



24 April 2009

Commissioner Androulla Vassiliou
Commissioner for Health

Robert Madelin
Director-General, DG Health and Consumers
European Commission
B-1049 Brussels, Belgium

Re: Conscientious objection and patients rights in Europe

Dear Commissioner Vassiliou and Director-General Robert Madelin,

This letter is to follow-up on our intervention at the EU Open Health Forum in Brussels in December 2008 regarding patients right to access health services in Europe. As civil society representatives, ASTRA and the Center for Reproductive Rights, two non-governmental organizations working to promote and advance reproductive health and rights in Europe, would like to reiterate the importance of achieving health security in Europe and express our support for all of DG SANCO's work on promoting equality in access to health care and its commitment to ensuring participation by civil society. We believe that in order to achieve health security and to realize patients' rights in Europe, barriers to accessing health care must be addressed. We respectfully urge DG SANCO to address the unregulated practice of conscientious objection in Europe as one such barrier.

Background

The practice of conscientious objection arises in the field of health care when individual health care providers or institutions refuse to provide certain health services based on religious, moral or philosophical objections.ⁱ Standards on conscientious objection in health care settings may shield providers from liability for refusing to provide services, but they should also impose certain obligations on providers in order to ensure that patients receive the medical care they need and are legally entitled to receive.ⁱⁱ Conscientious objection is often raised in the field of reproductive health care, including health care providers' refusal to perform abortions, contraceptive sterilization or prenatal diagnosis.ⁱⁱⁱ The availability of providers for reproductive health services is specifically impacted by the practice of conscientious objection. The effective protection of the right to health includes access to health care services.^{iv} Women's access to reproductive health care, legal and ethical obligations of health care providers and state's obligations to ensure the effective exercise of the right to health, require that states impose necessary restrictions and regulations on the application of conscientious objection in reproductive health care settings.

Situation in Member States and Candidate Countries

While some Member States and Candidate Countries protect health care providers from legal obligations to perform procedures to which they have conscientious objections,^v many member states, lack of a comprehensive and effective legal and policy framework governing the practice of conscientious objection by health-care providers. The absence of such frameworks mean that women, in some Member States and Candidate Countries today, are generally unable to access reproductive health care services they are lawfully entitled to receive (see below), undermining their rights to health care services and to privacy among other rights, and potentially constituting a breach of the duty of care and abandonment of patients.^{vi}

Decisions of national level courts of Member States, indicate numerous and ongoing problems in the practice of conscientious objection in reproductive health care settings in such countries as **France** (regarding the problem of institutional invocation of conscientious objection),^{vii} **Germany** (regarding ensuring the availability of doctors willing to perform abortions),^{viii} and the **United Kingdom** (regarding failure to inform women of pregnancy risks).^{ix}

While many member states exempt health-care providers from performing procedures to which they conscientiously object through a legal or ethical framework which also places obligations on the health care provider, many of these frameworks are limited to one type of procedure, such as abortion, or do not impose clear and comprehensive obligations on conscientious objectors. Others, like Poland and Italy, also lack effective oversight and necessary regulation of the practice. As a result, women face formidable barriers in accessing reproductive health care services they need and are legally entitled to receive. For example, a current case is pending before the European Court of Human Rights against **Poland** regarding a woman who was repeatedly denied genetic prenatal examination due in large part to unregulated practice of conscientious objection.^x An indication that this is an ongoing and growing problem is evidenced by a recent report by **Italy**'s Ministry of Health that showed that nearly 70% of gynecologists in Italy refuse to perform abortions on moral grounds. It found that between 2003 and 2007 the number of gynecologists invoking conscientious objection in their refusal to perform an abortion rose from 58.7 percent to 69.2 percent. The percentage of anesthesiologists who refused to help in an abortion rose from 45.7 percent to 50.4 percent. And in the southern parts of the country, the numbers are higher.^{xi}

International and European regional statements on conscientious objection

Concern over the lack of availability of reproductive health care services due to laws and practices concerning conscientious objection has been raised by United Nations Treaty Monitoring bodies against some Member States and Candidate Countries, such as **Croatia**,^{xii} **Italy**,^{xiii} **Poland**^{xiv} and **Slovakia**.^{xv} For example, in July 2008, the CEDAW Committee in its Concluding Observations to Slovakia noted that "...is deeply concerned about the insufficient regulation of the exercise of conscientious objection by health professionals with regard to sexual and reproductive health" and recommended that Slovakia "...adequately regulate the invocation of conscientious objection by health professionals so as to ensure that women's access to health and reproductive health is not limited. The Committee recalled its "General Recommendation 24, which states that it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women" and recommended "...that, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers."^{xvi}

The European Union Network of Experts on Fundamental Rights has also addressed the concern over the law and practice of conscientious objection in relation to access to various health services, including abortion. In 2005 it issued an opinion on the conformity of a draft treaty on conscientious objection between the Holy See and Slovakia with the European Union Charter on Fundamental Rights. The Network recognized that while conscientious objection can be considered a part of the freedom of thought, conscience and religion, when it conflicts with other rights and freedoms, it is necessary to restrict exercise of conscientious objection by means of creating adequate balance between conflicting rights and freedoms.^{xvii} The opinion notes that “this right [to conscientious objection] should be regulated in order to ensure that, in circumstances where abortion is legal, no woman shall be deprived from having effective access to the medical service of abortion.”^{xviii} In addition, they noted that denying a woman the effective possibility to abort in circumstances where abortion is lawful under the regulations of the State concerned may “amount to the infliction of an inhuman and degrading treatment”.^{xix}

The European Court of Human Rights while considering the admissibility of a challenge to a French court’s decision that “ethical or religious principles are not legitimate grounds to refuse to sell a contraceptive,”^{xx} also recognized the limitations of conscientious objection when persons are completely reliant on a certain profession to obtain legally authorized services, “It considers that, as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.”^{xxi} The Court explained that Article 9 of the European Convention on Human Rights protects acts closely linked to personal convictions and religious beliefs, such as acts of worship, teaching, practice, and observance. However, it noted that Article 9 does not always guarantee the right to behave in public in a manner governed by that belief. The Court said that the word “practice” used in Article 9(1) does not protect “each and every act or form of behaviour motivated or inspired by a religion or a belief.”^{xxii} The decision reflects this Court’s understanding of the limitations of conscientious objection, especially in circumstances when persons are completely reliant on a certain profession to obtain legally authorized health-care services.

A groundbreaking pronouncement regarding women’s right to abortion was issued on 16 April 2008 by the Parliamentary Assembly of the Council of Europe. A majority of the parliamentarians adopted a resolution entitled ‘Access to Safe and Legal Abortion in Europe’ (Resolution).^{xxiii} The Resolution recommends member states to “guarantee women’s effective exercise of their right of access to a safe and legal abortion; allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion...and lift restrictions which hinder, *de jure* or *de facto*, access to safe abortion, and, in particular, take the necessary steps to create the appropriate conditions for health, medical and psychological care...”^{xxiv}

State Obligations

It is the duty of the state to ensure access to health care services provided for by law. Thus, States must effectively regulate the practice of conscientious objection to ensure the adequate availability of lawful reproductive health care services and information. Basic principles, derived from medical and international human rights standards, governing the regulation of conscientious objection should include:

- Ensuring adequate availability and accessibility of reproductive health care providers by employing adequate staff available and willing to competently delivery services, and that are available in a timely manner within a convenient distance;

- Conscientious objectors must provide timely and effective notice to patients that they are conscientious objectors;
- Conscientious objectors have a duty to refer the patient, to another provider willing and able to perform the health care procedure/treatment. Such a provider must be conveniently accessible and the referral should be done in a timely manner;
- Conscientious objection cannot be invoked in emergency situations when life or permanent health is at risk;
- Conscientious objection applies to health care treatment/procedures that the health care provider directly objects to, not diagnostic care which may or may not lead to an objectionable act by the patient (such as prenatal examinations to detect fetal impairment);
- Conscientious objection cannot be invoked in information services; patients must be informed of all risks, benefits and alternatives to treatment;
- Conscientious objection can only be invoked by individuals, cannot be invoked by institutions (publicly funded hospitals must provide legal reproductive health care services);
- Conscientious objection should not apply to hospital staff in performing general care functions, such as preparing operating rooms, making appointments, issuing referral notices, etc;
- Provision of oversight and monitoring of the practice of conscientious objection so as to ensure women are able to access the medical services they need and are legally entitled to receive;
- Conscientious objectors should be required to register their objection with state health officials and patients should in turn know which health care provider is an objector;
- National health systems should train health care providers in performing all legal reproductive health care services, irrespective if objectionable. This will ensure access to health care services in emergency and other situations where conscientious objection is not applicable.

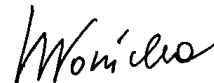
Conclusion

We hope that the above information provides a basis for addressing this barrier to health security and patients' rights in Europe. We respectfully urge DG SANCO to address this issue in its all its related work. Should you need more information or clarification, please do not hesitate to contact us.

Respectfully yours,



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ⁱ World Health Organization, *Considerations for Formulating Reproductive Health Laws*, W H O / R H R / 0 0 . 1 (2 0 0 0), Chapter 2, part 4: Conscientious Objection, available at http://www.who.int/reproductive-health/publications/rhr_00_1/RHR_00_1_Chapter2_part4.htm

ⁱⁱ See for example, European Union Network of Expert Opinion 4-2005, *The Right to Conscientious Objection and the Conclusions by EU Member States of Concordats with the Holy See*, 14 December 2005, page 16, available at http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf A health care providers right to refuse to participate in medical procedures that may offend their religious or other conscience convictions is not unlimited as it may be incompatible with a patients' rights to receive lawful medical treatment.

ⁱⁱⁱ See for example, World Health Organization, *Considerations for Formulating Reproductive Health Laws*, W H O / R H R / 0 0 . 1 (2 0 0 0), Chapter 2, part 4: Conscientious Objection, available at http://www.who.int/reproductive-health/publications/rhr_00_1/RHR_00_1_Chapter2_part4.htm

^{iv} International Covenant on Economic, Social and Cultural Rights, Article 12 and General Comment 14 on the Right to the Highest Attainable Standard of Health, para 21 which calls on States to remove all barriers to women's access to health services, including in the area of sexual and reproductive health

^v Such protection can be found in conscientious objection clauses present in general health care legislation, deontology codes (medical ethics codes) or in legislation or regulations governing specific health procedures. For some EU Member State clauses, see European Union Network of Expert Opinion 4-2005, *The Right to Conscientious Objection and the Conclusions by EU Member States of Concordats with the Holy See*, 14 December 2005 pages 8-14 available at http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf

^{vi} See World Health Organization, *Considerations for Formulating Reproductive Health Laws*, W H O / R H R / 0 0 . 1 (2 0 0 0), Chapter 2, part 4: Conscientious Objection, available at http://www.who.int/reproductive-health/publications/rhr_00_1/RHR_00_1_Chapter2_part4.htm

^{vii} In a 2001 decision of the French Constitutional Council, the Council recognized that conscientious objection is a right afforded to individuals, not institutions, and upheld the repeal of paragraphs in the Code of Public Health, removing the possibility that department heads of public health establishments could refuse to allow the provision of abortion services in their departments. The case was brought by senators who claimed in part that the repeal of these provisions violated the principle of freedom of conscience protected by the Constitution. While the Constitutional Council recognized the fundamental nature of the freedom of conscience, it also clarified that such freedom was that of *individual*, not institutional or departmental, conscience "...which cannot be exerted at the expense of that of other doctors and medical staff working in his service." The Council also provided that "... these provisions [of the Health Code] contribute in addition to respect for the constitutional principle of the equality of users before the law and before the public service." Decision 2001-446 DC of 27 June 2001, Voluntary Interruption of Pregnancy (Abortion) and Contraception Act, paras. 11-13, 15, 17 (Fr.).

^{viii} A 1990 decision by the Bavarian High Administrative Court⁵⁶ in Germany, which was upheld by the Federal Administrative Court of Germany, ruled that a municipality's job advertisement for a chief physician in a municipal women's hospital, which included a requirement that the physician be willing to perform abortions, was not in violation of a law providing that no one is obligated to perform abortions. The court referred to the need to provide abortions in public hospitals. It emphasized that public hospitals must enable women to realize their entitlement to abortion under the law and, thus, the criteria for the job was deemed permissible. Judgment of the Bavarian Higher Administrative Court of 03/07/1990, BayVGH DVB1. 1990, 880-82 (F.R.G.).

^{ix} In 2003, the High Court of Justice Queens Bench Division found a doctor negligent for failing to properly counsel – in part because of his religious beliefs – his patient on her increased risk of giving birth to a baby with Down's Syndrome and the availability of prenatal screenings for such abnormalities. The doctor, a devout Catholic, noted that he did not routinely and explicitly discuss screening for abnormalities with every pregnant woman. He testified that he thought pregnancy was a happy event and would want to "soothe, not alarm patients," but that he expected he would have told someone of the plaintiff's age that she was "at a slightly raised risk" for fetal abnormalities. The court noted that "[o]n his own account Dr. Kwun's approach to the subject [of informing patients about screening for abnormalities] was coloured by his belief in Roman Catholic doctrine." The court ultimately found that if the doctor had used the phrase "slightly raised risk," as the doctor testified, "it would have been seriously

misleading,” considering that experts testified that the risk for fetal abnormalities increases significantly at the plaintiff’s age. *Enright and another v. Kwun and another*, [2003] E.W.H.C. 1000 (Q.B.).

^x See information on case at Center for Reproductive Rights website, available at http://www.reproductiverights.org/crt_ab_access_legal.html#poland

^{xi} New York Times, *Italy: Rise in Doctors Refusing to Perform Abortions*, April 23, 2008, available at http://www.nytimes.com/2008/04/23/world/europe/23briefs-RISEINDOCTOR_BRF.html?_r=1&oref=slogin

^{xii} CEDAW Concluding Observations to Croatia, 14/05/98, UN Doc. A/53/38 para.109

^{xiii} CEDAW Concluding Observations to Italy, 17/07/97, UN doc. A/52.38 Rev.1, Part III, para 353.

^{xiv} The United Nations Human Rights Committee, which oversees State Compliance with the International Covenant on Civil and Political Rights, in its latest concluding observations on Poland, specifically expressed concern over the unavailability of legal abortion due to the lack of information on conscientious objection: “The Committee ... is [] concerned at the unavailability of abortion in practice even when the law permits it ... and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. ... The State Party should ... provide further information on the use of the conscientious objection clause by doctors ...” Concluding observations of the Human Rights Committee: Poland. 05/11/2004 CCPR/CO/82/POL/Rev. 1, 8, available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.82.POL.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.82.POL.En?Opendocument); See also Poland, para. 25, U.N. Doc. CEDAW/C/POL/CO/6 (2007), available at [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/799a794c841033bcc12572a4003ca978/\\$FILE/N0724380.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/799a794c841033bcc12572a4003ca978/$FILE/N0724380.pdf)

^{xv} CEDAW Concluding Observations to Slovakia, CEDAW/ C/SVK/CO/4, paras. 28-29 (2008), available at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.SVK.CO.4.pdf>

^{xvi} CEDAW Concluding Observations to Slovakia, CEDAW/ C/SVK/CO/4, paras. 28-29 (2008), available at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.SVK.CO.4.pdf>

^{xvii} EU Network of Expert Opinion 4-2005, *The Right to Conscientious Objection and the Conclusions by EU Member States of Concordats with the Holy See*, 14 December 2005, pages 15-16, available at http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf; See also JUDITH BUENO DE MESQUITA, LOUISE FINER, CONSCIENTIOUS OBJECTION: PROTECTING SEXUAL AND REPRODUCTIVE HEALTH RIGHTS (Human Rights Center, University of Essex (2009).

^{xviii} EU Network of Expert Opinion 4-2005, *The Right to Conscientious Objection and the Conclusions by EU Member States of Concordats with the Holy See*, 14 December 2005, page 20, available at http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2005_4_en.pdf

^{xix} E.U. Network of Independent Experts on Fundamental Rights, *The Right of Conscientious Objection and the Conclusion by EU Member States of Concordats with the Holy See*, EUROPEAN COMMISSION (DG JUSTICE, FREEDOM AND SECURITY), CFR-CDF Opinion 4-2005.doc, 14 December 2005, p. 19 [“E.U. Network”].

^{xx} *Pichon v. France*, App. No. 49853/99, Eur. Ct. H.R. (2001) [“Pichon”].

^{xxi} Pichon.

^{xxii} *Pichon and Sajous v. France*, App. No. 49853/99, Eur. Ct. H.R. (2001).

^{xxiii} Resolution 1607 (2008) Access to safe and legal abortion in Europe

^{xxiv} Paras 7.2-7.4