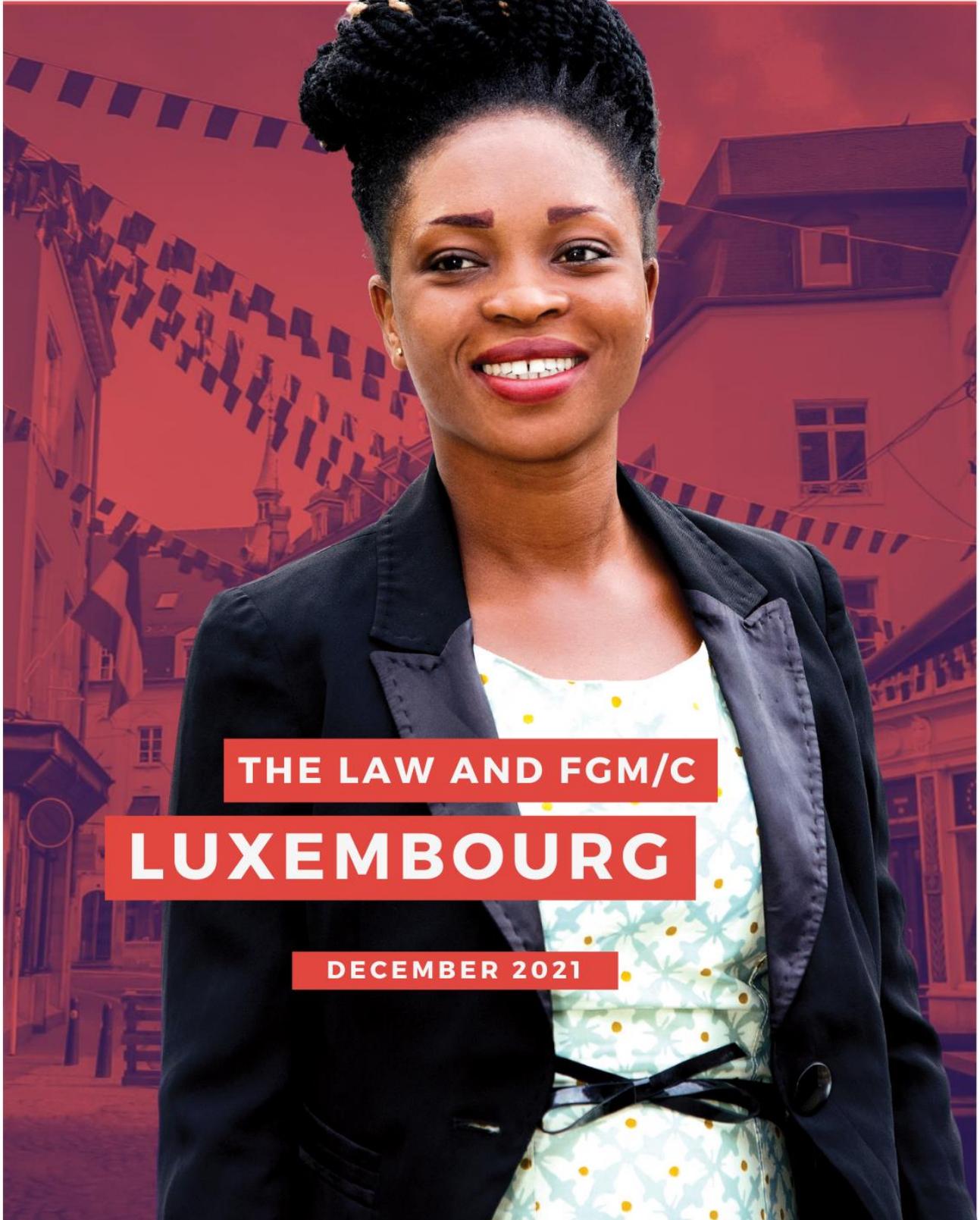




28 TOO MANY
FGM... let's end it.

ORCHID  PROJECT



THE LAW AND FGM/C

LUXEMBOURG

DECEMBER 2021

National Legal Framework

Overview of National Legal Framework in Luxembourg

National legislation:

- ✓ Specific law/provision criminalising FGM/C
- ✓ Provides a definition of FGM/C
- ✓ Criminalises the performance of FGM/C
- ✓* Criminalises the procurement, arrangement and/or assistance of acts of FGM/C
- X** Obligation to report incidents of FGM/C to the authorities
- ✓ Criminalises the participation of medical professionals in acts of FGM/C
- ✓ Extraterritorial application regardless of double criminality

* See below for more detail.

** Not reporting can, under certain circumstances, constitute a crime.

Introduction

The Grand Duchy of Luxembourg (*Luxembourg*) is a landlocked country in western Europe with an estimated population of 634,700.¹ Luxembourg is a constitutional monarchy with a parliamentary democracy. It has a civil-law legal system.

FGM/C Prevalence

A report published by the European Institute for Gender Equality (the *EIGE*) indicated that in 2012 there was no current or representative data on the prevalence of female genital mutilation/cutting (*FGM/C*) among women and girls living in Luxembourg.²

The EIGE estimates that, as of 2021, between 102 and 136 girls up to the age of 18 in Luxembourg are at risk of undergoing FGM/C. The majority of these originate from Eritrea. Smaller groups originate from Egypt, Ethiopia, Guinea, Somalia, and Sudan.³

National Legal Framework

Specific Provision in General Law

FGM/C is criminalised in Luxembourg under a specific provision in general criminal law, **Article 409bis of the Penal Code of the Grand Duchy of Luxembourg (1879, amended 2018)** (the *Criminal Code*).

Article 409bis(1) contains a general prohibition on performing, facilitating or promoting FGM/C, regardless of the victim's consent.

Article 409bis(4) prescribes that it is considered an aggravating circumstance if FGM/C was committed:

- against a minor;
- against a victim whose particular vulnerability was known or apparent to the perpetrator due to the victim's illegal or precarious administrative situation, precarious social situation, age, illness, infirmity, physical or psychological deficiency or state of pregnancy; or
- with the threat or use of force or other forms of coercion, abduction, fraud or deception.

Articles 409bis(3) and 409bis(5) respectively prescribe the following as aggravating circumstances for an offence under **Article 409bis(1)** and additional aggravating circumstances for an offence under **409bis(4)**:

- if FGM/C results in an apparently incurable disease or a permanent incapacity for personal work;
- if FGM/C was committed by a natural or adoptive parent or (great-) grandparent or a parent or (great-) grandparent by law;
- if FGM/C was committed by a person who had authority over the victim or abused said authority conferred to him or her by his or her function; and
- if FGM/C causes the death of the victim.

Definition of FGM/C

Article 409bis(1) of the Criminal Code defines 'FGM/C' as the excision, infibulation or any other mutilation of all or part of the labia majora, labia minora or clitoris. This is in line with the definition of 'FGM' given by the World Health Organization.⁴

Women and Girls of All Ages

The performance of FGM/C on women and girls of all ages has been criminalised in Luxembourg, and **Article 409bis(4) of the Criminal Code** prescribes that it is an aggravating offence to perform, promote or facilitate FGM/C on a minor.

Procuring, Aiding and Abetting

Article 409bis(1) of the Criminal Code criminalises performing, facilitating and promoting FGM/C. Hence, for the purposes of establishing the offence of FGM/C, the law does not distinguish between the simple act of facilitating or promoting FGM/C and the actual performance of the FGM/C.

Aiding and abetting crimes of any nature are punishable under **Articles 66–69 of the Criminal Code**.

Allowing the Use of Premises

Allowing the use of premises for the purpose of FGM/C could be qualified as 'facilitating' FGM/C and is therefore criminalised in Luxembourg under **Article 409bis of the Criminal Code**.

Providing or Possessing Tools

Providing (specific) tools for the purpose of FGM/C can be qualified as 'facilitating' FGM/C, which is prohibited under **Article 409bis of the Criminal Code**.

Possessing (specific) tools for the purpose of FGM/C has most likely not been criminalised in Luxembourg. The **Criminal Code** does not have a general provision on preparing to commit offences. Possession has only been criminalised in relation to certain offences, in their specific provisions, and this is not the case for Article 409bis.

Article 409bis(2) does criminalise attempting to perform, facilitate or promote FGM/C. However, **Article 51 of the Criminal Code** defines an 'attempt' as an act that forms the beginning of the execution of an

offence that has only been suspended due to circumstances beyond the perpetrator's control. Consequently, the simple act of possessing tools that may be destined to be used for FGM/C is, in our view, unlikely to equate to the facilitation or promotion of FGM/C.

Obligation to Report FGM/C

In principle, not disclosing to the authorities in Luxembourg an instance of FGM/C, to the extent that it may still be prevented, is a criminal offence. **Article 140(1) of the Criminal Code** provides that knowingly refusing to inform the judicial or administrative authorities of an offence that may still be prevented, or the effects of which may still be limited, or the perpetrators of which are susceptible to committing another offence that may be prevented, is, in and of itself, a crime. The following persons are out of the scope of Article 140(1), unless the victim of the underlying offence is a minor:

- the perpetrator's parents, grandparents, siblings and their spouses;
- the perpetrator's spouse or legal partner; and
- persons bound by professional secrecy.

Medicalised FGM/C

Medicalised FGM/C is criminalised in Luxembourg under **Article 409bis of the Criminal Code**.

The **Criminal Code** does not contain a specific provision on medicalised FGM/C, nor on medical malpractice.

Extraterritoriality

The Criminal Procedure Code of Luxembourg (the *Criminal Procedure Code*) extends the typically territorial application of Luxembourgish criminal law to the commission, promotion and facilitation of FGM/C abroad, regardless of whether double criminality is met.

Article 5-1 of the Criminal Procedure Code provides that any Luxembourgish national, individual who has habitual residence in Luxembourg or is present on Luxembourgish territory who has committed one of the offences described in, *inter alia*, Article 409bis of the Criminal Code may be prosecuted and tried in Luxembourg, even if the offence was not criminalised in the country where it was committed, and if the Luxembourgish authorities did not receive either a complaint from the offended party or a denunciation from the authority of the country where the offence was committed.

Penalties

There are several penalties for performing, facilitating or promoting FGM/C in Luxembourg, depending on the presence of aggravating circumstances and additional aggravating circumstances.

- **Article 409bis(1) of the Criminal Code** prescribes a sentence of *three- to five-years' imprisonment and a fine of €500 to €10,000* for performing, promoting or facilitating FGM/C, in the absence of aggravating circumstances.
- **Article 409bis(3) of the Criminal Code** prescribes a sentence of *five- to seven-years' imprisonment and a fine of €1,000 to €25,000* if the FGM/C resulted in an incurable disease or permanent incapacity to perform personal work.
- **Article 409bis(3) of the Criminal Code** prescribes a sentence of *seven- to ten-years' imprisonment and a fine of €2,500 to €30,000* if FGM/C:

- was committed by a natural or adoptive parent or (great-) grandparent or a parent or (great-) grandparent by law of the victim;
 - was committed by a person who had authority over the victim or abused said authority conferred to him or her by his or her function; or
 - caused the death of the victim.
- **Article 409bis(4) of the Criminal Code** prescribes a sentence of *ten- to fifteen-years' imprisonment and a fine of €1,000 to €25,000* if FGM/C was committed:
 - against a minor;
 - against a victim whose particular vulnerability was known or apparent to the perpetrator due to the victim's illegal or precarious administrative situation, precarious social situation, age, illness, infirmity, physical or psychological deficiency or state of pregnancy; or
 - with the threat or use of force or other forms of coercion, abduction, fraud or deception.
 - **Article 409bis(5) of the Criminal Code** prescribes a sentence of *fifteen- to twenty-years' imprisonment and a fine of €3,000 and €50,000* if, in addition to the aggravating circumstances under **Article 409bis(4)**, the FGM/C resulted in an incurable disease or permanent incapacity to perform personal work.
 - **Article 409bis(5) of the Criminal Code** prescribes a sentence of *up to life imprisonment and a fine of €5,000 to €75,000* if, in addition to the aggravating circumstances under **Article 409bis(4)**, FGM/C was committed:
 - was committed by a natural or adoptive parent or (great-) grandparent or a parent or (great-) grandparent by law of the victim;
 - was committed by a person who had authority over the victim or abused said authority conferred to him or her by his or her function; or
 - caused the death of the victim.

The sentences outlined above apply equally to offenders, regardless of whether they performed, facilitated or promoted FGM/C. Accessories to the crime outlined in Article 409bis are sentenced as the principal offenders of the crime, whereas mere accomplices are given the sentence immediately lower than the sentence they would have received had they been the principal offenders.

As outlined above, failing to report FGM/C when it can still be prevented, its effects limited or when it is likely that the perpetrator will perform, promote or facilitate FGM/C again is in and of itself a crime and is punishable by virtue of **Article 140(1) of the Criminal Code**, which prescribes a sentence of *one- to three-years' imprisonment and a fine of €251 to €45,000*.

Protection

Protecting Uncut Girls and Women

Uncut girls can be protected through child protection laws in general civil law.

Article 387-9bis of the Civil Code of Luxembourg (the *Civil Code*) prescribes that parental authority may be totally (or partially) withdrawn by a district court from parents who, *inter alia*, by lack of care or direction endanger the safety, health or morality of their child. This might apply to the situation where a girl is at a concrete risk of FGM/C because her parents are, by lack of direction, endangering her safety and health.

Under **Article 387-11**, the child's guardianship will be arranged by the court if parental authority is partially or totally withdrawn.

There are no specific or general laws protecting uncut women, aside from general criminal law.

Implementation of The Law

Court Cases

There are no Luxembourgish court cases in relation to FGM/C known to 28 Too Many.

Conclusions and Recommendations

Conclusions

FGM/C is criminalised in Luxembourg under a specific provision in general criminal law, **Article 409bis of the Criminal Code**.

The definition of 'FGM' maintained in the law covers all **types of FGM/C** and is in line with the WHO's definition; however, it omits the criterion of FGM/C being performed for non-medical reasons. **Medicalised FGM/C** is not specifically addressed, but is likely to be covered by the general criminality of FGM/C.

Article 409bis(1) of the Criminal Code does not distinguish legally between facilitating FGM/C and performing FGM/C – performing, facilitating and promoting FGM/C are all criminalised under Article 409bis(1).

There is an **obligation to report** FGM/C to the authorities in Luxembourg if it can still be prevented.

The Criminal Procedural Code extends **extraterritorial application** of Luxembourg criminal law to the commission, promotion and facilitation of FGM/C abroad, regardless of double criminality, if the perpetrator is a Luxembourgish national, a habitual resident of Luxembourg or is present in Luxembourg at the time of the act.

Recommendations

We recommend that Luxembourg instate an obligation for (at least) relevant professionals to report cases where FGM/C has been performed.

We also recommend that Luxembourg extend extraterritorial application of Luxembourg criminal law to the commission, promotion and facilitation of FGM/C abroad, regardless of double criminality, in cases where only the victim has Luxembourg nationality or is a habitual resident of Luxembourg.

Appendix I: International and Regional Treaties

LUXEMBOURG	Signed	Ratified/ Acceded	Reservations on reporting?
International			
International Covenant on Civil & Political Rights (1966) (<i>ICCPR</i>) ⁵	✓ 1974	✓ 1983	No
International Covenant on Economic, Social & Cultural Rights (1966) (<i>ICESCR</i>) ⁶	✓ 1974	✓ 1983	No
Convention on the Elimination of All forms of Discrimination Against Women (1979) (<i>CEDAW</i>) ⁷	✓ 1980	✓ 1989	No
Convention on the Rights of the Child (1989) (<i>CRC</i>) ⁸	✓ 1990	✓ 1994	No
Regional			
Istanbul Convention ⁹	✓ 2011	✓ 2018	No
European Convention on Human Rights ¹⁰	✓ 1950	✓ 1953	No

‘Signed’: a treaty is signed by countries following negotiation and agreement of its contents.

‘Ratified’: once signed, most treaties and conventions must be ratified (i.e. approved through the standard national legislative procedure) to be legally effective in that country.

‘Acceded’: when a country ratifies a treaty that has already been negotiated by other states.

Appendix II: National Laws

Criminal Code

Art. 51

Il y a tentative punissable, lorsque la résolution de commettre un crime ou un délit a été manifestée par des actes extérieurs qui forment un commencement d'exécution de ce crime ou de ce délit, et qui n'ont été suspendus ou n'ont manqué leur effet que par des circonstances indépendantes de la volonté de l'auteur.

Art. 140

- (1) Le fait, pour quiconque ayant connaissance d'un crime dont il est encore possible de prévenir ou de limiter les effets, ou dont les auteurs sont susceptibles de commettre de nouveaux crimes qui pourraient être empêchés, de ne pas en informer les autorités judiciaires ou administratives est puni d'une peine d'emprisonnement de un à trois ans et d'une amende de 251 à 45.000 euros.
- (2) Sont exceptés des dispositions qui précèdent, sauf en ce qui concerne les crimes commis sur les mineurs:
 - les parents en ligne directe et leurs conjoints, ainsi que les frères et sœurs et leurs conjoints, de l'auteur ou du complice du crime;
 - le conjoint de l'auteur ou du complice du crime, ou le partenaire au sens de la loi modifiée du 9 juillet 2004 relative aux effets légaux de certains partenariats;
 - les personnes astreintes au secret professionnel et visées par l'article 458 du Code pénal.

Art. 409bis

- (1) Quiconque aura pratiqué, facilité ou favorisé l'excision, l'infibulation ou toute autre mutilation de la totalité ou partie des labia majora, labia minora ou clitoris d'une femme, avec ou sans consentement de cette dernière, sera puni d'un emprisonnement de trois à cinq ans et d'une amende de 500 euros à 10 000 euros.
- (2) La tentative de commettre l'infraction visée au paragraphe 1er sera punie d'un emprisonnement de huit jours à un an et d'une amende de 251 euros à 5 000 euros.
- (3) Si la mutilation des organes génitaux d'une personne de sexe féminin a entraîné une maladie paraissant incurable ou une incapacité permanente de travail personnel, les peines seront la réclusion de cinq à sept ans et une amende de 1 000 euros à 25 000 euros. Si la mutilation des organes génitaux d'une personne de sexe féminin a été commise par un ascendant légitime, naturel ou adoptif de la victime ou par une personne qui a autorité sur elle ou abuse de l'autorité que lui confèrent ses fonctions ou si elle a occasionné la mort, même sans intention de la donner, les peines seront la réclusion de sept à dix ans et une amende de 2 500 euros à 30 000 euros.
- (4) L'infraction prévue au paragraphe 1 er est punie de la réclusion de dix à quinze ans et d'une amende de 1 000 euros à 25 000 euros :
 1. si l'infraction a été commise envers un mineur ;
 2. si l'infraction a été commise envers une personne dont la particulière vulnérabilité, due à sa situation administrative illégale ou précaire, à sa situation sociale précaire, à son âge, à une maladie, à une infirmité, à une déficience physique ou psychique ou à un état de grossesse, est apparente ou connue de l'auteur ;
 3. si l'infraction a été commise par la menace de recours ou le recours à la force ou d'autres formes de contrainte, par enlèvement, fraude, tromperie.

- (5) Les infractions visées au paragraphe 4 sont punies de la réclusion de quinze à vingt ans et d'une amende de 3 000 euros à 50 000 euros si elles ont entraîné une maladie paraissant incurable ou une incapacité permanente de travail personnel. Elles sont punies de la réclusion à vie et d'une amende de 5 000 euros à 75 000 euros si l'infraction a été commise par un ascendant légitime, naturel ou adoptif de la victime, par une personne qui a autorité sur elle ou abuse de l'autorité que lui confèrent ses fonctions, ou si l'infraction a causé la mort, même sans intention de la donner.

Criminal Procedure Code

Art. 5-1

Tout Luxembourgeois, toute personne qui a sa résidence habituelle au Grand-Duché de Luxembourg, de même que l'étranger trouvé au Grand-Duché de Luxembourg, qui aura commis à l'étranger une des infractions prévues aux articles 112-1, 135-1 à 135-6, 135-9 et 135-11 à 135-16, 162, 164, 165, 166, 178, 179, 198, 199, 199bis, 245 à 252, 310, 310-1, 348, 368 à 384, 389, 409bis, 496-1 à 496-4 et, dans les conditions de l'article 506-3, à l'article 506-1 du Code pénal, pourra être poursuivi et jugé au Grand-Duché, bien que le fait ne soit pas puni par la législation du pays où il a été commis et que l'autorité luxembourgeoise n'ait pas reçu soit une plainte de la partie offensée, soit une dénonciation de l'autorité du pays où l'infraction a été commise.

Civil Code

Art. 387-9bis

Peuvent se voir retirer totalement l'autorité parentale, en dehors de toute condamnation pénale, les parents qui, soit par de mauvais traitement, soit par une consommation habituelle et excessive de boissons alcooliques ou par un usage de stupéfiants, soit par une inconduite notoire ou des comportements délictueux, soit par un défaut de soins ou un manque de direction, mettent en danger la sécurité, la santé ou la moralité de l'enfant. Il en est de même pour le parent qui épouse une personne ou qui est lié par un partenariat au sens de la loi modifiée du 9 juillet 2004 relative aux effets légaux de certains partenariats avec une personne contre laquelle un retrait de l'autorité parentale a été prononcé.

L'action en retrait total de l'autorité parentale est portée devant le tribunal d'arrondissement, siégeant en matière civile, soit par le ministère public, soit par un membre de la famille respectivement le tiers auquel l'enfant a été confié, soit par le tuteur de l'enfant.

Art. 387-11

Si le retrait total ou partiel est prononcé contre les parents ou le survivant d'eux, le tribunal procède à l'organisation de la tutelle.

Si le conseil de famille ne trouve pas la personne à laquelle il estime pouvoir confier la tutelle, le tribunal procède conformément à l'article 433 du Code civil.

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- 1 Le Portail des Statistique, Grand-Duché de Luxembourg (2021) *Population by sex and nationality on 1st January (x 1000) 1981, 1991, 2001—2021*. Available at https://statistiques.public.lu/stat/TableViewer/tableView.aspx?ReportId=12853&IF_Language=eng&MainTheme=2&FldrName=1 (23 July 2021).
 - 2 European Institute for Gender Equality (2013) Current situation of female genital mutilation in *Luxembourg*. Available at <https://eige.europa.eu/publications/current-situation-and-trends-female-genital-mutilation-luxembourg> (accessed 23 July 2021).
 - 3 European Institute for Gender Equality (2021) *Female genital mutilation: How many girls are at risk in Luxembourg?* Available at <https://eige.europa.eu/publications/female-genital-mutilation-how-many-girls-are-risk-luxembourg> (accessed 23 July 2021).
 - 4 World Health Organization (2020) *Factsheet: Female Genital Mutilation*. Available at [https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation#:~:text=Female%20genital%20mutilation%20\(FGM\)%20involves,benefits%20for%20girls%20and%20women](https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation#:~:text=Female%20genital%20mutilation%20(FGM)%20involves,benefits%20for%20girls%20and%20women) (accessed 23 July 2021).
 - 5 *International Covenant on Civil and Political Rights* (1966) United Nations Treaty Collection: Status of Treaties. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (accessed 23 July 2021).
 - 6 *International Covenant on Economic, Social and Cultural Rights* (1966) United Nations Treaty Collection: Status of Treaties. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4 (accessed 23 July 2021).
 - 7 *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) United Nations Treaty Collection: Status of Treaties. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&clang=_en#9 (accessed 23 July 2021).
 - 8 *Convention on the Rights of the Child* (1989) United Nation Treaty Collection: Status of Treaties. Available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (accessed 23 July 2021).
 - 9 - Council of Europe (2021) *Chart of signatures and ratifications of Treaty 210, Convention on preventing and combating violence against women and domestic violence*. Available at <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyenum=210> (accessed 23 July 2021).
 - Council of Europe (2021) *Reservations and Declarations for Treaty 210, Convention on preventing and combating violence against women and domestic violence*. Available at <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=210&codeNature=0> (accessed 23 July 2021).
 - 10 - Council of Europe (2021) *Chart of Signatures and Ratifications of Treaty 005, Convention for the Protection of Human Rights and Fundamental Freedoms*. Available at [coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?module=signatures-by-treaty&treatyenum=005](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?module=signatures-by-treaty&treatyenum=005) (accessed 23 July 2021).
 - Council of Europe (2021) *Reservations and Declarations for Treaty 005, Convention for the Protection of Human Rights and Fundamental Freedoms*. Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/?module=declarations-by-treaty&numSte=005&codeNature=0> (accessed 23 July 2021).

Cover images: Kristina Keidere (undated) *Early morning in Luxembourg. No people at the streets, just morning delivery for restaurants is there*. Shutterstock ID: 786637042.

vystekphotographie (undated) *Portrait of woman*. 123RF ID: 33621745.

Please note that the use of a photograph of any girl or woman in this report does not imply that she has, nor has not, undergone FGM/C.

This report analyses and discusses the application of national (criminal) laws to the commission of FGM/C and any possible related crimes. It also explores other legal factors deemed relevant, such as legal obligations to report the commission or likely upcoming commission of FGM/C, available legal protective measures for girls and women at risk of FGM/C, and any obligations of national governments in relation to FGM/C.

The initial research conducted for this report consisted of a questionnaire developed by 28 Too Many (part of Orchid Project) and Ashurst LLP. The information contained in the responses to that questionnaire was then reviewed by Middelburg Human Rights Law Consultancy, updated and used as the basis of further research from relevant sources. This report is mainly based on primary legal sources such as legislation, case law and authoritative literature, but does use secondary sources such as government documents, journal articles and newspaper articles.

This report has been prepared as a work of legal research only and does not represent legal advice in respect of any of the laws of the Grand Duchy of Luxembourg. It does not purport to be complete or to apply to any particular factual or legal circumstance. It does not constitute, and must not be relied or acted upon as, legal advice or create an attorney-client relationship with any person or entity. Neither 28 Too Many, Orchid Project, Ashurst LLP and Middelburg Human Rights Law Consultancy nor any other contributor to this report accepts responsibility for losses that may arise from reliance upon the information contained herein, or any inaccuracies, including changes in the law since the research was completed in August 2021. No contributor to this report holds himself or herself out as being qualified to provide legal advice in respect of any jurisdiction as a result of his or her participation in this project or contribution to this report. Legal advice should be obtained from legal counsel qualified in the relevant jurisdiction/s when dealing with specific circumstances. It should be noted, furthermore, that in many countries there is a lack of legal precedent for the penalties laid out in the law, meaning that, in practice, lesser penalties may be applied.

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