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LIMITE

JAI	**SOC**
FREMP	**ANTIDISCRIM**
COHOM	**GENDER**
COPEN	**JEUN**
EDUC	**DROIPEN**
MIGR	**CODEC**

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NOTE

From: To:	General Secretariat of the Council Delegations
Subject:	Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence - Comments submitted by Member States following the COPEN meeting on 31 January 2023

Delegations will find attached the above mentioned comments, which concern Articles 1-15.

Contents

CROATIA

Proposal for a Directive on combating violence against women and domestic violence (document WK 1034/2023 INIT)

- Comments by Croatia

Article 4:

We point out that the proposed definition of "domestic violence" as a crime of actual endangerment is broader than the definition of "domestic violence" laid down in Article 3(b) of the Council of Europe Convention on preventing and combating violence against women and domestic violence, as well as than the criminal justice concept of domestic violence contained in national criminal substantive legislation which is being called into question in this way.

With regard to point (b), the part of the definition relating to the circle of possible perpetrators (other family member of the victim, irrespective of the biological or legal family ties'), which does not harmonise (in the proposal) the degree of kinship to which criminal law protection of biological or legal family ties extends, the level of biological or legal kinship to which criminal law protection extends and the circle of persons to whom it applies should be defined. It is also necessary to clarify whether the 'current or former' part of the provision also refers to family members who are legally related (or concerns only spouses and partners), i.e. whether domestic violence would also include the act committed by a former legal relative who is no longer one because the marital relationship has ended (e.g. an act of violence committed by A's ex-husband towards A's sister).

With regard to point (ba), we support this provision in the Proposal, but we are of the opinion that it is vague in terms of a general reference to instruments of European law (in order to see the scope of the provision, it should be clearly stated which EU legislation is at issue).

Point d), which defines cyberviolence, we are of the opinion that the definition does not represent added value, given that Articles 7, 8, 9 and 10 refer to criminal offences whose means of committing is information communication technology and the meaning of which expression should not be contained in this instrument. If it is insisted on, then we suggest that cyber violence is defined through the offences referred to in Art. 7-10 of the proposal, indicating the remark 'for the purposes of this Directive'.

Article 5

The offence should be aligned with the opinion of the Council Legal Service, i.e. the word "women" should be replaced with word "persons" in order to cover all persons as injured parties/victims of this crime. This would be also in line with the Victims Rights Directive 2012/29/EU in which Article 2 defines a "victim" as (i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss, which is directly caused by a criminal offense.

Article 7

In points a) and b) it has been stated that criminal behaviour is "*making it available to a multitude of end users*...", and the same is stated as a criterion in the recital 19. We are of the opinion that the term "*multitude*" should not be used in the provision for several reasons:

- There is no definition of what number constitutes a multitude, so the provision can be interpreted arbitrarily;

- It is not clear how to prove that number of users: whether by the number of those to whom it was available, regardless of whether they used that opportunity; or by the number of those who viewed the mentioned content;

- We are of the opinion that already availability to public users should be a punishable offense, and we suggest removing the word: "to the multitude", so that the provision reads: "making available to end users..."

Also, in points a) and b), the expression is unclear to us: "*unless the act was justifiable in view of its purpose and other circumstances*..." It is not clear to us what would be the situations when the act would be justified in view of its purpose?

Finally, we assume that the introduction of reasons for the exclusion of illegality of sharing of intimate or manipulated content without consent, due to the fact of the freedom of expression (satirical or artistic) of opinion could not be a justified reason for the exclusion of illegality because what is violated here is the breach/violation of trust between persons filming sexually explicit behaviour or intimate parts of the body.

Article 8

We support the deletion of the term: "*continuous*". Since the same word "*continuous*" is used in a recital 20, we suggest its deletion in recital 20 as well. In Article 10, it is prescribed that only intentional behaviour aimed at inciting violence is punishable as a criminal offense, we are of the opinion that it should be established that the criminal offense includes surveillance of the victim without her consent.

We propose to delete the part that reads: "*when this is likely to violate that person space*", because the act of placing a person under surveillance by means of information and communication technology without authorization/consent violates his/her privacy, therefore it is not necessary adding new features to the part and thus narrowing the area of its application.

Article 9b and 9c

In Article 9, point b) and c) the expression: "multitude of end-users " has been used again, which we suggest to be deleted from the text, and in accordance with the explanation given for the Article 7. We suggest that instead of the above mentioned, the wording: "publicly available to end users" is used. The same wording is used in recital 21 and it should be deleted there as well.

That recital also mentions attacks "on a large scale, for example in the form of mass harassment by a significant number of people". Although it is stated that special attention should be paid to it where exactly such attacks take place, we are of the opinion that the meaning of prevention is that such behaviour does not occur regardless of the mass of those who join. If an attack of mass harassment by a significant number of people is the result someone's intentional action, the policy of sanctions should be adapted to this type of behaviour and the above should be sanctioned as a particularly serious form of criminal offense.

In Article 9, points b) and c), we propose to delete the word significant. The text should be read: "...~~*significant*~~ *psychological harm*." We believe that the word ***significant*** has no added value. It is not clear what will be determined as a matter of significant consequences, what are the measurement indicators? This expression is in no way in favour of the victim of a particular criminal act.

Article 15

In Article 15, paragraph 6, has been stated the limitation period in relation to criminal offenses committed to the detriment of a child. We are of the opinion that the earlier proposed definition of the limitation period, which does not only apply to criminal offenses in Articles 5 and 6, but also to other criminal offenses against the child, was more acceptable.

CZECH REPUBLIC

We would like to thank the Presidency for providing the opportunity to submit written comments. The Czech Republic has already expressed its views during the meeting on 31 January. Additionally, we provide our statement to the second redraft of articles 1-6.

Article 1

The Czech Republic can be flexible regarding the amendments of Art. 1. We can also agree with the new recital 10 bis.

Article 2 Victims at an increased risk of violence and specific risks

As stated already during the meeting the CZ supports the proposed changes by the PRES in the sense of moving this article to recitals. We can also agree with the suggested changes in the respective recitals.

Article 3 Scope and Article 4ba

The Czech Republic does not oppose moving this article into definitions. However, we believe that this article (either article 3 or article 4ba) is superfluous, existing legislative acts (except for the PIF directive) do not contain a provision on the scope. Usually, the scope in the directive is used if it is necessary to somehow limit the use of the directive (e.g. article 2 of the proposal for a directive on asset recovery and confiscation which limits this directive only for some types of crimes). We believe that in this directive it is not the case and the rights and obligations arising from the directive must be applied in all necessary cases without any exceptions, otherwise, we might face discrimination. Therefore, the Czech Republic prefers the option, where this text would not be included in the text at all.

Article 4 Definitions

- **Violence against women**

We welcome some of the proposed changes by the Presidency. We support the deletion of "harm or suffering".

The CZ would like to repeat its objection to part "*or that affects women or girls disproportionately*" - linking the definition to statistical data on the number of offences (i.e. that a given act is committed against a woman or a girl to a greater extent) is not appropriate, as it presupposes the statistical determination of the number of victims by gender and, due to the fact that the content of this concept may change over time by linking it to the determination of the frequency of the relevant acts, it does not define this concept clearly and predictably enough. Stating that this type of violence is directed against a woman or a girl because she is a woman or a girl is completely sufficient.

Moreover, we would like to hear further clarification from the Commission in regard to the necessity to state explicitly "sexual". We believe that sexual harm is already included in physical and mental harm. We need this clarification in order to fully understand the difference.

Proposed wording:

"violence against women" means all forms of gender-based violence, coercion or arbitrary deprivation of liberty, or threats thereof, directed against a woman or a girl because she is a woman or a girl ~~or that affects women or girls disproportionately~~, including all acts of such violence that result in, or are likely to result in, harm, including physical, sexual mental or emotional harm or economic loss ~~[irrespective of the gender of the victim]~~ which constitutes a criminal offence in national or Union law."

- **Domestic violence**

Even after the proposed changes, it is still very hard to understand what domestic violence in this drafted definition represents. There is no clear distinction between domestic violence and other types of violence. One of the characteristics of domestic violence is that it takes place in private, behind closed doors and includes inappropriate prolonged or repeated aggressive behaviour. Therefore, the definition should be explicitly supplemented by the element **of prolonged or repeated violence**.

We are also of the opinion that since the definition of domestic violence is in a directive based on criminal law, it is necessary to link this definition only to criminal law purposes. Therefore, for the purpose of criminal law domestic violence should be linked to cases where the **perpetrator shares a home with the victim (or shared in past).** If the perpetrator does not live with the victim, or has never lived with the victim, and behaves violently towards the victim, the offence is different from domestic violence. According to the facts of criminal offence it can be considered as a different criminal offence, so the perpetrator would not remain unpunished. Definition based on the shared residence for the criminal purpose does not affect the interpretation of the term in other areas of law or for non-legal purposes.

Also "irrespective of biological or legal family ties" does not bring any further clarification but rather more confusion about who can actually be the perpetrator.

We reiterate our comment regarding "sexual" as stated above.

Proposed wording

> "domestic violence" means all **prolonged or repeated** acts of violence, that result in, or are likely to result in, harm, including physical, mental or emotional harm or economic loss, committed by a person who is a current or former spouse, or partner or other family member of the victim, ~~irrespective of biological or legal family ties~~, ~~whether or not the offender shares or has shared a residence with the victim~~, which constitutes a criminal offence in national or Union law

- **Cyber violence**

Regarding this definition, the CZ can be flexible even though we believe that there is not any added value to such a definition.

- **Multitude of end users**

We welcome the deletion of this definition in Article 4. Currently, further discussion on the relevance of the "multitude of end users" in the relevant articles on cybercrimes is necessary. However, we propose to either a) define this word in the relevant recitals, b) work further on the criminal offences regarding cybercrimes and see if it is even necessary to use this word.

- **Sexual harassment at work**

The Czech Republic supports the deletion of this definition. As such the definition is based on the directive on equal opportunities and equal treatment (2006/54/EC), i.e. the area of the legal basis relating to the social policy according to the TFEU. The conduct defined in the proposal may not in all circumstances correspond to a sufficient degree of harm to be punishable under criminal law. Therefore, we agree with the deletion of this definition. Provisionally, it is also possible to agree that it would be preferable to incorporate the proposed sentence into the articles in question which deal with the issue of sexual harassment at the workplace.

- **Dependant**

The CZ agrees with the proposed process by the Presidency.

In general, however, the Czech Republic maintains its position that it is not proportionate to guarantee all dependants indiscriminately, or in all situations, the rights or measures provided for in the proposed directive (e.g. the right to an individual assessment under Article 18(8), the right to special support under Chapter 4, as provided for in Article 19(1) of the proposed directive), especially in cases where they have not themselves directly or indirectly witnessed the violent act (e.g. because it was a crime committed through information and communication technologies). Moreover, the definition confuses the procedural and substantive concepts of 'suspect' and 'perpetrator'. The term 'dependent person' is also used for the offence of cyberstalking under Article 8 and for protection and restraining orders and expulsions under Article 21, but in this context it is, in our view, more appropriate to use the term **'close person' or 'close person living together with the victim'**, as the dependence of the person on the victim is not decisive in this respect.

Article 5 Rape

The CZ agrees with the view expressed in the opinion of the CLS. At the moment, there is no legal basis for the crime of rape to be regulated at EU level. The legal basis based on Article 83(1) TFEU, specifically the sexual exploitation of women and children, cannot be interpreted as including rape, as the 'exploitative element' of this offence is absent. If this offence were to be retained in the Directive, the list of euro-crimes would have to be extended to include sexual abuse and sexual violence.

Article 6 Female genital mutilation

The Czech Republic supports the proposed change in recital 16 which provides the Member states with more flexibility.

Article 7 Non-consensual sharing of intimate or manipulated material

The CZ can agree to the proposed amendments to clarify the wording of this Article. At the same time, the CR welcomes the clarification of terminology in the second paragraph – altering covers broader scope of action than manipulating. However, the Czech Republic considers that the criminal conduct referred to should be aimed **at more serious forms of conduct** (to fulfil the purpose of the criminal law as ultima ratio), in particular **conduct causing serious harm to the victim's rights, his or her esteem in society**, etc.

We also understand the requirements of some MS which require some limitation of such an offence provided that it is, for example, art material, but we consider that if the conduct was linked to the causing of harm, there would be no need for the exception in the form of legitimate forms of expression. Alternatively, we could support France idea to consider the general requirement in the opening section of this article: “Member States shall ensure that the following intentional conduct is punishable as a criminal offence, without prejudice to exemptions provided by their national law.", or other similar text.

Furthermore, if the conduct (in par. a and b) **was linked to the causing of harm to the victim**, it would be possible to delete the condition of making it accessible to a multitude of end-users because the seriousness of the offence would be perceptible. It should be point out that the criminality of the conduct should not be based on the number of users, since this is a feature which is difficult to define, and is likely to present a number of problems in proving the subjective aspect of this feature (we have also came to this problem regarding the definition of this word during the discussion on 31 January).The harmfulness of conduct should rather lie in the harm caused to the victim. If, however, "the accessibility multitude of end-users" should be kept in this article, we require further specification of this term in the recitals.

Proposed wording:

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

a) Making images, or videos or similar material depicting sexually explicit conduct or the intimate parts of a person without their consent accessible ~~**to a multitude of end-users**~~ by means of information and communication technologies **and causing serious harm**, ~~**unless the act was justifiable in view of its purpose and other circumstances**~~.
b) producing or altering and subsequently making accessible ~~**to a multitude of end-users**~~, by means of information and communication technologies, images, videos or ~~other~~ **similar** material, making it appear as though another person is engaged in sexual activities, without that person's consent **and causing serious harm**, ~~**unless the act was justifiable in view of its purpose and other circumstances;**~~
c) threatening to engage in the conduct referred to in points (a) and (b) in order to coerce another person to do, acquiesce or refrain from a certain act.

Article 8 Cyber stalking

We support the changes in par. a) and c) which move this conduct under harassment. We also support changing the words from continuous to repeatedly. However, a condition for the criminality of such conduct should be that the exercise of surveillance must cause the victim to have a reasonable apprehension for his or her life or health, rather than that such conduct might disturb his or her peace. Disturbance of the peace is a subjective feeling which may be very different for each person. A disturbance of the peace may also constitute conduct which would be punishable by lesser legal means, not necessarily always by criminal law. Thus, in our view, arousing a **reasonable fear for the victim's life or health** will more appropriately fulfil the principle of the ultima ratio.

Article 9 Cyber harassment

The Czech Republic believes that criminal offences stated in this article (par. a, b, c) are too extensive. The necessary legal basis stated in Article 83 par. 1 TFEU is not fulfilled since one of the requirements is that the criminal offence must be a "particularly serious crime". Further limitations are therefore necessary.

Additionally, paragraph (a) uses the term "dependent person" - this term does not include persons who are not directly cared for or financially supported by the victim and who do not live in the same household as the victim, but who is in a close family or other familial relationship with the victim (so-called close persons), e.g. a sibling of the victim or the victim's mother who lives in a different household from the victim and who are not supported by the victim in any way. These persons would not be covered by this provision even if the perpetrator threatened the victim with harm specifically addressed to the victim's sibling or mother. The CZ, therefore, requests that the term "dependent" be replaced by the more appropriate term "close person". Also, we believe that the new addition "is likely to" should be deleted

Article 10 Cyber incitement to violence or hatred

The CZ does not agree with the proposed hate crime offence. In view of the fact that the original proposal to extend Article 83(1) TFEU to hate speech has not been approved by the Council yet and cannot be expected to do so in the near future, it is not possible to accept that the issue of hate speech will be unsystematically regulated in criminal law only for the online cases.

Article 12 Penalties

We support the changes in par. 5 and 6 which unite the penalties for all cybercrimes we also agree with lowering the maximum penalty to 1 year of imprisonment. We support the Presidency decision to not set up sanctions in regard to aggravating circumstances which goes beyond the minimum necessary harmonisation and cannot be supported. We welcome the changes in par. 4.

Article 13 Aggravating circumstances

The Czech Republic welcomes the steps proposed to make this provision on aggravating circumstances clearer. However, at this point, we are of the opinion that the discussions on this article should be postponed until there is an agreement on the form and wording of all criminal offences (articles 5-10). Some of the aggravating circumstances are relevant only to some types of criminal offences in the form they were drafted in the original proposal and without the original wording their relevance would lose sense. Moreover, there are still ongoing discussions on the legal base which must be resolved before we can move further with this article.

Generally, we believe that the list of aggravating circumstances should be significantly limited and more flexible. In Czech criminal law, aggravating circumstances are not linked to individual offences but are instead set out in general terms so that they can be applied to all offences. For this reason, the proposed wording with an exhaustive list goes completely against the established national system and would seriously interfere with the existing national rules.

Article 15 Limitation periods

The Czech Republic appreciates the Presidency's proposal to allow Member States greater flexibility in the case of limitation periods. The proposal has made significant progress, as the start of limitation periods is no longer linked to subjective facts in some cases, while at the same time removing the specific limitation period. The Czech Republic prefers the second option put forward, which only sets out general requirements for limitation periods.

FINLAND

Proposal for a Directive on combating violence against women and domestic violence (document WK 17827/2022)

- **Comments by Finland**

The Finnish delegation thanks the Presidency for the opportunity to provide written comments on the draft Directive. At this point, we present the following views.

Articles 7 to 10 – General remarks

- Given the nearly unlimited possibilities of information technology, it should be made clear that the legal basis for computer crime does not apply to all offences that can also be committed on a computer-assisted or -enabled basis. There are also other prerequisites that the acts specified in Articles 7-10 must fulfil. This should be specified in the recitals, at least. Otherwise, the legal basis could be interpreted too extensively and uncontrollably, and the Directive will set an unwelcome precedent.
- Accordingly, we propose that the offences to be possibly included in Articles 7-10 meet the following criteria (as well as the other criteria set out in TFEU Article 83(1)), and in the recitals are characterised as follows[1]:

> "cyber-enabled offences where the involvement of information systems substantially changes the characteristics and escalates the harmful impact of the offences"

This could, for example, be included in the Recitals as follows:

> (17) It is necessary to provide for harmonised definitions of offences and penalties regarding certain forms of cyber violence **where the involvement of information systems substantially changes the characteristics and escalates the harmful impact of the offences.** Cyber violence particularly targets and impacts women politicians, journalists and human rights defenders. It can have the effect of silencing women and hindering their societal participation on an equal footing with men. Cyber violence also disproportionately affects women and girls in educational settings, such as schools and universities, with detrimental consequences to their further education and to their mental health, which may, in extreme cases, lead to suicide.

[1] See also Council document 9117/22, paragraph 9, regarding "EU position for the participation in the negotiations for a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes".

- We think that the element of "multitude of end users" in the crime definitions is closely related to the "computer crime" legal basis, and it is important to keep it in Articles 7-10. This is the very element that *amplifies the harmful effect* of these cyber-enabled offences and which differentiates these acts from non-cyber stalking, harassment, incitement to violence etc. (see also Recital 18). If the "multitude of end users" -requirement is not included, the definitions of the offences will be much broader than intended in the Commission proposal, and without this amplifying effect, the offences would not be essentially different than their non-cyber counterparts. Thus, in that case Articles 7-10 would go beyond the "computer crime" legal basis in our view.
- Finland does not consider it a problem that "multitude of end users" is not specified in more exact terms than in Recital 18. Similar non-specific concepts are common and unavoidable in criminal law. It is normal that the judges are required to use discretion in borderline cases, taking into account all relevant circumstances.
- However, we note that, since the Directive can only contain minimum rules, it does not require to limit the definitions of offences only to those that relate to the "multitude of end users" in the MS's national criminal laws. It should therefore be clear that, as far as the Directive is concerned, the MS's are free to avoid this concept altogether and define these offences in broader terms in their national criminal laws.

FRANCE

NOTE DES AUTORITÉS FRANÇAISES

Objet : Commentaires des autorités françaises sur les articles 1 à 6 de la proposition de directive sur la lutte contre la violence à l'égard des femmes et la violence domestique – Note des autorités françaises.

Réf. : WK 1034/23

Lors de la réunion du groupe COPEN du 31 janvier 2023, la Présidence a sollicité les Etats membres en vue de transmettre des commentaires sur les articles 1 à 15 de la proposition de directive sur la lutte contre la violence à l'égard des femmes et la violence domestique. En réponse, les autorités françaises souhaitent faire part des éléments suivants.

Sur l'article 1 relatif à l'objet :

Les autorités françaises sont favorables à l'insertion d'un nouveau considérant 10 bis. Toutefois, elles s'opposent à la suppression de la mention « aux femmes et aux enfants », au litera a), au regard de la base juridique de la directive.

Par ailleurs, les autorités françaises partagent l'idée de clarifier la temporalité visée à l'article 1er par la formule *"for an appropriate time".*

Courtesy translation

The French authorities are in favour of the insertion of a new recital 10a. However, they are opposed to the deletion of the reference to "women and children" in litera a), in view of the legal basis of the Directive.

Furthermore, the French authorities share the idea of clarifying the temporality referred to in Article 1 with « for an appropriate time ».

Sur l'article 2 sur les victimes exposées à un risque accru de violences et risques spécifiques :

Les autorités françaises sont favorables au déplacement du contenu de l'article aux considérants 11 et 12.

S'agissant des mesures spécifiques susceptibles d'être mises en œuvre en présence de formes de discriminations croisées, visées au considérant 11, qui apparaissent insuffisamment définies, les autorités françaises proposent qu'il soit de préférence indiqué que les « *Etats membres devraient offrir aux victimes de discriminations croisées une particulière attention notamment en vue de leur fournir des mesures d'assistance ou d'orientation vers les services d'aide adaptés* ».

Courtesy translation

The French authorities are in favour of moving the content of the article to recitals 11 and 12.

With regard to the specific measures likely to be taken in the presence of forms of intersectional discrimination, referred to in recital 11, which appear to be insufficiently defined, the French authorities propose that it should preferably be stated that "Member States should offer victims of cross-discrimination special attention, in particular with a view to providing them with measures of assistance or referral to appropriate support services".

Sur l'article 3 sur le champ d'application :

Les autorités françaises ne sont pas opposées à la suppression de l'article 3 et à son inclusion dans les définitions contenues à l'article 4.

Courtesy translation

The French authorities are not opposed to the deletion of Article 3 and its inclusion in the definitions contained in Article 4.

Sur l'article 4 sur les définitions :

Sur le litera a) relatif à la définition de « violences à l'égard des femmes », les autorités françaises sont favorables à l'ajout de la mention concernant les violences sexuelles. Toutefois, elles rappellent leur souhait de supprimer la mention « *irrespective of the gender of the victim* », qui est contradictoire avec le terme même de « violences à l'égard des femmes » qui est défini, pour des raisons de clarté et de sécurité juridiques. Il apparait nécessaire aux autorités françaises d'assurer la cohérence entre la dénomination d'un concept et sa définition. Les autorités françaises proposent que la précision que les chapitres 3 à 7 s'appliquent *« indifféremment du genre de la victime »,* soit plutôt placée dans la définition (b) (violence domestique).

Sur le litera b) sur la définition de « violence domestique », les autorités françaises sont favorables à la proposition de la Présidence visant à inclure une référence aux violences sexuelles.

Sur le litera c) les autorités françaises jugent nécessaire le maintien de la référence aux enfants témoins de violences domestiques. Ces derniers constituent de manière incontestable les victimes des faits de violence commis au sein de leur foyer, au préjudice de l'un de leur parent, la violence psychologique se substituant alors à la violence physique lorsqu'elle n'est pas directement subie.

Par ailleurs, les autorités françaises sont défavorables à la suppression de la mention *« sex or ».* En effet, les deux termes « sexe » et « genre » devraient être conservés afin de respecter la diversité des traditions juridiques des Etats membres.

Sur le litera d) sur la définition de « *cyber violence »,* les autorités françaises proposent la suppression de cette définition et l'ajout d'une référence à celle-ci au sein d'un considérant, pour éviter que d'autres actes de cyberviolence pour lesquels les femmes pourraient constituer des victimes et qui ne figurent pas aux articles 7 à 10 échappent au champ d'application de la directive.

Sur le litera da) sur la « multitude d'utilisateurs finaux » (« *multitude of end-users* »), les autorités françaises sont favorables à la suppression de cette définition, évitant ainsi la répétition en des termes différents de la même idée.

Sur le litera g) sur la définition de « harcèlement sexuel au travail », les autorités françaises sont favorables à la suppression de cette définition.

Sur le litera j) sur la définition de personne à charge, les autorités françaises sollicitent le maintien dans le corps de la définition, a minima, des enfants vivant dans le même ménage que la victime, à qui la victime fournit des soins ou une aide. Ne pas viser ce public n'apparaît pas cohérent avec l'objet de la directive, alors même que ces enfants nécessitent une protection, dès lors qu'ils partagent le même foyer que la victime et qu'ils subissent les conséquences, à tout le moins psychologiques, des faits commis.

Courtesy translation

With regard to litera a) concerning the definition of "violence against women", the French authorities are in favour of adding the reference to sexual violence. However, they reiterate their wish to delete the reference to "irrespective of the gender of the victim", which is contradictory to the very term "violence against women" which is defined, for reasons of clarity and legal certainty. The French authorities consider necessary to ensure consistency between the name of a concept and its definition. The French authorities propose that the clarification that Chapters 3 to 7 apply "regardless of the gender of the victim" be placed in definition (b) ("domestic violence") instead.

On litera b) on the definition of "domestic violence", the French authorities support the Presidency's proposal to include a reference to sexual violence.

On litera c) the French authorities consider necessary to maintain the reference to children witnesses of domestic violence. These children are undoubtedly victims of acts committed in their own home against one of their parents, psychological violence replacing physical violence when it is not directly suffered.

Furthermore, the French authorities are against the deletion of the term "sex or". Indeed, the two terms "sex" and "gender" should be kept in order to respect the diversity of the legal traditions of the Member States.

On litera d) on the definition of "cyber violence", the French authorities propose the deletion of this definition and the addition of a reference to it within a recital, to avoid that other acts of cyber violence for which women could be victims and which are not listed in Articles 7 to 10 escape the scope of the directive.

On litera da) on the "multitude of end-users", the French authorities are in favour of deleting this definition, thus avoiding the repetition of the same idea in different terms.

On litera g) on the definition of "sexual harassment at work", the French authorities are in favour of deleting this definition.

With regard to litera j) on the definition of "dependant", the French authorities request that at least children living in the same household as the victim, to whom the victim provides care or assistance, be retained in the body of the definition. Not targeting this group does not appear to be consistent with the purpose of the Directive. These children require protection, since they share the same household as the victim and suffer the consequences, at least psychological, of the acts committed.

Sur l'article 6 sur les mutilations génitales féminines :

Les autorités françaises sont très favorables à la flexibilité introduite par la Présidence pour les Etats membres au sein du considérant 16, permettant une qualification plus générale dans le droit national de la notion de mutilations génitales féminines.

Par ailleurs, les autorités françaises pourraient émettre une réserve quant à la terminologie *"exploitative practice"* et les conséquences éventuelles que cette notion d'exploitation pourrait avoir sur la caractérisation de l'infraction. Elles proposent ainsi de remplacer cette notion par les termes *« abusive practice ».*

Courtesy translation

The French authorities are strongly in favour of the flexibility introduced by the Presidency for the Member States in recital 16, allowing a more general qualification in national law of the concept of female genital mutilation.

Furthermore, the French authorities have reservations about the term "exploitative practice" and the possible consequences that this notion of exploitation could have in the characterization of the offence. Therefore, the French authorities propose to replace "exploitative practice" by "abusive practice".

Sur l'article 7 sur le partage non consenti de matériels intimes ou manipulés :

Les autorités françaises proposent d'introduire un renvoi au droit national pour fixer les conditions auxquelles il serait possible de justifier les actes visés par leurs finalités ou d'autres circonstances dont, notamment, les activités de sensibilisation et la liberté d'expression en accord avec l'article 11 de la Charte des droits fondamentaux de l'Union européenne. Cet article est en effet susceptible de viser des vidéos et images réelles d'une personne, qui seraient diffusées sans son consentement. Or dans cette hypothèse, la seule dimension artistique ou satirique ne saurait, pour les autorités françaises, constituer un élément exonératoire de responsabilité pour l'auteur des faits.

L'article 7 pourrait être rédigé ainsi :

> Member States shall ensure that the following intentional conduct is punishable as a criminal offence**, without prejudice to exemptions provided by their national law**:"
>
> (a) making ~~intimate~~ images, or videos or ~~other~~ similar material depicting sexually explicit conduct ~~activities~~ or the intimate parts of a person, ~~of another person without that person's~~, without their consent accessible to a multitude of end-users by means of information and communication technologies, ~~unless the act was justifiable in view of its purpose and other circumstances~~;
>
> (b) producing or ~~manipulating~~ altering and subsequently making accessible to a multitude of end-users, by means of information and communication technologies, images, videos or other material, making it appear as though another person is engaged in sexual activities, without that person's consent, ~~unless the act was justifiable in view of its purpose and other circumstances~~;

Un considérant 19bis pourrait être ajouté afin de justifier les actes visés par leurs finalités ou d'autres circonstances :

> (19bis) Such images, videos or materials disseminated to end-users by means of information and communication technologies for educational purposes, awareness-raising campaigns about violence against women and domestic violence or for justifiable forms of freedom of expression as enshrined in Article 11 of the Charter, such as journalistic publications, should not be considered as non-consensual sharing of intimate, manipulated or altered materials to the extent that such exemptions are provided under Union law or under national laws.

Dans le prolongement des débats intervenus lors du groupe COPEN et de l'avis de la Commission, les autorités françaises considèrent, à la lecture du considérant 18, que le fait de rendre accessibles les matériels intimes ou manipulés à une « multitude d'utilisateurs finaux » comprend aussi l'envoi de ces matériels à un seul destinataire, dès lors qu'il intervient par le biais de technologies susceptibles d'en amplifier la diffusion et de le rendre finalement accessible à un public large (communication par le biais de plateformes telles que Whatsapp ou Facebook messenger par exemple).

Courtesy translation

The French authorities will reiterate the comments already submitted to the Presidency.

On Article 7 on non-consensual sharing of intimate or manipulated material, the French authorities propose to introduce a reference to national law to set out the conditions under which it would be possible to justify the acts covered by their purposes or other circumstances including, inter alia, awareness raising activities and freedom of expression, as enshrined in Article 11 of the Charter.

This article is likely to cover real videos and images of a person, which are disseminated without their consent. In this case, the French authorities consider that the artistic or satirical dimension alone does not exonerate the perpetrator from liability.

Article 7 could read as follows:

> Member States shall ensure that the following intentional conduct is punishable as a criminal offence**, without prejudice to exemptions provided by their national law**:"
>
> (a) making ~~intimate~~ images, or videos or ~~other~~ similar material depicting sexually explicit conduct ~~activities~~ or the intimate parts of a person, ~~of another person without that person's~~, without their consent accessible to a multitude of end-users by means of information and communication technologies, ~~unless the act was justifiable in view of its purpose and other circumstances~~;
>
> (b) producing or ~~manipulating~~ altering and subsequently making accessible to a multitude of end-users, by means of information and communication technologies, images, videos or other material, making it appear as though another person is engaged in sexual activities, without that person's consent, ~~unless the act was justifiable in view of its purpose and other circumstances~~;

A recital 19a could be added to justify the acts covered by their purposes or other circumstances:

> (19bis) Such images, videos or materials disseminated to end-users by means of information and communication technologies for educational purposes, awareness-raising campaigns about violence against women and domestic violence or for justifiable forms of freedom of expression as enshrined in Article 11 of the Charter, such as journalistic publications, should not be considered as non-consensual sharing of intimate, manipulated or altered materials to the extent that such exemptions are provided under Union law or under national laws.

In line with the discussions in the COPEN group and the Commission's opinion, the French authorities consider, on the basis of recital 18, that making intimate or manipulated material accessible to a "multitude of end-users" also includes the sending of such material to a single recipient, provided that this is done by means of technologies likely to amplify its dissemination and ultimately make it accessible to a wide audience (communication via platforms such as Whatsapp or Facebook messenger, for example).

Sur l'article 8 sur la traque furtive en ligne :

Les autorités françaises n'ont pas d'opposition au déplacement des litera (a) et (c) de l'article 8 dans l'article 9 sur le cyberharcèlement, dès lors que les comportements visés sont bien susceptibles de recouvrer cette qualification pénale.

S'agissant de l'article 8(b) les autorités françaises privilégient la notion initialement proposée par la Commission de « surveillance continue » plutôt que la notion de répétition proposée par la Présidence. Elles notent toutefois avec intérêt la proposition de la Commission visant à remplacer le terme « repeatedly » par « persistently », à laquelle elle serait favorable. Par ailleurs, la proposition d'ajout de « *when this is likely to violate that person's peace* » apparait être tautologique avec le fait réprimé par ce texte et l'atteinte à la vie privée qui en résulte pour la victime. Les autorités françaises sont défavorables à l'ajout de cette mention qui introduit une notion floue et non objective. *Courtesy translation*

The French authorities have no objection to moving litera (a) and (c) of Article 8 to Article 9 on cyber harassment, as these acts can indeed be classified as such.

With regard to Article 8(b), the French authorities prefer the concept initially proposed by the Commission of "continuous surveillance" rather than the notion of repetition proposed by the Presidency. However, they note with interest the Commission's proposal to replace the term "repeatedly" with "persistently", which they would support. Moreover, the proposed addition of the wording "when this is likely to violate that person's peace" appears to be tautological with the act punishable by this text and the resulting invasion of privacy for the victim. The French authorities are opposed to the addition of this reference, which introduces a vague and non-objective notion.

Sur l'article 9 sur le cyberharcèlement :

Concernant le nouvel article 9 (a), les autorités françaises sont favorables à la proposition de la Présidence visant à ce que le champ de l'infraction soit restreint aux menaces de « commettre des infractions pénales ». Elles sollicitent par ailleurs la suppression des ajouts de la Présidence « is likely to » et « seriously » pour des questions de sécurité juridique. Elles considèrent que la rédaction initiale proposée par la Commission, du nouvel article 9 (b) était plus claire et sollicitent sa réintroduction.

Elles demandent en outre la réintroduction de l'ancien article 9 (b), dès lors que la participation collective aux actions de harcèlement lui semble également devoir être réprimée, au-delà du seul fait d'engager la conduite menaçante ou insultante. <u>*Courtesy translation*</u>

As regards the new Article 9 (a), the French authorities are in favour of the Presidency's proposal that the scope of the offence be restricted to threats to "commit criminal offences". They also request the deletion of the Presidency's additions "is likely to" and "seriously" for reasons of legal certainty.

They consider that the initial drafting proposed by the Commission of the new Article 9 (b) was clearer and request its reintroduction.

They also request the reintroduction of the former Article 9 (b), as they consider that collective participation in attacks referred by this article should also be punished, beyond the sole act of engaging in threatening or insulting conduct.

Sur l'article 10 sur l'incitation à la violence ou la haine en ligne :

Les autorités françaises n'ont pas d'opposition à la restriction des cas incriminés visés au paragraphe 2. Elles indiquent cependant que, sous réserve de l'avis du Service juridique du Conseil, la formulation de ce type de clause devrait être calquée sur celle des articles 5 et 8 de la directive 2011/93/UE (*« It shall be within the discretion of Member States to decide whether this Article applies to cases… »*) plutôt que sur celle de l'article 1er de la décision-cadre 2008/913/JAI.

<u>*Courtesy translation*</u>

The French authorities have no objection to the restriction of the incriminated cases referred to in paragraph 2. However, they indicate that, subject to the opinion of the Council Legal Service, the wording of this type of clause should be modelled on that of Articles 5 and 8 of Directive 2011/93/EU ("It shall be within the discretion of Member States to decide whether this Article applies to cases...") rather than on that of Article 1 of Framework Decision 2008/913/JHA.

Sur l'article 11 sur l'incitation, participation et complicité, et tentative :

Les autorités françaises, dans le prolongement de la demande de la Présidence au groupe COPEN, indiquent ne pas avoir d'opposition à la modification de cet article, tel que proposé par la Présidence.

<u>*Courtesy translation*</u>

The French authorities, following the Presidency's request at the COPEN group, indicate that they have no opposition to the modification of this article, as proposed by the Presidency.

Sur l'article 12 sur les sanctions :

Les autorités françaises sont favorables à la suppression du paragraphe 3 au regard des difficultés constitutionnelles que pourrait présenter l'introduction d'une peine obligatoire en droit français, s'il n'est pas laissé à la juridiction la possibilité de ne pas prononcer cette peine au vu des éléments de fait, de droit, ou de la personnalité de l'auteur.

Sur le paragraphe 4 de l'article, les autorités françaises privilégient le maintien de la rédaction initiale proposée par la Commission, l'ajout de la mention relative aux cas les plus graves n'étant pas assez précise.

Sur le paragraphe 5 de l'article, les autorités françaises sollicitent la réduction de la peine minimale encourue à six mois pour faciliter la transposition en droit national.

Courtesy translation

The French authorities are in favour of deleting paragraph 3 in view of the constitutional difficulties that could be caused by the introduction of a mandatory penalty in French law if the court is not given the option of not imposing such a penalty in the light of the facts, the law or the personality of the offender.

With regard to paragraph 4 of the article, the French authorities prefer to retain the initial wording proposed by the Commission, as the addition of the reference to the most serious cases is not sufficiently precise.

With regard to paragraph 5 of the Article, the French authorities call for the minimum penalty to be reduced to six months to facilitate transposition into national law.

Sur l'article 13 sur les circonstances aggravantes :

Les autorités françaises sont favorables à la seconde option présentée par la Présidence consistant à distinguer les circonstances aggravantes entre les infractions d'une part pour les articles 5 à 6 et d'autre part pour les articles 7 à 10.

S'agissant des circonstances aggravantes pertinentes pour les articles 5 à 6, les autorités françaises indiquent leurs réserves s'agissant de celle visée au 13 (a). La notion « *d'autre infraction pénale relevant de la violence à l'égard des femmes ou de la violence domestique* » lui semble en effet devoir être précisée pour pouvoir être transposée en droit national. Par ailleurs, les autorités françaises sont favorables à la suppression de la référence au fait que les infractions aient généré **«** de graves dommages physiques ou psychologiques pour la victime », telle que visée à l'article 13 (i), de tels dommages étant nécessairement inhérents à la commission des faits de viol et de mutilation génitale féminine.

S'agissant des circonstances aggravantes pertinentes pour les articles 7 à 10, les autorités françaises ne sont pas opposées à ce que soient prévues des circonstances aggravantes pour ce type de faits au vu de la prégnance du sujet de la criminalité informatique comme nouvel enjeu de politique pénale. Elles restent toutefois dans l'attente des propositions précises de la Présidence sur les circonstances aggravantes qu'elle conservera lors de la réécriture de l'article.

Les autorités françaises précisent ne pas avoir d'objection à la mention « *si cela s'avère pertinent* » à la fin du premier paragraphe, dans la mesure où il serait alors considéré que chaque Etat membre peut déterminer quelle circonstance aggravante transposer pour chaque infraction.

Courtesy translation

The French authorities are in favour of the second option submitted by the Presidency consisting in distinguishing aggravating circumstances between offences for Articles 5 to 6 on the one hand and Articles 7 to 10 on the other.

With regard to the aggravating circumstances relevant to Articles 5 to 6, the French authorities have reservations about the aggravating circumstance referred to in Article 13(a). The notion of "another criminal offence of violence against women or domestic violence" seems to them to require further clarification before it can be transposed into national law. Furthermore, the French authorities are in favour of deleting the reference to the fact that the offences have caused "severe physical or psychological harm for the victim", as referred to in Article 13 (i), as such harm is necessarily inherent in the commission of the acts of rape and female genital mutilation.

With regard to the aggravating circumstances relevant to Articles 7 to 10, the French authorities are not opposed to providing for aggravating circumstances for this type of act in view of the importance of the subject of computer crime as a new criminal policy issue. However, they are still expecting precise proposals from the Presidency on the aggravating circumstances that it will retain when the article is rewritten.

The French authorities state that they have no objection to the phrase "if relevant", at the end of the first paragraph, since it would then be considered that each Member State can determine which aggravating circumstance to transpose for each offence.

Sur l'article 14 sur la compétence :

Les autorités françaises sont favorables à la limitation de la section 4 aux infractions visées aux articles 5 et 6 et sollicitent que cette limitation soit également appliquée à la section 5 afin de s'assurer que l'exception relative à l'absence de nécessité d'un signalement de la victime ou d'une dénonciation officielle pour engager les poursuites ne s'applique qu'aux infractions les plus graves.

Courtesy translation

The French authorities are in favour of limiting Section 4 to the offences referred to in Articles 5 and 6 and request that this limitation also be applied to Section 5 in order to ensure that the exception relating to the absence of the need for a report made by the victim or an official denunciation to initiate proceedings applies only to the most serious offences.

Sur l'article 15 sur la prescription :

Les autorités françaises sont favorables à la première option proposée.

S'agissant de l'article 15§2 (viol), elles indiquent que, dans l'hypothèse où l'article 5 serait maintenu, elles sollicitent le maintien de la période de 20 ans, qui lui apparait plus protectrice des droits des victimes.

S'agissant de l'article 15§3 (mutilations génitales féminines) les autorités françaises sont en faveur, ainsi que le propose la Présidence, d'une réduction de la période de prescription à 5 ans.

Concernant les articles 15§4 et 15§5 (criminalité informatique), les autorités françaises prennent acte du fait qu'il n'existe plus de période de prescription minimum pour les faits liés à la criminalité informatique.

Concernant l'article 15§6, les autorités françaises valident le fait que le point de départ de la prescription à la majorité de la victime ne concernerait que les faits de viol et de mutilation génitale féminine.

Courtesy translation

The French authorities are in favor of the first option proposed.

With regard to Article 15§2 (rape), they indicate that, if Article 5 is maintained, they request that the 20-year period to be maintained, as they consider it to be more protective of victims' rights.

With regard to Article 15§3 (female genital mutilation), the French authorities favor, as proposed by the Presidency, that the limitation period be reduced to 5 years.

Concerning Articles 15§4 and 15§5 (computer crime), the French authorities note that there is no longer a minimum limitation period for acts related to computer crime.

With regard to Article 15§6, the French authorities will support the fact that the starting point of the limitation period at the age of majority of the victim would only concern acts of rape and female genital mutilation.

GERMANY

Proposal for a Directive on Combating Violence against Women and Domestic Violence

Position statement by Germany following the COPEN Council Working Group Meeting on 31st of January 2023:

Germany thanks the Swedish Council Presidency for competently coordinating the consultation process. We expressly support the approach taken by the Swedish Presidency to define criminal offences more clearly in order to meet the level of legal clarity required in criminal law, while also providing amendments limiting the application of the provisions to cases of particularly serious crime. We gratefully accept the opportunity to contribute a position statement on the provisions discussed in the Council Working Group meeting of 31 January 2023. We would also like to comment at this point on the requirements initially excluded because of their reference to Article 5:

- The language of the justification in Article 7(a) and (b) is too vague. The objective of the justification is not clearly expressed. **The following wording** is suggested:
  "… unless the act is justified for the purposes of art or science, research or teaching".
  During the negotiations in the Council Working Group it became clear that Member States hold many incompatible views regarding the wording of grounds for justification. Against this background, we would **alternatively** support the proposal put forward by France and other Member States to make reference to **the respective national law** regarding justification. We do not consider it essential to limit the scope of the provision in other respects.

- The **limitation of the scope of Article 8(b)** proposed by the Swedish Presidency **is generally welcomed**. Still, this provision essentially aims to criminalise preparatory acts, the punishment of which continues to appear questionable for reasons of proportionality (given the lack of severity of the acts). Furthermore, Regulation (EU) 2016/679 (General Data Protection Regulation) already provides rules at European level for the sanctioning of unauthorised data processing. Where the "household exemption" applies and the General Data Protection Regulation is therefore not applicable, punishment of criminally relevant action will likely be provided for in the national legal systems. Moreover, if these acts involve illegal access to information systems or illegal interception of data, Member States are already required to criminalise them pursuant to Articles 3 and 6 of Directive 2013/40 (Attacks against Information Systems). Therefore, we ultimately see **no need for regulation in the framework of the present Directive**.

  Should the provision be retained, **we consider it necessary to limit its scope beyond what is currently proposed by the Swedish Council Presidency**, in order not to breach the limits of the legal basis provided by Article 83(1), second subparagraph TFEU. In this regard, we explicitly endorse the Czech and Austrian request to further limit the scope of the offence.

- For reasons of clarity, we think that the term "sex", referring to the biological construct, should be retained in **Article 10** alongside the term "gender", referring to the social construct. Should the Swedish Presidency continue to maintain the view that the term "gender" includes "sex", we would not oppose this position and would support wording the provision accordingly. In that case, an explanation should be included in the recitals.

- In accordance with the Presidency's proposal regarding Article 12(4), which we welcome, the minimum maximum penalty set out in **Article 12(2)** should also be adjusted so as to be in line with the Council conclusions of 24/25 April 2002 on the "approach to apply regarding approximation of penalties" (ST 9141/02). In those **conclusions, the Council agreed on four levels of criminal sanctions with minimum maximum penalties of one, two, five or ten years.** The minimum maximum penalty set out in Article 12(2) of the present Proposal, which provides for a threshold of 8 years, does not meet these requirements. The **general approach agreed on the draft Directive on Environmental Crime** also provides for this system of minimum maximum penalties. **Article 5 should provide for a minimum maximum penalty of five years.** Member States also have to be afforded sufficient **flexibility** to deal with atypical individual cases. The **specification of higher minimum maximum penalties for offences committed under aggravating circumstances as defined in Article 13 is also unacceptable for us**. National particularities should be taken into account here and Member States should be left with some discretion in this respect. We are in favour of **deleting** the corresponding requirement (increase of the penalty in the case of aggravating circumstances) in Article 12(2).

- With its mandatory provision, **Article 12(3)** interferes too much with the competence of the Member States. Instead, an **optional provision** should be chosen, according to which Member States must ensure that the courts or competent authorities can impose an obligation to undergo therapy. We already forwarded a written amendment proposal to this effect, which is set out again below and will also be resubmitted: "Member States **shall ensure that the competent judicial authorities may impose** on an offender of the criminal offence referred to in Article 5, who has previously been convicted of offences of the same nature, the obligation to participate in an intervention programme referred to in Article 38."

- **Article 13, which contains mandatory and far too detailed rules regarding the determination of punishment, significantly interferes with the competence of the Member States and is, in Germany's view, unacceptable**. The main reason for this is that the existence of aggravating circumstances is supposed to always result in an increase of the penalty according to Article 12(2). Therefore, the term "shall" should **ideally** be replaced by a phrase that allows for a coherent implementation by the Member States, for example "**may take the necessary measures**." In this connection, it would be important to know – as previously asked during the first discussion of these provisions – whether the Commission would consider it permissible to transpose this provision into a general sentencing rule which would allow the relevant circumstances to be considered as aggravating circumstances without specifically mentioning them in the law. Or is it necessary, in the Commission's view, to explicitly include each and every rule regarding the determination of punishment in the corresponding criminal law provisions in national law? The latter would likely lead to considerable implementation efforts in many Member States and would not be compatible with the systematic structure of the German Criminal Code. Moreover, it can be assumed that national criminal codes would become virtually unreadable for legal practitioners as a result. As was the case with the **general approach for the draft Directive on Environmental Crime**, the requirement should, **at the very least**, be relaxed so that only one aggravating circumstance has to be transposed into national law, and the importance of the national rules for the determination of punishment should also be emphasised. The provision could then be worded as follows: "Member States shall ensure that **one or several of** the following circumstances **may**, **in accordance with the relevant provisions of national law**, be regarded as aggravating circumstances in relation to those offences." In its recent proposal for a **Directive "on the definition of criminal offences and penalties for the violation of Union restrictive measures" (Sanctions Directive), the Commission itself already suggested this approach ("one or several of")** for the regulation of aggravating circumstances (Article 8 of that proposal). The Presidency's idea of now specifying different aggravating circumstances for the various individual Articles would only further compromise the coherence of national criminal law systems. Only if the above proposals by Germany receive no support could the possibility be considered, **purely way of alternative**, to provide for more general requirements to take into account different **groups** of aggravating circumstances (with due consideration for the national structures regarding the rules for the determination of punishment). Any further differentiation between the specific aggravating circumstances within those groups should, however, be left to the Member States.

- We welcome the Presidency's proposal for **Article 14(4)**, whereby jurisdiction established over the offences referred to in Articles 5 and 6 would not be subject to the condition that the acts be punishable in the country where they were performed. If this were not limited to Articles 5 and 6, Article 14(4) would have too broad a scope and would interfere disproportionately with the legal systems of the countries where the offences were performed. The limitation to particularly serious offences, i.e. rape and genital mutilation, can therefore be supported.

- With regard to the provisions on limitation periods in **Article 15,** we welcome the fact that the two options proposed by the Presidency significantly streamline the Commission's proposal [commencement of the limitation period is no longer linked to awareness of the offence; in the case of minors, the limitation period is limited to Articles 5 and 6 and commences at the earliest once the victim has reached 18 years of age]. In Germany's view, however, only the second proposed option can be supported in order to avoid jeopardising the coherence of Member States' rules on limitation periods.

LATVIA

Please see below written comments of Latvia:

Article 5:

Taking into account the opinion of The Council Legal Service of possible high risks of legal proceedings in connection whether Article 83(1) TFEU allows for the adoption of minimum rules for the criminal offences of rape against women, Latvia is inclined to agree that in such circumstances the article should be deleted.

Article 6:

Latvia does not support the provision contained in Article 6(b) as a separate criminal offense. The described actions include what is provided for in point a), that is, the methods used by the perpetrator of the criminal offense specified in point b) in order to achieve his action and to force or achieve the victim's non-resistance to the performance of criminal actions. Accordance with the Second Paragraph of Article 46 of the Criminal Code, when determining the type of punishment, the nature of the committed criminal offense and the damage caused, as well as the personality of the perpetrator, are taken into account. Also, in accordance with Article 15 of the Criminal Code, criminal liability is provided for an attempt to commit a crime, that is, a deliberate action (inaction) directly aimed at committing an intentional crime, if it is not committed to the end due to reasons independent of the will of the perpetrator. Pursuant to the third part of Article 15 of the Criminal Code, finding or adapting means or tools or otherwise intentionally creating favourable conditions for the commission of an intentional crime is recognized as preparation for a crime, if, in addition, it is not continued for reasons beyond the will of the perpetrator. According to the first part of Article 20 of the Criminal Code, an act or failure to act committed knowingly by which a person (joint participant) has jointly with another person (perpetrator) participated in the commission of an intentional criminal offence, but he himself or she herself has not been the direct perpetrator of it, shall be considered to be joint participation. Organisers, instigators, and abettors are joint participants in a criminal offence.

Article 7:

The Article 7 is generally too broad and vaguely defined. Criminal offenses must be distinctly defined, thus it can be transposed in national legislation and it is completely understandable for what actions person is being prosecuted for. As already indicated at the COPEN meeting, Latvia joins those States which indicate that the article needs to include an element of harm. As an example, Latvian legal system has an instrument for criminalizing harm: *"if substantial harm has been caused thereby"*. The terms *"multitude of end users"*; is still not understandable in context of criminalisation.

Article 8:

Latvia has criminalized stalking in accordance with Istanbul Convention - *"For repeated or lasting tracking and surveillance of another person, expressing threats to such person, or unsolicited communication with such person, if such person has had reasonable grounds to fear for his or her safety or the safety of his or her relatives"*. The Article, according to Latvian criminal legal system, includes also stalking using means of information and communication technologies, although it is not specifically mentioned.

In the national criminal justice system of Latvia, a crime is classified according to the factual actions, and if they are carried out - then the person will be held criminally responsible, regardless of the place where the crime was committed. In this context, Latvia wants to clarify and ask the Commission a question. Will the adoption of the article in the national legal system be accepted as appropriately implemented, if no special reference to information communication technologies is included? (the same applies to the other articles). Latvia would like to stress out that Criminal Code of Latvia does not distinguish the environments (offline or online) in which the act can be committed. Currently "stalking" already criminalizes actions in both environments and the inclusion of additional notes could create a constitutional risk that online activities were not criminalized until such amendments were made.

Article 10:

Latvia does not support Article 10 of the Directive. Incitement can happen in all kinds of environments, not only in the e-environment. Also, it is not clearly defined what actions member states should criminalize, because the structure of Article 10 provides for criminal liability only for inciting a hate crime, not for committing a hate crime itself. It should be noted that hate crimes are not included in the list of Article 83, paragraph 1 of the TFEU. Also, the approach proposed by the European Commission is too fragmented. Hate crime in general, not just gender-based hate, needs to be addressed within EU as a whole spectrum. The European Commission has a proposal to supplement Article 83 of the TFEU with hate crimes, which shows the desire to provided member states with a unitary criminal law regulation regarding all forms of hate.

Article 12:

Latvia does not support the provision of the approach that, if a criminal offense is committed under the aggravating circumstances referred to in Article 13, the maximum penalty shall be longer, because it does not correspond to the general legal norms and approach contained in the national legal system of Latvia. In accordance with the legal system of Latvia, the sanction of each article of the separate part of the Criminal Code defines the range from the minimum to the maximum amount of the penalty. The judge is the one who, assessing the actual circumstances, mitigating and aggravating circumstances, applies to the person the specific type and measure of punishment - which is provided for in the sanction of the relevant article. The first part of Article 48 of the Criminal Code lists aggravating circumstances that the court can recognize as aggravating liability. According to the findings of Latvian criminal law theory, upon finding aggravating circumstances, the perpetrator of a criminal offense has a reason to impose a harsher punishment, however, this is in the control of the court and the sanction of the article must determine one range of punishment, namely the minimum and maximum punishment.

Article 13:

Latvia also has an objection to subparagraph (a) of Article 13. It is raised in accordance with the basic principles of criminal law existing in the national legal system. In 2013, the Latvian legislator abandoned a criminal law institute such as the repetition of criminal offenses, taking into account that the institute created problems in the application of fair punishment and contradicted the basic norm of the legal system of a democratically legal state. The institution of repetition violated one of the most important basic principles of criminal law - ne bis in idem, as a person was prosecuted for an offense more serious than the one actually committed, and this was based on the commission of another criminal offense. The text of subparagraph (a) is worded in a way that it can be understood that the person has committed a similar offense. To indicate that a person has committed a crime, he or she must have been convicted of it. We point out that according to Latvian legal system, if a person has committed several similar criminal offenses for which a sentence has not yet been imposed, the person will be held criminally liable for each crime separately.

Latvia does not support Article 13 (h) of the Directive. It should be noted that Articles 5 and 6 of the Directive the actions provided for in the article are physical and the mentioned is included as a feature of the composition of the criminal offense. It is not clear how the actions mentioned in Articles 7, 8, 9 and 10 (actions take place in the e-environment) can be carried out using force. Namely, the perpetrator does it without any physical contact with the victim. In Latvia, as an aggravating circumstance is established - Article 48, Paragraph one, Point 15 of the Criminal Code - the criminal offence related to violence or threats of violence, or the criminal offence against morality and sexual inviolability was committed against a person to whom the perpetrator of a criminal offence is related in the first or second degree of kinship, or against the spouse or former spouse, or against a person with whom the perpetrator of a criminal offence is or has been in continuous intimate relationships, or against a person with whom the perpetrator of a criminal offence has a joint (single) household.

Latvia does not support point (n) and (o) of Article 13 of the Directive, as it does not consider that the mentioned should be recognized as a separate aggravating circumstances in the national legal system. The question to be assessed is whether such actions should be considered as aggravating circumstances, which in the national legal system will thus be applicable to all crimes defined in the Criminal Law. Or these actions should be directly attributable to the techniques, types and tactics of committing the specific crimes provided for in the Directive. It should be noted that in accordance with the second part of Article 46 of the Criminal Code, when determining the type of punishment, the nature of the committed criminal offense and the damage caused, as well as the personality of the perpetrator, are taken into account. Therefore, according to the regulation of the Criminal Code, if a criminal offense has been filmed, photographed or otherwise recorded, or causing the victim to take, use drugs or alcohol, the judge, taking into account the special nature of the criminal offense, can apply a harsher punishment.

ROMANIA

Proposal for a Directive on combating violence against women and domestic violence

RO comments

Art. 7 para a) and para b)

RO believes that the phrase "unless the act was justifiable in view of its purpose and other circumstances" is very wide, thus the text is not clear what types of acts can be considered by MS as "justifiable in view of its purpose and other circumstances".

The text must have a certain degree of predictability in order to make its transposition accurate and possible.

In our previous interventions/comments, RO argued that clarifications are needed, in order to define the limits of the scope of the illicit acts from the so-called pamphlets/satires, etc., which do not present real or allegedly real images of a person in intimate situations (in other words, which cannot reasonably create the appearance of veracity).

We thank the SE PRES for the rewording, but we are not convinced that this is the best way to solve it.

Art. 15 point 6

Article 6 deals with the crime of female genital mutilation. As a result of the amendment of recital 16 (in the sense that it is not mandatory to provide in the domestic legislation for an offence as such), in some MS (including Romania) the provision would imply the postponement of the beginning of the running of the limitation period also for offences such as battery or other violence, bodily harm, etc. (respectively, criminal offences of a general nature covering mutilation activities within the meaning of the Directive).

Such an approach would seem excessive because the acts of mutilation envisaged by the proposal for a directive cannot be dissociated from the other ways in which those offences can be committed.

Therefore, perhaps consideration could be given to the possibility that, in the case of Article 6, the proposed measure may be left to the discretion of MS.

SLOVENIA

Article 8

Cyber stalking (Recitals 17–18, 20)

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

Paragraph a) Moved to Article 9 (a) since the acts are harassment rather than stalking.

~~(a) persistently engaging in threatening or intimidating conduct directed at another person, by means of information and communication technologies, which causes that the person fears for own safety or that the person fears for safety of dependants;~~

Paragraph b) The change from "persistently" to "repeatedly" is in line with the Istanbul Convention. Suggestion to limit the scoop, otherwise googling a person repeatedly could be criminalised.

(b) repeatedly placing another person under ~~continuous~~ surveillance, without that person's consent or a legal authorisation to do so, by means of information and communication technologies, to track or monitor that person's movements and activities, when this is likely to violate that person's peace;

Paragraph c) Moved to Article 9 (c) since the acts are harassment rather than stalking.

~~(c) making material containing the personal data of another person, without that person's consent, accessible to a multitude of end-users, by means of information and communication technologies, for the purpose of inciting those end-users to cause physical or significant psychological harm to the person.~~

Article 9

Cyber harassment (Recitals 17–18, 21)

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

Paragraph a) The change from "persistently" to "repeatedly" is in line with the Istanbul Convention.

(a) ~~persistently~~ repeatedly engaging in threatening ~~or intimidating~~ conduct directed at another person, at least when this conduct involves threats to commit criminal offences, by means of information and communication technologies, which is likely to cause~~s~~ ~~that~~ the person to seriously fear~~s~~ for their own safety or ~~that~~ the ~~person fears for~~ safety of dependants;

Paragraph b) Change in line with Article 9 a.

(b) engaging in threatening or insulting conduct, ~~initiating an attack with third parties directed at another person, by making threatening or insulting material accessible~~ visibly to a multitude of end-users, with other persons, by means of information and communication technologies, with the effect of causing significant psychological harm to the attacked person;

(c) making material containing the personal data of another person, without that person's consent, accessible to a multitude of end-users, by means of information and communication technologies, for the purpose of inciting those end-users to cause physical or significant psychological harm to the person.

~~(b) participating with third parties in attacks referred to in point (a).~~

Article 10

Cyber incitement to violence or hatred (Recitals 17–18, 22–23)

Article 10: We propose a new second section in order to align the Article to the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

1. Member States shall ensure that the intentional conduct of inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to ~~sex or~~ gender, by public dissemination ~~to the public~~ of material containing such incitement by means of information and communication technologies is punishable as a criminal offence.

2. For the purpose of paragraph 1, Member States may choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.

Article 11

Incitement, aiding and abetting, and attempt

Article 11: A minor change.

1. Member States shall ensure that inciting and aiding and abetting the commission of any of the criminal offences referred to in Articles 5 to ~~9~~10 are punishable as criminal offences.

2. Member States shall ensure that an attempt to commit any of the criminal offences referred to in Articles 5 and 6 is punishable as a criminal offence.

Article 12

Penalties (Recital 15)

Article 12: A suggestion to align Section 4 with the PIF-Directive, since not all aggravating circumstances are relevant to all offences. We also suggest having the same sanctions for offences under Articles 7–10.

1. Member States shall ensure that the criminal offences referred to in Articles 5 to 11 are punishable by effective, proportionate and dissuasive criminal penalties.

2. Member States shall ensure that the criminal offence referred to in Article 5 is punishable by a maximum penalty of at least 8 years of imprisonment and at least 10 years of imprisonment if the offence was committed under aggravating circumstances referred to in Article 13.

3. Member States shall ensure that an offender of the criminal offence referred to in Article 5, who has previously been convicted of offences of the same nature, mandatorily participates in an intervention programme referred to in Article 38.

4. Member States shall ensure that the criminal offence referred to in Article 6 is punishable by a maximum penalty of at least 5 years of imprisonment ~~and at least 7 years of imprisonment~~ in the most serious cases of Article 6 as defined in their national law ~~if the offence was committed under aggravating circumstances referred to in Article 13.~~

5. Member States shall ensure that the criminal offences referred to in Articles ~~8~~7 ~~and~~ to 10 are punishable by a maximum penalty of at least 1/2 years of imprisonment.

~~6. Member States shall ensure that the criminal offences referred to in Articles 7 and 9 are punishable by a maximum penalty of at least 1 year of imprisonment.~~

Article 13

Aggravating circumstances

Article 13: Member States are invited to indicate if they support one list of aggravating circumstances that covers all offences or if there should be a difference between on the one hand aggravating circumstances that are relevant to Articles 5 and 6 and on the other hand aggravating circumstances that are relevant to Articles 7–10. Only minor changes suggested at this stage.

In so far as the following circumstances do not already form part of the constituent elements of the criminal offences referred to in Articles 5 to 10, Member States shall ensure that they may be regarded as aggravating circumstances in relation to those offences, where relevant:

(a) the offence, or another criminal offence of violence against women or domestic violence, was committed repeatedly;

(b) the offence was committed against a person made vulnerable by particular circumstances, such as a situation of dependence or a state of physical, mental, intellectual or sensory disability~~, or living in institutions~~;

(c) the offence was committed against a child;

(d) the offence was committed in the presence of a child;

(e) the offence was committed by two or more persons acting together;

(f) the offence was preceded or accompanied by extreme levels of violence;

(g) the offence was committed with the use or threat of using a weapon;

(h) the offence was committed with the use of force or threats to use force, or coercion;

(j) the offender has previously been convicted of offences of the same nature;

(i) the offence resulted in ~~the death or suicide of the victim or~~ severe physical or psychological harm for the victim;

(k) the offence was committed against a former or current spouse or partner;

(l) the offence was committed by a member of the family or person cohabiting with the victim;

(m) the offence was committed by abusing a recognised position of trust, authority or influence;

(n) the offence was filmed, photographed or recorded in another form and made accessible by the offender;

(o) the offence was committed by causing the victim to take, use or be affected by drugs, alcohol or other intoxicating substances.

Article 14

Jurisdiction

Article 14: A couple of Member States had concerns regarding Section 4 and we suggest limiting that Section to Articles 5 and 6.

1. Member States shall take the necessary measures to establish their jurisdiction over the criminal offences referred to in Articles 5 to 11 where:

(a) the offence is committed in whole or in part within their territory;

(b) the offence is committed by one of their nationals.

2. A Member State shall inform the Commission where it decides to extend its jurisdiction to criminal offences referred to in Articles 5 to 11 which have been committed outside its territory in any of the following situations:

(a) the offence is committed against one of its nationals or habitual residents in its territory;

(b) the offender is a habitual resident in its territory.

3. Member States shall ensure that their jurisdiction established over the criminal offences referred to in Articles 7 to ~~10~~ 11 includes situations where the offence is committed by means of information and communication technology accessed from their territory, whether or not the provider of intermediary services is based on their territory.

4. In cases referred to in paragraph 1, point (b), each Member State shall ensure that its jurisdiction established over the criminal offences referred to in Articles 5 and 6 is not subject to the condition that the acts are punishable as criminal offences in the country where they were performed.

5. In cases referred to in paragraph 1, point (b), Member States shall ensure that the exercise of their jurisdiction is not subject to the condition that a prosecution can be initiated only following a report made by the victim in the place where the criminal offence was committed, or a denunciation from the State of the place where the criminal offence was committed.

Article 15

Limitation periods

Article 15: We put forward two options with the aim of limiting the scope of application to the most serious cases.

1. Member States shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of ~~concerning~~ criminal offences referred to in Articles 5 to 11 for a sufficient period of time after the commission of those criminal offences.

2. Member States shall take the necessary measures to provide for a limitation period for criminal offences referred to in Article 5 of at least 10/20 years from the time when the offence was committed.

3. Member States shall take the necessary measures to provide for a limitation period for criminal offences referred to in Article 6 of at least 5/10 years from the time when the offence was committed.

~~4. Member States shall take the necessary measures to provide for a limitation period for criminal offences referred to in Articles 7 and 9 of at least 5 years after the criminal offence has ceased or the victim has become aware of it.~~

~~5. Member States shall take the necessary measures to provide for a limitation period for the criminal offences referred to in Articles 8 and 10, of at least 7 years after the criminal offence has ceased or the victim has become aware of it.~~

6. If the victim is a child, the limitation period for offences referred to in articles 5 and 6 shall commence at the earliest once the victim has reached 18 years of age.

or

1. Member States shall take the necessary measures to provide for a limitation period that enables the investigation, prosecution, trial and judicial decision of ~~concerning~~ criminal offences referred to in Articles 5 to 11 for a sufficient period of time after the commission of those criminal offences, in order for those criminal offences to be tackled effectively. The limitation period should be commensurate with the gravity of the offence concerned.

~~2. Member States shall take the necessary measures to provide for a limitation period for criminal offences referred to in Article 5 of at least 20 years from the time when the offence was committed.~~

~~3. Member States shall take the necessary measures to provide for a limitation period for criminal offences referred to in Article 6 of at least 10 years from the time when the offence was committed.~~

~~4. Member States shall take the necessary measures to provide for a limitation period for criminal offences referred to in Articles 7 and 9 of at least 5 years after the criminal offence has ceased or the victim has become aware of it.~~

~~5. Member States shall take the necessary measures to provide for a limitation period for the criminal offences referred to in Articles 8 and 10, of at least 7 years after the criminal offence has ceased or the victim has become aware of it.~~

6. If the victim is a child, the limitation period for offences referred to in articles 5 and 6 shall commence at the earliest once the victim has reached 18 years of age.