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'A' ITEM NOTE

From:	General Secretariat of the Council
To:	Council
Subject:	Draft DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on combating violence against women and domestic violence **(first reading)** - Adoption of the legislative act = Statements

Statement by Austria, Croatia, Cyprus, Finland, Greece, Italy, Latvia, Luxembourg, Poland, Romania, Slovenia, Spain and Sweden

We welcome the agreement on the Directive on combating violence against women and domestic violence and wish to declare the following.

According to the Fundamental Rights Agency (FRA), 1 in 20 women in the EU over the age of 15 have been raped. Non-consensual sex is an extremely serious violation of individuals' sexual integrity and must be prevented and combated with full force at all levels, including at EU level. Austria, Croatia, Cyprus, Finland, Greece, Italy, Latvia, Luxembourg, Poland, Romania, Slovenia, Spain and Sweden therefore regret that the Directive does not include the criminal offence of rape based on the lack of consent. The fact that the Directive contains requirements for education in terms of consent is, however, a step in the right direction.

Nevertheless, even without a consent-based provision on rape, it has been of utmost importance for us to ensure that the Directive is adopted as soon as possible, as it contains other crucial elements. No specific legal instrument has up until now addressed violence against women and domestic violence at EU level. This Directive is therefore a milestone for international standards in this field. The Directive provides much-needed comprehensive responses, incorporating prevention, protection, support for victims and prosecution for a range of criminal offences which constitute violence against women and domestic violence.

We are convinced that this Directive will provide a forceful contribution to the safety and security of women all across the EU.

Statement by Bulgaria

The Republic of Bulgaria attaches great importance to the promotion and protection of fundamental rights, an important part of which is the equality between women and men. We are and will remain dedicated to the principles and values of the European Union as enshrined in the Treaties.

The Republic of Bulgaria is strongly committed to combatting domestic violence and violence against women. The Bulgarian government and civil society are actively engaged in preventing such forms of violence and in providing protection and support to their victims. We consider the proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence (hereinafter "the Directive") as important milestone in combating violence against women and girls, protecting victims and punishing offenders that will support the EU Member State to advance their national legislation.

However, in 2018, the Constitutional Court of the Republic of Bulgaria adopted a decision stating that the Council of Europe's Convention on Preventing and Combatting Violence against Women and Domestic Violence ("Istanbul Convention") promotes legal concepts that intend to differentiate between "sex" as a biological (women and men) category and "gender" as a social construct. In 2021, the Constitutional Court adopted another decision clarifying that the notion "sex" used in the Constitution could only be regarded in the sense of its biological determination.

In light of the abovementioned decisions, the Republic of Bulgaria declares that the term “gender” used in the Directive and any of its derivative terms are understood as encompassing only the male and female sex in their biological meaning. The Republic of Bulgaria also declares that it does not accept the concept of “gender” and the “gender-based” approach, as defined in the Istanbul Convention.

Lastly, the Republic of Bulgaria will only accept the translation in Bulgarian of the term “gender” as “пол” in the text of the Directive.

Statement by Hungary

Hungary recognises and promotes equality between men and women in accordance with the Fundamental Law of Hungary and the primary law, principles and values of the European Union, as well as commitments and principles stemming from international law. Equality between women and men is enshrined in the Treaties of the European Union as a fundamental value. In line with these and its national legislation, Hungary interprets the concept of ‘gender’ as reference to ‘sex’ and the concept of ‘gender equality’ as ’providing equal chances and opportunities for women and men’ in the *Directive combating violence against women and domestic violence.*

Statement by Slovakia

Slovak Republic welcomes a compromise reached with the European Parliament on the Directive on combating violence against women and domestic violence. In our view, this is an important step forward in the common fight against violence against women. In this context, Slovak Republic wishes to recall its position that the term “gender” within this directive shall be translated as “sex”, particularly within definitions of victims, in line with national legislation in the fields of criminal law, victims’ rights and discrimination. In cases where context demands the use of the Slovak equivalent for “gender” the appropriate translation shall be used, such as in terms “gender roles”, “gender stereotypes”, “gender equality” or “gender-based violence”.

Statement by Estonia

Estonia wholeheartedly supports the aims of combating violence against women and domestic violence. However, we would like to highlight our concerns about a possible precedent being created with the broad interpretation of the area of *computer crime* within the meaning of Article 83 paragraph 1 of the Treaty on the Functioning of the European Union ("TFEU" or "Treaty"). This provision provides the Union with a competence to establish minimum rules concerning the definition of criminal offences and sanctions in the 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. The drafters of the Treaty kept in mind the specific need to safeguard the fundamental aspects of national criminal justice systems as is evident from Article 83 paragraph 3 TFEU. This is also underlined in Article 67 paragraph 1 TFEU which explicitly emphasizes the need to respect different legal systems and traditions of the Member States, which reflects the fact that Justice and Home Affairs matters fall within the core area of the sovereignty of the Member States.

The list of so-called *eurocrimes* in Article 83 paragraph 1 TFEU covers eleven areas of crime, which merit a common Union approach due to their particularly serious nature and typical cross-border dimension. This list can be extended only by a unanimous decision of the Council after obtaining consent of the European Parliament. Keeping this in mind, the interpretation of the list of *eurocrimes* should not be interpreted broadly.

At the EU level, there are two legal instruments based on Article 83 paragraph 1 TFEU with reference to the area of computer crime - Directive 2019/713 and Directive 2013/40/EU. Both of these instruments cover offences that can only be committed through the use of technology, where the devices are both the tool for committing the crime and the target of the crime (cyber-dependant crime). The proposal for a Directive on combating violence against women and domestic violence follows a different logic, the technology itself is not necessary to commit a criminal offense but it is used to increase the scale or reach of "traditional" crimes (cyber-enabled crime).

Consequently, if "computer crime" would be interpreted as covering every act that could be perpetrated by means of a computer system, this would vest the European Union with an unlimited competence to criminalise various conduct unrelated to any other area of offences already listed in Article 83 paragraph 1 TFEU only by reference to the fact that such acts can be perpetrated by means of a computer system. This would not only significantly broaden the scope of EU competences, but it might bring about a spill-over effect, because Member States implementing such legislation would have to ensure that their criminal law forms a coherent whole. Therefore, such new offences would most likely be transposed in a technology neutral way which would mean that despite the reference in EU legislation to the offence being committed by means of a computer system, national transposition would expectedly also cover other forms of committing such an offence.

The Article 10 on incitement to hatred is one of these examples. Establishing minimum requirements on incitement to hatred would have been better suited following an agreement to expand the list of *eurocrimes* in Article 83 paragraph 1 TFEU. This would have allowed for a comprehensive overview of the existing *acquis* to ensure that the offences are well formulated, cover the most serious forms of incitement and do not infringe upon the freedom of expression.

Another example we would like to highlight, is the Article 7 on cyber harassment, more specifically point (c) of this Article, which establishes minimum rules on the unsolicited sending of an image, video or other similar material depicting one's genitals to another person (*cyberflashing*). Although only intentional cases of cyberflashing are criminalised, where receiving such material is likely to cause serious psychological harm to the receiver, it is still questionable whether cyberflashing should be harmonised at the EU level. It is difficult to interpret cyberflashing as a particularly serious crime with cross border dimension in the meaning of Article 83 TFEU. Regulating cyberflashing at the EU level is an example of unjustified overcriminalisation.