



## European Court rejects request for an advisory opinion on biomedicine treaty

The European Court of Human Rights has decided not to accept the request for an advisory opinion submitted by the Council of Europe's Committee on Bioethics (DH-BIO) under Article 29 of the Convention on Human Rights and Biomedicine ("the Oviedo Convention"). The [decision](#) is final.

The DH-BIO asked the European Court of Human Rights to provide an advisory opinion on two questions regarding the protection of the human rights and dignity of persons with mental disorders in the face of involuntary placement and/or treatment.

The Court rejected the request because, although it confirmed, generally, its jurisdiction to give advisory opinions under Article 29 of the Oviedo Convention, the questions raised did not fall within the Court's competence.

This was the first time the European Court had received a request for an advisory opinion under Article 29 of the Oviedo Convention. Such requests should not be confused with requests for an advisory opinion under Protocol No. 16, which allows the highest courts and tribunals, as specified by member States which have ratified it, to request advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the European Convention on Human Rights or its Protocols.

### Background

The request for an advisory opinion was introduced on 3 December 2019.

The questions posed by the Bioethics Committee were intended to obtain clarity on certain aspects of the legal interpretation of Article 7 of the Oviedo Convention, with a view to providing guidance for its current and future work in this area. The questions were as follows:

*(1) In light of the Oviedo Convention's objective "to guarantee everyone, without discrimination, respect for their integrity" (Article 1 Oviedo Convention), which "protective conditions" referred to in Article 7 of the Oviedo Convention does a Member State need to regulate to meet minimum requirements of protection?*

*(2) In case of treatment of a mental disorder to be given without the consent of the person concerned and with the aim of protecting others from serious harm (which is not covered by Article 7 but falls within the remits of Article 26(1) of the Oviedo Convention), should the same protective conditions apply as those referred to in question 1?*

In June 2020 the Contracting Parties to the European Convention on Human Rights ("the European Convention") were invited to address the question of the Court's jurisdiction, to give their comments on the request of the DH-BIO, and to provide information about relevant domestic law and practice. The following civil society organisations were granted leave to intervene in the proceedings: Validity; the International Disability Alliance, the European Disability Forum, Inclusion Europe, Autism Europe and Mental Health Europe (jointly); and the Center for the Human Rights of Users and Survivors of Psychiatry.

The request for interpretation was examined by the Grand Chamber.

### Decision of the Court

The Court both recognised that it had jurisdiction to give advisory opinions under Article 29 of the Oviedo Convention, and determined the nature, scope and limits of that jurisdiction. Article 29 of

the Oviedo Convention provides that the Court may give advisory opinions on “legal questions” that concern the “interpretation” of the “present Convention”. That terminology can be clearly traced back to 1995 when the Court supported the idea of taking on an interpretative function, drawing on the wording of what is now Article 47 § 1 of the European Convention. As the use of the adjective “legal” in that article denoted the intention to rule out any jurisdiction on the Court’s part regarding matters of policy and any questions which went beyond merely interpreting the text, a request under Article 29 should be subject to a similar limitation and any questions posed must therefore be of a “legal” nature.

This procedure entailed an exercise in treaty interpretation, applying the methods set out in Articles 31-33 of the Vienna Convention. While the Court treats the Convention as a living instrument to be interpreted in the light of present-day conditions, it considered that there was no similar basis in Article 29 to take the same approach to the Oviedo Convention. Compared to the European Convention, the Oviedo Convention was modelled as a framework instrument/treaty setting out the most important human rights and principles in the area of biomedicine, to be developed further with respect to specific fields through protocols.

In particular, while the relevant provisions of the Convention did not rule out the conferral of a judicial function on the Court in relation to other human rights treaties concluded within the framework of the Council of Europe, this was subject to the proviso that its jurisdiction under its constitutive instrument remained unaffected. It could not operate the procedure provided for in Article 29 of the Oviedo Convention in a manner incompatible with the purpose of Article 47 § 2 of the Convention, which was to preserve its primary judicial function as an international court administering justice under the Convention.

In the observations received from Governments, some considered that the Court was not competent to answer the questions, by virtue of Article 47 § 2 of the European Convention. Some provided various suggestions as to what “protective conditions” should be regulated by the States party to the Oviedo Convention. Most of them indicated that their domestic law provided for involuntary interventions in relation to persons suffering from a mental disorder where this was necessary to protect others from serious harm. Generally, such interventions were governed by the same provisions, and were subject to the same protective conditions as interventions aimed at protecting the persons concerned from causing harm to themselves. Trying to differentiate between the two bases for involuntary intervention was very difficult, given that many pathologies posed a risk to the person concerned and to third parties alike.

The common theme of the three contributions received from the intervening organisations was that Articles 7 and 26 of the Oviedo Convention were not compatible with the Convention on the Rights of Persons with Disabilities (CRPD). The notion of imposing treatment without consent was contrary to the CRPD. Such a practice went against the principles of dignity, non-discrimination and the liberty and security of the person, and violated a series of CRPD provisions, in particular Article 14 of that instrument. All of the Parties to the Oviedo Convention had ratified the CRPD, as had all but one of the 47 Contracting States to the European Convention. The Court should strive for a harmonious interpretation between the corresponding provisions of the European Convention, the Oviedo Convention and the CRPD.

In the Court’s opinion, however, the “protective conditions” that member States “needed to regulate to meet the minimum requirements of protection” under Article 7 of the Oviedo Convention could not be further specified by abstract judicial interpretation. It was clear that this provision reflected a deliberate choice to leave a degree of latitude to the States Parties to determine, in fuller detail, the protective conditions applying in their domestic law in this context.

As for the suggestion that it draw on relevant Convention principles, the Court reiterated that its advisory jurisdiction under the Oviedo Convention had to operate in harmony with and preserve its jurisdiction under the European Convention, above all with its primary judicial function as an

international court administering justice. It should not therefore interpret in this context any substantive provisions or jurisprudential principles of the Convention. Even though the Court's opinions under Article 29 were advisory and therefore non-binding, a reply would still be authoritative and focused at least as much on the European Convention itself as on the Oviedo Convention and risked hampering its pre-eminent contentious jurisdiction.

Nevertheless, the Court pointed out that, despite the distinct character of the Oviedo Convention, the requirements for States under its Article 7 correspond in practice to those under the European Convention, as at present, all of the States that have ratified the former are also bound by the latter. Accordingly, the safeguards in domestic law that correspond to the "protective conditions" of Article 7 of the Oviedo Convention need to satisfy the requirements of the relevant provisions of the European Convention, as developed by the Court through its extensive case-law in relation to the treatment of mental disorder. Moreover, that case-law is characterised by the Court's dynamic approach to interpreting the Convention, which is guided also by evolving national and international legal and medical standards. Therefore, the competent domestic authorities should ensure that national law is and remains fully consistent with the relevant standards under the European Convention, including those that impose positive obligations on States to ensure effective enjoyment of fundamental rights.

For these reasons, neither the establishment of the minimum requirements for "regulation" under Article 7 of the Oviedo Convention, nor "achieving clarity" regarding such requirements based on the Court's judgments and decisions concerning involuntary interventions in relation to persons with a mental disorder could be the subject of an advisory opinion requested under Article 29 of that instrument. Question 1 was therefore not within the competence of the court. As for question 2, which followed on from the first and was closely related to it, the Court likewise considered that it was not within its competence to answer it.

## Separate Opinion

Judges Lemmens, Grozev, Eicke and Schembri Orland expressed a joint dissenting opinion which is annexed to the decision.

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### Useful links:

- [The Oviedo Convention](#)
- [Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment](#)
- [Convention on the Rights of Persons with Disabilities \(CRPD\)](#)

*The decision is available in English and in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.