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NOTE

From:	Presidency
To:	Delegations
Subject:	Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence - Proposal from the Presidency for a redraft of Articles 1-15

After completing the first reading of the proposal by the COPEN Working Party under the French and Czech Presidencies, the Swedish Presidency intends to start a new reading, which will focus during the first two meetings (13th and 31st of January 2023) on Chapters 1 and 2.

On 13th of January, we will begin the discussions on the basis of an amended version of the text of Chapter 1, prepared following the extensive discussions held during the first reading and also taking into account the input provided by delegations thereafter.

Moving on to Chapter 2 we focus the discussion on the legal basis for Article 5 and ask Member States to indicate their position on the basis of the question set out below. We will then continue and examine Articles 6-10 and discuss those provisions both with regard to their legal basis and to the substance. If time allows, we will also discuss Articles 11-15, being aware that some Articles may need further work, having regard in particular the progress achieved in relation to the offences.

Delegations' attention is drawn to the fact that, at this stage, only the provisions will be the subject of consideration. The recitals will be considered at the later stage, as will this allow to take into account the progress made on the operative part.

To facilitate Member States' preparation for the COPEN meetings in January, the relevant provisions are accompanied by brief description of the proposed improvements/changes. At the COPEN meetings we will of course explain these proposals in more detail.

Suggested changes are highlighted with strikethrough and underline, the explanations are included in boxes in relation to the relevant provisions.

CHAPTER 1

GENERAL PROVISIONS

Article 1

Subject matter (Recitals 1–3, 9–10)

This Directive lays down rules to prevent and combat violence against women and domestic violence. It establishes minimum rules concerning:

(a) the definition of criminal offences and penalties in the areas of sexual exploitation [of women and children] and computer crime;

Paragraph b) Some Member States had concerns regarding “before, during or after” and we suggest changing that wording in line with Article 8 of the Victims Directive by adding “and for an appropriate time”.

(b) the rights of victims of all forms of violence against women or domestic violence before, during ~~or~~ and for an appropriate time after criminal proceedings;

(c) victims’ protection and victims’ support.

~~Article 2~~

~~Victims at an increased risk of violence and specific risks~~ (Recitals 11–12)

Article 2: Considering that some Member States raised concerns on how to implement this Article the Presidency sees two possible solutions, on the one hand we could clarify what the Member States should do to transpose this provision, on the other hand we could move this wording to a recital.

~~1. When implementing the measures under this Directive, Member States shall take into consideration the increased risk of violence faced by victims experiencing discrimination based on a combination of sex and other grounds so as to cater to their enhanced protection and support needs, as set out in Article 18(4), Article 27(5) and Article 37(7).~~

~~2. Member States shall ensure that, in the application of this Directive, particular attention is paid to the risk of intimidation, retaliation, secondary and repeat victimisation and to the need to protect the dignity and physical integrity of victims.~~

~~Article 3~~

Scope (Recital 4)

Article 3: This Article relates to the provisions on the rights of victims, not the scope of the Directive in general. A solution could be to include this in the definitions in Article 4.

~~This Directive shall apply to the following criminal offences:~~

~~(a) criminal offences referred to in Chapter 2;~~

~~(b) acts of violence against women or domestic violence as criminalised under other instruments of Union law;~~

~~(c) any other acts of violence against women or domestic violence as criminalised under national law.~~

Article 4

Definitions (Recitals 4–8, 17–18)

For the purposes of this Directive, the following definitions shall apply:

Paragraph a) We suggest explaining both violence against women and the application in relation to the offences in this Directive, in Union law and in national law in this paragraph. This would be elaborated in a recital as well. It's important to make clear that Chapters 3-6 apply irrespective of the gender of the victim.

(a) “violence against women” means all forms of gender-based-violence, coercion or arbitrary deprivation of liberty, or threats thereof, that is 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, mental or emotional harm or economic loss [irrespective of the gender of the victim] which constitutes a criminal offence in national or Union law physical, sexual, psychological or economic harm or suffering, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;

Paragraph b) Proposed changes aim to better align the wording with the Victims' Rights Directive. See for example Article 2(1)(a) of the Victims Rights' Directive and Recital 18 on "violence in close relationships". It builds on this definition by including "irrespective of biological or legal family ties".

(b) "domestic violence" means all acts of violence, that result in, or are likely to result in, harm, including physical, mental or emotional harm or economic loss physical, sexual, psychological or economic harm or suffering, committed by a person who is a current or former spouse, or partner or other family member of the victim ~~that occur within the family or domestic unit,~~ irrespective of biological or legal family ties, ~~or between former or current spouses or partners,~~ whether or not the offender shares or has shared a residence with the victim, which constitutes a criminal offence in national or Union law;

Paragraph bb) We propose a new definition to make it clear that this Directive is applicable to acts of violence criminalised in Chapter 2, acts of violence against women or domestic violence as criminalised under other instruments of Union law or any other acts of violence against women or domestic violence as criminalised under national law.

(ba) "violence which constitutes a criminal offense under national or Union law" means acts of violence criminalised in Chapter 2, acts of violence against women or domestic violence as criminalised under other instruments of Union law or any other acts of violence against women or domestic violence as criminalised under national law;

Paragraph c) Minor changes.

(c) “victim” means any person, regardless of ~~sex or~~ gender, unless specified otherwise, who has suffered harm, which was directly caused by acts of violence ~~covered under this Directive against women or domestic violence~~, including child witnesses of ~~such~~ domestic violence;

Paragraph d) The definition seems too wide. As the wording is now, the article could cover all sorts of offences where computers are being used. We therefore propose changes.

(d) “cyber violence” means any act of violence covered in Articles 7 to 10 ~~by this Directive that is committed, assisted or aggravated in part or fully by the use of information and communication technologies~~;

Paragraph da) Some Member States asked for more clarity on “multitude of end-users”. We suggest adding a definition and to elaborate on this in a recital.

(da) “multitude of end-users” means a significant number of end-users of the systems in question;

Paragraph e) Member States raised concerns on how to make sure the text is in line with fast development of technology. We suggest deleting this definition: this is in line with Directive on combating the sexual abuse of children that uses the same wording without a definition.

~~(e) “information and communication technologies” means all technological tools and resources used to digitally store, create, share or exchange information, including smart phones, computers, social networking and other media applications and services;~~

Paragraph f) Minor updates.

(f) “providers of intermediary services” means providers of the services as defined in Article 32 point (gf) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) ~~Regulation (EU) YYYY/XXX of the European Parliament and of the Council 51 [Regulation on a Single Market for Digital Services];~~

Paragraph g) Suggestion to use “acts” and relate to criminal offences to better link the Article with criminal law, in order to stay within the legal basis.

(g) “sexual harassment at work” means any ~~form~~ acts of unwanted verbal, non-verbal or physical conduct of a sexual nature, where it occurs in the course of, linked with, or arising in matters of employment, occupation and self-employment, with the purpose or effect of violating the dignity of the victim, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, which constitutes a criminal offense under national law;

(h) “child” means any person below the age of 18 years;

Paragraph i) The definition relates to Article 45. However, this definition is already included in the relevant Directive (2011/93, Article 2 b), which we are modifying with Article 45.

~~(i) “age of sexual consent” means the age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child;~~

(j) “dependant” means a child of the victim or any person, other than the offender or suspect, living in the same household as the victim, for whom the victim is providing care and support.

CHAPTER 2

OFFENCES CONCERNING SEXUAL EXPLOITATION OF WOMEN AND CHILDREN AND COMPUTER CRIME

Article 5

Rape (Recitals 13–15)

With respect to this provision, following the discussions in November on the basis of the opinion of the Council Legal Service, it will be important that all the Member States express their position, in order to guide the work on the proposal. Member States are invited to indicate whether the Article should be kept as is, whether it should be changed in any way (for instance, by replacing “women” with “persons”) or whether it should be deleted at this stage, possibly pending the extension of the list of euro-crimes.

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

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

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

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

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

Article 6

Female genital mutilation (Recital 16)

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

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

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

Articles 7–10: Given the preliminary comments expressed by some of the Member States at the meeting in November we would like to continue the discussion on the legal basis in relation to cybercrimes.

Article 7

Non-consensual sharing of intimate or manipulated material (Recitals 17–19)

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

Paragraph a) Suggestions aim to make it a bit clearer that this Article is intended to cover both sexual activities and naked bodies. Moreover, a suggested addition in the end, to exclude legitimate forms of expression, such as satirical or artistic material.

(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;

Paragraph b) Wording changed to “altering” in order to better cover “deepfakes”. Moreover, a suggested addition in the end, to exclude legitimate forms of expression, such as satirical or artistic material.

(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;

(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 (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 causes ~~that~~ the person to seriously fears 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

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