

# Abortion law reform in Europe: The 2018 Belgian and Irish Acts on termination of pregnancy

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## Abstract

Two European countries, Belgium and Ireland, have recently reformed their abortion laws. Through a comparative approach, this article analyses the 2018 Abortion Acts and pinpoints the common challenges encountered in the drafting process. Under both legal regimes, abortion is lawful up to 12 weeks with no requirement as to reason, and provisions on a mandatory reflection period and conscientious objection only differ in detail. While later abortion is permitted in Ireland and Belgium on similar medical grounds, access to abortion on the foetal abnormality ground remains substantially more limited in Ireland as compared to Belgium. To conclude, this article reflects upon the general direction in which abortion law in Europe is heading, as exemplified by the discussed reforms. As is true for most European countries, ongoing concern regarding the level of criminalisation and barriers to safe and equitable access to abortion may necessitate further reform.

## Introduction

Since the 1960s, most European countries have moved to legalise abortion, making termination of pregnancy in the first trimester of pregnancy available on social grounds or even upon request. After this period (or in more permissive countries, after the second trimester of pregnancy), abortion is prohibited, except to save the life of the pregnant woman or for specific reasons such as severe foetal abnormality.<sup>1</sup>

As abortion continues to be one of the most divisive issues in Western society, debates to facilitate or, alternatively, to restrict women's access to abortion flare up regularly. In European countries where amendments to restrict abortion access have recently been proposed, such as Lithuania (2018),<sup>2</sup> Norway (2018),<sup>3</sup> Poland (2016/2018),<sup>4</sup> Slovakia (2018)<sup>5</sup> and Spain (2014),<sup>6</sup> these have sparked a public outcry that resulted in their withdrawal. In contrast, recent amendments aimed at

facilitating access to abortion have been adopted, for example, in France (2014–2017),<sup>7</sup> Germany (2019),<sup>8</sup> the United Kingdom (Northern Ireland) (2019)<sup>9</sup> and Iceland (2019).<sup>10</sup> In two European countries, Belgium and Ireland, more comprehensive reforms of domestic abortion laws have taken place. Both countries adopted new abortion legislation in 2018, aimed at removing barriers to access to abortion. Considering that for such a long time Ireland upheld a near-absolute prohibition on abortion, the recent reform of the Irish abortion legislation is considered momentous. Similarly, the revision of the Belgian Abortion Act has been portrayed as a turning point by the national media.

This article examines and compares the provisions and merits of the Abortion Acts adopted in Belgium and Ireland in 2018. First, a brief overview of the development of abortion regulations in both countries will be provided, focusing on the debate leading up to the adoption of both Acts. Second, the article discusses and compares the provisions of both Acts, analysing (1) the grounds for legal access to termination of pregnancy, as they relate to the different time limits provided in the respective Acts; (2) the procedural requirements for legal access; (3) the provisions concerning conscientious objection; and (4) the criminal sanctions applicable in case of unlawful abortion. By way of conclusion, I will reflect upon some of the contemporary dilemmas on abortion that are foregrounded by these reforms.

## Origins and evolution of the Belgian and Irish Abortion Acts

### The Belgian Act on the Termination of Pregnancy

Prior to 1990, abortion in Belgium was covered by the Criminal Code and was illegal under any circumstance.<sup>11</sup> While some medical practitioners had already been providing abortion services for more than 20 years, abortion remained a contentious issue that divided society and politics.<sup>12</sup> Heated debates preceded the adoption of the 1990 Abortion Act and King Baudouin ultimately refused to sign it, resulting in a constitutional crisis. The ‘Act on the Termination of Pregnancy’ was eventually signed into law by the Council of Ministers, after having declared the King temporarily ‘unfit to rule’.<sup>13</sup>

The 1990 Act revised the provisions on abortion in the Belgian Criminal Code under the title ‘Crimes against the Family and Public Morality’. While abortion

remained a crime in principle, the Act introduced conditions under which abortion would be justified. During the first 12 weeks of pregnancy, abortion could be performed if the pregnant woman found herself in a 'situation of distress'.<sup>14</sup> From the 13th week onwards, abortion was deemed lawful only when additional requirements were met. These requirements will be outlined below.

Almost three decades later, in 2018, legislative proposals were introduced to amend abortion legislation. The provisions on voluntary abortion were removed from the Criminal Code and transferred to separate legislation, the 'Act on the Voluntary Termination of Pregnancy', adopted in October 2018.<sup>15</sup> However, as will be demonstrated below, the extraction of the provisions from the Criminal Code did not fully decriminalise abortion.

#### The Eighth Amendment of the Irish Constitution and the Health (Regulation of Termination of Pregnancy) Act 2018

Ireland has long been associated with having some of the most restrictive abortion provisions in Europe.<sup>16</sup> For more than 30 years, the foetus was granted constitutional protection by the 'Eighth Amendment', which acknowledged 'the right to life of the unborn (...), with due regard to the equal right to life of the mother (...)'.<sup>17</sup> This Amendment, which was incorporated in Article 40.3.3° of the Irish Constitution in 1983 as the result of a public vote, established a near-absolute prohibition on abortion.

For a long time, it remained unclear when exactly the right to life of the mother would take priority over the life of the unborn, so as to allow legal access to abortion in Ireland. A first indication was provided by the Supreme Court in *Attorney General v. X*, which asserted that this would be the case when there was a real and substantial risk to the pregnant woman's life (including the risk of suicide).<sup>18</sup> Although this decision was not given effect in statute, the issue was raised again in 2010 before the European Court of Human Rights in *A, B & C v. Ireland*. In that case, three women who were obliged to travel to the United Kingdom for an abortion argued that the Irish state had violated their rights under the European Convention of Human Rights.<sup>19</sup> With regards to the third plaintiff, a woman suffering from cancer, the Court was of the opinion that the Irish state

violated Article 8 of the Convention, in that it did not adhere to its obligation to provide an accessible and effective procedure by which the applicant could have determined whether she qualified for legal termination of pregnancy on Irish soil.

After public outrage following the tragic death of Savita Halappanavar in 2012, a woman who was denied a therapeutic abortion, the Irish government finally took the initiative to regulate legal termination of pregnancy in cases of risk to the life of the woman.<sup>20</sup> A new Act, the Protection of Life During Pregnancy Act 2013, specified that termination of pregnancy would be lawful in cases of a real and substantial risk to the woman's life, including the risk of suicide.<sup>21</sup>

Apart from the debate on termination due to a risk to the pregnant woman's life, a parallel debate emerged on allowing abortion for foetal abnormality.<sup>22</sup> The latter question was at stake in *Mellet v. Ireland* and *Whelan v. Ireland*, two cases addressed by the UN Human Rights Committee in 2016 and 2017, respectively. These cases concerned two women who travelled to the United Kingdom to terminate their pregnancies after their fetuses were diagnosed with fatal abnormalities.<sup>23</sup> The Human Rights Committee argued that the application of Ireland's abortion law subjected the women to cruel, inhuman and degrading treatment and that, being under an obligation to take steps to prevent similar violations occurring in the future, Ireland should amend its law on voluntary termination of pregnancy to ensure compliance with the International Covenant on Civil and Political Rights.

Following these developments, the Irish government established a Citizens' Assembly in 2016 to discuss the scope of the Eighth Amendment.<sup>24</sup> The Assembly suggested amending the Constitution so as to allow the Irish Parliament – the Oireachtas – to legislate for abortion.<sup>25</sup> Follow-up discussions were held by a special Joint Oireachtas Committee, which arrived at similar conclusions.<sup>26</sup> Following a broader debate in both Houses of the Oireachtas,<sup>27</sup> the Minister of Health initiated a referendum Bill, outlining that Article 40.3.3° would be repealed and replaced with a provision stating that 'provision may be made by law for the regulation of termination of pregnancy'.<sup>28</sup> In a historic vote in May 2018, 66.4% of the Irish people voted to repeal the Eighth Amendment. As in Belgium, the Irish legislature introduced the new provisions on abortion in a separate statute which deals with the legal grounds for abortion as well as with the sanctions that

would apply in case of a breach of the law. The Health (Regulation of Termination of Pregnancy) Act was finally signed into law by the President on 20 December 2018.<sup>29</sup>

## Grounds for legal termination of pregnancy under the 2018 Belgian and Irish Acts

### Termination in the first 12 weeks of pregnancy

In both Belgium and Ireland, abortion up to 12 weeks of pregnancy is now available 'upon request' in that it does not require the fulfilment of additional substantive requirements.<sup>30</sup> Importantly, although both Acts employ a 12-week limit, the start of the pregnancy is calculated differently. While the Belgian legislature considers conception as the moment when the 12-week period starts to run, the Irish legislature sticks to 'the medical principle that pregnancy is generally dated from the first day of a woman's last period'.<sup>31</sup> Accordingly, women in Belgium have two more weeks to access legal abortion 'on request' in comparison to women seeking access to these services in Ireland.

Despite criticism from some civil society organisations and members of the opposition, the Belgian Parliament did not extend the 12-week term. One of the main arguments in favour of such an extension was 'abortion tourism' of Belgian women to the Netherlands, where women can request an abortion up to the 22nd week of pregnancy without substantial restrictions.<sup>32</sup> This phenomenon is deemed problematic by some, because the Dutch procedure is more expensive, is not financially covered by the Belgian social security system and often happens without psychosocial counselling.<sup>33</sup> Proposals to extend the first stage to 14, 16, 18 or 20 weeks of gestation were not adopted because ultimately no majority could be found in Parliament.<sup>34</sup>

In the parliamentary debates on the Termination of Pregnancy Bill in the Oireachtas, a broader political consensus with regards to a 12-week gestational limit was reached. A main reason for this seems to have been that the 12-week term was first suggested by the Citizens' Assembly, subsequently confirmed by the Joint Committee on the Eighth Amendment, and later presented to the public in the draft Bill prior to the referendum. On various occasions, members of the

Oireachtas suggested not diverging too much from the key elements of the draft version on which the electorate based its vote.

Neither Belgium nor Ireland introduced substantive requirements for abortion requests within the first 12 weeks of pregnancy. In contrast to the 1990 Act, the 2018 Belgian Act no longer requires that the pregnant woman finds herself in a 'situation of distress'.<sup>35</sup> In practice, the 'situation of distress' had always been subjectively and autonomously determined by the woman and could not be challenged before the court. While the removal of the requirement of a 'situation of distress' is commendable as it may reduce the stigma affecting the pregnant woman who seeks abortion, its true impact is negligible since it will not lead to a change in practice.

It is remarkable that the Irish legislation does not include additional substantive requirements, given that for such a long time the country upheld a near-absolute prohibition on abortion in all stages of pregnancy. The Act only requires that the medical practitioner is of 'the reasonable opinion formed in good faith' that the pregnancy concerned has not exceeded 12 weeks of pregnancy. The choice not to include additional requirements signals that the Irish legislature now acknowledges some autonomy of the pregnant woman in making reproductive choices early in pregnancy. Moreover, it seems that in refraining from including a requirement of distress, Ireland has anticipated the lack of substance that such a legal test may have in practice, as indicated by experience in other countries, such as Belgium.

Termination after 12 weeks of pregnancy

From the 13th week, lawful termination of pregnancy is in both countries no longer available upon request but instead limited to specific medical conditions.

The Belgian legislature preserved the conditions that were already laid out in the 1990 legislation, thus allowing termination of pregnancy when (1) carrying the pregnancy to term poses a serious danger to the health of the woman; or (2) it is certain that the child to be born will suffer from an extremely severe and incurable disease.<sup>36</sup>

In Ireland, termination after 12 weeks of pregnancy is also allowed on medical grounds. As with early termination of pregnancy, the Act requires that medical practitioners are of the reasonable opinion, formed in good faith, that these grounds are fulfilled. First, the Irish Abortion Act makes termination of pregnancy possible when there is a risk to the life, or of serious harm to the health of the pregnant woman, and when it is appropriate to carry out the termination of pregnancy to avert that risk.<sup>37</sup> Second, just like the Belgian Act, the Irish Act permits termination of pregnancy when a severe condition in the foetus is present, but it requires that the abnormality is considered fatal.<sup>38</sup>

Termination for risk to life or health of the pregnant woman

As both the Belgian and the Irish legislation allow termination of pregnancy for health-related risks to the pregnant woman, it must first be clarified what is understood by 'health', especially since controversy may arise about mental health risks.

As discussed earlier, the case of *Attorney General v. X* and the Protection of Life During Pregnancy Act 2013 already confirmed the legality of abortion in Ireland when there is a real and substantial risk to the woman's *life*, including as a result of suicide. In addition, the new Irish Act includes the risk to *health* as a legitimate ground for termination of pregnancy beyond 12 weeks up until foetal viability. Furthermore, the Act explicitly defines 'health' as meaning 'physical or mental health'.<sup>39</sup>

The provision on health in the Irish Act clearly broadens access to termination of pregnancy as compared to the access provided by the Protection of Life During Pregnancy Act 2013. Under the new legislation, medical practitioners no longer need to wait for a condition to become life-threatening to intervene. Nonetheless, it remains unclear how 'serious harm to health' will be interpreted in practice. More specifically where it concerns mental health, one can wonder if mental health threats other than suicide will be considered severe enough to justify termination of pregnancy under Irish law. Moreover, as one health threat can quickly lead to another, some Members of Parliament (MPs) had recommended referring to a 'risk to (harm to) the health' rather than to a 'risk to *serious* harm to the health'.<sup>40</sup>



In Belgium, the debate on the definition of the concept of health risk as a ground for lawful abortion has been limited. While the Belgian Act refers to a risk to the health of the pregnant woman, neither the 1990 nor the 2018 legislation defines 'health'. However, during parliamentary discussions, the drafters of the 1990 bill explicitly interpreted the concept as including physical and mental health. In practice, conditions such as 'psychological pressure', a weak psychological balance or mental instability, a risk to suicide and a manic depressive psychosis have all been reported as grounds for abortion beyond 12 weeks.<sup>41</sup> The observation that Parliament, during its debate on the new Act, did not find it necessary to comment on the practice may be construed as lending credibility to the acceptability of different mental health issues as grounds for lawful abortion. It should be kept in mind, however, that the Act requires the threat to the health of the woman to be *serious*. While recognising that the meaning of 'serious' is as vague as in the Irish Act, giving a detailed legal definition or examples would excessively limit the ability of physicians to make case-by-case assessments. Acknowledging the pregnant woman's perspectives on what constitutes a threat to her health is important, as she is best placed to evaluate the risks she is prepared to take during her pregnancy. It is therefore crucial to carefully choose the terminology in abortion legislation so as to leave sufficient room for these perspectives in clinical decision-making.

Termination for socio-economic reasons?

As is clear from the previous discussion, termination of pregnancy post-12 weeks in Belgium and Ireland can only be lawfully performed for health-related concerns. The legislatures in both countries did not broaden the scope to social or economic hardships. Nonetheless, abortion practice shows that many women who seek an abortion after 12 weeks of pregnancy are struggling with psychosocial and relational difficulties. These complexities often account for difficult decision-making processes or the denial of the pregnancy during a certain period.<sup>42</sup> On rare occasions, medical professionals may also be confronted with later abortion requests related to issues such as extreme poverty, incest, severe substance abuse or underage pregnancy. If these women do not manage to access abortion services within the first 12 weeks of pregnancy, travelling abroad often remains



the only option – an option that burdens them with additional psychological and financial distress. While these situations may sometimes leave room for termination of pregnancy based on mental health grounds, legal uncertainty remains when a link to mental health is absent. To address this issue, certain members of the Belgian and Irish parliaments attempted to broaden the scope of the provision on lawful termination of pregnancy after 12 weeks to also include socio-economic factors.

In the final drafting of the Termination of Pregnancy Bill, certain members of the Irish Lower House – the Dáil – attempted to include ‘social well-being’ in the definition of ‘health’, thereby refusing an interpretation of the term that would merely refer to the absence of disease or infirmity.<sup>43</sup> Nevertheless, these suggestions did not find their way into the law. Similarly, certain Belgian politicians and experts proposed adding the ‘psychosocial situation’ of the pregnant woman to the health grounds for abortion under Belgian law, when the situation poses a serious obstacle to the continuation of the pregnancy.<sup>44</sup> These proposals did not define what would constitute a ‘psychosocial situation’, which makes the concept difficult to assess. Because its scope and its relation to mental health risks remain rather vague, opponents feared that this inclusion would open the door to abortion after 12 weeks of pregnancy based on personal issues, such as unemployment, divorce or financial problems.<sup>45</sup> In light of these objections, it was eventually decided not to include a reference to socio-economic issues in the Voluntary Termination of Pregnancy Act.

#### Termination for foetal abnormality

As previously mentioned, the Irish Abortion Act allows termination of pregnancy after 12 weeks gestation for a fatal foetal abnormality. More specifically, the provision specifies that termination of pregnancy is lawful when the foetus is affected by a condition that is likely to lead to its death either before or within 28 days of birth.<sup>46</sup> By addressing foetal abnormalities, the Irish legislature acknowledges the two recent rulings by the UN Human Rights Committee discussed earlier.<sup>47</sup>

Unlike in Belgium, the Irish legislature decided not to allow abortion when the foetus is suffering from conditions that are not expected to result in its death in the very short term. Terminating a pregnancy when the foetus is affected by a non-fatal condition is therefore only lawful in Ireland in the first 12 weeks. However, access on this ground will be rather unlikely in practice, as the presence of severe abnormalities is generally only detected at a later stage.

In its report, the Citizens' Assembly had recommended that termination of pregnancy for foetal abnormality that is *not* likely to result in death before or shortly after birth, should be lawful for up to 22 weeks gestation.<sup>48</sup> The Joint Committee on the Eighth Amendment did not accept this recommendation, nor was it eventually included in the Draft General Scheme published prior to the referendum.<sup>49</sup> Consequently, the majority of MPs who discussed the draft Bill before the Oireachtas endorsed the position that (non-fatal) disability would not be included as a lawful ground for abortion after 12 weeks, as the public had not agreed to such an extension in the referendum.

Due to broad support for the provision allowing termination of pregnancy only when the foetus is suffering from a fatal condition, most amendments brought forward during the debate before the Oireachtas targeted its details, such as the '28 days' limit. Indeed, some MPs questioned the practical implications of specifying the exact neonatal period in which the foetus suffering from a fatal condition would be expected to die.<sup>50</sup> In this respect, it should be remembered that all articles on the substantive grounds for termination of pregnancy refer to the 'reasonable opinion, formed in good faith' of the medical practitioners who are requested to certify an abortion. Arguably, when an erroneous judgment of a medical practitioner would be addressed in court, for instance on the estimation of postnatal survival, there might be no violation of the legal provisions if the medical practitioner can be shown to have acted with reason and in good faith.

In contrast to Ireland, access to lawful termination of pregnancy after 12 weeks pregnancy extends to non-fatal foetal abnormalities in Belgium. Termination based on this provision is only legal if it is *certain* that the child to be born will suffer from an extremely severe and incurable disease. The terminology of this provision was criticised in parliamentary hearings and discussions preceding the 2018 Act. For example, some experts and MPs argued that 100% certainty is often impossible to

attain in medical science.<sup>51</sup> Accordingly, they proposed to refer to the presence of a 'serious risk' or 'real risk' as a more appropriate alternative. In addition, it was argued by one expert that requiring the existence of 'an extremely severe disease' was too strict and did not fit the description of less severe, yet serious conditions such as Down's Syndrome, that in current practice often lead to termination.<sup>52</sup> Despite these challenges, Parliament retained the original wording of the provision.<sup>53</sup>

## Termination after viability

### Foetal viability

During the debates that took place in the Belgian and Irish Parliaments on the legality of termination of pregnancy beyond 12 weeks of gestation, controversies arose on the legal relevance of foetal viability.

The Belgian Act on Voluntary Termination of Pregnancy 2018 does not contain a time limit for medically indicated abortions and, hence, viability does not seem to carry any legal weight. However, the legality of post-viability abortion was challenged in the parliamentary debates leading up to the 1990 Act. During these discussions, the submitters of the legislative proposal clarified that they considered the concept of abortion to be restricted to the period before the viability of the foetus, situated at the 24th week of pregnancy.<sup>54</sup> According to them, termination of pregnancy involving a viable foetus had to be considered as 'child murder' instead of abortion.<sup>55</sup> However, an amendment that explicitly equated post-viability abortion with the crime of 'child murder' was rejected, leaving the controversy unsettled.<sup>56</sup>

Excluding post-viability terminations from the scope of the Act, while at the same time refusing to categorise them as child murder, would create a legal vacuum with regards to (termination of pregnancy involving) a viable foetus. As a result, Belgian legal doctrine remains divided over the legal acceptability of post-viability abortion,<sup>57</sup> as are the few courts where the issue has arisen in wrongful birth lawsuits against gynaecologists.<sup>58</sup> In the light of this legal uncertainty, it was surprising that Parliament refrained from clarifying its position when it reformed the Act in 2018. It is likely that this silence reflected the implicit confirmation of late

termination of pregnancy as being in accordance with the law. This position would be consistent with the absence of a temporal limit in the Act and would avoid the legal vacuum highlighted above. Moreover, it should be pointed out that post-viability termination of pregnancy is currently an established medical practice,<sup>59</sup> publicly acknowledged in the Belgian media<sup>60</sup> and in legal doctrine.<sup>61</sup> Although the mere fact that an intervention is performed does not prove its legality, its level of acceptance and the observation that no provider has ever been prosecuted support the suggestion that termination of pregnancy after viability is allowed under current abortion legislation.<sup>62</sup> In view of this context, all abortions from the 13th week of pregnancy onwards should be dealt with equally and subjected to the same conditions, regardless of viability.<sup>63</sup>

In contrast to this reticence, the Irish legislature explicitly employs the concept of viability in its 2018 legislation. The Act defines viability as ‘the point in a pregnancy at which, in the reasonable opinion of a medical practitioner, the foetus is capable of survival outside the uterus without extraordinary life-sustaining measures’.<sup>64</sup>

Interestingly, this definition of viability does not include a specific gestational limit but instead refers to a medical assessment. This choice was likely informed by developments in neonatology that have resulted in medical demarcations of viability that are earlier than some countries’ legally defined thresholds.<sup>65</sup> Indeed, recent examples of healthy children born after 21 or 22 weeks of gestation have stirred the debate on whether viability definitions in abortion laws should follow the medical developments.<sup>66</sup> Instead of referring to a specific number of weeks, the Irish Act explicitly leaves the determination of viability to the appreciation of the medical practitioner. Such a broad margin of appreciation has both advantages and disadvantages. On the one hand, leaving the appreciation of viability to the physician leaves more room for an individual analysis of the foetus involved. As viability assessments tend to be subject to specific elements such as the weight of the foetus, the degree of development and the number of foetuses present, merely relying on legal limits expressed in terms of weeks would not necessarily guarantee a correct assessment of viability.<sup>67</sup> On the other hand, leaving the assessment entirely to the opinion of the medical practitioner creates a risk of subjective interpretation, possibly resulting in erroneous judgments. The lack of a viability limit expressed in terms of weeks could also mean that physicians would

be reluctant to perform abortions near the threshold of viability, as some legal uncertainty remains as to how courts may interpret the legal definition.

#### Termination for risk to life or health of the pregnant woman

In the Irish Act, reference to viability is only made in the provision on risk to the health or life of the pregnant woman. The provision establishes that termination on this ground can only take place if the medical practitioners are of the opinion that the foetus has not reached viability.<sup>68</sup> Importantly, an exception to this rule is made in a situation of emergency. When the medical practitioners are of the opinion that there is an *immediate* risk to life, or of serious harm to health, and the termination of pregnancy is *immediately* necessary to avert that risk, termination can be performed regardless of foetal viability.<sup>69</sup> It is left to the medical practitioners involved to decide on the level of urgency.

In the debates before the Oireachtas, criticism was voiced by MPs who deemed it unacceptable that the Act would allow abortion right up to the point of birth, rather than prioritising early delivery of the viable foetus.<sup>70</sup> However, on various occasions, the Minister of Health stressed that early delivery would always be mandated and that the reference to ‘immediate’ in the law indicates exceptional cases in which there is no other option than to terminate the pregnancy, and no time to examine whether the foetus might be viable.<sup>71</sup>

As indicated above, the lack of a temporal limit in the Belgian Act implies that abortion of a viable foetus might be considered if there is a serious risk to the health of the pregnant woman, regardless of urgency. Nonetheless, this legal possibility will be of little relevance in practice as wanted pregnancies will usually result in early delivery of a viable foetus rather than in termination. By limiting access to post-viability abortion on maternal health grounds only to *urgent* cases, Ireland has avoided these kinds of inconsistencies.

#### Termination for foetal abnormality

Interestingly, the concept of viability as defined in the Irish Act is not used to determine access to abortion for foetal abnormality. As outlined above, the

provision that regulates abortion for foetal abnormality has its own description of what could be considered 'foetal viability' (viz. when there is no condition in the foetus that will likely lead to its death before birth or within 28 days of birth). If a fatal abnormality is discovered, termination of pregnancy is legal up to right before birth. While the use of multiple descriptions of viability in the Irish Act may cause confusion, it is commendable that the Irish legislature has attempted to clarify them in the respective provisions.

Similar to the maternal health ground, the Belgian Act does not contain a temporal limit for access to termination of pregnancy for extremely severe and incurable foetal abnormalities. Regardless of the 1990 parliamentary statements on the unacceptability of abortion of a viable foetus, a tacit consensus seems to exist that it is allowed, as is also confirmed by the current medical practice.

## Procedural requirements

Apart from the substantive grounds for termination of pregnancy, both Acts establish procedural requirements. These include, among others, requirements relating to the abortion provider, the abortion request, informed consent and mandatory waiting periods.

### Abortion provider

The Belgian Act on Voluntary Termination of Pregnancy 2018 retains all the procedural provisions of the 1990 Act. The termination of pregnancy itself needs to happen under medically responsible conditions in a health care institution, which can be a hospital or a specialised abortion facility.<sup>72</sup> This prohibits abortion performed in a private practice or at home. In addition, the healthcare institution must have in place a counselling or information department, which provides support to the pregnant woman.<sup>73</sup>

The Irish legislature decided to adopt the Abortion Act without requiring the establishment of dedicated abortion facilities. Hence, in Ireland, termination of

pregnancy may take place at a general practitioner's private surgery, a hospital, a family planning clinic or a women's health clinic that provides abortion services.<sup>74</sup>

### Abortion request

As stipulated in the Belgian Act, the pregnant woman has to explicitly request a doctor to perform a termination of pregnancy, after which the physician ascertains the fulfilment of the substantive requirements outlined above.<sup>75</sup> For terminations post-12 weeks, the physician must involve a second physician.<sup>76</sup> Prior to termination, the treating physician verifies whether the pregnant woman has the firm wish to terminate the pregnancy. This means that he or she needs to verify that the woman knows the implications of her decision and is under no pressure. To protect the physician in this task, the Act stipulates that the physician's appreciation of the firm wish can never be challenged before court.<sup>77</sup> Lastly, if the pregnant woman decides to end her pregnancy, she is obliged to confirm this in writing prior to, and on the same day of, the termination of pregnancy.<sup>78</sup>

The Irish Act formalises the procedure to be followed when a request is made, by introducing a system of certification. Before carrying out the termination of pregnancy, one medical practitioner needs to certify his or her reasonable opinion formed in good faith that the conditions laid out in the Act are met. For terminations post-12 weeks for risk to life or health or for fatal foetal abnormality, two medical practitioners have to certify their judgments on these issues. The certification needs to be obtained prior to the termination of pregnancy, unless there is a risk to life or health in emergency and it is not practicable to certify a priori in this case.<sup>79</sup> The Act does not however oblige the medical practitioner to provide the certification within a specific number of days. Hence, to remain within the 12-week period, the pregnant woman will not only have to take into account a mandatory reflection period (discussed below), but also possible delays with regards to the certification.

### Informed consent

As with the 1990 statute, the Belgian Act on Voluntary Termination of Pregnancy of 2018 legally binds the physician to a threefold duty to inform. First, the



physician is required to give information about the immediate or future risks resulting from a termination.<sup>80</sup> Second, the pregnant woman needs to be reminded about the availability of childcare facilities were she to decide to carry the foetus to term, and about the possibility of having the child adopted.<sup>81</sup> Third, the pregnant woman has to be informed about contraceptives.<sup>82</sup> Additional duties of information are assigned to the counselling department. This department must inform the pregnant woman about the rights, assistance and advantages granted by law to families or unmarried mothers and their children.<sup>83</sup> At the request of the treating physician or the pregnant woman, the counselling department is also required to provide information about the means to address any psychological and social issues that the pregnant woman might be facing.<sup>84</sup> While certain MPs and experts criticised some of these information duties for their allegedly burdensome and shaming effect on pregnant women, they were retained in the 2018 Act.

The Irish Act remains silent when it comes to information or counselling. The only provision relating to consent states that 'Nothing in this Act shall operate to affect any enactment or rule of law relating to consent to medical treatment'.<sup>85</sup> Some Irish MPs expressed a wish to have a specific section included on informed consent, including several, far-reaching informational duties.<sup>86</sup> Among others, they suggested to include the duty to inform the woman about the method of termination, the medical risks involved and the probable gestational age of the foetus. More controversial provisions of the same proposal included information on the anatomical and physiological characteristics of the foetus, information about foetal pain in terminations of pregnancies after 20 weeks and information stating that the 'father of the child to be born' is legally liable to assist in the support of the child. Another divisive proposal provided for obligatory foetal ultrasound imaging and auscultation of the foetal heartbeat not less than 24 hours before the abortion.<sup>87</sup>

In response to the proposed amendments, the Irish Minister of Health reiterated that it was already standard practice among medical practitioners to provide comprehensive information, to make the pregnant woman aware of her options and to seek consent.<sup>88</sup> The issue of consent is therefore regulated by Article 21 of the Act, referring to the general principles incorporated in, for example, 'The Guide to Professional Conduct and Ethics for Registered Medical Practitioners' of the

Medical Council 2016 or the 'National Consent Policy' of the Health Service Executive.<sup>89</sup>

The refusal to include more specific provisions on informed consent again demonstrates the crucial turn which Ireland has taken with regards to termination of pregnancy. The legislature makes it clear that (lawful) abortion should be treated as a public health service, to be monitored by the national health department, and it recognises abortion as a medical treatment to which general principles apply.<sup>90</sup> This position is also confirmed by the fact that terminations will be paid for by the state as part of its public health service.

In Belgium, proposals were suggested to include voluntary abortion in the definition of healthcare as provided in the Belgian Act on Patients' Rights and in the Act on Healthcare Professions, but these initiatives were unsuccessful. A formal recognition of voluntary abortion as a form of healthcare would, however, be welcome, as this would be consistent with the fact that early termination may now be requested without stating any reasons and that voluntary abortion has been removed from the Criminal Code. Such a formal recognition would also make the general rules on informed consent in healthcare applicable to abortion and would render most of the information duties in the Act obsolete.

Reflection period

Both Belgium and Ireland apply a mandatory reflection period.<sup>91</sup>

According to the 1990 Belgian Act on the Termination of Pregnancy, abortion could not be carried out earlier than at the sixth day after the first consultation of the pregnant woman with the treating physician.<sup>92</sup> The obligation was applicable to all abortion requests. Under this provision, the question was raised as to whether the reflection period could be shortened or bypassed in exceptional circumstances. In one Belgian court judgment, it was argued that failure to comply with the mandatory reflection period could be justified by a state of emergency.<sup>93</sup> The case involved a situation in which abandoning the reflection period was the only way to remain within the legal limit of 12 weeks. The Court ruled that the physical and psychological integrity of an underage girl who had

requested an abortion concerned a higher social value than respecting the reflection period.<sup>94</sup>

While the 2018 Act retains the 6-day reflection period, it now explicitly addresses these issues. First, the reflection period no longer has to be taken into account when there is an urgent medical reason, which can either be physical or psychological.<sup>95</sup> Second, when the first consultation approaches the end of the 12th week by less than 6 days, the days of the reflection period that have not passed yet are added to the 12-week term.<sup>96</sup> As a result, the legal obligation of a 6-day waiting period will in itself never result in pushing the pregnancy beyond the 12-week limit. Despite these vital changes, some Belgian MPs and legal experts had advocated shortening the 6-day period or removing it completely,<sup>97</sup> following the example set by France in 2016.<sup>98</sup>

In Ireland, the Health (Regulation of Termination of Pregnancy) Act 2018 introduces a reflection period, yet this is solely applicable to termination of pregnancy in the first 12 weeks of pregnancy. The Act states that the termination of pregnancy shall not be carried out by a medical practitioner unless a period of not less than 3 days has elapsed from the date of certification by the medical practitioner.<sup>99</sup>

The inclusion of a reflection period in the 2018 Act is somewhat strange, as it was not sought by the Citizens' Assembly nor by the special Joint Oireachtas Committee. MPs and experts who criticised the requirement mainly associated it with a stigmatising effect on, and practical inconveniences for, the pregnant woman who has made up her mind.<sup>100</sup> Others proposed similar exceptions to the waiting period as those that are now applicable in Belgium.<sup>101</sup> None of these amendments were eventually included in the final text of the 2018 Act. On the contrary, regardless of the reflection period, the Act stipulates that the termination of early pregnancy should always take place before the pregnancy has exceeded 12 weeks.<sup>102</sup> Hence, a pregnant woman who is granted certification for termination of pregnancy less than 3 days before the last day of the 12-week period will not be able to obtain a legal termination, unless she has access on medical grounds.

Regardless of these concerns, the need for a reflection period in abortion legislation can be questioned. A significant number of women experience the reflection period as unnecessary and mentally burdensome. After all, most women

already go through a decision-making process prior to the first consultation or they have to wait several days before they get an appointment. What matters is that the pregnant woman is appropriately informed and certain about her willingness to terminate the pregnancy. In this regard, removing the legal requirement would be commendable, particularly since physicians can always suggest taking some days to reflect if they believe that this would be appropriate for the pregnant woman to make up her mind.<sup>103</sup>

## Conscientious objection

Refusal to carry out the termination of pregnancy

In Belgium and Ireland, the right to request a termination of pregnancy is not a right to the actual performance of the termination, not even when the legal conditions are met. In all stages of pregnancy, including the first 12 weeks, the medical practitioner retains the right to refuse to carry out the termination of pregnancy. The right to conscientious objection is protected by international law and explicitly safeguarded by the Belgian and the Irish 2018 Abortion Acts.<sup>104</sup>

The 2018 Belgian Abortion Act protects refusal by doctors, nurses and any member of the paramedical personnel to participate in a termination of pregnancy. As in the 1990 Act, the doctor is obliged to inform the woman during the first consultation about his or her refusal.

The provision in the Irish Act is similar in scope, in that it also covers the objection to carry out the abortion and to participate. The right to conscientious objection can be invoked by medical practitioners, midwives and nurses unless there is an emergency. This is different to Belgium, where unfortunately no medical exception to the right of conscientious objection was introduced in the recent Act.<sup>105</sup>

Unsurprisingly, the right to conscientious objection gave rise to heated debate in Ireland. As Irish abortion services are not yet as well established as they are in Belgium, more Irish women may have to deal with principled refusal by their own general practitioners. This is to be expected mostly in rural areas where societal approval rates of abortion are considerably lower.<sup>106</sup> Without compromising the right to conscientious objection, the Irish State may have to accommodate these

concerns by introducing legal or non-legal measures to facilitate safe and equitable access for these women.

### Duty to refer

To offer the pregnant woman some sort of recourse after conscientious objection, the Abortion Acts in both countries introduce the obligation to refer the woman to another medical practitioner.

In Belgium, the obligatory referral is a new provision, first introduced in the 2018 Abortion Act. The refusing physician must provide the contact details of a second physician, an abortion facility or a hospital department to which the pregnant woman can direct a new request.<sup>107</sup> While the refusing physician needs to inform the woman about his or her conscientious objection during the first consultation, the Act does not mention when exactly the physician has to provide the contact details. Importantly, in contrast to violations of other procedural or informational duties imposed on the medical practitioner, the 2018 Act does not provide sanctions for refusing physicians who violate their duty to refer.

In Ireland, the duty to refer already existed in the 2013 Protection of Life During Pregnancy Act but now includes a new reference as to its timing:

A person who has a conscientious objection referred to in subsection (1) shall, as *soon as may be*, make such arrangements for the transfer of care of the pregnant woman concerned as may be necessary to enable the woman to avail of the termination of pregnancy concerned.<sup>108</sup>

Some MPs challenged the reference to 'as soon as may be' as being too vague, others as being too directive.<sup>109</sup> In addition, certain members of the Oireachtas who were opposed to further legalisation of abortion criticised the duty to refer, as they feared that it would nullify the right to conscientious objection of refusing physicians.<sup>110</sup> However, it should be noted that, as is the case in Belgium, the violation of the duty to refer is not subject to sanctioning in Ireland.<sup>111</sup>

Importantly, in Ireland, the duty to refer is complemented by a review procedure allowing the pregnant woman to formulate a new request for termination of

pregnancy after a negative decision or lack of decision.<sup>112</sup> This review procedure solely involves requests for termination of pregnancy related to a risk to health or life or to a condition likely to lead to the death of the foetus. In this case, a professional review committee will verify whether the medical conditions laid out in the corresponding provisions allow access to termination of pregnancy.<sup>113</sup>

## Criminal sanctions

One of the main aims of the Belgian reforms was to move away from considering abortion as a criminal act, positioned within the Criminal Code. To that aim, the legislature extracted the provisions on voluntary termination of pregnancy from the Criminal Code and rephrased access to termination of pregnancy positively: ‘The pregnant woman *can* ask a doctor to terminate her pregnancy under the following conditions’. The new Act thus represents a significant symbolic departure from the situation where abortion was primarily considered to be a crime.

Although voluntary termination of pregnancy is now regulated in a separate Act, the old criminal sanctions were retained, which suggests that it is incorrect to state that abortion is now decriminalised.<sup>114</sup> More specifically, the person who causes a termination of pregnancy outside the legal parameters may be sentenced from 3 months to 1 year of imprisonment and a fine of €100 to €500.<sup>115</sup> Moreover, the woman who deliberately lets someone terminate her pregnancy outside the statutory conditions may face similar sanctions.<sup>116</sup> Nevertheless, some changes were made to the section on criminal offences. Most strikingly, a new offence was introduced sanctioning the person who denies the pregnant woman access to an abortion facility.<sup>117</sup> The reason behind this measure and its exact scope remain unclear, considering that anti-abortion protests or blockades at abortion facilities have never been reported in Belgium. Arguably, this provision was inspired by a similar amendment that was adopted in France in 2017.<sup>118</sup> As mentioned earlier, all provisions and sanctions relating to involuntary abortion remain part of the Belgian Criminal Code and were not subject to reform.<sup>119</sup>

The Offences Section in the 2018 Irish Act stipulates three types of offences, which can all be sanctioned with a fine or term of imprisonment not exceeding 14 years.<sup>120</sup> The key offence stipulates: ‘It shall be an offence for a person, by any

means whatsoever, to intentionally end the life of a foetus otherwise than in accordance with the provisions of this Act'.<sup>121</sup> The person who knowingly assists the pregnant woman in seeking unlawful termination of pregnancy is also criminalised.<sup>122</sup> Interestingly, the Irish legislature explicitly decriminalises the pregnant woman committing an offence in respect of her own pregnancy.<sup>123</sup> This is new in comparison to the Protection of Life During Pregnancy Act of 2013, yet not surprising as the decriminalisation of the pregnant woman was recommended by the Joint Committee and welcomed by several members of the Oireachtas. In addition, the Joint Committee had also referred to the chilling effect on doctors caused by criminalisation and to the observation that criminalisation does not seem to affect the overall incidence of abortions.<sup>124</sup> In line with these comments, some MPs advocated removing some of the offences, especially those involving assistance in or performance of consensual abortions.<sup>125</sup> In response, the Minister of Health argued that the question as to whether a sanction would in practice apply would always need to be assessed in the light of the medical practitioners' reasonable opinion, formed in good faith.<sup>126</sup> Moreover, he stressed the importance of heavy sanctions in protecting pregnant women from coerced or forced abortions, as the offences section would also apply to these situations.

When comparing the sanctions in both Abortion Acts, several interesting observations can be made. Punishment in both Acts can be said to be excessive in some regards. The criminal sanctions in the Belgian Act are severe in that they also apply to (minor) violations of procedural requirements. This means that non-adherence to, for instance, the duty to inform about contraceptives, is subject to the same sanctions as apply to performing an unlawful abortion. In view of the potentially disproportionate effects of this sanctioning regime, it is regrettable that the revised Belgian Abortion Act did not introduce a greater diversification of penalties. Similarly, the separate offences in the Irish Act are covered by the same penalties, also referred to by some MPs as 'blanket criminalisation', providing for sentencing of up to 14 years of imprisonment. This means that the person who violently ends the life of a foetus without the pregnant woman's consent may face the same penalty as the person who purchases an abortion pill for a pregnant friend online. It is difficult to understand how applying such a heavy penalty to a variety of infringements would be in line with the intention of the Irish legislature to destigmatise termination of pregnancy. The current approach lacks in nuance and



may have a chilling effect on healthcare providers and on pregnant women considering termination of pregnancy.

Regardless of these concerns, the Irish legislature took an important step by completely decriminalising the woman in respect of her own termination of pregnancy. While some Belgian MPs and experts advocated the same idea, the Belgian legislature did not go as far. Furthermore, it remains unclear whether the Belgian Abortion Act also criminalises the woman who terminates her own pregnancy outside the legal conditions. Moreover, legal experts remain divided over the interpretation of the provision referring to 'the woman who deliberately *lets someone* terminate her pregnancy'.<sup>127</sup>

Lastly, due to the divergence of public opinion on abortion in Ireland, it would be expected that the Irish legislature, more so than the Belgian one, would have felt the need to explicitly address the issue of safe access to abortion. Remarkably, the Health (Regulation of Termination of Pregnancy) Act 2018 does not contain obligations to ensure safe access.<sup>128</sup> While the Irish Minister of Health announced plans to introduce 'safe access zones' to prevent protests at abortion providers and denial of access to pregnant women,<sup>129</sup> at the time of writing, these have yet to come to fruition.<sup>130</sup>

## Concluding remarks

Recent abortion law reforms in Ireland and Belgium allow us to reflect upon the shared contemporary dilemmas that exist in the context of abortion and to make some general predictions on where legislation in Europe may be heading.

With a surprisingly liberal Act, Ireland has largely managed to catch up with abortion law reforms that took place in many European countries decades ago, thereby aligning itself with the decisions of a number of European and international judicial bodies. While the foregoing analysis is limited to a comparison of the Belgian and Irish Abortion Acts, it can more generally be observed that abortion laws in Europe are showing similar tendencies. More specifically, there seems to be a trend towards lifting barriers to accessing abortion in the first trimester of pregnancy, and a general consensus on permitting

abortion for pregnancies that involve non-viable fetuses or that are affected by serious maternal disease. Moreover, as indicated by the 2018 reform and more recent legislative proposals in Belgium, improving access to abortion remains at the forefront of political debate in many countries, even where relatively broad grounds for abortion access were introduced decades ago.

Importantly, this analysis of Irish and Belgian Abortion legislation highlights areas of concern that remain even after the 2018 reforms. These areas of concern, which can also be found in the abortion legislation of other European countries, may need to be addressed in the future. More specifically, three related topics of ongoing particular concern may be identified, relating to the decriminalisation and medicalisation of abortion and to guaranteeing equitable and safe access.

## Decriminalisation

In Belgium and Ireland, the decriminalisation of abortion was one of the main aims of the 2018 abortion law reform. In both countries, steps were taken to remove the criminal connotation associated with abortion. Nevertheless, criminal law sanctions have remained in place and a system of blanket criminalisation has been maintained. The term 'decriminalisation' is often used to refer to different levels of liberalisation of abortion access, some of which have now been implemented in Belgium and Ireland. For instance, in both countries, first trimester abortion has been made available upon request. As substantive requirements for early termination of pregnancy are now absent, imposing sanctions for the performance of these abortions has become virtually impossible. In addition, both countries have chosen not to, or no longer to, incorporate the provisions on voluntary abortion in the Criminal Code. While this does not amount to 'decriminalisation' in the strict sense of the term, the intention again was to step away from framing abortion as a criminal act. Furthermore, at the Belgian and Irish Parliaments, discussions were held as to whether criminal sanctions should at all be foreseen. In Ireland, this has resulted in the complete decriminalisation of the pregnant woman for violations of the law in respect of her own pregnancy. By contrast, attempts in Ireland and Belgium to remove or reduce criminal sanctions for doctors who perform (unlawful) termination of pregnancy have proved unsuccessful.

Decriminalisation, in different forms and shapes, is also an emerging topic in other European countries. The debate relates to the question of how abortion should be regulated, and whether the measures taken are necessary and proportionate to secure the conduct that society deems ethical. In answering these questions, one particular challenge will be to prevent abuse when access to abortion would be heavily deregulated or completely decriminalised. For instance, as societies generally do not support abortion on request in more advanced stages of pregnancy, other ways may need to be sought to effectively regulate these abortions, especially after viability.

### Abortion as healthcare

A closely related question concerns the medicalisation of abortion, an issue that was discussed during parliamentary discussions in both Ireland and Belgium. Complete decriminalisation usually implies treating abortion as a part of normal healthcare, to which the rules on patients' rights and the guidelines on professional conduct apply. Currently, in a mere handful of countries (e.g. Canada and a few Australian states), access to abortion is not subject to substantive requirements but instead relies on professional opinion and procedural regulations. The Irish legislature did not follow this example, yet it recognises lawful abortion as a form of public healthcare, applies the general principles of medical conduct to it and provides abortion services free of charge. It did not, however, equate abortion with regular medical treatment, as it maintained substantive conditions, time limits and sanctions. In addition, abortion is still regulated by law instead of being left to professional self-regulation.

Similarly, in parliamentary debates preceding the adoption of the Belgian Abortion Act, voices were raised to formally include abortion in the definition of 'healthcare', but without success. While more debates on medicalisation are to be expected and may be welcomed, medicalisation may also be associated with certain risks. For instance, leaving the decision to physicians and healthcare institutions could invite paternalism on their part, possibly even resulting in more difficult access to abortion. Moreover, medical professionals may wish for clear legal guidance to inform their decisions in such a sensitive medical domain. Where medicalisation of

abortion would be considered, states should be careful in balancing the interests at stake.

#### Equitable and safe access to abortion

Finally, as with all legislation, the success of abortion law largely depends on its practical implementation. While Belgium has decades of experience in providing abortion services (mostly through specialised abortion facilities), it is not yet certain whether Ireland will also manage to facilitate proper access to abortion. Separate legislation and guidelines, including on the introduction of 'safe access zones', may be essential to overcoming geographical, financial, psychological and other barriers to accessing abortion services in the country. Guaranteeing equitable access may also mean striking the right balance between the rights of physicians and the rights of patients, which in the 2018 Irish and Belgian Abortion Acts is pursued through the introduction of mandatory referrals or third-party reviews after conscientious objection. Similarly, concern to provide equitable access might also necessitate investigating the possible delaying or dissuasive effects of the mandatory reflection periods and of some of the informational duties.

While European countries are increasingly aligning their abortion laws with supranational jurisprudence and some general tendencies can be observed in abortion laws and legislative reforms, many countries are facing similar challenges in regulating abortion. As shown by the examples of Ireland and Belgium, this may mean that issues regarding decriminalisation, medicalisation and equitable access will need further exploration.

## Notes

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30. Irish Health (Regulation of Termination of Pregnancy) Act, Article 12; Belgian Act on the Voluntary Termination of Pregnancy, Article 2, 1°, a). As a rule, national abortion legislations contain specific gestational limits that are linked to progressively more stringent conditions for lawful abortion. These limits express the idea of 'progressive legal protection', according to which more protection is granted to an embryo or a foetus depending on its level of development.

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40. Dáil Éireann, Committee Stage Amendments 46-47, 5 November 2018.

Available

at: <https://data.oireachtas.ie/ie/oireachtas/bill/2018/105/dail/3/amendment/numberedList/eng/nl-b10518d.pdf> (accessed 28 February 2019).

41. All abortion providers must report cases to the National Evaluation Commission on the Termination of Pregnancy, a multidisciplinary body set up by law which

presents the general abortion trends to the Parliament every 2 years. For an analysis of the concept of 'serious risk to the woman's health' in Belgian abortion legislation, as based on the reports of the National Evaluation Commission, see T. Vansweevel, 'Abortus', pp. 256–7.

42. National Commission for the Evaluation of the Law on the Termination of Pregnancy 1990, Report to the Parliament 2006-2007 (2008), p. 52 [Nationale Commissie voor de evaluatie van de wet van 3 april 1990 betreffende de zwangerschapsafbreking, Verslag ten behoeve van het parlement, 1 januari 2006 - 31 december 2007, 1 augustus 2008]. Available at: <http://overlegorganen.gezondheid.belgie.be/nl/documenten/2008-ivg-tweejaarlijks-verslag> (Dutch) (accessed 28 February 2019).

43. Dáil Éireann, Committee Stage Amendments 34-35, 5 November 2018.

44. Legislative proposals: M. Gerkens and E. Willaert et al. (2017); M. Van Hees and R. Hedebouw (2017); K. Lalieux, V. Caprasse, M. Gerkens, K. Jiroflee and M. Van Hees (2018). Available at: <http://www.lachambre.be/FLWB/PDF/54/2271/54K2271001.pdf>; <http://www.lachambre.be/FLWB/PDF/54/2518/54K2518001.pdf>; <http://www.lachambre.be/FLWB/PDF/54/3215/54K3215001.pdf> (Dutch and French) (accessed 28 February 2019); J.J. Amy and Y. Manigart in Belgian House of Representatives, Report of 1 August 2018, p. 54 and p. 127. See, for instance, C. Fonck in Belgian House of Representatives, Report of 1 August 2018, p. 28.

45. See, for instance, C. Fonck in Belgian House of Representatives, Report of 1 August 2018, p. 28.

46. Irish Health (Regulation of Termination of Pregnancy) Act, Article 11(1).

47. *Mellet v. Ireland* [2016]; *Whelan v. Ireland* [2017].

48. Citizens' Assembly, Final Report (2017), p. 36.

49. Instead, the Joint Committee believed it was necessary to provide 'specific resources so that there are social supports for carers and better facilities for people whose children have special needs'. Joint Committee, Report on the Eighth Amendment (2017), p. 11.

50. Dáil Debates, Select Committee on Health, 6 November 2018, pp. 61–71.

51. Belgian House of Representatives, Integral Report Plenary Meeting, 4 October 2018, p. 52; Belgian House of Representatives, Report of 1 August 2018, p. 35, pp. 104–5, p. 130 and p. 140.

52. G. Pennings in Belgian House of Representatives, Report of 1 August 2018, p. 104.

53. More controversial examples of conditions that have been reported to the Belgian Evaluation Commission as grounds for abortion include club feet, a cleft lip and congenital heart defects. For an elaborate discussion about the types of foetal abnormalities reported to the Belgian Evaluation Commission, see T. Vansweevelt, 'Abortus', pp. 257–61.

54. It remains unclear whether the MPs' statements were aimed at prohibiting all terminations beyond the 24th week or only those where the foetus does not have fatal anomalies. It is most likely that the MPs at the time did not imagine the possibility of termination requests after the 24th week of pregnancy for foetal abnormalities that are not necessarily incompatible with life.

55. On behalf of all the political parties that would later approve the legislative proposal, speakers expressed their agreement with that interpretation.

56. Currently, the crime 'child murder' in the Belgian Criminal Code only involves the killing of children during birth or shortly after. Belgian Criminal Code, Article 396.

57. For: G. Genicot, *Droit médical et biomédical* (Brussel: Larcier, 2017), 655; H. Nys, *Geneeskunde. Recht en medisch handelen* (Mechelen: Kluwer, 2016), 233; T. Vansweevelt, 'Abortus', p. 268. Against: N. Colette-Basecqz and N. Blaise, 'L'avortement' in X, *Les Infractions*. Vol. III (Brussels: Larcier, 2011), pp. 46–8; A. Delannay, 'Les homicides et lésions corporelles volontaires' in X, *Les Infractions*. Vol. II (Brussels: Larcier, 2010), p. 203; A. De Nauw, *Inleiding tot het bijzonder strafrecht* (Mechelen: Kluwer, 2010), p. 132 and p. 200.

58. Court of First Instance of Brussels, 21 April 2004, *Tijdschrift voor Belgisch Burgerlijk Recht/Revue Générale de Droit Civil* 2 (2006), pp. 108–16 (Dutch and

French); Court of First Instance of Hasselt, 16 October 2006, *Tijdschrift voor Gezondheidsrecht/Revue de Droit de la Santé* 1 (2012), pp. 49–54 (Dutch and French); Court of First Instance of Leuven, 6 March 2013, *Tijdschrift voor Gezondheidsrecht/Revue de Droit de la Santé* 2 (2017), pp. 108–13 (Dutch and French).

59. See for instance data from University Hospital Ghent in the Master's thesis of A. De Maesschalk, 'Tweede en Derde Trimesterzwangerschapsafbreking: Stand van Zaken' [Second and Third Trimester Termination of Pregnancy: State of Affairs] (Dutch) (2014) pp. 23–4. Available at [https://lib.ugent.be/fulltxt/RUG01/002/163/951/RUG01-002163951\\_2014\\_0001\\_AC.pdf](https://lib.ugent.be/fulltxt/RUG01/002/163/951/RUG01-002163951_2014_0001_AC.pdf).

60. 'Wij kicken niet op een zwangerschapsafbreking' [We Don't Thrive on a Termination of Pregnancy] (Dutch), *De Standaard*, 17 November 2018; 'Steeds meer vraag naar erg late zwangerschapsafbrekingen om medische redenen' [Increasing Demand for Very Late Terminations of Pregnancy for Medical Reasons] (Dutch), *Humo*, 6 March 2015.

61. N. Hautenne, 'Qualifications pénales autour de l'enfant à naître' [Criminal Qualifications on the Child to be Born] (French), *Tijdschrift voor Gezondheidsrecht/Revue de Droit de la Santé* 2 (2005) 411; K. Van Assche, 'Goorloofbaarheid van en informatieplicht over late zwangerschapsafbreking' [Lawfulness of and Information Duty on Late Termination of Pregnancy] (Dutch), *Tijdschrift voor Gezondheidsrecht/Revue de Droit de la Santé* 2 (2017), pp. 116–8; M. Collette and P. De Hert, 'Waarom individualisering abortus ons niet (helemaal) bekoort' [Why Individualisation of Abortion Does Not (Entirely) Satisfy Us] (Dutch), *Juristenkrant* 377 (2017) 15.

62. According to a recent study, Flemish neonatologists have positive attitudes towards late termination of pregnancy. L. Dombrecht et al., 'Neonatologists and Neonatal Nurses Have Positive Attitudes towards Perinatal End-of-Life Decisions, a Nationwide Survey', *Acta Paediatrica* 109 (2020), pp. 494–504.

63. F. De Meyer, 'Late Termination of Pregnancy in Belgium: Exploring Its Legality and Scope', *European Journal of Health Law* 27 (2020), pp. 9–34.

64. Irish Health (Regulation of Termination of Pregnancy) Act, Article 8. There is no consensus on the definition of foetal viability. For example, the United States Supreme Court stated in *Roe v. Wade* (1973) that viability is the 'interim point at which the fetus becomes (...) potentially able to live outside the mother's womb, albeit with artificial aid' and 'is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks'. See *Roe v. Wade* [1973] 410 U.S. 113, IX, B.

65. B.H. Arzuaga and B.H. Lee, 'Limits of Human Viability in the United States: A Medicolegal Review', *Pediatrics* 128 (2011), pp. 1047–52; L. Han, M.I. Rodriguez and A.B. Caughey, 'Blurred Lines: Disentangling the Concept of Fetal Viability from Abortion Law', *Women's Health Issues* 28 (2018), pp. 287–8.

66. The youngest premature survivor reported to date was born at 21 weeks and 4 days dating from the last menstrual period. K.A. Ahmad, C.S. Frey, M.A. Fierro, A.B. Kenton and F.X. Placencia, 'Two-Year Neurodevelopmental Outcome of an Infant Born at 21 Weeks' 4 Days' Gestation', *Pediatrics* 140(6) (2017).

67. G.D.V. Hankins, L.D. Pacheco and T.S. Wen, 'Fetal Assessment Near the Limits of Viability', *Seminars in Perinatology* 37 (2013), pp. 401–3.

68. Irish Health (Regulation of Termination of Pregnancy) Act, Article 9(1)(b).

69. Op. cit., Article 10(1)(a) and (b).

70. See for example N. Grealish in Dáil Debates, 17 October 2018, p. 753. Available at: <https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2018-10-17/debate/mul@/main.pdf> (accessed 28 February 2019); M. Collins in Dáil Debates, 18 October 2018, p. 832. Available at: <https://data.oireachtas.ie/ie/oireachtas/debateRecord/dail/2018-10-18/debate/mul@/main.pdf> (accessed 28 February 2019).

71. S. Harris in Dáil Debates, Select Committee on Health, 7 November 2018, p. 4. Available at: [https://data.oireachtas.ie/ie/oireachtas/debateRecord/select\\_committee\\_on\\_health/2018-11-07/debate/mul@/main.pdf](https://data.oireachtas.ie/ie/oireachtas/debateRecord/select_committee_on_health/2018-11-07/debate/mul@/main.pdf) (accessed 28 February 2019); Seanad Debates, 10 December 2018, pp. 79–



80, <https://data.oireachtas.ie/ie/oireachtas/debateRecord/seanad/2018-12-10/debate/mul@/main.pdf> (accessed 28 February 2019).

72. In Belgium, more than 80% of abortions are carried out in specialist abortion facilities. Abortion in private surgery or, for example, in prison, is not allowed.

73. The counselling department is not necessarily institutionalised in practice, but rather refers to the presence of one or more staff members capable of assisting and informing the pregnant woman, for example psychologists, physicians, nurses, social assistants or midwives. Belgian Act on the Voluntary Termination of Pregnancy, Article 2, 1°.

74. Abortion in hospital is mandatory if the woman is more than 9 weeks pregnant or in case of medical and health-related illness. This and other practical information can be found on the website of the Irish Health Services Executive: <https://www2.hse.ie/abortion/> (accessed 28 February 2019).

75. Belgian Act on the Voluntary Termination of Pregnancy, Article 2.

76. Op. cit., Article 2, 5°.

77. Op. cit., Article 2, 2°, c.

78. Op. cit., Article 2, 4°.

79. In this case, the certification can happen not later than 3 days after the carrying out of the termination of pregnancy. Irish Health (Regulation of Termination of Pregnancy) Act, Article 10(2)(b).

80. Belgian Act on the Voluntary Termination of Pregnancy, Article 2, 2°, a.

81. Op. cit., Article 2, 1°, b and 2, 2°, b.

82. Op. cit., Article 2, 6°

83. Op. cit., Article 2, 1°, b.

84. Op. cit.

85. Irish Health (Regulation of Termination of Pregnancy) Act, Article 21.
86. See discussion on Amendment no. 146 in Dáil Debates, Select Committee on Health, 8 November 2018,
87. Dáil Éireann, Report Stage Amendment 44, 26 November 2018. Available at: <https://data.oireachtas.ie/ie/oireachtas/bill/2018/105/dail/4/amendment/numberedList/eng/b105a18d-drnl.pdf> (accessed 28 February 2019).
88. S. Harris in Select Committee on Health, 8 November 2018, pp. 7–9.
89. For an overview of the consent policy in Ireland, see Health Service Executive, 'National Consent Policy' (2017). Available at: <https://www.hse.ie/eng/about/who/qid/other-quality-improvement-programmes/consent/national-consent-policy-august-2017.pdf> (accessed 28 February 2019). See also Medical Council, 'Guide to Professional Conduct and Ethics for Registered Medical Practitioners' (2016). Available at: <https://www.medicalcouncil.ie/News-and-Publications/Reports/Guide-to-Professional-Conduct-and-Ethics-8th-Edition-2016-.pdf> (accessed 28 February 2019).
90. See, Minister of Health S. Harris, op. cit., p. 8: 'Termination of pregnancy should be a part of the public health service like other health services. Therefore, I do not see any reason to differentiate the issue of consent in this legislation relative to any other procedure provided as part of the public health service'.
91. In Ireland, this period has also been referred to as 'cooling-off period'. In Belgium, some have called this 'bedenktijd' (Dutch), which literally translates to 'change-your-mind period'. These terms are arguably more suggestive in nature.
92. Belgian Act on the Termination of Pregnancy 1990, Article 2, 3° and 4°.
93. Correctional Court of Bruges, 7 February 2006, *Tijdschrift voor Gezondheidsrecht/Revue de Droit de la Santé* 3 (2007), 186 (Dutch and French).
94. M. N. Veys, 'Abortus bij minderjarige en wilsonbekwame patiënten: de rol van de Wet Patiëntenrechten en de noodtoestand' [Abortion on minors and incapacitated patients: the role of the Law on Patients' Rights and the emergency

situation] (Dutch), *Tijdschrift voor Gezondheidsrecht/Revue de Droit de la Santé* 3 (2007), 161. The case concerned a pregnant 14-year old girl who, it was feared, would commit suicide or terminate the pregnancy herself, posing a threat to her physical integrity.

95. Belgian Act on the Voluntary Termination of Pregnancy, Article 2, 3°.

96. When the last day of the extended period is a Saturday, a Sunday or a legal holiday, the termination of pregnancy can be carried out on the next working day.

97. See for example: Legislative proposal (K. Lalieux, V. Caprasse, M. Gerkens, K. Jiroflee, M. Van Hees), Parl. Doc. House of Rep. 2017-18, no. 54 3215/1; Legislative proposal (M. Van Hees En R. Hedebouw), Parl. Doc. House of Rep. 2017-18, no. 54 2518/1; Legislative proposal (K. Jiroflee e.a.), Parl. Doc. House of Rep. 2017-18, no. 54 2571/1.

98. In 2016, France deleted the requirement of a waiting period from the corresponding provision in its Code of Public Health. See Act of 26 January 2016 on the Modernisation of Our System of Healthcare [Loi n° 2016-41 du 26 janvier 2016 de modernisation de notre système de santé], Articles 82 and 127, amending Article L. 2212-5 of the French Code of Public Health. Available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031912641&categorieLien=id> (French) (accessed 28 February 2019).

99. Irish Health (Regulation of Termination of Pregnancy) Act, Article 12(3).

100. For an elaboration on practical obstacles originating from the reflection period, see for example R. Coppinger in Select Committee on Health, 7 November 2018. See also expert opinions of S. Arulkumaran in Joint Committee, 18 October 2017, p. 50. Available at: [https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint\\_committee\\_on\\_the\\_eighth\\_amendment\\_of\\_the\\_constitution/2017-10-18/debate/mul@/main.pdf](https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_the_eighth_amendment_of_the_constitution/2017-10-18/debate/mul@/main.pdf) (accessed 28 February 2019); C. Zampas in Joint Committee, 4 October 2017, p. 52. Available at: [https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint\\_committee\\_on\\_the\\_eighth\\_amendment\\_of\\_the\\_constitution/2017-10-04/debate/mul@/main.pdf](https://data.oireachtas.ie/ie/oireachtas/debateRecord/joint_committee_on_the_eighth_amendment_of_the_constitution/2017-10-04/debate/mul@/main.pdf) (accessed 28 February 2019).

101. Dáil Éireann, Committee Stage Amendments 86 and 88, 5 November 2018.

102. Irish Health (Regulation of Termination of Pregnancy) Act, Article 12(4). The article also obliges the treating physician to carry out the termination of pregnancy 'as soon as may be' after the reflection period has elapsed.

103. T. Vansweevelt, F. De Meyer and K. Van Assche, 'De abortuswet 2018: Over symbolische verbeteringen en openstaande knelpunten' [The Abortion Act 2018: On symbolic improvements and remaining bottlenecks] (Dutch), *Tijdschrift voor Gezondheidsrecht/Revue de Droit de la Santé* 4 (2019), pp. 220–32.

104. Belgian Act on the Voluntary Termination of Pregnancy, Article 2, 7°; Irish Health (Regulation of Termination of Pregnancy) Act, Article 22. See also World Health Organization, 'Safe Abortion: Technical and Policy Guidance for Health Systems, Second Edition', pp. 96–7. Available at: [https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434\\_eng.pdf;jsessionid=A42D1C90DB08D9CD7E57AAA341C21AAF?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf;jsessionid=A42D1C90DB08D9CD7E57AAA341C21AAF?sequence=1) (accessed 28 February 2019).

105. However, article 422bis of the Belgian Criminal Code punishes those who do not offer help to a person in great danger, if this would not put themselves at risk. Although this principle may already prohibit refusal of medical assistance in urgent medical cases, it would have been appropriate if the 2018 Act would have included a duty to participate in a termination of pregnancy in a situation of emergency.

106. For example, this may be the case in some cities or villages in Donegal, the only Irish constituency that voted 'no' in the 2018 Referendum.

107. Belgian Act on the Voluntary Termination of Pregnancy, Article 2, 7°.

108. The right to refuse is further clarified in existing medical guidelines. See Medical Council, 'Guide to Professional Conduct and Ethics for Registered Medical Practitioners' (2016), Section 49, which deals with 'Refusal to treat'.

109. Dáil Éireann, Committee Stage Amendments 150, 151 and 153, 5 November 2018.

110.Op. cit., Amendments 149 and 152.

111.One MP proposed an appropriate sanction by the Medical Council. Op. cit., Amendment 157.

112.Irish Health (Regulation of Termination of Pregnancy) Act, Articles 13–18.

113.Op. cit., Article 16.

114.T. Vansweevelt, K. Van Assche and F. De Meyer, 'De nieuwe abortuswet: over symboliek en knelpunten', *De Morgen*, 8 November 2018. Available at: <https://www.demorgen.be/opinie/de-nieuwe-abortuswet-over-symboliek-en-knelpunten-bba27296a/> (Dutch) (accessed 28 February 2019).

115.Belgian Act on the Voluntary Termination of Pregnancy, Article 3, para 1.

116.Op. cit., Article 3, para 3.

117.Op. cit., Article 3, para 2.

118.See Act of 20 March 2017 Concerning Extending the Crime of Obstructing Access to Voluntary Termination of Pregnancy [Loi no. 2017-347 du 20 mars 2017 relative à l'extension du délit d'entrave à l'interruption volontaire de grossesse], Article 1, amending Article L. 2223-2 of the French Code of Public Health. Available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034228048&categorieLien=id> (French) (accessed 28 February 2019).

119.Belgian Criminal Code, Article 348; 349; 352.

120.Irish Health (Regulation of Termination of Pregnancy) Act, Article 23(5).

121.Op. cit., Article 23(1).

122.Op. cit., Article 23(2) and (4).

123.Op. cit., Article 23(3).

124.Joint Committee, Report on the Eighth Amendment (2017), Chapter 3.

125. See, for instance, Dáil Éireann, Committee Stage Amendment 15, 5 November 2018.

126. See, for instance, S. Harris in Select Committee on Health, 6 November 2018, p. 48: 'There are parameters in place that trust a doctor's clinical judgment and give a doctor's clinical judgment the protection of a decision based on their reasonable opinion and in good faith,...'.

127. It should, however, be pointed out that the pregnant woman is partially protected as the law requires her *deliberate* intent to let someone terminate the pregnancy outside the legal conditions.

128. For an attempt to introduce safe access to the legislation, see Seanad Éireann, Committee Stage Amendment 62, 10 December 2018. Available at: <https://data.oireachtas.ie/ie/oireachtas/bill/2018/105/seanad/3/amendment/numberedList/eng/nl-b105b18d-sc.pdf> (accessed 28 February 2019).

129. 'Health Minister to Ban Protests at Abortion Providers', *The Irish Examiner*, 28 December 2018. Available at: <https://www.irishexaminer.com/breakingnews/ireland/health-minister-to-ban-protests-at-abortion-providers-894311.html> (accessed 28 February 2019).

130. A. Conneely, 'Renewed call for safe access zones for abortion services' *RTE News*, 6th January 2020. Available at <https://www.rte.ie/news/2020/0106/1104625-abortion-rights-call/> (accessed 30th March 2020).