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## OPINION OF THE LEGAL SERVICE<sup>1</sup>

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From: Legal Service

To: COPEN

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Subject: Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence

- Legal basis – Scope of Article 83 TFEU
- Rules for specific victims – Compatibility with the principle of non-discrimination

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### I. INTRODUCTION

1. On 8 March 2022, the Commission presented a proposal for a Directive of the European Parliament and the Council on combating violence against women and domestic violence<sup>2</sup> (the ‘proposed directive’).

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<sup>1</sup> This document contains legal advice protected under Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, and not released by the Council of the European Union to the public. The Council reserves all its rights in law as regards any unauthorised publication.

<sup>2</sup> COM(2022)105, 2022/0066(COD).

2. The Council Legal Service (CLS) was asked to concentrate its analysis on the following two aspects of the proposed directive:
- (A) whether Article 83(1) TFEU allows for the adoption of minimum rules for the criminal offences, as proposed, of rape against women and female genital mutilation (Articles 5 and 6 of the proposed directive),<sup>3</sup> as well as non-consensual sharing of intimate or manipulated material (so-called “revenge porn”), cyber stalking, cyber harassment, and cyber incitement to violence or violence (Articles 7 to 10 of the proposed directive) and
  - (B) whether establishing measures which only apply to specific victims or specific contexts, namely victims of violence against women and domestic violence, would be in compliance with the principle of non-discrimination<sup>4</sup>.

The two issues will be examined in turn.

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<sup>3</sup> In addition, it may be noted that Article 45 of the proposed directive would amend Article 3 of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1), thereby aligning some of the already existing offences concerning sexual abuse against children provided for in Article 3 of the above-mentioned Directive, with the definition set out in Article 5 of the proposed directive for the crime of rape against women.

<sup>4</sup> The analysis of the proposal is still ongoing in the COPEN Working Party. This opinion is without prejudice to issues which could arise in the course of this analysis, including as regards the competence of the EU co-legislators to adopt specific provisions on the rights of victims, and which in principle will be addressed in the course of the discussion.

## II. LEGAL ANALYSIS

### A. LEGAL BASIS FOR THE MINIMUM RULES ON CRIMINAL OFFENCES SET OUT IN ARTICLES 5 TO 10

3. Article 83(1), first subparagraph, TFEU, confers on the EU a competence to establish minimum rules concerning the definition of criminal offences and sanctions in specific areas of crime, following the ordinary legislative procedure. In accordance with this provision, those areas of crime are defined on the basis of two criteria, namely (1) that the area must relate to crimes that are “*particularly serious*”, and (2) that those crimes must have “*a cross-border dimension*”. The cross-border dimension in the specific context of Article 83 TFEU can result from (i) the nature of such offences, (ii) from their impact, or (iii) “*from a special need to combat them on a common basis*”.
4. The second subparagraph of Article 83(1) TFEU then lists areas of crime which the authors of the Treaty considered to already fulfil those two criteria. This list of so-called “euro-crimes” includes, in particular, “*trafficking in human beings and sexual exploitation of women and children*” and “*computer crime*”. The third subparagraph of Article 83(1) TFEU contains a so-called simplified revision procedure that enables the Council, by unanimity and after obtaining the consent of the European Parliament, to extend the list of such “euro-crimes”.
5. This list of “euro-crimes” finds its origin in the Amsterdam Treaty, which, at the time, provided for a non-exhaustive list of such crimes, which could be subject to EU level minimum rules, to be adopted by unanimity in the Council.

6. This approach concerning EU substantive criminal law was reviewed in the Lisbon Treaty. It was agreed that the Treaty would set out an exhaustive list of crimes, on which EU legislation could then be adopted by qualified majority voting and ordinary legislative procedure. This exhaustive list could, however, be adapted by the Council, which would be empowered to add further crimes to the list, acting by unanimity. The list of “euro-crimes” inserted in Article 83(1), second subparagraph, TFEU by the Lisbon Treaty was, in essence, a combination of the areas of crime identified in Articles K.1 and K.3(e) ex-TEU, and those listed in the conclusions of the Tampere European Council of 15-16 October 1999.
7. It follows from the drafting history of Article 83(1) TFEU that the intention of the authors of the Treaties was to counterbalance, in that provision, the transition from unanimity to qualified majority voting by establishing an exhaustive list of areas of crime, which could then be extended by a unanimous decision of the Council.
8. Any such extension must comply with two criteria (and sub-criteria) referred to in paragraph 3 above, namely the seriousness and the cross-border dimension of the crimes.
9. As the Commission proposed to set out minimum rules on the criminal offences referred to in Articles 5 to 10 of the proposed directive on the basis of the current list of “euro-crimes”, the question whether Article 83(1) TFEU constitutes an appropriate legal basis for the adoption of minimum rules for those criminal offences must be examined, as EU law currently stands, in light of that list of “euro-crimes”.

10. More specifically, this requires an assessment as to whether the crimes of rape against women and of female genital mutilation can be considered as being part of, and included in, the area of crime concerning “*trafficking in human beings and sexual exploitation of women and children*”<sup>5</sup> and, on the other hand, whether the crimes of non-consensual sharing of intimate or manipulated material (so-called “revenge porn”) cyber stalking, cyber harassment, and cyber incitement to violence or hatred can be considered as being part of, and included in, the area of “*computer crime*”.

1) **Legal basis for the rules relating to the criminal offences of rape against women and of female genital mutilation (Articles 5 and 6 of the directive)**

11. Articles 5 to 10 of the proposed directive are included in its Chapter 2, titled “*Offences concerning sexual exploitation of women and children and computer crime*”.

According to Article 5, the crime of “*Rape*” is defined as follows:

*“1. Member States shall ensure that the following intentional conduct is punishable as a criminal offence:*

*(a) engaging with a woman in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object;*

*(b) causing a woman to engage with another person in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object.*

*2. Member States shall ensure that a non-consensual act is understood as an act which is performed without the woman’s consent given voluntarily or where the woman is unable to form a free will due to her physical or mental condition, thereby exploiting her incapacity to form a free will, such as in a state of unconsciousness, intoxication, sleep, illness, bodily injury or disability.*

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<sup>5</sup> According to the Explanatory memorandum of the proposed directive, the minimum rules set out in Articles 5 and 6 of the proposed directive would fall within the scope of the area of crime of “sexual exploitation of women”.

3. *Consent can be withdrawn at any moment during the act. The absence of consent cannot be refuted exclusively by the woman's silence, verbal or physical non-resistance or past sexual conduct.*"

According to Article 6, the crime of "*Female genital mutilation*" is defined as follows:

*"Member States shall ensure that the following intentional conduct is punishable as a criminal offence:*

*(a) excising, infibulating or performing any other mutilation to the whole or any part of the labia majora, labia minora or clitoris;*

*(b) coercing or procuring a woman or a girl to undergo any of the acts referred to in point (a)."*

12. It should therefore be examined whether the two crimes can be considered as falling within the “euro-crime” of “*sexual exploitation of women and children*” as set out in article 83(1), second subparagraph, TFEU. As the notion of “*sexual exploitation of women and children*” forms part of a provision of the Treaties setting out the competence of the EU co-legislators to adopt common rules, this notion must be interpreted as an autonomous concept of EU law<sup>6</sup>. Furthermore, in accordance with established case-law, in interpreting a provision of EU law and its wording, it is necessary to consider i) its origins<sup>7</sup> and ii) its context and the aims pursued by the legislation of which it forms part<sup>8</sup>. In order to ensure a consistent approach, a comparison with the relevant EU and international law instruments already referring to the notion of exploitation is also of essence in this context.

**a) Origins of Article 83 TFEU**

13. The process leading up to the adoption of the text of Article 83(1) TFEU started in the Treaty of Amsterdam, which amended Article K.1 ex-TEU. The resulting article provided that “*the Union's objective (...) to provide citizens with a high level of safety within an area of freedom, security and justice (...) shall be achieved by preventing and combating crime, organised or otherwise, in particular (...), trafficking in persons and offences against children, (...)*” (emphasis added).

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<sup>6</sup> This view is also consistent with the case-law of the Court according to which the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which make no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU; that interpretation must take into account the context of the provision and the purpose of the legislation in question. See, for example, judgments of 18 January 1984, *Ekro*, 327/82, EU:C:1984:11 and of 19 September 2000, *Linster*, C-287/98, EU:C:2000:468, paragraph 43.

<sup>7</sup> Judgments of 27 November 2012, *Pringle*, C- 370/12, EU:C:2012:756, paragraph 135, of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C- 583/11 P, EU:C:2013:625, paragraph 50 and of 27 October 2016, *Commission v Germany*, C-220/15, EU:C:2016:815, paragraph 39.

<sup>8</sup> Judgments 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C- 583/11 P, EU:C:2013:625, paragraph 50 and of 22 June 2021, *Venezuela v Council (Whether a third State is affected)*, C-872/19 P, EU:C:2021:507, paragraph 42.

14. Article K.3(e) ex-TEU, which listed the non-exhaustive list of areas of crime where approximation of rules could be envisaged, did not explicitly refer to “sexual exploitation of women”. However, as follows from the conclusions of the Tampere European Council of 15-16 October 1999, “*exploitation of women*” was understood as a component of trafficking in human beings. The conclusions, which spelled out the focus for the legislative work in this area post-Amsterdam, stated that “[w]ithout prejudice to the broader areas envisaged in the Treaty of Amsterdam and in the Vienna Action Plan, the European Council considers that, with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as (...) trafficking in human beings, particularly exploitation of women, sexual exploitation of children, (...)”(emphasis added).
15. This led to the adoption of series of framework decisions, including Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings<sup>9</sup>, and Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography<sup>10</sup>.

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<sup>9</sup> OJ L 203, 01/08/2002, p. 1.

<sup>10</sup> OJ L 13, 20/01/2004, p. 44.



16. When the approach on substantial criminal law was reviewed in the context of the European Convention that led to the draft Constitutional Treaty, the exhaustive list of areas of crime where EU minimum rules concerning the definition of criminal offences and sanctions can be established was drafted by combining the areas of crime identified in Articles K.1 and K.3(e) ex-TEU, and those in the conclusions of the Tampere European Council of 15-16 October 1999<sup>11</sup>. There were several requests by members of the Convention to amend the list, notably to include “*domestic violence*”<sup>12</sup>, but these amendments were not retained. In the process, however, the wording of the relevant area of crime did evolve, going from “*trafficking in human beings, particularly exploitation of women, sexual exploitation of children*”, to “*trafficking in human beings and sexual exploitation of women and children*” (emphasis added). The resulting Article III-271 of the draft Treaty establishing a Constitution for Europe was taken over unchanged in the Treaty of Lisbon and became what is now Article 83 TFEU.
17. It therefore appears from the drafting history of Article 83 TFEU that “*sexual exploitation of women*” was construed as being narrowly linked to, and a specific and important form of, trafficking in human beings. Domestic violence was deliberately left out of the list of areas of crime. There is no conclusive evidence in the preparatory works relating to Article 83 TFEU that the intention of the authors of the Treaties was to consider the criminal offences of rape and female genital mutilation to be covered by the area of crime of “*trafficking in human beings and sexual exploitation of women and children*”. Nevertheless, it must be noted that the fact that the wording of the area of crime went from using the preposition “*particularly*” in the conclusions of the Tampere European Council to using the coordinating conjunction “*and*” in the text of Article 83 TFEU is an element that could plead in favour of a more extensive reading of this provision.

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<sup>11</sup> Praesidium, Espace de liberté, de sécurité et de justice - projet d'article 31, partie I - projet d'articles de la partie II, CONV 614/03, p. 25.

<sup>12</sup> Working group X "Freedom, Security and Justice", Changes to the Draft Final Report (WD 18) proposed by Anne Van Lancker, Elena Paciotti, Iñigo Mendez de Vigo, WP X – WD 29, p.6 and Secretariat of the European Convention, Reaction to draft text, CONV 802/03 – Analysis, CONV 821/03, p.90.

**b) Context and aim of Article 83 TFEU**

18. Concerning the systematic and contextual reading of Article 83 TFEU, it must first be noted that “*sexual exploitation of women*” is one part of a single area of crime, identified in Article 83(1), second subparagraph, TFEU as “*trafficking in human beings and sexual exploitation of women and children*”. In light of the context in which they appear in the second subparagraph of in Article 83(1) TFEU, it would seem that, first, the terms “*sexual exploitation*” should be interpreted as being in relation with “*trafficking in human beings*”<sup>13</sup>.
19. Second, the interpretation of this legal basis must be consistent with the aim of promoting equality between women and men and the prohibition against discrimination based on sex, set out in Articles 2 and 3(3) TEU, Articles 8 and 11 TFEU and Article 21 of the Charter of Fundamental Rights (the Charter), which are all provisions of primary EU law of equal legal value to Article 83 TFEU. Interpreting “*sexual exploitation of women*” as part of a wider area of crime identified as “*trafficking in human beings and sexual exploitation of women and children*” would be one way to ensure such consistency in so far as, read as a single area of crime, the reference to “*women*” is not exhaustive but mainly descriptive of a situation where those two categories (women and children) are, and were considered by the authors of the Treaties to be, the main victims of sexual exploitation and therefore requiring particular attention.
20. In the present case, the interpretation of the Treaties advocated by the Commission in the explanatory memorandum for the proposed directive, according to which “*sexual exploitation of women*” should be interpreted in isolation and as including rape, leads it to propose an incrimination of the crime of rape as concerns adults which only relates to women.

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<sup>13</sup> This appears to reflect the criminological reality. Indeed, as noted by the Commission in its recent Communication on the EU Strategy on Combatting Trafficking in Human Beings 2021-2025 (COM(2021)171), “[t]he majority of the victims [of trafficking in human beings] in the EU are women and girls trafficked for sexual exploitation”. The same conclusion was reached by the European Parliament in its Report on the implementation of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (2020/2029(INI)), according to which “*sexual exploitation remains the most prevalent form of trafficking in the European Union*”.

21. Indeed, according to the proposed directive, contrary to the gender-neutral approach taken, for example, in the Council of Europe Convention on preventing and combating violence against women and domestic violence (the “Istanbul Convention”)<sup>14</sup> as concerns the criminal law part of the Convention<sup>15</sup>, rape of adults would be criminalised at EU-level only where perpetrated against women, despite the fact that sexual freedom and physical integrity of man is to be equally protected by the incrimination of rape<sup>16</sup>. However, no justification consistent with the case-law of the Court of Justice for this difference in treatment of comparable situations can be found, namely one based on an objective and reasonable criterion, related to a legally permitted aim pursued by the legislation in question and proportionate to the aim pursued by the treatment<sup>17</sup>.

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<sup>14</sup> See Article 36 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on 11 May 2011, Council of Europe Treaty Series - No. 210, available at <https://rm.coe.int/168008482e>. This Article, which defines sexual violence, including rape, is drafted in such way that the crime refers to “persons”, i.e is defined regardless of the sex of the persons concerned.

<sup>15</sup> The only exceptions to this gender neutrality concerns female genital mutilation and forced abortion and forced sterilisation, given the nature of the offences. See the Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, available at <https://rm.coe.int/1680a48903>, paragraphs 153, 198 and 203.

<sup>16</sup> According to Eurostat, 9 in 10 rape victims are women and girls (Eurostat, Violent sexual crimes recorded in the EU, 2018, available at <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20171123-1>). The fact that men are less likely to get raped does not mean that, in relation to the existence of an incrimination of rape at EU level, they are not in a comparable situation to women and children.

<sup>17</sup> See judgment of 16 December 2008, *Arcelor Atlantique et Lorraine a.o.*, C-127/07, EU:C:2008:728, paragraph 47 and the case-law cited.

22. The CLS recalls that the interpretation of a provision of the Treaties cannot lead to a situation where the EU co-legislators would be conferred a competence which would entail, by its nature, the risk of a breach of the principle of non-discrimination, provided for in Articles 2 and 3(3) TEU, Articles 8 and 11 TFEU and Article 21 of the Charter. The non-discrimination provisions and Article 83(1) TFEU, all provisions of primary law of the same legal value, contained in the same Treaties, must be interpreted in a manner that is consistent between themselves. Article 83(1) TFEU and notably the criteria set out in that provision cannot be interpreted as ensuring only partially the protection provided by the Charter and the Treaties in this field, and giving the EU co-legislators the competence to establish, only with regard to one sex, minimum rules concerning the definition of a criminal offence which, by its very nature, affects the sexual integrity and the human dignity of all persons regardless of their sex.
23. Limiting the EU-law definition of the crime of rape only to women would lead to a situation which cannot be reconciled with the non-discrimination provisions set out in Articles 2 and 3(3) TEU, Article 8 and 11 TFEU, and Articles 1, 3 and 21 of the Charter.
24. This leads to an interpretation of the notion of “*sexual exploitation of women*” as forming part of the wider area of crime, namely “*trafficking in human beings and sexual exploitation of women and children*”, with the exploitation element being a common component together with trafficking in human beings. In accordance with such interpretation, it is possible to adopt rules which apply to both sexes, as was done in the Human Trafficking Directive 2011/36/EU<sup>18</sup> and the Child Sexual Abuse and Sexual Exploitation Directive 2011/93<sup>19</sup>.

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<sup>18</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).

<sup>19</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1).

25. Such interpretation, where the reference to “*women*” is not exhaustive but mainly descriptive of a situation where those two categories (women and children) are the main victims of sexual exploitation, would ensure that Article 83(1) TFEU could be applied in a manner consistent with the non-discrimination provisions set out in Articles 2 and 3(3) TEU, Article 8 and 11 TFEU, and Articles 1, 3 and 21 of the Charter.
26. This approach would however exclude that the notion of “*sexual exploitation of women*” be interpreted in isolation, as an autonomous area of crime that would comprise crimes being centred on sexual violence, and thus capable of including the crime of rape, and not having the exploitative element as a common component with trafficking of human beings.
27. That being said, the fact that the provision uses the coordinating conjunction “*and*” (and not the preposition “*particularly*” used in the conclusions of the Tampere European Council), could allow for an interpretation, according to which “*sexual exploitation of women*” would be considered an autonomous area of crime and thus be capable of including the crime of rape. However, in order to safeguard the internal consistency of the Treaties and in particular the consistency between, on the one hand, Articles 2 and 3(3) TEU, Article 8 and 11 TFEU, and Articles 1, 3 and 21 of the Charter and, on the other hand, Article 83(1) TFEU, it must be stressed that if such interpretation were to be followed, the phrase “*sexual exploitation of women and children*” would have to be interpreted in such a way as to include the sexual exploitation of all persons, including men. Therefore, if the Council would decide to follow this avenue, the crime of rape could not be defined as solely referring to women.
28. When it comes to the criminal offence of female genital mutilation, provided for in Article 6 of the proposed directive, it is a practice affecting seriously the physical integrity of girls and does not concern men. It follows that the considerations and reasoning set out above in paragraphs 18 to 27 are not relevant here.

**c) Notion of "sexual exploitation" in relevant international law instruments**

29. The most relevant international instrument<sup>20</sup> in the field, namely the Istanbul Convention, demonstrates that “*sexual exploitation*”, apart from being generally linked with trafficking in human beings, is a distinct legal concept from sexual violence, which in turn includes rape. The Istanbul Convention is referred to in the explanatory memorandum for the proposed directive as an “*important point of reference for the [proposed directive]*”. This instrument and its explanatory memorandum do not use the word “*sexual exploitation*”, but “*gender-based violence*” or “*violence against women*” concerning the various offences it defines, and, as concerns rape, explicitly classifies it as a form of sexual violence<sup>21</sup>.

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<sup>20</sup> In the course of the discussion in COPEN, the Commission services have referred to the definition of “sexual exploitation” contained in the UN Secretary-General’s Bulletin Special measures for protection from sexual exploitation and sexual abuse (<https://www.unhcr.org/protection/operations/405ac6614/secretary-generals-bulletin-special-measures-protection-sexual-exploitation.html>) as a definition which has inspired the one used in the explanatory memorandum of the proposed directive. According to that definition, “*sexual exploitation*” is “*any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another*”. However, it must be noted that this Bulletin from the UN Secretariat was issued in a specific context, namely “*for the purpose of preventing and addressing cases of sexual exploitation and sexual abuse, and taking into consideration General Assembly resolution 57/306 of 15 April 2003, ‘Investigation into sexual exploitation of refugees by aid workers in West Africa*’”. It thus concerns the situation of particularly vulnerable persons, in a specific context. In this regard, the Bulletin specifies that the definitions it contains in Section 1 have been explicitly drafted “[f]or the purposes of the present bulletin”.

<sup>21</sup> See Article 36 of the Istanbul Convention.

30. In parallel, the main international instruments concerning the fight against trafficking in human beings, namely the 2005 Council of Europe Convention on Action against Trafficking in Human Beings<sup>22</sup>, as well as the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime<sup>23</sup>, both confirm the meaning generally given to the notion of “*sexual exploitation*”, namely not as covering forms of sexual abuse based only on violence or lack of consent (non-consensual act) but as being centred on a more specific unlawful advantage obtained by abusing of various forms of vulnerable situations.
31. In particular, the 2005 Council of Europe Convention on Action against Trafficking in Human Beings defines trafficking in human beings as “*the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*” (emphasis added). Article 19 of the Convention refers to the possible financial component of human trafficking and of sexual exploitation, and encourages parties to “*establish as criminal offences under its internal law, the use of services which are the object of exploitation (...), with the knowledge that the person is a victim of trafficking in human beings*”. The 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children follows the same logic, and defines trafficking in human beings in exactly the same terms.

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<sup>22</sup> Council of Europe Convention on Action against Trafficking in Human Beings, signed in Warsaw on 16 May 2005, Council of Europe Treaty Series - No. 197, available at <https://rm.coe.int/168008371d>.

<sup>23</sup> United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organised Crime, adopted by UN General Assembly resolution 55/25, available at [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=xviii-12-a&chapter=18](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18).

32. This stresses the importance of the exploitative element as an essential and distinctive element, which is the main characteristic of the notion of sexual exploitation as a specific form of sexual abuse, but goes above and beyond the issues of sexual violence and consent to a sexual activity, which are central to the notion of rape.

**d) Notion of "*sexual exploitation*" in relevant EU secondary legislation and policy documents**

33. This interpretation is confirmed, to a large extent, by already adopted or issued EU instruments, with one exception. It is recalled that, even if previous practice cannot create a precedent binding on the institutions<sup>24</sup>, it constitutes a useful element to inform the ordinary meaning associated with these terms in an EU context.

**i) *The Human Trafficking Directive***

34. In the Human Trafficking Directive<sup>25</sup>, which was adopted by the EU legislator after the entry into force of the Lisbon Treaty, Article 2(3), which concerns offences related to trafficking in human beings, states that “[e]xploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs” (emphasis added). Article 2(4) provides that “[t]he consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant (...)”. Exploitation thus relates to the act of taking illicit advantage of a person or abusing of its vulnerable situation, in particular in the context of trafficking in human beings, irrespective of the issue of consent, rather than the act having as its only purpose and consequence the infliction of sexual activity upon a person without his or her consent.

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<sup>24</sup> Judgment of 26 March 1996, *Parliament v Council*, C- 271/94, EU:C:1995:367, paragraph 24.

<sup>25</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L 101, 15.4.2011, p. 1).



*ii) The Child Sexual Abuse and Sexual Exploitation Directive*

35. The Child Sexual Abuse and Sexual Exploitation Directive<sup>26</sup>, also adopted after the entry into force of the Lisbon Treaty, covers, and distinguishes between, “*offences concerning sexual abuse*” in Article 3 (concerning sexual activities with children) and “*offences concerning sexual exploitation*” in Article 4 (concerning procurement of children for child pornography and for child prostitution). It then further incriminates conduct in relation to distribution and consumption of child pornography (Article 5) and solicitation of children for sexual purposes (Article 6).
36. This Directive thus covers all the different forms of sexual abuse of children and sexual exploitation of children, all under the legal basis of “*trafficking in human beings and sexual exploitation of women and children*” provided for in Article 83(1), second subparagraph, TFEU.
37. It must be stressed however that children below the age of consent are, inherently, in a situation of vulnerability and, by definition, cannot consent to sexual activities with an adult, precisely because of their vulnerability and their sexual immaturity. The rules applicable to protect children having reached the age of sexual consent, but still below the age of eighteen, are slightly different, but as minors, they still need a specific legal protection. Any sexual activity with a minor entails the risk of exploitation, by the adult, of a position of vulnerability, differential power, or trust, for sexual purposes, with a different degree depending on the age of the minor. Therefore, as concerns children, the exploitative element can be considered as an underlying central element both for “*sexual abuse*” as defined in Article 3 of the Directive, for “*sexual exploitation*” as defined in Article 4 of the Directive, for “*offences concerning child pornography*” covered by Article 5 and for “*solicitation of children for sexual purposes*” covered by Article 6.

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<sup>26</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1).

38. With regard however to the children above the age of sexual consent, Article 8 of the Directive, which concerns “*consensual sexual activities*”, explicitly leaves it to the discretion of the Member States to decide whether to apply some of the criminal offences defined in the Directive to consensual sexual activities between peers who are close in age and degree of psychological and physical development or maturity, in so far as the acts did not involve any abuse. This confirms that the criminal offences provided for by the Directive are based on the legal presumption that the relationship between an adult and a child entails the exploitation by the adult of the vulnerable position of the minor.
39. Nevertheless, it must be stressed that there is a provision of the Directive that appears to follow a different logic, namely Article 3(5)(iii) thereof. That provision concerns sexual activities with a child which involve coercion, force or threats. It appears that the main constitutive element of that crime is not so much in relation to the inherent vulnerability of the minor, but is rather focused on the use of violence as a form of sexual abuse, and concerns not only cases where the child has not reach the age of sexual consent, but also cases where the minor has reached that age. Admittedly, such a provision is based on an extensive interpretation of the notion of “*sexual exploitation*” as comprising crimes centred on sexual violence, and thus capable of including rape.
40. It is however still arguable that the situation is different as concerns the crime of rape of adults, as for the latter, there is not necessarily the exploitation of a position of vulnerability, differential power, or trust, which, in the case of minors, can be presumed. For adults, the exploitative element of a vulnerability may be linked to specific circumstances, but is not relevant as such and, in any event, this element is not defined by simply referring to age or sex.

41. The CLS notes that Article 45 of the proposed directive would amend Article 3 of the Child Sexual Abuse and Sexual Exploitation Directive, thereby aligning, in substance, the definitions of rape and sexual consent for the child above the age of sexual consent with Article 5 of the proposed directive concerning the crime of rape against women. This would introduce the concept of consent in Article 3 of the Child Sexual Abuse and Sexual Exploitation Directive, thereby further stretching also in this Directive the link with the notion of sexual exploitation in the strict sense. This would entail that the notion of “*sexual exploitation*” in Article 83(1), second subparagraph, TFEU, be interpreted as containing two notions: exploitation in the strict sense and abuse in the sense of sexual violence or rape.

**iii) Relevant EU policy documents.**

42. Apart from EU legal instruments, relevant EU policy documents also seem to confirm that a cautious approach has been followed when interpreting the scope of the notion “*sexual exploitation*”.
43. In particular, the many reports and communications from the Commission related to the fight against trafficking in human beings use the term “*sexual exploitation*” as relating to the act of taking unjust advantage of a person for one’s own financial benefit, notably in the context of trafficking in human beings<sup>27</sup>. The same is true in the latest “EU Gender Equality Strategy 2020-2025”, which clearly distinguishes, on the one hand, between “*sexual exploitation*”, as a criminal activity related to trafficking in human beings, and, on the other hand, “*gender-based violence*”, including sexual harassment, abuse of women and female genital mutilation<sup>28</sup>.

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<sup>27</sup> See, for example, the Third report on the progress made in the fight against trafficking in human beings (2020) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (COM2020/661 final), Second report on the progress made in the fight against trafficking in human beings (2018) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (COM/2018/777 final) and Report on the progress made in the fight against trafficking in human beings (2016) as required under Article 20 of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (COM/2016/0267 final).

<sup>28</sup> COM(2020)152 final.

e) **Conclusion on the notion of “sexual exploitation” and on the material scope of Article 83 TFEU**

44. It follows from the above that both in international instruments and in the EU *acquis*, the notion of “*sexual exploitation*” is generally used in relation to, or as a specific aspect of, human trafficking or, in any event, concerns crimes characterised by a component of essentially exploitative nature and related to taking unjust advantage of a sexual activity imposed upon a person in a vulnerable situation. Conversely, the notion of “*sexual exploitation*” is generally not used to cover crimes like rape or engaging sexual activity with a person without his or her consent, of which the essential constitutive element is sexual violence directly affecting physical integrity and sexual freedom.
45. Nevertheless, the Council could choose to take a different approach and endorse a more extensive reading of the legal basis as regards the notion of sexual exploitation of women and children, on the basis of two aspects referred to above, namely i) the use of the coordinating conjunction “*and*” in the description of the area of crime in Article 83(1) TFEU, and ii) the fact that in the Child Sexual Abuse and Sexual Exploitation Directive, the legal basis of “*sexual exploitation of children*” has been interpreted somewhat extensively and used in order to establish minimum rules concerning an offence where the exploitative element is less present but is rather focused on the use of violence as a form of sexual abuse.

46. If that were the case, and if the EU co-legislators were to consider rape as being part of the area of “*sexual exploitation of women and children*”, the CLS stresses that this would constitute an important extension of the scope of Article 83 TFEU. Such an extension would constitute a precedent as regards possible extensive interpretations of the areas of crimes already established by this provision. In particular, the notion of “*sexual exploitation*” in the legal basis would then have to be read as allowing the EU co-legislators to adopt secondary legislation on all forms of sexual abuse based on violence and, in effect, as covering “sexual exploitation of persons”. Furthermore, such an extensive interpretation of the areas of crime already provided for by Article 83 TFEU would entail significant legal risks in case of litigation. It could also be considered as encroaching on the specific powers conferred on the Council to extend the list of “euro-crimes”, as provided for in the third subparagraph of Article 83(1) TFEU.
47. A more nuanced approach may be justified for the crime of female genital mutilation, in so far as genital mutilation is a practice that could be narrowly linked to forms of exploitation of minors<sup>29</sup>. It could be argued that it contains an exploitative element, in so far as it affects, to a large effect, the vulnerable situation of minors and could thus be interpreted as falling within the scope of “*sexual exploitation of children*”.

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<sup>29</sup> Furthermore, it follows from the information gathered by the European Institute for Gender Equality that female genital mutilation is mostly performed on girls between 0 and 15 years of age (World Health Organization (WHO) (2008), *Eliminating Female Genital Mutilation: An Interagency Statement* - OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, Geneva, cited in European Institute for Gender Equality (2013), ‘Female genital mutilation in the European Union and Croatia — Report’. See also, European Institute for Gender Equality (2018), *Estimation of girls at risk of female genital mutilation in the European Union, Step-by-step guide, 2nd Edition, Annex 3*), in a family context (Communication from the Commission to the European Parliament and the Council “Towards the elimination of female genital mutilation”, p.6. See also World Health Organization (WHO) (2008), *Eliminating Female Genital Mutilation: An Interagency Statement* - OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, Geneva, p.5.).

48. In order to avoid the legal risks referred to above in paragraph 45, the scope of the second subparagraph of Article 83(1) TFEU could be extended, in accordance with its third subparagraph, by means of a unanimous Council decision to be taken on the basis of a Commission proposal (in accordance with the Article 76(a) TFEU), after obtaining the consent of the European Parliament, in order to add thereto, a new “euro-crime” and conferring on the EU co-legislators the competence to establish minimum rules on the definition of criminal offences and sanctions in the field of sexual abuse and sexual violence concerning persons.
49. In this context, with regard to the two criteria that need to be fulfilled, as explained above in paragraph 3, the CLS observes that the crimes of rape and female genital mutilation undoubtedly meet the first criteria set out in Article 83(1) TFEU. They do constitute particularly serious crimes.
50. The gravity of those crimes is also evidenced by the fact that both “*rape*” and “*grievous bodily injury*” are mentioned in Article 2(2) of the European Arrest Warrant Decision<sup>30</sup>, which lists those serious offences which give rise to surrender pursuant to a European arrest warrant without verification of the double criminality of the act.

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<sup>30</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1). On rape, see also judgement of 21 June 2022, *Ligue des droits humains*, C-817/19, EU:C:2022:491, paragraph 149.

51. As regards the second criteria, namely the cross-border dimension of the areas of crime, even if it is doubtful that those two crimes can be held to have a cross-border dimension by their “*nature*” or their “*impact*”, nothing appears to exclude that, on the basis of objective factors, the Council could, by making use of its margin of discretion, decide that the cross-border dimension of those crimes would result from “*a special need to combat them on a common basis*”, for instance in view of their particular seriousness and the need to ensure an equivalent level of protection to persons enjoying the right of free movement within the EU. This could be the case, for example, if the Council, having assessed the situation objectively, would conclude that the existing instruments of judicial cooperation in criminal matters are regarded as insufficient in order to achieve the objectives set out in Article 67(3) TFEU<sup>31</sup>.
52. If, however, the Council would decide to maintain in the proposed directive the crime of rape as defined in its Article 5, on the basis of the same considerations and reasoning set out in paragraphs 18 to 27, such provision would still have to be redrafted in a way that would ensure its compliance with the non-discrimination principle, as set out in Articles 2 and 3(3) TEU, Articles 8 and 11 TFEU and Article 21 of the Charter.

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<sup>31</sup> Article 67(3) TFEU provides that “[t]he Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.” In this context, it may be noted that the European Parliament has called upon the Council to adopt a decision enlarging the list of crimes in Article 83(1) TFEU in order “*to include violence against women and girls and other forms of gender-based violence in the catalogue of EU-recognised crimes*” and then “*to use that new area of crime as a legal basis for a holistic and victim-centred directive of the European Parliament and of the Council to prevent and combat all forms of gender-based violence, both online and offline*”. See European Parliament resolution of 28 November 2019 on the EU’s accession to the Istanbul Convention and other measures to combat gender-based violence (2019/2855(RSP)), paragraph 20, European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU (2021/2035(INL)), paragraph 67 and European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence (2020/2035(INL)), paragraphs 55 and 56.

## 2) Legal basis for rules related to cyberviolence (Articles 7 to 10)

53. The rules related to cyberviolence are set out in Articles 7 to 10 of the proposed directive. Article 7 of the proposed directive aims at establishing minimum rules concerning the definition of the crime of non-consensual sharing of intimate or manipulated material (so-called “revenge porn”), Article 8 concerning cyber stalking, Article 9 covering cyber harassment, and Article 10 concerning cyber incitement to hatred or violence.
54. Among the areas of crime listed in Article 83(1) TFEU, the second subparagraph lists “*computer crime*”, which the Commission has indicated as the basis for the adoption of the rules set out in Articles 7 to 10 of the proposed directive.
55. “*Computer crime*” has been present in the lists of area of crime throughout the process leading up to the insertion of Article 83(2) TFEU in the current Treaties. This area of crime was already present in the conclusions of the Tampere European Council of 15-16 October 1999, where the terms “*high tech crimes*” was used in English, and “*criminalité utilisant les technologies avancées*” (i.e. criminality using advanced technologies) in French. During the discussion in the European Convention, an amendment was proposed, to replace “*computer crime*” with “*attacks against information systems*”<sup>32</sup>, but it was rejected, thus confirming that the intention was not to restrict this provision only to threats to computer infrastructures. The resulting Article III-271 of the Treaty establishing a Constitution for Europe was taken over unchanged in the Treaty of Lisbon and became what is now Article 83 TFEU.

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<sup>32</sup> Secretariat of the European Convention, Reaction to draft text CONV 802/03 – Analysis, CONV 821/03.



56. According to the Commission, “[t]he term ‘computer crime’ in Article 83(1) TFEU covers offences against or intrinsically linked to the use of information and communication technologies. Using such technologies as a means of attack can amplify the severity of the offence in terms of quantity, quality, intensity, target selection and duration, to an extent that cannot be achieved by other means. The minimum rules on crimes amounting to cyber violence against women under this proposal address such offences, which are intrinsically linked to the online environment and the use of such technologies.”<sup>33</sup>
57. This definition does indeed correspond to the meaning that has been assigned to these terms in an EU context. The EU binding instruments adopted in the area have focused on one aspect of computer crime, namely threats to computer infrastructure<sup>34</sup>. Nevertheless, EU policy documents confirm that the area of computer crime (also referred to indifferently as “high tech crime”, “computer-related crime” or “cybercrime”) has been consistently understood as covering two types of threats: not only threats to computer infrastructures but also computer-assisted threats<sup>35</sup>.

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<sup>33</sup> Explanatory memorandum.

<sup>34</sup> Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ L 69, 16.3.2005, p.67) and Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218, 14.8.2013, p. 8) focus on threats to computer infrastructure.

<sup>35</sup> See, for example, Explanatory memorandum for the Proposal for a Council Framework Decision on attacks against information systems (COM(2000)173), Commission Communication Towards a general policy on the fight against cybercrime (COM(2007)267), Council Conclusions of 27-28 November 2008 on a Concerted Work Strategy and Practical Measures Against Cybercrime (doc. 15569/08), Council conclusions of 26 April 2010 on an Action Plan to implement the concerted strategy to combat cybercrime (doc. 5957/2/10 REV 2), Explanatory Memorandum for the proposal for a Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA (COM(2010)517) and Commission and High Representative Joint Communication Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace (JOIN(2013)01).

58. That interpretation is corroborated by a systematic and contextual reading of the provision:
- First, the areas of crime listed in Article 82(1), subparagraph 2, TFEU, one of which is “*computer crime*”, are indeed “*areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis*”.
  - Second, both threats to computer infrastructures and computer-assisted threats, by their nature and their impact, have an inherent cross-border dimension, linked to the cross-border nature of information and communication systems. Both threats to computer infrastructures and computer-assisted threats are particularly serious. As concerns computer-assisted crime, beyond the intrinsic seriousness of the underlying criminal activities potentially involved (child sexual abuse, psychological violence, hate speech, drugs and arms trafficking, etc.), and as mentioned by the Commission in the explanatory memorandum of the proposed directive, the use of computers has an amplification effect which increases the harm caused and thus the seriousness of the offences<sup>36</sup>.
59. In the light of the foregoing considerations, having regard not only to the wording of Article 83(1) TFEU but also to its origins, context and aim, the CLS considers that the terms “*computer crime*” in Article 83(1) TFEU may be read as allowing the adoption by the EU co-legislators of minimum rules on computer-assisted crime.

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<sup>36</sup> In this context, it may be noted that, according to the case-law, a distinction must be drawn between the definition of an area of crime, which is linked to the seriousness and the cross-border nature of the crimes at stake, and the competence of the EU co-legislators to adopt minimum rules, which does not cover solely situations in which the elements inherent in the commission of a particular offence are confined within a single Member State (see, to this effect, judgment of 21 October 2021, *Okrazhna prokuratura – Varna*, C-845/19, EU:C:2021:864, paragraph 33). This would appear to mean that, provided that the minimum rules adopted by the EU co-legislators relate to an area of serious crime with a cross-border dimension, the specific rules themselves may relate to situation which, by themselves and taken in isolation, do not necessarily have a cross-border dimension, or, by inference, are not necessarily serious.

**B. MEASURES PROTECTING SPECIFIC VICTIMS AND COMPLIANCE WITH THE PRINCIPLE OF NON-DISCRIMINATION**

60. Beyond the issue of the legal basis for the above-mentioned substantive criminal provisions of the proposed directive, the CLS was asked to examine whether establishing measures which only apply to specific victims, namely victims of violence against women and domestic violence, was legally appropriate in light of the principle of non-discrimination.
61. According to consistent case-law, the principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified<sup>37</sup>. A breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them. The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account<sup>38</sup>.

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<sup>37</sup> See judgment of 16 December 2008, *Arcelor Atlantique et Lorraine a.o.*, C-127/07, EU:C:2008:728, paragraph 23 and the case-law cited.

<sup>38</sup> See judgment of 16 December 2008, *Arcelor Atlantique et Lorraine a.o.*, C-127/07, EU:C:2008:728, paragraph 25 and 26 and the case-law cited.

62. As regards victims' rights, the aim of the proposed directive is to establish minimum rules for the victims of violence against women and domestic violence. As indicated in the explanatory memorandum and as follows implicitly from the preamble of the proposed directive, the objective is to complement the rules set out in the Victims Directive<sup>39</sup>, in order to cater for the specific needs of victims of violence against women and domestic violence. Judicial cooperation in criminal matters in the EU, to which the relevant provisions of the proposed directive relate, aims, in accordance with Article 82(2) TFEU, to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, in particular with regard to the rights of victims of crime<sup>40</sup>.
63. In relation to the subject-matter of the proposed directive, its objectives and the principles on which judicial cooperation in criminal matters in the EU is based, the different categories of victims of crime are not necessarily in a comparable situation, depending on their specific vulnerabilities, on the type of harm suffered or on other relevant characteristics. A difference in treatment between categories of victims may thus be justified.

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<sup>39</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012, p. 57)

<sup>40</sup> It may be noted, in this regard, that the measures based on Article 82(2)(c) TFEU are not limited to minimum rules on the rights of victims of crimes which have been made subject to minimum rules based on Article 83(1) TFEU or of the "euro-crimes" listed in Article 83(1) TFEU. It is therefore possible to adopt such measures also for victims of crimes which are not subject and cannot be subject to EU minimum rules of substantive criminal law. It appears to have been the intention of Article 3 of the proposed directive to provide that Member States will have to ensure that all victims of acts of violence against women or domestic violence will have to benefit from the minimum rules on the rights of victims contained in the proposed directive, whether the offences are criminalised under EU law or under national law. Such an approach is legally possible. However, the drafting and placement of such a provision could be adapted in order to avoid any misunderstandings on its scope.

64. However, this needs to be assessed for each provision that creates a difference in treatment, in order to ensure that such difference in treatment is justified by the specificities of the situation of the categories of victims concerned. Such justification must be adequately reflected in the preamble of the proposed directive.
65. In other words, the EU co-legislators may provide specific rights to specific victims, and therefore exclude other victims from their benefit, provided the latter are in a different situation from the former. If they are in the same situation, excluding them from those rights would constitute discrimination. Moreover, when the EU co-legislators provide for specific rights to specific victims, the justification for the difference in treatment must be set out in the preamble to the directive.
66. In the present case, for many provisions of Chapters 4, 5 and 6 of the proposed directive, which are targeted at violence against women and domestic violence and victims of cyber incitement to violence or hatred, this justification is not immediately apparent and not spelled out in the recitals.
67. First, some of the key terminology used in the directive is unclear<sup>41</sup> and potentially misleading. Indeed, the terms “*victims of violence against women and domestic violence*”, used in many of the provisions of Chapters 3 to 6 of the proposed directive, would give the impression that the rules contained therein are addressed only to victims who are women or victims of domestic violence. This is compounded by the fact that Article 4(a) of the proposed directive defines “*violence against women*” as “*gender-based violence*” so, presumably, violence based on the gender of the person.

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<sup>41</sup> See also, on this point, the two negative opinions of the Regulatory Scrutiny Board, SEC(2022)150, which, concerning the impact assessment report, indicated that “[t]he report still needs to define more clearly the differences between the concepts of violence against women as opposed to gender-based violence against women and domestic violence affecting all victims and use the clarified definitions consistently throughout the report.”

68. However, it follows from Article 4(a) that “*violence against women*” is a category of crimes that not only includes violence which only affects women<sup>42</sup> but any “*gender-based violence (...) which affects women or girls disproportionately*” so, presumably, irrespective of the sex of the victim. Moreover, Article 4(c) provides that victim means “*any person, regardless of sex or gender, unless specified otherwise*”. Finally, “*gender-based violence*” is defined in the preamble of the Victims Directive as “*Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately*”. So this notion goes beyond violence based on the gender of the person.
69. The gender-neutral nature of “*violence against women*” appears to be corroborated by Recital 5, which states that:
- “The measures under this Directive have been designed to address the specific needs of women and girls, given that they are disproportionately affected by the forms of violence covered under this Directive, namely violence against women and domestic violence. This Directive, however, acknowledges that other persons may also fall victim to these forms of violence and should benefit from the measures provided for therein. Therefore, the term ‘victim’ should refer to all persons, regardless of their sex or gender”.* (emphasis added)
70. Nevertheless, the ambiguity created by the apparent contradiction between the expression used and its definition creates a significant legal uncertainty, which is a problem in itself for a legislative act which aims at “*facilitat[ing] mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension*” (Article 82(2) TFEU).
71. Moreover, the use of a criminological definition in Article 4(a) of the proposed directive (“*violence (...) that affects women or girls disproportionately*”) and an open-ended list of crimes contained in Recital 4 adds to the uncertainty of the scope of the victims’ rights.

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<sup>42</sup> Such as femicide, female genital mutilation or forced abortion.

72. The above drafting problems could be addressed by ensuring consistency with the existing *acquis* and use the terminology of the Victims Directive, namely “*gender-based violence*” (see Article 9(3)(b) of the Victims Directive and Recital 17)<sup>43</sup>. Another approach could be to streamline and clarify the definition of “*violence against women*” in the operative provisions, in order to make clear that it is a category of violence, irrespective of the sex of the victim<sup>44</sup>.
73. Second, it is not always clear from the recitals why the victims of sexual violence or domestic violence should be the only victims benefitting from certain rights, and not, for example, other victims of serious crimes suffering from comparable “*physical, sexual, psychological or economic harm*”<sup>45</sup>, vulnerable victims of other crimes or victims of forms of hate speech not covered by Article 10 of the proposed directive.
74. This is particularly the case as “*violence against women*” has a very wide scope and covers homicide (femicide), sexual violence (rape, sexual abuse), sexual exploitation of children and trafficking of human beings for the purpose of sexual exploitation (covered by Directives 2011/93 and 2011/36), early and forced marriage, forced abortion, forced sterilisation, on-line harassment incriminated by the proposed directive (non-consensual sharing of intimate or manipulated material, cyber stalking, cyber harassment, cyber incitement to violence against persons defined by reference to sex or gender) or which may be incriminated at national level (online sexual harassment, cyber bullying or the unsolicited receipt of sexually explicit material), and off-line harassment (sexual harassment, stalking)<sup>46</sup>.

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<sup>43</sup> A further inconsistency between the Victims Directive and the proposed directive which should be addressed is the notion of “*domestic violence*”, which appears to have a quasi-identical scope to “*violence in close relationships*”, defined in Recital 18 of the Victims Directive and used in Articles 9(3)(b), 22(3), 23(2)(d) and 26(2) of the Victims Directive.

<sup>44</sup> A possible definition could be: “*‘violence against women’ means all forms of violence that only affect women or that affect women disproportionately, irrespective of the sex of the victim, including all acts of such violence that (...)*”.

<sup>45</sup> See Article 4(a) of the proposed directive.

<sup>46</sup> See Recital 4 of the proposed directive.

75. This affects several provisions of the proposed directive. To give a few examples, in no way exhaustive, it would need to be better justified in the recitals why facilitated reporting of crimes, including online, set out in Article 16(1), should be limited to victims of violence against women and domestic violence, and should not also benefit to other vulnerable victims or victims of violence in general.
76. Similarly, it should be clarified why specific rules on reporting on the residence status of a victim to competent migration authorities, set out in Article 16(5), should not also benefit to other vulnerable victims or victims of violence in general. The same is true as regards the benefit of the specific obligations on the speedy processing of complaints (Article 17(2)) and obligations to record and investigate allegations of sexual violence and domestic violence (Article 17(3)), which could benefit in the same way to other vulnerable victims or victim of violence in general.
77. It should be examined whether it would not be justified to extend measures to remove certain online material (Article 25) to other victims, beyond those victims of incitement to violence or hatred against a group of persons or a member of such a group defined by reference to sex or gender, including to victims of other forms of hate speech, some of which is already covered by EU secondary legislation, such as public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin<sup>47</sup>.
78. Another question is whether specialist support to victims (Article 27) should not be extended to all “*victims with specific needs*” in general, as defined in Article 9(3) of the Victims Directive as “*victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships*”.

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<sup>47</sup> Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (OJ L 185, 24/07/1996, p. 5).



79. It remains unclear why the specific measures related to shelters and other interim accommodations (Article 32) should be limited to “*women victims of domestic violence and sexual violence*” (emphasis added), not also benefit to all other “*victims in need of a safe place due to an imminent risk of secondary and repeat victimisation, of intimidation and of retaliation*”, referred to in Article 9(3) of the Victims Directive, which establishes the obligation for Member States to develop and provide such shelters.
80. To take a last example, it should be envisaged whether to extend measures to allow for safe contact between a child and a holder of parental responsibilities who is an offender or suspect of violence against women or domestic violence (Article 34) to all situation where a child enters into contact with a violent offender.
81. In order to address the issue, and depending on what is considered appropriate, the EU co-legislators could either explain what justifies the differences in treatment, or widen the scope of the rights in order to include all victims which are in the same situation, or clearly specify the victims targeted by the measures, so that the justification for the difference in treatment is immediately apparent<sup>48</sup>.
82. It follows from the above that for the rules set out in Chapters 3, 4 and 5, the text of the proposed directive should clarify the victims to which the rules apply, by using terminology and definitions guaranteeing sufficient legal certainty. Moreover, it should be ensured that adequate justification for differences in treatment between victims is provided in the preamble of the proposed directive or, alternatively, if that is not possible, that the scope of the beneficiaries of the rights set out in the articles of the proposed directive in Chapters 3, 4 and 5 is adapted in so far as necessary to ensure that there is no unjustified difference in treatment between victims which are in a comparable situation.

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<sup>48</sup> This targeted approach was used in the proposed directive, for example, for Article 12 (specialist support for victims of sexual violence), Article 30 (specialist support for victims of sexual harassment at work), Article 33 (support for child victims), or Article 35 (targeted support for victims with specific needs and groups at risk).

### III. CONCLUSIONS

83. In view of the above, the Council Legal Service is of the opinion that:

- a) Having regard to the origins, the context and the aim pursued by Article 83 TFEU, as well as the relevant EU and international law instruments and policy documents, the area of crime “*trafficking in human beings and sexual exploitation of women and children*” concerns crimes characterised by a component of essentially exploitative nature, which therefore does not cover crimes like rape, of which the essential constitutive element is sexual violence.
- b) However, given that the notion of “*sexual exploitation*” was already interpreted extensively by the EU co-legislators in Article 3(5) iii of the Child Sexual Abuse and Sexual Exploitation Directive, with the objective of protecting minors, the Council could choose to consider that the notion of “*sexual exploitation*” set out in Article 83(1) TFEU may include, to a certain extent, other crimes based on sexual violence such as the crime of rape. Nevertheless, such a reading i) would set a precedent as concerns the extensive interpretation of Article 83 TFEU, ii) would require, in order to comply with the principle of non-discrimination, that the notion be, in effect, interpreted as referring to the “sexual exploitation of adults” or rather “sexual exploitation of persons” and that the crime of rape as defined in Article 5 of the proposed directive be redrafted in a gender-neutral way, and iii) would entail significant legal risks in case of litigation, notably a risk of annulment of the relevant provisions of the proposed directive.
- c) In order to avoid the above-mentioned legal risks, the Council could choose to extend the list of “euro-crimes” set out in the second subparagraph of Article 83(1) TFEU, by following the procedure set out in the third subparagraph, in order to add thereto a crime related to sexual abuse and sexual violence concerning persons.
- d) The crime of female genital mutilation can be interpreted as falling within the scope of “*sexual exploitation of children*”, in so far as it affects, to a very large extent, the vulnerable situation of minors.

- e) The terms “*computer crime*” in Article 83(1), second subparagraph, TFEU can be read as allowing the adoption, by the EU co-legislators, of minimum rules on computer-assisted crime, namely concerning the definition of the crime of non-consensual sharing of intimate or manipulated material (so-called “revenge porn”), cyber stalking, cyber harassment, and cyber incitement to hatred or violence, as aspects of the area of crime of computer crime.
- f) With a view to complying with the principle of non-discrimination, the drafting of the rules set out in Chapters 3, 4 and 5 and the related recitals in the proposed directive should be redrafted so as to clarify the victims to whom the rules apply – by using terminology and definition guaranteeing sufficient legal certainty – so as to provide adequate justification for any difference in treatment between victims and so as to adapt the scope of the beneficiaries of the rights.
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