(i) anyone (a single person or a couple of the same or different sex) accessing surrogacy practices abroad as well as

(ii) doctors, nurses, lawyers, agents and any other Italian person who performs activities abroad that may fall within the scope of the offence (also for aiding and abetting the offence), even for the benefit of non-Italian citizens.

Those with dual citizenship who carry out such practices in their country of residence would also be affected.

The provision for punishment of the so-called universal offence has hitherto been provided for in the case of offences (i) extremely serious, punishable by much harsher penalties and (ii) sanctioned by the majority of states or provided for in international conventions.

On the other hand, there is a clear difference between the sanction framework considered here (up to two years imprisonment as a maximum) and those - much higher - of the offences which are peacefully included in the scope of application of Article 7 of the Criminal Code (e.g. sexual offences, abandonment abroad of minors, trafficking in persons, reduction to or maintenance in slavery or servitude).

In addition, the offence considered here - unlike the other offences subject to extra territorial sanctions - incriminates conduct that is not similarly considered a crime by the generality of legal systems and in the places where it is committed, and indeed, in those places, it is often expressly lawful and regulated according to the laws in force.

In other words, the Italian State arrogates to itself the power to assess what is lawful on the territory of any other State, deeming the choice made by that State as to the lawfulness of the actions committed on its territory to be inadequate. We will return to this point later in relation to European Union law.

It should be added that the incrimination envisaged by the bill makes no distinction between the practice of surrogacy in an ethical or altruistic manner in order to achieve parenthood and the practice of commercialisation for financial gain.

The provision would have a particular impact on same-sex couples since, unlike different-sex couples, the civil registration documentation itself (i.e. foreign birth certificates) showing the names of two men would make it obvious or at least highly probable that surrogacy had been used. This would prevent the request for

transcription in Italy of birth certificates of children born abroad through such practice and would therefore prevent such minors from having their family ties legally recognised.

With regard to the greater exposure of same-sex couples compared to heterosexual couples, it is sufficient to observe that the recent circulars of the Ministry of the Interior (in particular the one issued by the Prefect of Milan) concerning the transcription of birth certificates and the prohibition to transcribe those in which surrogacy is involved have focused exclusively on same-sex couples.

Moreover, the introduction of an extra-territorial criminal sanction, equating birth by surrogacy with extremely serious crimes, would project a social stigma on children born by surrogacy as the children of a crime, as already heard in some conversations. This would apply not only to newborns but also to children already living.

The bill takes no account whatsoever of the position and protection of children born by these techniques and the right of children not to be discriminated against, including on the grounds of their parents' sexual orientation and their birth status, as provided for in the New York Convention on the Rights of the Child.

The prohibition is imposed without any consideration of local legislation and the circumstances of the case and the regulatory technique prohibits a conduct carried out entirely within a different State.

Furthermore, in light of the principle of proportionality, the State in whose territory the surrogacy takes place is certainly in a better position to regulate what happens within its territory. From another perspective, the draft bill hinders citizens of other States from receiving services from Italian citizens within the territory of those States or from carrying out a surrogate motherhood in favour of Italian citizens or from providing services in favour of Italian citizens. The irrationality and disproportionality of the rule is evident in the case in which several people of different citizenships take part in the same pregnancy procedure for others, where only people of Italian citizenship would be criminally sanctioned, even reaching the case of couples of citizens of one Italian and one from another State where the non-Italian person would be prevented from exercising their rights due to the criminal sanction imposed on their spouse or partner.

*

This note was co-authored by a team of attorneys composed by Mario Di Carlo, Vincenzo Miri, Ferdinando Poscio, Alexander Schuster, Matteo Uslenghi.