

European Disability Forum***Re: Criminalisation of forced sterilisation under EU and international human rights law***

ADVICE

Introduction

1. We are instructed by the European Disability Forum (“EDF”) to advise on the potential applicability of the new proposal to be put before the European Parliament. The new proposal is entitled: *‘Proposal for a Directive of the European Parliament and of the Council on combatting violence against women and domestic violence’* (“the proposal”). We are asked to advise on its interaction with the issue of forced sterilisation. We are specifically asked to address the following questions:
 - a. Is forced sterilisation a form of sexual exploitation?
 - b. Is forced sterilisation a breach of international human rights / EU law?
 - c. Does the EU have competence to criminalise forced sterilisation under EU Treaties and what would be the added value for the EU Member States to have the EU criminalise forced sterilisation?

Relevant background

2. In March 2022, the European Commission published the proposal.¹ This followed the European Parliament's repeated requests for legislative proposals addressing gender-based violence in the EU.²
3. The proposal seeks to combat violence against women and domestic violence throughout the EU. This is intended to make EU law in this area more effective and consistent, thereby ensuring its alignment with international standards.³ The Commission aims to achieve this through a variety of measures including criminalising relevant offences.⁴
4. The proposal would apply to criminal acts against women, as defined by EU and national law. Currently, forced sterilisation is dealt with under domestic law.⁵ The proposal seeks to criminalise a number of criminal offences including female genital mutilation ("FGM"), and certain forms of cyber violence. This is to be done at EU level on the bases of Articles 82(2) and 83(1) of the Treaty on the Functioning of the EU ("TFEU").⁶ The Commission has focused on these crimes as they *'disproportionately affect women, are not sufficiently addressed at national level and fall within the EU's remit'*⁷ and are *'unlikely to significantly decrease without additional EU action'*.⁸
5. EDF is interested in securing the designation of forced sterilisation as a crime at EU level. For the reasons below, we are of the opinion that the EU has competence under Articles 82(2), 83(1) and 83(2) to achieve this aim.

¹<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0105>.

²Section 1 of the proposal, Page 1.

³Section 1 of the proposal, Page 2.

⁴Section 1 of the proposal, Page 1.

⁵Introductory paragraph (4) of the proposal.

⁶Chapter 2 of the proposal: Offences Concerning Sexual Exploitation of Women and Children and Computer Crime.

⁷Section 1 of the proposal, Page 4.

⁸Section 1 of the proposal, Page 3.

Forced sterilisation

6. Forced sterilisation is the involuntary or coerced removal of a person's ability to reproduce. Legally, sterilisation should not be performed on a person unless they have provided their informed consent, free from threat or undue pressure.⁹ This requires that the person is informed before the procedure begins, in a language and manner they understand, and of the purpose, nature, consequences and risks of the procedure.¹⁰ They must also have the right to withdraw their consent to it at any time.¹¹
7. The World Health Organization ("WHO") addresses the additional information that must be provided to an individual prior to the procedure. This includes the fact that sterilisation is permanent and there are alternative temporary contraception methods available. It must be explained that the decision to undergo the procedure is only for the individual to make. The WHO stresses that individuals with disabilities need appropriate support in decision-making.¹²
8. In some cases, an individual may lack mental capacity to give consent. Commenting on such situations in its tenth periodic report concerning Portugal, the Committee on the Elimination of Discrimination against Women, recommended that Member States '*[e]nsure the full, free and informed consent of women with disabilities for any intervention or medical treatment [and] train health professionals on human rights, dignity, autonomy and the needs of women with disabilities.*'¹³ This would provide practical and procedural safeguards against the ongoing risk identified by the Committee that '*[w]omen and girls with disabilities are particularly vulnerable to forced sterilization carried*

⁹The Convention on Human Rights and Biomedicine of the Council of Europe, Chapter II, Article 5. For discussion in the context of forced sterilisation, see: [Concluding Observations on the Third Periodic Report of Slovakia](#), 8th September 2015, CAT; and *V.C. v. Slovakia*, no. 18968/07, 8th November 2011, §§77, 105, 110, 112 and 119. See also Article 3 of the EU Charter of Fundamental Rights; *Csoma v. Romania* Application no. 8759/05, 15 January 2013.

¹⁰The Convention on Human Rights and Biomedicine of the Council of Europe, Chapter II, Article 5. By analogy in the case of mental healthcare, see also Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Healthcare, General Assembly Resolution 46/119, 17th December 1991, Principle 11.

¹¹*V.C. v. Slovakia*, no. 18968/07, 8th November 2011, §105.

¹²'Eliminating Forced, Coercive and Otherwise Involuntary Sterilization', WHO.

¹³'Concluding observations on the tenth periodic report of Portugal', 13th June 2022 – 1st July 2022, §41(c).

out under the pretext of legitimate medical care or with the consent of others speaking in their name.¹⁴

9. Failure to follow these important safeguards could constitute a breach of the individual's rights against torture and ill-treatment, and to healthcare and private and family life.¹⁵
10. In relation to torture and other ill-treatment, forced sterilisation constitutes a breach where:
 - a. it is performed without the informed consent of the individual¹⁶
 - b. it is performed based on the notion that women with disabilities or from minoritised racial and/or ethnic groups are unfit to have children¹⁷
11. In relation to healthcare, forced sterilisation violates the rights:
 - a. to free and informed consent¹⁸
 - b. equal access to the highest attainable standard of health¹⁹
 - c. family planning services²⁰

¹⁴Concluding observations on the tenth periodic report of Portugal', 13th June 2022 – 1st July 2022, §40(c).

¹⁵UN Convention on the Rights of Persons with Disabilities, Article 23(1); UN Convention on the Elimination of Violence against Women, Article 16; Istanbul Convention, Article 39(b); EU Charter of Fundamental Rights, Articles 7 and 9; International Covenant on Civil and Political Rights, Article 17(1); European Convention on Human Rights, Article 8; *Gauer and Others v. France*, no. 61521/08, March 2011; *V.C. v. Slovakia*, no. 18968/07, 8th November 2011; *N.B. v. Slovakia*, no. 29518/10, 12th June 2012.

¹⁶*Gauer and Others v. France*, no. 61521/08, March 2011; *V.C. v. Slovakia*, no. 18968/07, 8th November 2011; *N.B. v. Slovakia*, no. 29518/10, 12th June 2012; *I.G. , M.K. and R.H. v. Slovakia*, no. 15966/04, 13th November 2012; Note – outstanding decision in *G.M. and Others v Republic of Moldova*, no. 44394/15, communicated 19th March 2021.

¹⁷[Joint Statement by the United Nations Committee against Torture, the Subcommittee on Prevention of Torture, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Committee on the Rights of Persons with Disabilities. See also:](#) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1(1); International Covenant on Civil and Political Rights, Article 7; UN Convention on the Rights of Persons with Disabilities, Article 15(1); [Report of the Special Rapporteur on violence against women, its causes and consequences](#), Ms. Radhika Coomaraswamy, in accordance with the Commission on Human Rights resolution 997/44, 21st January 1999; *I.G. , M.K. and R.H. v. Slovakia*, no. 15966/04, 13th November 2012; *R.R. v. Poland*, no. 27617/04, 26th May 2011; Committee Against Torture, General Comment No. 2, CAT/C/GC/2, 24th January 2008, §20.

¹⁸UN Convention on the Rights of Persons with Disabilities; International Covenant on Economic, Social and Cultural Rights.

¹⁹UN Convention on the Rights of Persons with Disabilities; International Covenant on Economic, Social and Cultural Rights; International Covenant on the Elimination of All Forms of Racial Discrimination, Article 5; Parliamentary Assembly for the Council of Europe ("PACE") Resolution 1946 (2013), §6.4 and §6.8.

²⁰Convention on the Elimination of Violence Against Women, Article 12(1); [Communication No. 4/2004, A.S v Hungary](#), 29th August 2006, §11.2.

d. counselling, and medical advice on the risks of and alternatives to sterilisation²¹

12. On the issue of private and family life, forced sterilisation deprives the individual of the rights:

a. to create a family; to decide on how many children they have, and when to have them²²

b. to have their fertility, reproductive autonomy, and physical and mental integrity protected by the state²³

Harmonisation under EU Law

13. Under Article 83(2) of the TFEU, the EU has competence to criminalise and sanction offences at EU level if the approximation of such law is '*essential for the effective implementation*' of an EU policy that is subject to harmonisation (i.e., binding on all Member States).

14. The EU has harmonised policies against forced sterilisation because it has signed the Istanbul Convention which prohibits forced sterilisation,²⁴ and it has repeatedly confirmed its intention to conclude its accession to the Istanbul Convention or at least create measures mirroring the Convention in the event it is not ultimately ratified.²⁵ Further, the EU Charter which binds all Member States prohibits torture and ill-treatment,²⁶ which include forced sterilisation.

15. We are of the view that harmonisation of EU criminal law is an effective and appropriate avenue for the EU to implement in the proposal.

²¹Article 12 CEDAW case law, [Communication No. 4/2004](#), A.S v Hungary, 29th August 2006, §11.3.

²²UN Convention on the Rights of Persons with Disabilities, Article 23(1); Convention on the Elimination of Violence against Women, Article 16; [Communication No. 4/2004](#), A.S v Hungary, 29th August 2006, §11.4.

²³EU Charter, Article 23; *R.R. v. Poland*, no. 27617/04, 2011, §§180-181; *P. and S. v. Poland*, no. 57375/08, 2013, §96; *Tysiąc v. Poland*, no. 5410/03, 2007, §§106-107.

²⁴Article 39.

²⁵<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152>; Section 1 of the proposal, Page 7.

²⁶Article 4.

The Istanbul Convention

16. The Istanbul Convention criminalises forced sterilisation.²⁷ It provides that Parties to the Convention *'shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: ... performing surgery which has the purpose or effect of terminating a woman's capacity to naturally reproduce without her prior and informed consent or understanding of the procedure.'*²⁸
17. The EU has signed the Convention.²⁹ The Commission has expressed that *'concluding the EU's accession [to the Convention] is a key priority for the Commission [and s]hould the EU's accession to [it] remain blocked, the Commission intends to propose in 2021 measures, within the limits of EU competence, to achieve the same objectives as the Istanbul Convention'*.³⁰
18. Therefore, the EU intends to ratify the Convention without reservation, harmonising its prohibition on forced sterilisation. Even if the Convention is not fully ratified by the EU, the Commission pledges to impose its own measures which would mirror the Convention and therefore criminalise forced sterilisation. The inclusion of forced sterilisation in the proposal as a crime at EU level would fully align with the Commission's intention in both scenarios and is a necessary measure to meet either aim.

²⁷Article 39.

²⁸Article 39.

²⁹13th June 2017 <<https://eige.europa.eu/news/eu-signs-istanbul-convention>>.

³⁰<<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152>>. See also Section 1 of the proposal, Page 7.

EU Charter

19. The EU Charter prohibits torture and other ill-treatment.³¹ The Convention on the Rights of Persons with Disabilities, which the EU has signed and formally confirmed,³² prohibits torture or cruel, inhuman or degrading treatment or punishment.³³ Both instruments are subject to harmonisation measures because they bind all Member States.

20. At EU level, forced sterilisation is a form of torture and ill-treatment. For example, the European Court of Human Rights (“ECtHR”) has confirmed that the failure to provide appropriate medical care will amount to a breach of the European Convention on Human Rights’ prohibition of torture and ill-treatment.³⁴ The ECtHR has found violations of this prohibition where during a sterilisation and in the absence of a medical emergency, the individual’s personal autonomy,³⁵ choice, and informed consent as a patient were disregarded.³⁶

21. The same applies at international level. For example, in 2008 the then Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Professor Juan E. Méndez, found that forced sterilisations based on discriminatory ideas that women with disabilities and/or from marginalised communities are unfit to have children could amount to torture.³⁷ An inter-Committee report from UN bodies found that *‘[f]orms of severe violence perpetrated by State or private actors directed at disabled persons can amount to torture’*.³⁸

³¹Article 4.

³²< https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-15&chapter=4&clang=en>

³³Article 15.

³⁴*R.R. v. Poland*, no. 27617/04, 2011 §152; *P. and S. v. Poland*, no. 57375/08, 2013, §160; *V.C. v. Slovakia*, no. 18968/07, 2012, §106-120.

³⁵*Gauer and Others v. France*, no. 61521/08, March 2011; *V.C. v. Slovakia*, no. 18968/07, 8th November 2011; *N.B. v. Slovakia*, no. 29518/10, 12th June 2012; *I.G. , M.K. and R.H. v. Slovakia*, no. 15966/04, 13th November 2012; Note – outstanding decision in *G.M. and Others v Republic of Moldova*, no. 44394/15, communicated 19th March 2021.

³⁶*V.C. v. Slovakia*, no. 18968/07, 8th November 2011, §119-120.

³⁷[Report of the Special Rapporteur on torture and other cruel, inhuman or degrading punishment](#), Juan E. Méndez, 1st February 2013, §48.

³⁸[Joint Statement by the United Nations Committee against Torture, the Subcommittee on Prevention of Torture, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Committee on the Rights of Persons with Disabilities. See also: Convention against Torture and Other Cruel, Inhuman or](#)

22. Our opinion is that the prohibition on torture and ill-treatment extends to forced sterilisation, making it subject to harmonisation.

Essential need for approximation

23. The essential need for the approximation of criminal laws arises because Member States' national laws do not consistently criminalise or sanction forced sterilisation. For example, a 2021 report commissioned by the EU found that in Cyprus, Romania, Latvia and Bulgaria there are *'no explicit provision[s] ... envisaged for forced sterilisation.'*³⁹ The Commission has also highlighted the failure of national laws to combat the on-going prevalence of this crime within the EU: *'forced sterilisation ... [a]gainst women and girls are forms of gender-based violence and serious violations of women's and children's rights within the EU.'*⁴⁰

24. The 2021 report found that *'[c]ommon definitions and sanctions might promote harmonisation at EU level in how certain offences such as ... forced sterilisation – which are currently not explicitly recognised under the criminal codes of certain Member States – are treated.'*⁴¹ The proposal stresses that combatting violence against women through criminalising relevant offences would promote its plan to *'protect the core EU values and to ensure that the EU Charter on Fundamental Rights is upheld.'*⁴²

Degrading Treatment or Punishment, Article 1(1); International Covenant on Civil and Political Rights, Article 7; UN Convention on the Rights of Persons with Disabilities, Article 15(1); [Report of the Special Rapporteur on violence against women, its causes and consequences](#), Ms. Radhika Coomaraswamy, in accordance with the Commission on Human Rights resolution 997/44, 21st January 1999; *I.G. , M.K. and R.H. v. Slovakia*, no. 15966/04, 13th November 2012; *R.R. v. Poland*, no. 27617/04, 26th May 2011; Committee Against Torture, General Comment No. 2, CAT/C/GC/2, 24th January 2008, §20.

³⁹Gender-based violence as a new era of crime listed in Article 83(1) TFEU', European Parliamentary Research Service, June 2021, Page 25.

⁴⁰<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152>>. For more examples of inadequate national law implementations: ['Concluding observations on the initial report of the Czech Republic'](#), Committee on the Rights of Persons with Disabilities, 2017, §42; ['Baseline Evaluation Report: Slovenia'](#), GREVIO, Council of Europe, 12th October 2021, §277.

⁴¹Gender-based violence as a new era of crime listed in Article 83(1) TFEU', European Parliamentary Research Service, June 2021, Page 43.

⁴²Section 1 of the proposal.

25. There is an essential need for the approximation of criminal laws in the EU to effectively implement the EU's commitment to the Istanbul Convention and its explicit prohibition on forced sterilisation and the Charter's prohibition on torture and ill-treatment.

Development in crime

26. Under Article 83(1) of the TFEU, the EU may criminalise '*particularly serious crime with a cross-border dimension.*' The areas of crime the EU has competence over for this purpose are: '*terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeit means of payment, computer crime and organised crime.*'⁴³

27. Forced sterilisation carried out in connection with, or for the purposes of, sexual exploitation or trafficking will fall within the EU's competence. For example, scenarios where forced sterilisation has been performed as a contraceptive method to enable an individual to be sex trafficked without the risk of pregnancy.

28. Not all forced sterilisations fit within the scope of sexual exploitation. However, the EU still has the competence to criminalise forced sterilisation based on Article 83(1) where it represents a development of particularly serious crime of a cross-border nature.⁴⁴

29. It is arguable that forced sterilisation constitutes a development in sexual violence crime. By way of example, the proposal seeks to criminalise FGM despite it being categorised as a crime of gender-based violence rather than sexual exploitation. FGM therefore represents a development in sexual violence crimes. The Commission states:

⁴³Article 83(1) TFEU.

⁴⁴'Gender-based violence as a new area of crime listed in Article 83(1) TFEU', European Parliamentary Research Service', 2021.

*‘The term ‘sexual exploitation’ in Article 83(1) TFEU can be understood as **any actual or attempted abuse of a position of vulnerability, differential power or trust**, including, but not limited to, profiting monetarily, socially or politically from a **sexual act** with another person. The exploitative element can refer to the achievement of power or domination over another person for the purpose of sexual gratification, **financial gain and/or advancement**. The criminal offences of rape and **female genital mutilation presuppose these elements**. **Female genital mutilation is an exploitative practice performed for the purpose of preserving and asserting domination over women and girls and to exert social control over girls and women’s sexuality.**⁴⁵*

30. The Commission also addresses this issue, referring to the crime of sexual violence as including *‘acts otherwise directed against a person’s sexuality without the person’s consent’*, and designating FGM as one such crime on the basis that it *‘violates women’s bodies and often damages their sexuality, mental health, well-being and participation in their community.’*⁴⁶

31. The parallels between FGM and forced sterilisation are stark. FGM directly targets women. Although forced sterilisation is not exclusively perpetrated against women and girls, most reports of forced sterilisation within the EU are committed against women, including women with disabilities and/or from ethnically and racially minorities. For example:

- In an interagency report, the WHO confirms that *‘[h]istorically, women have been disproportionately subjected to forced, coerced and otherwise involuntarily sterilization’*⁴⁷
- Human Rights Watch reports that *‘[w]omen with disabilities are particularly vulnerable to forced sterilizations performed under the*

⁴⁵Section 2: Legal Basis, Subsidiarity and Proportionality.

⁴⁶< https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en>

⁴⁷‘Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement’, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, WHO, 2014.

*auspices of legitimate medical care or the consent of others in their name*⁴⁸

- Amnesty International reports that in the Czech Republic, *'[t]housands of women, the majority of whom were Roma, were sterilized [by being] coerced into signing consent forms, often while they were in labour or recovering from Caesarean sections*⁴⁹
- In 2018 the European Parliament raised the issue of the forced sterilisations of 140 women and girls with disabilities in Spain in 2016 alone⁵⁰
- In 2018, further reports of forced sterilisations against women and girls in Spain, France and Croatia emerged⁵¹

32. The 'cross-border' nature of forced sterilisation arises from its *'nature [and] impact'* and *'from a special need to combat [it] on a common basis.'*⁵² The practice continues to be performed across Member States, with an EU commissioned report recognising the failure of national laws to combat it and the need for action at EU level.

33. Our opinion is that the EU has competence under Article 83(1) to criminalise forced sterilisation on the basis that it represents a development in sexual violence crimes, and it cannot logically seek to criminalise FGM under this provision without doing the same for forced sterilisation.

⁴⁸'Sterilization of Women and Girls with Disabilities: A Briefing Paper', 10th November 2011.

⁴⁹'Czech Republic: Hard won justice for women survivors of unlawful sterilization', 22nd July 2021.

⁵⁰'Forced sterilisation of women and girls with disabilities in Spain', European Parliament, 7th February 2018. See also: < https://www.europarl.europa.eu/doceo/document/E-8-2018-000791_EN.html>

⁵¹'Forced sterilisation of women and girls in Europe', Inclusion Europe, 2018 < <https://www.inclusion-europe.eu/forced-sterilisation-of-women-and-girls-in-europe/>>

⁵²Article 83(1) TFEU; For example, see: [Directive 2012/29/EU](#) of the European Parliament and of the Council, 25th October 2012, §6.

Next steps

34. Please do not hesitate to contact us if we can be of any further assistance.

Conclusion

35. We so advise.

16th September 2022

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