

**OPEN LETTER**  
**From reputed professors, Jurists, Lawyers in the EU**  
**on the Legal basis of the Directive on combating violence against women and domestic**  
**violence and the article on the offense of rape<sup>1</sup>**

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**RE: Harmonisation of the crime of rape based on lack of freely given consent that should be part of the new EU Directive on combating violence against women and domestic violence**

1. This Open Letter is signed by the signatories of this article, professors, lawyers, and legal experts on European Union (EU) law, constitutional law and penal law across the EU, and is addressed to the co-legislators involved in the interinstitutional negotiations on the Proposal for a Directive on combating violence against women and domestic violence (the Proposed Directive).<sup>2</sup> It provides legal arguments in support of the Proposed Directive, in particular with respect to the criminalisation of specific forms of violence against women such as rape. The arguments laid down in this Open Letter are in response to the Opinion of the Legal Service of the Council of the EU (the Legal Service Opinion).<sup>3</sup>
2. At the outset, we recall that the EU aims at promoting gender equality, as set out by Articles 2 and 3(3) of the Treaty on the EU<sup>4</sup> (TEU), Articles 8 and 10 of the Treaty on the Functioning of the EU<sup>5</sup> (TFEU) (together, the Treaties) and Article 21 of the EU Charter of Fundamental Rights.<sup>6</sup> Furthermore, Declaration No. 19 on Article 8 of the TFEU establishes that combatting “*all kinds of domestic violence*” is part of the EU’s general efforts to eliminate inequalities between women and men and Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims. The Proposed Directive is the first piece of legislation in the EU that will comprehensively address violence against women and domestic violence. It aims to ensure a high level of security and the full enjoyment of fundamental rights within the EU, including the right to equal treatment and non-discrimination between women and men.

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<sup>1</sup> \* Letter initiated by the European Women's Lobby (EWL).

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<sup>2</sup> Proposal for a Directive of the European Parliament and of the Council of 8 March 2022 on combating violence against women and domestic violence, COM(2022)105, 2022/0066(COD), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0105>.

<sup>3</sup> Opinion of the Legal Service of the Council of the European Union of 31 October 2022 (14277/22), available at: <https://data.consilium.europa.eu/doc/document/ST-14277-2022-INIT/en/pdf>.

<sup>4</sup> Treaty on the European Union (OJ C 202, 7.6.2016).

<sup>5</sup> Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016).

<sup>6</sup> Charter of Fundamental Rights of the European Union (OJ C 202, 7.6.2016).

3. We recall that the EU has acceded to the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), which entered into force on 1 October 2023.<sup>7</sup> This accession to the Istanbul Convention reaffirms the EU's commitment to combat all forms of violence against women and Member States expressly recognised that *“violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men, the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”*<sup>8</sup>
4. We consider that the legal bases from the Treaties used in the Proposed Directive are appropriate for its purpose. The Proposed Directive introduces minimum standards on the definition of criminal offences that disproportionately affect women and that are not sufficiently addressed at national level.<sup>9</sup> This falls within the EU's competence as per the areas of eurocrime set out in Article 83(1) TFEU relating to trafficking in human beings and sexual exploitation of women and children and computer crimes. Article 83(1) TFEU also provides the legal basis concerning the introduction of minimum rules on 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.
5. We regret the position of the Council of the EU, in which it proposes to delete the harmonised definition of the crime of rape, based on the lack of freely given consent.<sup>10</sup> We support the Declaration made by Belgium, Italy, Greece and Luxembourg, also supported by Ireland and Spain, regretting the lack of political ambition with regard to the criminalisation of the offence of rape.<sup>11</sup> As laid down in this Open Letter, deleting the article proposing a harmonised approach to rape (Article 5 of the Proposed Directive) defeats the purpose of Articles 82 and 83 TFEU and is not consistent with other European legal instruments.

### **1) The notion of rape is a form of sexual exploitation pursuant to Article 83(2) TFEU**

<sup>7</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on 11 May 2011, Council of Europe Treaty Series - No. 210, available at: <https://rm.coe.int/168008482e>.

<sup>8</sup> Id., para. 14.

<sup>9</sup> Commission Staff Working document: Subsidiarity Grid Accompanying the document Proposal for a Directive on combating violence against women and domestic violence of 8 March, 2022, SWD(2022) 60 final, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2022:0060:FIN:EN:PDF>;

Commission Staff Working Document: Impact Assessment Accompanying the document Proposal for a Directive on combating violence against women and domestic violence of 8 March 2022, SWD(2022) 62 final, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2022:0062:FIN:EN:PDF>;

Commission Staff Working Document: Follow-up to the second opinion of the Regulatory Scrutiny Board and additional information the document Proposal for a Directive on combating violence against women and domestic violence of 8 March 2022 (SWD) 61 final, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2022:0061:FIN:EN:PDF>; and

Commission's Directorate-General for Justice and Consumers, Sosa, L., De Vido, S., Criminalisation of gender-based violence against women in European states, including ICT-facilitated violence – A special report, Publications Office, 2021, available at <https://data.europa.eu/doi/10.2838/960650>

<sup>10</sup> General Approach of the Council of the European Union of 15 June 2023, 10717/23, available at: <https://data.consilium.europa.eu/doc/document/ST-10717-2023-INIT/en/pdf>

<sup>11</sup> Joint statement by Belgium, Greece, Italy and Luxembourg for the COREPER and Council minutes on the general approach on the proposal for a directive of the European parliament and the Council on combating violence against women and domestic violence of 31 May 2023, 9305/23 ADD 1, available at <https://data.consilium.europa.eu/doc/document/ST-9305-2023-ADD-1/en/pdf#:~:text=Belgium%2C%20Greece%2C%20Italy%20and%20Luxembourg%20strongly%20support%20the%20European%20Commission%27s%20must%20be%20addressed%20in%20unison>.

6. The criminal offence of rape constitutes a serious crime and one of the most severe attacks on a person's physical, psychological and sexual integrity and autonomy. In 2008, the United Nations Security Council adopted resolution 1820, which noted that "*rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide*". From a gender perspective, rape is a crime that is at the very core of the violation of women's fundamental rights, systematically committed against women across Europe.
7. The removal of rape from Article 5 of the Proposed Directive is based on an excessively restrictive interpretation of the notion of sexual exploitation under EU law. The eurocrime of sexual exploitation of women and children has already been used to criminalise sexual abuse of children in Directive 2011/93/EU on combatting the sexual abuse and sexual exploitation of children and child pornography (the Child Sexual Abuse and Sexual Exploitation Directive).<sup>12</sup> The expression "*sexual exploitation of women and children*" can be interpreted as both exploitation and abuse, in light of the existing legal instruments in force. Rape is exploitative *per se*, not only when the victim is a minor, and not under specific cases. A rapist exploits the position of vulnerability of a person, turns the person into a sexual object, commits an act characterised by a differential power imbalance and uses the situation to one's own advantage. The subordinated position given to women in society exposes women and girls to a higher risk of gender-based violence and sexual violence - a vulnerability exploited by abusers.
8. The European Commission has developed a thorough and sound legal analysis to assess the legal basis of the Proposed Directive, and an extensive feasibility and subsidiarity analysis. As per this analysis, rape is a crime recognised in all the EU Member States; however there are significant differences in terms of protection of victims across Member States. According to the analysis of the European Commission,<sup>13</sup> there are at least 13 Member States that do not include "*lack of consent*" as the main constituent element of the crime. The latest analysis<sup>14</sup> of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) on the Istanbul Convention identified important gaps in the implementation of the standards in Article 36 of the Istanbul Convention, given the different approaches to the criminalisation of rape.<sup>15</sup> Specifically, the definitions based on the use of force as the main constituent element of the crime do not offer adequate protection to victims: the requirement of higher thresholds of evidentiary standards of physical resistance and a shifting of the focus onto the victim's behaviour rather than on the accused's actions often results in secondary victimisation. A harmonised approach across the EU is fundamental to address this serious crime and ensure the same level of protection to victims: the lack of consent must be the constituent element of the crime of rape. As per the GREVIO analysis, the approach based on "*affirmative consent*" "*provide(s) clearer rules to parties at risk of perpetrating or being victims of sexual violence, as well as providing clarity to those charged with investigating and prosecuting such cases*". This is in line with the European Commission and, even more so, with the European Parliament proposals that included and elaborated on the exact definition in the Istanbul Convention.

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<sup>12</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (OJ L 335, 17.12.2011, p. 1).

<sup>13</sup> European Commission Staff Working Document, SWD(2022) 61 final (n 8).

<sup>14</sup> 4th General Report on GREVIO's Activities covering the period from January to December 2022, available at:

<https://rm.coe.int/4th-general-report-on-grevio-s-activities/1680aca199>.

<sup>15</sup> *Id.*

**2) Article 5 of the Proposed Directive does not create a precedent for an excessively extensive interpretation of Article 83(2)**

9. The inclusion of Article 5 in the Proposed Directive does not create a precedent for an excessively extensive interpretation of Article 83(2).
10. With regard to the Child Sexual Abuse and Sexual Exploitation Directive, the Legal Service Opinion states that “*the legal basis of ‘sexual exploitation of children’ has been interpreted somewhat extensively and used in order to establish minimum rules concerning an offence where the exploitative element is less present but is rather focused on the use of violence as a form of sexual abuse.*”<sup>16</sup> Indeed, Art. 3(5)(iii) of this Directive concerns sexual activities with a child “*where use is made of coercion, force or threats.*” The Legal Service Opinion notes that “[a]dmittedly, such a provision is based on an extensive interpretation of the notion of ‘sexual exploitation’ as comprising crimes centred on sexual violence, and thus capable of including rape.”<sup>17</sup> The Legal Service Opinion, however, argues that such a provision thereof may be linked to a presumption that children are vulnerable, which would not be applicable to adults.<sup>18</sup> This is manifestly doubtful, as the Istanbul Convention recitals state that the Member States “[recognise] that women and girls are exposed to a higher risk of gender-based violence than men.”<sup>19</sup>
11. Thus, there is a precedent applicable to the sexual exploitation of children, which can clearly be applied *mutatis mutandis* to the sexual exploitation of women as involving a situation of violence involving rape.

**3) Article 5 does not infringe the principle of non-discrimination**

12. The principle of non-discrimination requires equal treatment of situations that are considered as objectively comparable.<sup>20</sup> However, it is well established in the EU legal order and recalled by the Proposed Directive that there “*is a persisting manifestation of structural discrimination against women, resulting from historically unequal power relations between women and men. It is a form of gender-based violence, which is inflicted primarily on women and girls, by men*”. Violence against women is gender-based violence directed against a woman because she is a woman or that affects women disproportionately. Such violence is rooted in gender inequality being a manifestation of structural discrimination against women. Further, the Preamble of the Istanbul Convention recognizes that “*women and girls are exposed to a higher risk of gender-based violence than men.*” Men and women are not in situations that can be considered objectively comparable.
13. The EU has systematically put in place legislation based on the principle of positive action that include measures specifically designed to protect women in the recognition that they are objectively not in a comparable position as men and have traditionally been discriminated against, with the aim of creating a more egalitarian society. For example, the so-called “Women on

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<sup>16</sup> Para. 45 of the Legal Service Opinion (n 2).

<sup>17</sup> Id. para. 39.

<sup>18</sup> Id., para. 40.

<sup>19</sup> Para. 14 of the Preamble of the Istanbul Convention (n 6).

<sup>20</sup> See, for instance, Articles 10 and 19 TFEU, and Article 21 of the Charter of Fundamental Rights of the EU. See also judgement of 16 December 2008, *Arcelor Atlantique et Lorraine a.o.*, C-127/07, EU:C:2008:728, para. 23 and the case-law cited.

boards” Directive<sup>21</sup> adopted in November 2022 and “Work-life balance” Directive<sup>22</sup> adopted in June 2019 specifically address an issue of underrepresentation of women respectively on the boards of big companies and on a labour market in the EU. This recognition of comparably different situations is precisely what underpins the formulation of the eurocrime “sexual exploitation of women and children”, in recognition of women’s particular vulnerability. This is the very aim of the Istanbul Convention, which the EU ratified in full compliance with the Treaties and guarantees that minimum criminal legal standards apply to counter violence against women and domestic violence across the EU.

#### **4) Article 5 does not enhance the risk of litigation on key provisions of the Proposed Directive**

14. For the reasons mentioned above, it seems unlikely that, in case of litigation, there would be a risk of annulment of Article 5 of the Proposed Directive. Article 5 of the Proposed Directive relies on an appropriate legal basis for its purpose (see para. 1 and 2) and complies with the principle of non-discrimination (see para. 3).
15. In any event, should Article 5 of the Proposed Directive be found to be based on an extensive interpretation of Article 83(1) TFEU, and should Article 5 of the Proposed Directive be annulled, this would not jeopardise the validity of the other provisions of the Proposed Directive. Partial annulment of an Union act is possible if the elements to be annulled can be distinguished from the remainder of the act.<sup>23</sup>

#### **Conclusion**

16. In sum, we consider that there are no legal justifications that impede considering rape offences and sexual violence offences as forms of sexual exploitation. Nothing prevents the EU from proposing harmonised definitions of a series of offences included in the Istanbul Convention (ratified by the EU on 28 June 2023 **under the concept of “sexual exploitation of women” in Article 83(1) TFEU**). Therefore, the offences proposed by the European Commission (rape and female genital mutilation); and the additional offences proposed by the European Parliament (rape and sexual assault, female and intersex genital mutilation, sexual harassment, forced marriage and forced sterilisation) can be considered under this umbrella.
17. Taking into account all the above mentioned arguments, we call on the EU decision makers and Member States in the Council to include in the Proposed Directive the definition of the crime of rape based on the lack of consent, together with this interpretation of sexual exploitation, during the trilogue negotiations. It is not only legally accurate, but is also fully supported by European lawyers and academics, together with the broader civil society in Europe (including women’s organisations).

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<sup>21</sup> Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures (Text with EEA relevance), available at: <https://eur-lex.europa.eu/eli/dir/2022/2381/oj>.

<sup>22</sup> Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019L1158>.

<sup>23</sup> European Court of Justice (ECJ), Cases 17/74 *Transocean Marine Paint Association v Commission* [1974] E.C.R. 1063, para. 21; ECJ Joined Cases C-68-94 and C-30/95 *France and Others v Commission* [1998] E.C.R. I-1375, paras. 251-259.

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