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To:

Ms Ciara O'BRIEN

Chair of the Working Party on the OSCE and the Council of Europe (COSCE)

Council of the European Union

CC:

Ms Sylwia DOMISIEWICZ, Chair of the Working Party on Human Rights (COHOM),
Council of the European Union

Gabrijela Korže, Chair of the Working Party on Public Health, Council of the
European Union, Council of the European Union

Ms. Helena Dalli, Commissioner for Equality, European Commission

Ms. Emmanuelle Grange, Head of Unit Disability and Inclusion (EMPL.D.3),
European Commission

Subject:

Principle of unity, and duty to sincere cooperation in mixed agreements under threat: the Council of Europe's 'Draft Additional Protocol to the Oviedo Convention on Human Rights and Biomedicine' and Convention on the Rights of Persons with Disabilities

Dear Chair of the Working Party on the OSCE and the Council of Europe,

We are contacting you on behalf of the European Disability Forum (EDF), an umbrella organisation defending the rights of more than 100 million persons with disabilities in the European Union, and Mental Health Europe (MHE), the largest independent network organisation representing mental health users, professionals and service providers across Europe.

Since 2014, the Bioethics Committee of the Council of Europe (DH-BIO Committee) has been working on a draft additional protocol to the Oviedo Convention on Human Rights and Biomedicine concerning the "protection of human rights and dignity of persons with mental disorders" ("draft additional protocol to the Oviedo Convention") based on a [2004 Recommendation](#) of the Committee of Ministers. The text and spirit of this draft protocol go against the UN Convention on the Rights of Persons with

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Disabilities (CRPD), that has been ratified by the European Union, and 46 of the 47 Member States of the Council of Europe, including all EU Member States.

A lot of opposition has been expressed by various UN experts, the Council of Europe's Commissioner for Human Rights and Parliamentary Assembly, and human rights organisations and organisations of persons with disabilities. The [Fundamental Rights Agency of the EU](#) raised concerns about the impact the adoption of this draft would have on the obligations of EU Member States. In 2018, the [UN Committee on the Rights of Persons with Disabilities](#) called on **all Parties to the CRPD** to oppose the adoption of the protocol, noting that it goes against the right to equality, legal recognition before the law, liberty and security, integrity and health.

Despite this opposition, the final text of the draft additional protocol has been sent to permanent representations in December 2020 for adoption at the plenary meeting of the Committee of Bioethics on 2nd to 5th of November 2021.

The EDF and MHE are extremely concerned about the impact the adoption of the protocol would have of persons experiencing mental health problems in the EU, including in cross-border situations. We are also concerned about the effects this would have on the overall implementation of the CRPD, and on the development and implementation of human rights-based initiatives in mental health care, such as the [WHO Quality Rights Initiative](#).

As far as the CRPD is concerned, the **EU has an interest in ensuring the correct and uniform implementation of the Convention**, including to protect the rights of EU citizens experiencing mental health problems in cross-border situations. The adoption of the draft protocol and potential ratification may lead to national measures being incompatible with the CRPD.

In addition, a memorandum prepared by the law firm Gide Loyrette Nouel, has identified three arguments to oppose to the adoption of the draft additional protocol by EU Member States:

1. EU Member States are bound by the provisions of the CRPD under EU law since this Convention forms part of the EU legal order.
2. The duty of sincere cooperation imposes additional constraints on the EU Member States' actions, including in the international sphere.
3. The EU's increasing number of actions regarding the rights of persons with disabilities are in contradiction with the draft Additional Protocol.

In particular we would like to stress that **by supporting the adoption of this draft protocol, without discussing it at EU level, EU Member States may particularly fail to comply with the principle of unity (CJEU Opinions 2/91 and 1/94) and the duty of sincere cooperation (Art. 4(3) TEU) with respect to mixed agreements.** You can find a summary and the full memorandum attached, which was developed by the law firm Gide Loyrette Nouel in response to EDF's request to find legal arguments (under EU law) against the adoption of the additional protocol.

It is under these circumstances that we call on the COSCE to consider the issues created by the potential adoption of the draft additional protocol to the Oviedo Convention. In accordance with Article 4.3 of the CRPD, we request that this consideration and all discussions on the matter include the participation of representative organisations of persons with disabilities.

We remain at your disposal for more information and to support you to fully comply with the CRPD.

Sincerely,



Yannis Vardakastanis

President of the European Disability Forum



Kristijan Grđan

Vice-President of Mental Health Europe