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COMITE EUROPEEN DES DROITS SOCIAUX**

4 April 2016

Case Document No. 5

Transgender Europe and ILGA-Europe v. Czech Republic
Complaint No. 117/2015

**RESPONSE FROM THE COMPLAINANT ORGANISATIONS
TO THE GOVERNMENT'S SUBMISSIONS**

Registered at the Secretariat on 24 March 2016

COMPLAINANTS' RESPONSE TO THE CZECH GOVERNMENT'S
COMMENTS ON THE ADMISSIBILITY AND THE MERITS

1. By this submission, the complainant organisations respond to the Government's comments on the admissibility and the merits dated 22 February 2016. The first section reiterates the complaint's object, in light of certain remarks made by the Government. The second section addresses the Government's objection *ratione materiae*. The third section discusses the significance of relevant trends across Europe in the present matter, and supplements the evidence presented in the initial complaint in that respect. The fourth section provides additional justification for the need to separate medical requirements from administrative gender recognition proceedings. The fifth section provides additional detail on the issue of consent to forced sterilisation in the context of gender reassignment.

I. As to the object of the complaint

2. The Government has misrepresented the object of the present complaint in its observations, which is why it is necessary to reiterate it. The present complaint argues that the requirement of sterilisation provided for under the Czech law is in breach of Article 11 of the European Social Charter ('ESC') on the right to protection of health alone and/or in conjunction with the non-discrimination principle stated in the Preamble. Contrary to the Government's remarks,¹ the present complaint does not as such concern the pathologisation of transgender identities, nor does it allege a lack of remedies at the national level for victims of discrimination. This position is without prejudice to the complainant organisations' broader advocacy goal of achieving depsychopathologisation, an otherwise indispensable pre-requisite for the emancipation of transgender people, consonant with fundamental human rights.

¹ The Government's observations, §2.

Consequently, the complainant organisations will not address the Government's arguments on these aspects, which exceed the scope of the present complaint.

3. The notion of gender reassignment treatment (GRT), already introduced in the initial complaint, is also relevant in this context.² As the Government itself acknowledges,³ sterilization is achieved through some of the procedures coming within the broader scope of GRT that involve the removal of reproductive organs – orchiectomy for trans women and hysterectomy for trans men. In that sense, the present complaint necessarily extends to those surgical treatments, otherwise designated as gender reassignment surgery or genital surgery, to which similar considerations apply *mutatis mutandis*. The impugned legal provisions in Czech law actually mention sterilization and genital surgery in the same breath.⁴ First, the Act on Specific Health Services 2012 refers to “surgical sex change” and the “disabling of the reproductive function.”⁵ Second, the Civil Code 2014 refers to a “transformation of the genitalia” concomitant to a “disabling of the reproduction function.”

4. In addition, the Government's submission is contradictory. On the one hand, it alleges that the complainant organizations' claim to the effect that sterilization is an obligatory pre-requisite for the purposes of legal gender recognition is “one-sided” and “misleading”.⁶ On the other hand, it implicitly accepts throughout its observations that sterilization is a mandatory precondition in order to become eligible for legal gender recognition. It is difficult to come to terms with the Government's ambivalent position, seeing that mandatory sterilization is specifically mentioned in positive Czech law in two places as discussed above, making it clear that no alternative paths to legal gender recognition are available. The Government appears to suggest that as long as some form of legal gender recognition is in place, that should be enough to satisfy its obligations under the ESC and other international law. However, although these arrangements may have been progressive at the time when initially adopted in

² Initial complaint, §46.

³ The Government's observations, §10-11.

⁴ An academic analysis of the legal treatment of trans people under Czech law is available in Havelková B, ‘The Legal Status of Transsexual and Transgender Persons in the Czech Republic’ in Scherpe J (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015). The article is attached as annex 2 for the Committee's convenience.

⁵ For additional details see the initial complaint, §7-11.

⁶ The Government's observations, §3.

the 1980s, during the intervening decades they have become outdated and increasingly at odds with developments across Europe. As detailed in our initial complaint and in the present submission, the legal gender recognition scheme in its present format caters to the needs of a relatively small number of trans individuals, while at the same time forcing many individuals to undergo unwanted surgery and creating outcasts of those individuals who refuse the requisite medical intervention.

5. Not only has the Czech Republic failed to reform its legislation, but it has also adopted measures that may be characterised as retrogressive, and prohibited under social and economic rights standards. Thus, the Act on Specific Health Services 2012 introduced for the first time the sterilisation requirement in positive law. At the same time, the Civil Code 2014 introduced stricter medical requirements for the purposes of legal gender recognition than previous practice.⁷ Notably, another Council of Europe body, the European Commission against Racism and Intolerance (ECRI) criticized the legal gender recognition procedure in its 2015 Czech Republic country report.⁸ Thus, ECRI confirmed that legal gender recognition was predicated on surgery and stated its position that “gender reassignment should not be a prerequisite for gender changes in personal documents.”

6. The Government rejected the claimant organizations’ suggestion that the current legal gender recognition scheme is inspired by eugenic considerations underpinning similar measures that targeted Roma women and still target sexual offenders.⁹ However, the historical record contradicts the Government’s position. In 1969, a leading psychiatrist described a transsexual person’s rejection of their body and the desire for legal gender recognition as ‘infantile’, ‘narcissistic’, ‘pathetic’ and ‘spastic’.¹⁰ When gender reassignment treatment became available during the 1980s, it was dealt with under the rubric of ‘treatment of serious sexual disorders,’ together

⁷ Havelková, p. 4., remarks that “[the Civil Code] stipulates in Section 29(1) that that the ‘sex change’ occurs ‘through surgery with the simultaneous disabling of the reproductive function and the transformation of sexual organs’ (*přeměna pohlavních orgánů*). The provision further ties the date of the legal change to the date of the ‘confirmation (of operative change) issued by the health care provider’. Andrea Baršová has criticised the provision for ‘going beyond the requirements of the previous regime of the Act on Specific Health Services, especially with regards to the requirement of “transformation of sexual organs”.’”

⁸ *ECRI Report on the Czech Republic (fifth monitoring cycle)*, 13 October 2015, §127.

⁹ See the Government’s observations, §24.

¹⁰ See *Havelková*, p. 3, and references included therein.

with operations on intersex individuals (‘hermaphrodites’) and ‘deviants’ (such as sadists or pedophiles). A 1986 legal article described trans persons as ‘unfortunates’ and medical experts overwhelmingly considered transsexuality as a ‘sexual deviation.’ Thus, the ‘scientific’ underpinning of the legal gender recognition procedure as currently provided under Czech law confirms its outdated character and the urgency of reform.¹¹

II. As to the admissibility objection raised by the Government

7. In its submissions, the Government repeatedly raised a *ratione materiae* objection in relation to the present complaint.¹² As detailed in the initial complaint,¹³ the Committee has interpreted Article 11 in the light of Articles 2 and 3 of the European Convention on Human Rights (‘ECHR’). The ESC as a whole is underpinned by the values of dignity, autonomy, equality and solidarity. At the same time, health care in particular is instrumental to preserving human dignity. In addition, the Committee has interpreted the ESC in a purposive manner aimed at realising its aim and object, with any restrictions having to be construed narrowly.

8. The present complaint concerns those legal provisions in the Czech law rendering medical treatment compulsory for the purposes of enjoying equal recognition before the law. Any medical treatment without informed consent necessarily raises issues under Article 11, impinging on human dignity, personal autonomy and physical integrity. The Committee has in fact accepted that issues pertaining to transgender healthcare, including forced sterilisation, engage Article 11 of the ESC.¹⁴

¹¹ See among others the WPATH publishes the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC), which outline the treatment protocols for gender reassignment treatment, “based on the best available science and expert professional consensus”. The latest version from 2011 is available here: <http://www.wpath.org/>. According to a recent FRA report, the SoC “have been adopted (or are in the process of being adopted) in many of the EU Member States,” FRA, Professionally speaking: challenges to achieving equality for LGBT people, 2016, p. 75.

¹² See the Government’s observations, §26, as well as its previous comments on admissibility.

¹³ The initial complaint, §18-21.

¹⁴ See further the initial complaint, §20.

9. Mandatory sterilisation and genital surgery more broadly have been widely conceptualised as violations of the right to health, including sexual and reproductive health, or, as the case may be, of the right to bodily integrity,¹⁵ including, at the U.N. level, by the Committee on Economic, Social and Cultural Rights (CESCR),¹⁶ the Committee on the Elimination of Discrimination against Women (CEDAW)¹⁷ and the Special Rapporteur on Torture,¹⁸ and, at the Council of Europe level, by the Commissioner for Human Rights¹⁹ and the Parliamentary Assembly.²⁰ Notably, in a recently-released General Comment on the right to sexual and reproductive health, the CESCR noted that “laws and policies that indirectly perpetuate coercive medical practices further violate this duty, including incentive or quota-based contraceptive policies and hormonal therapy, surgery or sterilization requirements for legal recognition of one’s gender identity.”²¹ Courts in Italy²² and Germany²³ that struck down the requirements of sterilisation and/or genital surgery employed similar reasoning.

¹⁵ See further the initial complaint, §22-33.

¹⁶ CESCR, *Concluding observations on the second periodic report of Lithuania*, 24 June 2014: “The Committee encourages the State party to take effective measures to ensure that lesbian, gay, bisexual and transgender persons can enjoy their economic, social and cultural rights without discrimination, including access to health care, employment and education, and that legal recognition of their gender is not dependent on whether or not they have undergone gender reassignment surgery.”

¹⁷ See the *Concluding Observations* on the Netherlands mentioned in the initial complaint at fn. 46. CEDAW made similar comments in the *Concluding observations on the seventh periodic report of Belgium*, 7 November 2014, at §44-45: “44. The Committee is concerned that, to obtain legal recognition of their gender, transgender women need to undergo a lengthy and burdensome procedure and are required to undergo a psychiatric assessment and compulsory sterilization or surgery. 45. The Committee recommends that the State party: (a) Lighten the procedural burden for transgender women to obtain legal gender recognition by making the procedure more expeditious, transparent and accessible; (b) Amend current laws and practices, in particular the law of 10 May 2007 on transsexuality, to abolish the requirements for a psychiatric assessment, sterilization and surgery for transgender women who wish to obtain legal recognition of their gender.”

¹⁸ See, in addition to the report mentioned in the initial complaint at fn. 26, the *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (assessing the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender and intersex persons), 5 January 2016, §49.

¹⁹ See the initial complaint, §33 and references.

²⁰ Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015), *Explanatory Report*, §62: “Such requirements violate a person’s dignity, physical integrity, right to form a family and to be free from degrading and inhuman treatment.”

²¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 4 March 2016, §58.

²² See *infra*, §17.

²³ Federal Constitutional Court, 1 BvR 3295/07, 11 January 2011, available here <http://tgeu.org/german-federal-court-verdict-on-forced-sterilisation-2011/>, and summarized in the initial complaint at §38.

10. In light of the above, it is submitted that a forced sterilisation requirement engages the right to protection of health under Article 11 of the ESC.

III. The trends across Europe point towards the simplification and demedicalization of legal gender recognition procedures

11. The Government claimed that the legal gender recognition scheme in the Czech Republic complies with the jurisprudence of the European Court of Human Rights ('ECtHR').²⁴ As noted by the Committee in its admissibility decision,²⁵ this remark is misconceived, as the complaint was lodged under the ESC and not the ECHR, two legal instruments that are distinct, notwithstanding the close connection between them.

12. In any event, the Government's remark is inaccurate too. In principle, in *Christine Goodwin v. United Kingdom*, the ECtHR has left the conditions attached to legal gender recognition at the discretion of State Parties.²⁶ However, the ECtHR has not yet had the opportunity to examine the validity of the sterilisation requirement specifically, despite the fact that it raises serious human rights concerns. It came closest to doing so in *Y.Y. v. Turkey*, in which the judges involved expressed various degrees of concern with the sterilisation requirement, as well as hope that the right case would present itself affording them the possibility to examine its validity under the ECHR.²⁷ Since *Y.Y. v. Turkey* was published, the ECtHR has communicated several cases involving trans applicants challenging the sterilisation requirement, which are awaiting judgment.²⁸

13. The Government referred to the situation in some Council of Europe Member States, which similarly require some form of genital surgery for the purposes of legal gender recognition, as an argument to support its position.²⁹ Although admittedly

²⁴ Government's observations, §7

²⁵ At §10.

²⁶ *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §93, ECHR 2002-VI.

²⁷ *Y.Y. v. Turkey*, no. 14793/08, 10 March 2015, and in particular the concurring opinion of Judges Keller and Spano, and that of Judges Lemmens and Kūris.

²⁸ See *Garçon v. France*, App. no. 52471/13; *Nicot v. France*, App. no. 52596/13 and *A.P. v. France*, App. no. 79885/12, all pending, all communicated on 18 March 2015.

²⁹ Government's observations, §7.

Europe presents a mixed picture with respect to legal gender recognition, that in itself is not a decisive consideration. The ESC, like the ECHR, is a ‘living instrument,’ to be interpreted in the light of “present day conditions”. In that respect, in cases involving transgender claimants, the ECtHR has repeatedly emphasized the importance of trends as evidence to determine “present day conditions”, even where a clear consensus could not be identified.³⁰

14. The complainant organisations have already identified a substantial range of concerted national and regional developments in Europe, including national legislation, authoritative court judgments and documents issued by various Council of Europe agencies, demonstrating a solid trend towards the simplification and de-medicalization of legal gender recognition procedures.³¹ In *Y.Y. v. Turkey*, rendered in 2015, the ECtHR confirmed the existence of trends across Europe towards abandoning the sterilisation requirement.³² In turn, the European Union Agency for Fundamental Rights (FRA) confirmed, in a comprehensive report published in 2015, the existence of “a trend towards standardising and simplifying legal gender recognition procedures in EU Member States.”³³

15. Several notable developments took place since the introductory complaint was lodged, strengthening these trends, as follows. On 22 April 2015, the Parliamentary Assembly adopted a comprehensive resolution calling states to “adopt quick, transparent and accessible legal gender recognition procedures, based on self-determination”, including by “abolishing sterilization and other medical requirements such as a mental health diagnosis.”³⁴

³⁰ *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, §85, ECHR 2002-VI, *Y.Y. v. Turkey*, §110-111; also see the concurring opinion of Judges Keller and Spano.

³¹ See the initial complaint, §34-43.

³² *Y.Y. v. Turkey*, §110-111; also see the concurring opinion of Judges Keller and Spano.

³³ European Union for Fundamental Rights, *Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU: Comparative legal analysis (Update 2015)*, available here: http://fra.europa.eu/en/publication/2015/lgbti-comparative-legal-update-2015?utm_source=Equinet+General+Contact+List&utm_campaign=808ddb698d-Equinet+Newsbook+December+2015&utm_medium=email&utm_term=0_d65f7145bb-808ddb698d-118203633, p. 18.

³⁴ Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015).

16. In 2015, Malta³⁵ and Ireland³⁶ followed Denmark³⁷ in adopting gender recognition laws based entirely on a self-determination model, whereby an individual is entitled to change their documents based on simple notarised statement, without any medical requirements. On 18 March 2016, the Norwegian Ministry of Health published a draft bill that would allow individuals to self-determine their gender without having to undergo any compulsory requirements, like sterilization.³⁸ On 8 December 2015, in the United Kingdom, a parliamentary committee published a comprehensive report calling on the British Government among others to update the Gender Recognition Act 2004, with a view to removing pathologising medical gate keeping and to adopting the “principle of gender self-declaration.”³⁹

17. In two successive judgments rendered on 19 June 2015 and on 10 July 2015, the Kyiv Administrative District Court ruled that the requirements of sterilisation⁴⁰ and genital surgery⁴¹ respectively, imposed in the context of legal gender recognition, were unlawful. In Italy, the Court of Cassation (on 20 July 2015)⁴² and the Constitutional Court (on 21 October 2015)⁴³ clarified that existing legislation on legal gender recognition had to be interpreted as not requiring genital surgery or sterilisation, in the process settling a longstanding dispute between ordinary courts on this issue. Notably, the Constitutional Court found that the impugned legislation engaged the right to health in the Italian Constitution, which dictated that genital surgery could only be provided based on the informed consent of the person in question, and which prevailed over the state’s interest to ensure that their physical characteristics coincided with their official gender.

³⁵ *The Gender Identity, Gender Expression and Sex Characteristics Act 2015*, <http://tgeu.org/gender-identity-gender-expression-sex-characteristics-act-malta-2015/>.

³⁶ *The Gender Recognition Bill* was adopted on 22 July 2015, see <http://www.teni.ie/news-post.aspx?contentid=1409>.

³⁷ See initial complaint, §81, and refs.

³⁸ See TGEU, *Self-determination for trans people in Norway could soon be reality*, 18 March 2016, at <http://tgeu.org/self-determination-trans-people-norway-soon-reality/>.

³⁹ House of Commons, Women and Equalities Committee, *Transgender Equality: First Report of Session 2015-2016*, 8 December 2015, available here: <http://transinquiry.co.uk/report>.

⁴⁰ See TGEU, *Kiev Administrative Court decides forced sterilisation is illegal*, 20 June 2015, at <http://tgeu.org/kyiv-administrative-court-decides-forced-sterilisation-is-illegal/>.

⁴¹ See TGEU, *Administrative District Court of Kiev rules against forced surgery requirement*, 11 July 2015, at <http://tgeu.org/administrative-district-court-of-kyiv-rules-against-forced-surgery-requirement/>.

⁴² Supreme Court of Cassation, I civil section, no 15138, 20 July 2015.

⁴³ Constitutional Court, sentenza 221/2015, 5 November 2015.

IV. The need to separate medical requirements from administrative gender recognition proceedings

18. As discussed above, the Government declined to acknowledge openly in its observations that sterilisation is an indispensable pre-requisite for the purposes of legal gender recognition, despite it being clearly spelled out under national law. Consequently, the Government also failed to explain why individuals seeking legal gender recognition have to undergo sterilisation. Instead, the Government appeared to rely on the out-dated view that genital surgery is a marker of a ‘true’ trans person, or in other words that all trans persons necessarily wish to undergo genital surgery.

19. This view has been contradicted by evidence of a broad diversity within the trans community, all equally deserving of the fundamental right to equal recognition before the law. While some trans people wish to undergo GRT, there are many who do not desire it for a variety of reasons, or who wish to undergo GRT in their own time, not linked to legal gender recognition procedures. In that respect, the Commissioner for Human Rights stressed that “surgery of this type is not always medically possible” and that “the treatment may not be in accordance with the wishes and needs of the patient, nor prescribed by his/her medical specialist.”⁴⁴ A Parliamentary Assembly report remarked that “those trans people not matching the strict diagnosis or other medical requirements are not eligible to have their gender identity officially recognized.”⁴⁵

20. It follows that trans people may refuse to undergo GRT for a variety of reasons.⁴⁶ Some are elderly and/or have medical conditions that render surgery risky or contraindicated; many fear complications resulting from surgery or doubt that it would provide the desired physical or aesthetic result;⁴⁷ some have to take into

⁴⁴ *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, §3.2.1.

⁴⁵ Parliamentary Assembly, *Discrimination against Transgender people in Europe*, Resolution 2048(2015), *Explanatory Report*, §64.

⁴⁶ See Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 Mich. J. Gender & L. 373 (2013), pp. 408-409 and the sources cited therein.

⁴⁷ For example, according to Nicole Metzger, *Influencing factors on the decision process of the transition objective of transmen: An exploratory study of transmen in Germany and Switzerland*, 2014, many transmen do without the phalloplasty surgery because of the high complication rate.

account practical considerations such as being unable to take time from work/school,⁴⁸ caregiving responsibilities towards family members or lacking caregivers for themselves following surgery; some hold sincere religious/personal beliefs against surgical bodily modifications; loved ones may oppose GRT; some may want to maintain their reproductive capacity; some may be denied authorization to undergo GRT because they do not correspond to normative/stereotypical views of what a trans person should behave/look like; some feel that surgery is not necessary for them to feel comfortable living in their self-identified gender identity, particularly when they have for example already made alterations to their gendered appearance, names and pronouns. This diversity of perspectives is reflected in the individual statements provided by trans people living in the Czech Republic and attached to the present submission.⁴⁹ Some of these individuals refused any surgical treatments including sterilization, others opted for some surgical treatments, but not sterilization, and yet others reluctantly agreed to medical interventions rendering them infertile in order to become eligible for legal gender recognition.

21. Medical professionals have widely rejected the view that genital surgery should be taken as the marker of consistency of a trans person's gender identity or that it should be an eligibility requirement for the purposes of legal gender recognition. The WPATH recommended in its Standards of Care,⁵⁰ described as "flexible clinical guidelines," that treatment should be individualized, and suggested that changes in gender role alone may be sufficient treatment for some transgender people. In 2010, the WPATH issued a statement making it clear that gender recognition should not be premised on surgery or sterilization, but on the person's "lived gender, regardless of reproductive capacity," and urged all stakeholders to make the necessary changes in their procedures.⁵¹ In 2015, the WPATH additionally highlighted the fact that "no particular...mental health treatment or diagnosis is an adequate marker for anyone's gender identity, so these should not be requirements for

⁴⁸ See for example the situation of the claimant in the case decided by the Austrian High Administrative Court and summarized in the initial complaint at §37, Verwaltungsgerichtshof [High Administrative Court], 2008/17/0054, 27 February 2009.

⁴⁹ Annex 1.

⁵⁰ The WPATH SoC, see *supra* fn. 11.

⁵¹ *WPATH Identity Recognition Statement*, 16 June 2010, http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf.

legal gender change.”⁵² In 2015, the World Medical Association (WMA) issued a statement emphasizing that individuals had a “right to self-identification with regard to gender” and that they should not be required to undergo sterilisation as a prerequisite to legal gender recognition.⁵³

22. The move to reform legislation across Europe reflects an understanding that the medical requirements imposed on transgender people seeking legal gender recognition are in breach of fundamental human rights as well as lacking a sound justification from a policy perspective. This however cannot be taken to cast doubt on the merits of gender reassignment treatment or the need to fund it from public health insurance, as the Government suggests. On the contrary, there is a broad consensus among the medical community to the effect that gender reassignment treatment is necessary medical treatment that should be provided to all those who need it based on their informed consent.⁵⁴ In that respect, the Commissioner for Human Rights emphasized that although GRT is “often desired as a basic necessity” by trans people, “medical treatment must always be administered in the best interests of the individual and adjusted to her/his specific needs and situation.”⁵⁵ In any event, he continued, “it is disproportionate for the state to prescribe treatment in a ‘one size fits all’ manner,” which is what happens in the Czech Republic.

⁵² *WPATH Statement on Legal Recognition of Gender Identity*, 19 January 2015, available here: http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf.

⁵³ *WMA Statement on transgender people*, October 2015, available here: <http://www.wma.net/en/30publications/10policies/t13/>.

⁵⁴ The WPATH has undertaken a review of scientific literature and concluded that gender reassignment is the only effective treatment for those trans people who need to alter their body; in that sense, gender reassignment treatment is a necessary medical treatment, and not elective or cosmetic (WPATH SoC-7, p. 58). Research shows clearly that “surgery is essential and medically necessary to alleviate [trans people’s] gender dysphoria.” (WPATH SoC-7, p. 54) Follow-up studies have shown an undeniable beneficial effect of sex reassignment surgery on postoperative outcomes such as subjective well-being, cosmesis, and sexual function.” (WPATH SoC-7, p. 54 f.) One of the largest studies on trans peoples’ health recently undertaken in Europe (McNeil, Bailey, Ellis, Morton, Regan, *Trans Mental Health Study 2012*, available here http://www.gires.org.uk/assets/Medpro-Assets/trans_mh_study.pdf) demonstrates the positive effects access to necessary GRT has on the individual. Compared to those who wanted to transition but had no access, those who did transition showed a “substantially higher life satisfaction” (p. 17), a significantly higher rate of satisfaction with their own body (p. 18) and felt their mental health had improved (p. 50). 63% of those who transitioned reported that they harmed themselves less after transition (p. 55). Access to medical treatment saves lives: “Suicidal ideation and actual attempts reduced after transition, with 63% thinking about or attempting suicide more before they transitioned and only 3% thinking about or attempting suicide more post-transition.” (p. 59) The study also shows that lack of access “has a direct [negative] impact upon depression.” (p. 52).

⁵⁵ *Human Rights and Gender Identity*, Issue Paper by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, §3.2.1.

V. The lack of informed consent

23. The Government insisted that all gender reassignment treatment was provided strictly based on the informed consent of the individual in question. However, the lack of consent derives from the fact that many trans people undergo genital surgery for the sake of obtaining legal recognition of their gender identity. In other words, the Government is responsible for placing trans people in a situation where they have to choose between two fundamental rights – physical integrity and legal gender recognition. As discussed in the introductory complaint,⁵⁶ consent cannot be free where medical treatment is a precondition for accessing a benefit or right. Furthermore, national courts that struck down the sterilization/genital surgery requirement often identified the conundrum that trans people find themselves in as a source of human rights violations.⁵⁷

24. Regardless of the option that trans people take, they stand to forfeit a fundamental right and face severe harm. Assuming trans people refuse to comply with the medical requirements attached to legal gender recognition, they are forced to carry identification documents that do not correspond to their gender identity. According to a recent EU Agency for Fundamental Rights (FRA) survey, the lack of correct identity documents is one of the drivers for disproportionately higher levels of discrimination and abuse suffered by trans people. Thus, one in three trans respondents felt discriminated against when showing their identification card or other official document that identifies their sex. In addition, almost nine in 10 said that easier legal procedures for gender recognition in their gender identity would help them to live a more comfortable life.⁵⁸ Conversely, the WPATH⁵⁹ recommended legal gender recognition as an alternative measure capable of alleviating discomfort and distress related to the discrepancy of a person's gender identity and the sex assigned at birth.⁶⁰ In addition, the WPATH emphasized that “legally recognized

⁵⁶ Initial complaint, §13 et seq.

⁵⁷ *Idem*, §37-39.

⁵⁸ European Union Agency for Fundamental Rights, *Being Trans in the European Union: Comparative Analysis of EU LGBT Survey Data 2014*, pp. 81-82, 95.

⁵⁹ The WPATH publishes the *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SoC), which outline the treatment protocols for gender reassignment treatment, “based on the best available science and expert professional consensus”. The latest version from 2011 is available here: <http://www.wpath.org/>.

⁶⁰ *Idem*, p. 10.

documents matching self-identity are essential to the ability of all people to find employment, to navigate everyday transactions, to obtain health care, and to travel safely,” and that barriers to legal gender recognition may harm the physical and mental health of the person in question.⁶¹

25. If on the other hand trans persons choose legal gender recognition, they have to undergo a number of highly intrusive medical treatments with irreversible consequences, including permanent infertility. In its 2011 judgment, the German Constitutional Court has analyzed in detail the forced medical treatment requirement and concluded that it was disproportionate to the objectives pursued, and therefore in breach of the right to physical integrity in the Basic Law. In doing so, the Constitutional Court noted that it was “unacceptable” to demand trans persons to undergo interventions that carried considerable health risks and potentially life long adverse effects, as proof of their sincerity and of the permanent character of their “transsexuality” for the purposes of achieving legal gender recognition.⁶²

26. The Government made a series of questionable statements including for example that “applicants for sex changes do not regret termination of their reproductive function,” or that some “applicants for female-to male change cannot imagine being pregnant at all.”⁶³ In addition, the Government stated that “trans people are not restricted in their rights to reproduction...they can preserve their embryonic stem cells before the sex reassignment surgery.”⁶⁴ The Government failed to submit any evidence supporting their statements, including for example surveys, codes of conduct, etc. Notably, the presumptive existence of alternatives cannot detract from the fact that sterilization is a permanent impairment and that it amounts to an unjustified and wanton interference with fundamental rights. Notably, the *Committee of Ministers Recommendation Rec(2007)17 on gender equality standards and mechanisms*, prescribes that “both women and men must have a non-negotiable right to decide over their own body, including sexual and reproductive matters. Such acknowledgement must be reflected in the development, implementation, access to,

⁶¹ *WPATH Statement on Legal Recognition of Gender Identity*, 19 January 2015, http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf.

⁶² Federal Constitutional Court, 11 January 2011, §65, cited supra fn. 23.

⁶³ Government’s observations, §15.

⁶⁴ *Idem*, §12.

monitoring and evaluation of health-care services and in research priorities.”⁶⁵ Notably, the “preservation of embryonic stem cells” is not among the fertility preservation methods scientifically tested and normally available in other countries, namely embryo cryopreservation, oocyte cryopreservation and ovarian tissue cryopreservation (for trans men), and sperm cryopreservation, surgical sperm extraction and testicular tissue cryopreservation (for trans women).⁶⁶ In any event, based on information received from trans community organisations in the Czech Republic, at no stage in the gender reassignment procedure is information regarding reproductive options formally provided to trans patients, and no cases are known of individuals who have taken advantage of alternatives available.

27. The Government’s statements also fail to account for the diversity of experiences among the trans community. In that respect, the individuals who provided the statements attached to the present submission almost unanimously referred to the difficulties they experienced on a daily basis as a result of lacking personal documents that correctly recorded their gender identity.⁶⁷ For some of them, these difficulties became unbearable (for example one needed to change his documents in order to get married, while another did so in order to get a job so that he could provide for his children), such that they reluctantly accepted to undergo sterilization. At least two of the people who underwent sterilization reported having been traumatized by the operation and feeling regretful and angry.

Annexes

1. Individual statements
2. Havelková B, ‘The Legal Status of Transsexual and Transgender Persons in the Czech Republic’ in Scherpe J (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia 2015)

⁶⁵ Committee of Ministers Recommendation Rec(2007) 17, of 21 November 2007, Principle 44.

⁶⁶ See for example Chloë De Roo, Kelly Tilleman, Guy T’Sjoen & Petra De Sutter (2016), *Fertility options in transgender people*, *International Review of Psychiatry*, 28:1, 112-119.

⁶⁷ Annex 1.