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Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence

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Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence

A special report

Authors

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Coordinated by Alexandra Timmer and Birte Böök for the European network of legal experts in gender equality and non-discrimination.

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Executive summary

Introduction

Gender-based violence against women (GBVAW), including ICT-facilitated violence, is a pressing issue at the international and European levels. The COVID-19 pandemic has exacerbated existing patterns of discrimination against women and has caused an increase in several forms of violence. At the international level, VAW is recognised as a violation of human rights and as a form of gender-based discrimination against women. VAW is the result of the unequal balance of power between women and men, and is both a cause and a consequence of gender inequality. States have legal obligations to adopt preventive, protective and repressive measures to counter forms of VAW, based on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

At the European level, the Council of Europe Convention on Violence against Women and Domestic Violence (Istanbul Convention), adopted in 2011, is the legally binding instrument that comprehensively and holistically addresses gender-based violence against women and domestic violence. Article 4(1) of the Istanbul Convention states that States Parties 'shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.' The European Union signed the Convention in 2017, and at the time of writing, all EU Member States have signed it, while 21 have ratified it.

The EU has also issued several calls to Member States concerning violence against women. For example, the Resolution of the European Parliament of 28 November 2019 called on the Member States to ensure proper implementation and enforcement of the Convention, and to allocate adequate financial and human resources to preventing and combating violence against women and gender-based violence, as well as to the protection of victims; and called on the Commission to submit a legal act on the prevention and suppression of all forms of gender-based violence, including violence against women and girls. With regard to the protection of victims of crime, Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, (the Victims' Rights Directive) is also particularly relevant, since it expresses the EU's commitment to the protection of victims of crime, including victims of gender-based violence, and to the establishment of minimum standards in that regard.

Scope and method of this report

The aim of this thematic report is to carry out a comparative analysis of the criminal law provisions that are applied to gender-based violence against women, including domestic violence and online violence, at national level in Europe. It explores whether GBVAW is defined as a form of discrimination or a violation of the principle of equality. It identifies and defines ICT-facilitated violence and takes as examples two forms: non-consensual dissemination of intimate/private/sexual images, and hate speech based on gender. It also examines general aspects of enforcement and sanctioning that are particularly salient in the context of combating gender-based violence against women and domestic violence.

The report examines 31 jurisdictions: the member states of the European Economic Area (EEA), that is, the 27 European Union Member States (EU-27) in addition to Iceland, Liechtenstein and Norway, and the United Kingdom. Unless otherwise indicated, the report refers to the all jurisdictions under study as a totality. The report draws from the replies of 31 national experts on gender equality of the European network of legal experts in gender equality and non-discrimination (EELN) to a detailed

questionnaire containing 12 sets of thematic questions. That questionnaire is annexed to this report. The country reports provided information on existing legislation, criminal definitions used, prosecution and sanctioning, case law, limitations, and emerging debates. This information was supplemented with information from the baseline reports of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) on those EU Member States that have ratified the Istanbul Convention and have been already evaluated, and with information gathered from previous thematic reports by the EELN, EU agencies and specific mapping studies.

A brief description of the main general findings of each chapter of the report is outlined below. The details on specific countries are discussed in the main text of the report.

Chapter 1 Definitions of gender-based violence against women

Most of the states under review have not incorporated any definition of violence specifically focusing on women into their domestic jurisdictions. However, several of them have transposed the definition of 'gender-based violence' (GBV) from the Victims' Rights Directive, either in law or policy. This is mostly done in gender-neutral terms, with only a minority of states recognising gender-based violence against women (GBVAW) as a specific type of GBV or recognising the disproportionate impact of certain forms of violence on women. Some States Parties to the Istanbul Convention have adopted or refer to the Convention's definitions.

Although most states have transposed EU directives on gender equality law and have ratified the Istanbul Convention, gender-based violence against women is seldom recognised as a form of discrimination and the result of gender inequality, or else the recognition is indirect and merely formal. Only a few states have explicitly recognised the connection between violence and discrimination, and that is mostly in policies rather than laws. Most states have not recognised any form of intersectional discrimination in relation to violence against women. Only five states implicitly refer to the intersection of factors in some situations or have addressed the special vulnerability of certain groups of women, particularly in relation to asylum law.

This report endorses the technical and legal concept of **gender-based ICT-facilitated violence against women** to capture the multiple facets of this form of violence. Only one state has a specific definition of online violence against women, and the rest have either adopted specific legislation that addresses certain forms of ICT-facilitated violence or amended existing law on offline violence to include the online dimension as an aggravating circumstance. The forms of violence committed online that qualify as ICT-facilitated violence against women can be either specific behaviour that generally takes place online and that disproportionately affects women and girls (such as non-consensual dissemination of intimate/private/sexual images), or behaviour that commonly takes place offline (and has been defined in that sense in national legislation) but which, especially in recent years, has developed an online dimension (e.g. harassment and stalking).

Chapter 2 Domestic violence

Member States have adopted diverse approaches to the regulation of domestic violence, ranging from the adoption of specific offences, to relying on general offences in combination with some form of aggravation that acknowledges the importance and severity of domestic violence, or adopting a combination of both. Most countries, however, have **gender-neutral definitions** of domestic violence with no acknowledgment that domestic violence affects women disproportionately, which appears to impact on the number of prosecutions and final sentences imposed.

Another aspect found in the majority of national definitions of domestic violence is the requirement of the **repetition or regularity of violent acts** for them to be considered to fall under the ambit of domestic violence. This can reinforce secondary victimisation and pose significant challenges for prosecution as well. The report reveals that the systematic nature of the violence is addressed more effectively in systems where each instance of a repeated form of violent behaviour can be punished in combination with the criminalisation of domestic violence, rather than subsidiarily.

Psychological violence is criminalised in different ways in the Member States, sometimes as a specific element of the crime of domestic violence, sometimes through other offences such as insults, threats or coercion, and sometimes as an aggravating factor of other offences. One challenge that was highlighted in relation to psychological violence is the fact that some states have opted to focus on the harmful results, which increases the risk of secondary victimisation and entails a more difficult probative process. The explicit inclusion of **economic violence** as an element of domestic violence is still scarce and instead, property offences are often applied, leading to a more limited view of this type of violence than envisaged in the Istanbul Convention. Moreover, **sexual violence within intimate relationships** is still too often not recognised as a form of domestic violence, and therefore also ignored as an offence. Finally, another major shortcoming is the fact that in most jurisdictions, **child witnesses** of domestic violence are not considered direct victims. While in some states, this counts as an aggravating factor, a further issue arises concerning parental rights and protection measures, with domestic violence often not being considered as precluding the parental rights of the abusive parent.

In relation to the **personal scope** of domestic violence offences, the personal connection between perpetrators and victims is highlighted in most jurisdictions, regardless of whether a specific offence or a general offence is applied. In some cases, cohabitation is a requirement, excluding former partners or partners who do not cohabit. Other definitions are gender specific, which allows for a broader understanding of intimate relationships in the sense that cohabitation is not required, but in some cases excludes same-sex couples.

Chapter 3 Sexual violence, including rape

The definitions used to criminalise rape vary across the states under review, with few states focusing on the lack of **sexual consent**, as recommended by human rights norms and the Istanbul Convention, and some relying on the element of force or threats. In practice, across the different jurisdictions, this results in very unequal positioning of victims in terms of their access to justice and protection from violence. Nevertheless, over the last decade, there seems to be a positive trend of states amending their criminal laws to introduce consent-based definitions, with 11 states having adopted purely consent-based definitions to date. In all states, sexual consent is deemed to be absent where the victim is either helpless or cannot consent due to personal circumstances or being coerced.

Definitions of sexual violence and rape are consistently **gender neutral**, in that both males and females can be victims, except for Slovakia, where only women can be victims of rape. In three states, only males can be perpetrators of rape, as the definition is connected to penetration with a penis. In some jurisdictions, same-sex rape and sexual offences are explicitly recognised. Across all jurisdictions, the distinction between rape and other sexual offences relies on different factors, but is largely based on whether or not there is penetration.

The **minimum age of sexual consent** varies slightly between states and ranges from 15 to 18, with most states setting the age of consent at 16.

In terms of **prosecution** of these offences, while the majority of states have established *ex officio* prosecution for the crimes, only a minority have any dedicated protocol guidelines. There seem to be

great inconsistencies in national case law concerning the interpretation of certain acts as consensual or non-consensual. Overall, the national experts reported very low conviction rates for rape cases.

Chapter 4 Sexual harassment and harassment related to sex

Sexual harassment and harassment related to sex are generally regulated at the national level as a response to the EU directives on gender equality. However, EU legislation has not proven sufficiently effective to combat these phenomena in practice. In current EU law, the concept continues to be mainly limited to the field of work, along with the provision of and access to goods and services. The challenge is to **expand the concept beyond the working environment**, in line with the Istanbul Convention. In most countries, the scope of the prohibition on sex-based harassment and sexual harassment is already wider than in EU law, and in some of those countries, harassment and sexual harassment are prohibited in all spheres of life. This seems to indicate that states consider the current EU legal framework as insufficient to fully address sexual harassment and harassment based on sex.

Prohibitions of sexual harassment and harassment based on sex are dispersed throughout different areas of law. Ten countries have criminal provisions on sexual harassment in all spheres, and not limited to the working or related environment; 5 countries have criminal provisions regarding sexual harassment in the working environment; 7 countries have general criminal provisions on harassment; 20 countries have adopted a specific law on gender equality/equal treatment; 9 countries have adopted a law on anti-discrimination; 11 countries have specific provisions in labour codes or acts, while 8 countries have provisions in other legislation. Cyber harassment is expressly addressed by four countries, whereas a new trend regarding laws on sexism and street harassment can be seen in five countries. The experts have noted that legal fragmentation hinders the effectiveness of these laws.

Chapter 5 Female genital mutilation, and other non-consensual forms of genital interventions

Eighteen states have introduced a specific criminal law to address female genital mutilation (FGM). However, apart from in two states, there is no legislation in place prohibiting genital interventions on intersex children, even when these are therapeutically unnecessary and involuntary. Offences dealing with bodily injury, mutilation, and crimes against health apply to the practice of FGM in all states under review and may be a basis for criminal prosecution. In theory, this could also apply to other forms of non-consensual genital interventions, but as victims are rarely informed of these interventions because their medical histories do not provide the information, reporting such violence is often not possible in practice.

Specific definitions of FGM either refer to broad actions such as 'any form of mutilation' or focus on specific types of practice. They refer to genitalia more broadly or specific parts of genitalia. At least half of the specific offences refer explicitly to women and girls, while some remain silent on gender. Only one state has explicitly acknowledged the possibility of disconnecting the genitalia from gender identity, recognising that some persons could be subjected to the practice without self-identifying as a woman. Consent is not relevant in most states, while in several states, incitement, coercion, and even 'convincing' someone to undergo the practice is considered an offence.

In most states, FGM carries *ex officio* prosecution, however, specialised prosecutorial guidelines are present in only one state. The extraterritoriality principle applies in most states without the requirement of double criminality. Regardless of the existence of specific offences, *ex officio* prosecution and extraterritoriality, there is scarce jurisprudence on the issue, except for in asylum cases. This suggests that the criminalisation of FGM is not truly enforced at the domestic level, but is invoked to grant or deny refugee status. Moreover, this seems to indicate a gap between the risk and prevalence of FGM

as established in studies by the European Institute for Gender Equality (EIGE), and the numbers of prosecutions and sentences.

Chapter 6 Forced marriage

Forced marriages are criminalised in the great majority of countries, mainly in recent times, and mainly in response to the requirements of the Istanbul Convention. In particular, almost all countries have incorporated the definition of the Istanbul Convention, which encompasses both the act of forcing an adult or a child to enter into a marriage and that of luring an adult or a child to the territory of a Party or State other than the one of residence with the purpose of forcing this adult or child to enter into a marriage. The age at which a person might enter into marriage is generally 18, with some exceptions approved in court. Child marriages are not *per se* generally criminalised, except in Sweden, but the commission of the crime of forced marriage against a minor is considered as an aggravating circumstance in some states.

The crime of forced marriage is commonly described in national legislation in a gender-neutral way and it is not considered a form of violence against women. Twelve countries went beyond the idea of marriage, to include civil unions and extrajudicial marriages. In the latter case, the concept combines the prohibition of forced marriages with the prohibition of justifications based on honour. Countries commonly envisage civil consequences for forced marriages and/or underage marriages. Very few cases of forced marriage have been examined in court. This suggests that cases of forced marriages are rarely reported to the authorities. Even though the majority of laws are very recent, the low number of cases suggests that criminalisation is not enough.

Chapter 7 Stalking

Stalking has been specifically criminalised by the great majority of countries under analysis (27), and in two others a debate on criminalisation is ongoing. The increasing number of states criminalising the behaviour can be traced back to the ratification of, or the debate on ratification of, the Istanbul Convention, confirming the results of previous studies. The number of reported cases of stalking dramatically increased after criminalisation, according to some national experts.

Definitions of stalking are gender neutral across the reviewed states. In terms of elements of the crime, the repetition or the systematic nature of the actions has proved to be fundamental, and jurisprudence has played a pivotal role in interpreting this element. Some national provisions refer to the commission of the behaviour over a long period, while one mentions 'at least two occasions,' whereas courts have considered that a series of behaviour in a short period of time is sufficient to demonstrate the character of repetition. The laws of more than half of the reviewed states provide a list (exhaustive or non-exhaustive) of behaviours that can fall under the crime of stalking. The types of behaviour mentioned in the lists differ considerably.

On ICT-facilitated stalking, some general trends towards the recognition of the relevance of the online dimension of stalking can be observed: in the formulation of the crime; in the list of behaviours that could amount to stalking; as an aggravating circumstance; in domestic jurisprudence; in guidelines; as a current development. More than an explicit recognition of ICT-facilitated stalking, what emerges is that certain behaviours that are carried out using ICT fall under the scope of the criminal provision of stalking either through general references to 'any possible means' or 'other comparable acts.'

Enforcement of the law is the key issue for the crime of stalking. The problems that have been identified by the experts include the difficulties of proving in court the elements of the offence, the lack of sensitivity and awareness of the phenomenon on the part of public authorities, and the mild sentences (sometimes only a fine) despite the maximum penalties provided by the law being significant. National experts argue

that those elements have determined the low number of cases that end in court. Protocols have been adopted to encourage enforcement and correct implementation.

Chapter 8 Non-consensual dissemination of intimate/private/sexual images

Non-consensual dissemination of private images is mostly an **ICT-facilitated** form of violence against women. In line with developments in technology, the acts that this crime covers also develop quickly. Dissemination of intimate or private images is gendered in the sense that women and girls are the main targets, and also because the impact on women has been more severe. It is important to stress that the harmfulness of the dissemination of intimate/private/sexual images should be considered **irrespective of any initial consent given to the creation of the image**.

An increasing number of countries has criminalised – or are about to criminalise – the non-consensual dissemination of private images. Eleven of the states under review have specifically criminalised the non-consensual dissemination/publication/disclosure of intimate/private/sexual images. It is not expressly stated in all criminal provisions that the images can be obtained with or without the consent of the victims. Some national definitions include the element of intent to harm in the dissemination. However, it is possible to argue that the crime is inherently harmful, irrespective of whether there was such an intention on the part of the perpetrator. The criminalisation of non-consensual dissemination of intimate/private/sexual images has increased in recent years in the states under analysis. In two states where non-specific criminalisation exists, case law has addressed the non-consensual dissemination/publication of intimate/private/sexual images by using pre-existing legislation. Reforms are ongoing in four countries to explicitly address the behaviour.

When there is a lack of criminalisation of this practice, this directly impacts the *access to justice of the victims*, since their only alternative seems to be to complain to the specific online platform disseminating the images, requesting their removal, where the decision whether to do so remains to a large extent the prerogative of the platform. While some platforms have established procedures to make such claims, victims often have no recourse to a review of a negative decision, or access to any form of compensation. Moreover, the ability to target the offender (for instance, to cancel their account, etc.) is also dependent on the decision of the platform. The criminalisation of the behaviour would allow for the intervention of the state in guaranteeing victims' access to justice and also the offender's entitlement to due process. Civil law measures can also be applied, including the removal of non-consensual dissemination of images or recordings by order of a court. In any case, criminalisation cannot be placed in a vacuum but requires the adoption of preventive and protective measures.

Chapter 9 Hate speech based on the basis of sex/gender ('sexist hate speech')

Hate speech, understood as the publicly inciting to violence or hatred against a group or a person based on certain grounds, as enshrined in Framework Decision 2008/913 has been widely criminalised. 14 states have currently included gender or sex among the grounds protected against hate speech, while 23 States have included sexual orientation and gender identity and/or gender expression, and/or sex reassignment.

Hate speech taking place on the internet or making use of digital technologies has a particularly negative effect on women's and girls' human rights and empowerment, impacting on gender equality. However, domestic legislation makes scarce reference to the online dimension of the crime, and very few states appear to have laws regulating internet, media or ICT communications. There is no information about the procedures available at the national level to request the removal of hateful content from the platforms.

Chapter 10 Femicide/gender-related killing of women

The crime of murdering women because of their gender is increasingly referred to as 'femicide'. This is not a new form of violence or an isolated phenomenon but is instead the ultimate act of violence that is experienced in a continuum of violence. The concept of femicide highlights the structural and systemic character resulting from the discrimination suffered by women, including trans women, and the inaction or insufficient response of the state to prevent it. GREVIO (the body responsible for monitoring the implementation of the Istanbul Convention), the Inter-American system of human rights and the United Nations Special Rapporteur on violence against women (UN SRVAW) have promoted the adoption of legislation on femicide.

There are **two categories of femicide**. An *active or direct* category of femicide that includes intentional killing, armed conflict-related killings, female infanticide, and killings based on the sexual orientation and gender identity of women, and *passive or indirect* forms of femicide, which include maternal mortality and other forms of deaths resulting from neglect disproportionally affecting women or as the result of harmful practices. Thus, **femicide does not only occur in the private sphere**.

None of the states under review has introduced a specific offence addressing the gender-based killing of women, although a few provide for aggravating circumstances in cases of gender-motivated killing of women and there is a growing debate on the issue. Most states rely on the aggravations applicable to the killing by a partner or spouse, or death in the context of intimate partner violence. This, however, reduces the scope of femicide to the sphere of intimate relationships, ignoring other kinds of gender-motivated killing of women. It is worrying that not only is the gender-related killing of women seldom recognised, but the punishment of gender-based killing of women can still allow for mitigating circumstances based on the emotional state of the perpetrator. This report highlights the fact that the different legal definitions and aggravations used in the Member States can prevent data collection and comparison across countries. Facilitating the collection of data is a crucial step towards complying with the call to create femicide observatories. The report recommends that prosecutorial guidelines specifically addressing the gender-related killings of women should be adopted, even in the absence of a gender-based offence. The report also recommends the establishment of national femicide observatories and a European femicide observatory.

Chapter 11 General approach to enforcement and sanctioning

The final chapter provides an overview of general aspects of enforcement and sanctioning applicable to GBV. On prosecution, it reveals that states show **diverging statutes of limitations** for the various offences discussed. Some positive developments in this regard are the elimination of statute of limitations for sexual violence crimes. Moreover, in most states, the starting moment of crimes is delayed in relation to (*ex parte*) crimes against minors, most frequently in relation to sexual violence. The starting period then varies between the age of majority and longer periods, depending on the victim reaching a specific age. On extraterritoriality, although the Istanbul Convention requires the elimination of the requirement of double criminality for several offences (sexual violence and rape, forced marriage, FGM, forced abortion and forced sterilisation), only one state meets this obligation fully. In some other states, exceptions to double criminality are recognised, but certain restrictions are imposed on the elimination of the principle, e.g. that it only applies to certain offences. Three states require double criminality.

Different states' **approaches to sanctions and aggravating circumstances also vary**. 'Aggravating circumstances' are to be understood as any factors that the legislature or judge takes into account to decide on the seriousness of the offence and the severity of the sanction, regardless of whether they are considered as a qualification of the offence, an element of a more serious offence or an aggravating factor. Some states include specific aggravations to specific offences, in addition to general aggravations

that can apply to all crimes, whereas other states make a distinction between basic offences and more serious, 'qualified' offences, as well as relying on aggravating factors.

Varying levels of protection were also revealed. Medium and long-term **protection orders** are available in all the jurisdictions under review, except one. These include *civil law* interim measures or restriction orders in some states and *criminal law* protection orders in others. Emergency protection orders can be found in 21 states. In all cases, new regulations were adopted. The requirements for issuing emergency protection orders vary, however. In many cases, they refer to 'immediate danger', 'threat to life', 'threat to physical integrity', 'flagrancy' or 'serious risk' of the victim. The extent of the protection ranges from 24 hours to 20 days, and in most cases the victim is required to apply for an interim protection order. In most of the states under review, the laws suggest that protection orders could be applicable in emergencies, yet there are many difficulties in accessing protection in practice. These relate to the average time limits for the adoption of the measures or who can request such an order and which authority is entrusted with the capacity to make the decision.

In relation to **reparations**, all 31 jurisdictions discussed in the report are revealed to be on even terms. All states provide the possibility for victims of crime to claim compensation from the perpetrator, either through a civil suit in criminal proceedings or in civil proceedings. A gendered approach to reparations, which takes into account the idea that women's experiences of violence are inherently different to those of men, and that violence against women is the result of 'unequal relations of power' and structural gendered discrimination, has not yet made its way into the European normative framework. Moreover, state-funded compensation is not widely available in Europe. Although such compensation is provided in 24 states, in line with Council Directive 2004/80/EC of 29 April 2004, in most cases it is only provided to victims of violent, intentional crimes, and in at least 12 states, this option is only available if victims have sustained serious bodily injury or impairment of health. In a few cases, state funding is restricted to specific crimes. Moreover, in the majority of states, state-funded compensation is available subsidiarily, only when the victim cannot procure payment from the perpetrator, either because they have not been identified, cannot afford the compensation or compensation was denied in the criminal or civil proceedings.

Finally, states have taken different approaches to the transposition of the **Victims' Rights Directive 2012/29/EU** with regard to victims of GBVAW. This has mostly been done through the amendment of existing criminal procedure laws, sometimes in combination with new legislation, or else by adopting several different mechanisms to transpose the Directive. A number of national experts acknowledge that the Directive has not yet been fully or effectively transposed in their states, or that it has been transposed but in a way that involves some restrictions for victims of 'less severe crimes'.

Conclusions

The main conclusion of this report is that **gender-based violence against women, including ICT-facilitated violence, needs to be urgently tackled at the European level**. The national experts' responses to the questionnaires unequivocally confirm this necessity. Women in Europe are facing forms of GBV without the opportunity to obtain justice, owing to either a lack of adequate legislation or inappropriate gender-sensitive implementation. Consequently, each chapter of this report makes concrete suggestions for the adoption of offences and/or aggravations targeting different forms of GBVAW.

Criminalisation alone, however, cannot fully address the discrimination aspect of gender-based violence against women. Rather, the adoption of a holistic approach is needed. The report demonstrates that currently there are varying levels of protection afforded to victims of GBV across Europe. In this regard, it is essential to ensure the provision of urgent protection measures, with the potential to request medium and longer-term protection orders in combination with the provision of support services for victim and offender. Coordinated action in the next few years can help to overcome the current shortcomings.

Résumé

Introduction

La violence sexiste contre les femmes, en ce compris la violence facilitée par les technologies de l'information et de la communication (TIC), est une problématique urgente au plan international comme au plan national. La pandémie de COVID-19 a exacerbé les schémas discriminatoires en place à l'égard des femmes et provoqué l'intensification de plusieurs formes de violence. Au niveau international, la violence contre les femmes (VCF) est reconnue comme une violation des droits humains et comme une forme de discrimination fondée sur le genre à l'encontre des femmes. La VCF est générée par un rapport de force inégal entre les femmes et les hommes, et constitue à la fois une cause et une conséquence de l'inégalité des genres. Les États ont, en vertu de la convention des Nations unies sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDAW), l'obligation légale d'adopter des mesures de prévention, de protection et de répression pour lutter contre la VCF sous ses différentes formes.

Au niveau européen, la convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique (Convention d'Istanbul), adoptée en 2011, est l'instrument juridiquement contraignant qui aborde de façon globale et holistique la violence envers les femmes et la violence domestique. L'article 4, paragraphe premier, de la convention d'Istanbul dispose que les États Parties « prennent les mesures législatives et autres nécessaires pour promouvoir et protéger le droit de chacun, en particulier des femmes, de vivre à l'abri de la violence aussi bien dans la sphère publique que dans la sphère privée ». L'Union européenne a signé la Convention en 2017 et, à l'heure d'écrire ces lignes, tous les États membres de l'UE l'on signée et 21 l'ont ratifiée.

L'UE a lancé elle aussi plusieurs appels aux États membres concernant la violence à l'égard des femmes. La résolution du Parlement européen du 28 novembre 2019, par exemple, demande aux États membres d'assurer la mise en œuvre et l'application correctes de la Convention et de consacrer des ressources financières et humaines appropriées à la prévention et à la lutte contre les violences à l'égard des femmes et la violence à caractère sexiste, ainsi qu'à la protection des victimes; et invite la Commission à présenter un acte juridique sur la prévention et l'élimination de toutes les formes de de violences sexistes, y compris la violence à l'égard des femmes et des filles. En ce qui concerne la protection des victimes de criminalité, la directive 2012/29/UE du 25 octobre 2012 établissant des normes minimales pour ce qui concerne les droits, le soutien et la protection des victimes de criminalité (directive relative aux droits des victimes) est également particulièrement pertinente puisqu'elle manifeste l'engagement de l'UE de protéger les victimes de la criminalité, en ce compris les victimes de violence sexiste, et d'établir des normes minimales à cet égard.

Portée et méthodologie du présent rapport

Le présent rapport thématique vise à une analyse comparative des dispositions de droit pénal appliquées à l'échelon national en Europe en matière de violence sexiste à l'égard des femmes, y compris la violence domestique et la violence en ligne. Il cherche à déterminer si cette forme de violence est définie comme une forme de discrimination ou comme une violation du principe d'égalité. Il identifie et définit la violence facilitée par les TIC et en illustre deux formes, à savoir la diffusion sans consentement d'images intimes/privées/sexuelles, et le discours de haine fondé sur le genre. Le rapport se penche également sur des aspects généraux de la mise en application et des sanctions qui revêtent une importance particulière dans le cadre de la lutte contre la violence sexiste envers les femmes et la violence domestique.

Le rapport examine 31 juridictions: les États membres de l'Espace économique européen (EEE), à savoir les 27 États membres de l'Union européenne (UE-27) plus l'Islande, le Liechtenstein et la Norvège ainsi que le Royaume-Uni. Sauf indication contraire, le rapport fait référence à l'ensemble des juridictions étudiées comme un tout. Il s'appuie sur les réponses des 31 experts nationaux formant le Réseau européen d'experts juridiques en matière d'égalité des genres et de non-discrimination (EELN) à un questionnaire détaillé comportant douze séries de questions thématiques. Ce questionnaire est annexé au rapport. Les rapports par pays ont fourni des informations concernant la législation en place, les définitions pénales utilisées, les poursuites et les sanctions, la jurisprudence, les limites et les débats émergents. Ces informations ont été complétées de celles contenues dans les rapports de référence du Groupe d'experts sur la lutte contre la violence à l'égard des femmes et la violence domestique (GREVIO) à propos des États membres de l'UE qui ont ratifié la convention d'Istanbul et ont déjà fait l'objet d'une évaluation, ainsi que des informations tirées de précédents rapports thématiques de l'EELN, de rapports d'agences de l'UE et d'études cartographiques spécifiques.

Une description succincte des grandes conclusions de chaque chapitre est présentée ci-après. Les informations plus précises concernant des pays particuliers sont analysées dans le corps principal du rapport.

Chapitre 1 Définitions de la violence sexiste à l'égard des femmes

La plupart des États membres couverts par le rapport n'ont pas inclus de définition de la violence spécifiquement axée sur les femmes dans leurs ordres juridiques internes. Plusieurs d'entre eux ont toutefois transposé, dans leur droit ou leur politique, la définition de la « violence fondée sur le genre » (VFG) figurant dans la directive relative aux droits des victimes. Cette transposition s'effectue le plus souvent en termes neutres du point de vue du genre: seule une minorité d'États reconnaissent la violence sexiste contre les femmes comme un type particulier de VFG ou reconnaissent l'incidence disproportionnée sur les femmes de certaines formes de violence. Plusieurs États Parties à la convention d'Istanbul ont adopté les définitions de cette Convention ou y font référence.

Alors que la plupart des États ont transposé les directives de l'UE dans le domaine de l'égalité hommes-femmes et ont ratifié la convention d'Istanbul, la violence sexiste à l'égard des femmes n'y est pas reconnue comme une forme de discrimination et comme le résultat d'inégalité hommes-femmes, ou alors cette reconnaissance revêt un caractère indirect et purement formel. Seuls quelques États ont expressément reconnu le lien entre la violence et la discrimination, et le plus souvent dans leurs politiques plutôt que dans leurs lois. La plupart des États n'ont reconnu aucune forme de discrimination intersectionnelle par rapport à la violence à l'égard des femmes. Cinq seulement font implicitement référence à l'intersection de facteurs dans certaines situations ou ont abordé la question de la vulnérabilité particulière de certains groupes de femmes, en lien avec les lois sur l'asile notamment.

Le présent rapport se rallie au concept technique et juridique de **la violence sexiste à l'égard des femmes facilitée par les TIC** pour saisir la multitude de facettes que revêt cette forme de violence. Seul un État s'est doté d'une définition spécifique de la violence en ligne envers les femmes, les autres ayant soit adopté une législation spécifique qui vise certaines formes de violence facilitée par les TIC, soit modifié la législation existante relative aux violences hors ligne pour y inclure la dimension en ligne en tant que circonstance aggravante. Les formes de violence commise en ligne qualifiées de « violence envers les femmes facilitée par les TIC » peuvent consister soit en un comportement spécifique se manifestant généralement en ligne et affectant de manière disproportionnée les femmes et les filles (diffusion sans consentement d'images intimes/privées/sexuelles, par exemple), soit en un comportement couramment adopté hors ligne (et qui a été défini dans ce sens dans la législation nationale) mais qui a acquis, ces dernières années plus spécialement, une dimension en ligne (cyberharcèlement ou harcèlement facilité par les TIC, traque furtive (*stalking*) sur Internet ou facilitée par les TIC, entre autres).

Chapitre 2 Violence domestique

Les États membres ont opté pour des approches diverses en matière de réglementation de la violence domestique, qui vont de l'adoption de délits spécifiques au recours à des délits à caractère général combinés à une forme ou une autre d'aggravation pour reconnaître l'importance et la gravité de la violence domestique, ou encore à l'adoption d'une combinaison de ces deux approches. La grande majorité des pays ont cependant opté pour des **définitions neutres en termes de genre** qui ne reconnaissent dès lors pas que la violence domestique affecte les femmes de façon disproportionnée – ce qui semble se répercuter sur le nombre de poursuites engagées et de condamnations définitives prononcées.

Un autre aspect se retrouve dans la majorité des définitions nationales de la violence domestique: il s'agit de l'exigence d'une **répétition ou d'une régularité des actes violents** pour que ceux-ci soient considérés comme relevant d'une violence domestique – ce qui peut renforcer la victimisation secondaire et poser des défis majeurs en termes de poursuites. Le rapport montre que le caractère systématique de la violence est pris en compte de façon plus efficace dans les systèmes où chaque occurrence d'une forme répétée de comportement violent peut être punie en combinaison avec la pénalisation de la violence domestique plutôt que subsidiairement.

La violence psychologique est pénalisée de manières différentes dans les États membres, parfois en tant qu'élément spécifique du délit de violence domestique, parfois par le biais d'autres délits tels que les insultes, les menaces ou la coercition, et parfois en tant que facteur aggravant d'autres délits. L'une des difficultés mises en évidence concernant la violence psychologique est le fait que certains pays ont choisi de se concentrer sur les résultats préjudiciables, ce qui augmente le risque de victimisation secondaire et implique un processus probatoire plus complexe. L'inclusion explicite de la **violence économique** en tant qu'élément de la violence domestique reste rare et ce sont souvent les infractions contre les biens qui sont appliquées en leur lieu et place, ce qui génère une vision plus limitée de ce type de violence que celle envisagée dans la convention d'Istanbul. Par ailleurs, la **violence sexuelle avec rapports intimes** reste encore trop souvent ignorée en tant que forme de violence domestique, et dès lors en tant que délit. Enfin, une autre lacune majeure réside dans le fait que, dans la plupart des juridictions, les **enfants témoins** de violence domestique ne sont pas considérés comme des victimes directes. Si, dans certains États, il s'agit d'un facteur aggravant, un problème supplémentaire se pose en ce qui concerne les droits parentaux et les mesures de protection car il est fréquent que la violence domestique ne soit pas considérée comme excluant les droits parentaux du parent violent.

En ce qui concerne le **champ d'application personnel** des délits de violence domestique, le lien personnel entre les auteurs des faits et les victimes est souligné dans la plupart des juridictions, qu'elles appliquent la notion de délit spécifique ou la notion de délit général. Dans certains cas, la cohabitation constitue une exigence, ce qui exclut les anciens partenaires ou les partenaires ne vivant pas ensemble. D'autres définitions sont spécifiques quant au genre, ce qui permet une approche plus large des relations intimes au sens où la cohabitation n'est pas requise, mais ce qui exclut dans certains cas les couples de même sexe.

Chapitre 3 Violence sexuelle, y compris le viol

Les définitions utilisées pour pénaliser le viol varient selon les pays couverts par le rapport, quelques-uns d'entre eux se concentrant sur l'absence de **consentement sexuel**, comme le recommandent les normes des droits fondamentaux et la convention d'Istanbul, tandis que d'autres se fondent sur l'élément de la force ou des menaces. Dans la pratique, cette situation engendre, selon les différentes juridictions, un positionnement très inégal des victimes en termes d'accès à la justice et de protection contre la violence. Une tendance positive semble toutefois se dessiner depuis une dizaine d'années dans la mesure où des États modifient leurs lois pénales en vue d'y introduire des définitions basées sur le consentement: à ce jour, onze pays ont déjà adopté des définitions purement fondées sur cet élément. Dans tous les

pays étudiés, le consentement sexuel est réputé absent lorsque la victime est sans défense ou ne peut consentir en raison de circonstances personnelles ou de coercition.

Les définitions de la violence sexuelle et du viol sont systématiquement **neutres en termes de genre**, au sens où les victimes peuvent être tant masculines que féminines, hormis en Slovaquie, où seules des femmes peuvent être victimes de viol. Dans trois États, seuls des hommes peuvent être auteurs de viols, étant donné que la définition est liée à la pénétration par le pénis. Dans certaines juridictions, le viol et les délits sexuels entre personnes de même sexe sont expressément reconnus. La distinction entre le viol et d'autres délits sexuels est établie sur la base de facteurs différents selon les juridfictions, mais elle se fonde largement sur le fait qu'il y ait ou non pénétration.

L'**âge minimum du consentement sexuel** varie quelque peu selon les pays puisqu'il va de 15 à 18 ans, mais il est fixé à 16 ans dans la plupart des cas.

En ce qui concerne la **poursuite** de ces infractions, si la majorité des États ont instauré des poursuites d'office pour les délits pénaux, seule une minorité d'entre eux se sont dotés de lignes directrices pour des protocoles en la matière. Des incohérences majeures semblent exister dans la jurisprudence nationale quant à l'interprétation du caractère consensuel ou non consensuel de certains actes. De manière générale, les experts nationaux signalent de très faibles taux de condamnation dans les affaires de viol.

Chapitre 4 Harcèlement sexuel et harcèlement lié au sexe

Le harcèlement sexuel et le harcèlement lié au sexe sont généralement réglementés au niveau national en réponse aux directives européennes relatives à l'égalité hommes-femmes. La législation de l'UE ne s'est cependant pas avérée suffisamment efficace pour lutter contre ces phénomènes dans la pratique. À l'heure actuelle en effet, le droit européen se limite encore principalement au domaine du travail et à la fourniture et l'accès aux biens et aux services. Le défi consiste à **élargir le concept au-delà de l'environnement professionnel**, conformément à la convention d'Istanbul. Dans la plupart des pays, le champ d'application de l'interdiction de harcèlement fondé sur le sexe et de harcèlement sexuel est d'ores et déjà plus large que celui de la législation de l'UE, et cette interdiction couvre même, dans plusieurs de ces pays, toutes les sphères de vie. Ce constat semble indiquer qu'un certain nombre d'États considèrent que le cadre juridique actuel de l'Union ne suffit pas à lutter totalement contre le harcèlement sexuel et le harcèlement lié au sexe.

Les interdictions de harcèlement sexuel et de harcèlement lié au sexe sont dispersées entre différents domaines du droit. Dix pays se sont dotés de dispositions pénales concernant le harcèlement sexuel dans toutes les sphères et pas seulement dans l'environnement du travail ou y relatif; cinq pays ont adopté des dispositions pénales relatives au harcèlement sexuel dans l'environnement de travail; sept pays ont opté pour des dispositions pénales générales en matière de harcèlement; vingt pays ont adopté une loi spécifique concernant l'égalité des genres/égalité de traitement; neuf pays ont adopté une loi anti-discrimination; onze pays ont inclus des dispositions spécifiques dans leurs codes ou législation du travail, tandis que huit pays ont prévu des dispositions dans d'autres actes législatifs. Le cyberharcèlement est expressément abordé par quatre pays et une tendance nouvelle en matière de lois sur le sexisme et le harcèlement en rue peut être observée dans cinq pays. Les experts constatent que la fragmentation juridique entrave l'efficacité de ces lois.

Chapitre 5 Mutilation génitale féminine et autres formes non consensuelles d'interventions génitales

Dix-huit États ont adopté une législation pénale spécifique pour lutter contre la mutilation génitale féminine (MGF). Hormis dans deux États toutefois, aucune législation n'a été adoptée pour interdire les interventions génitales sur des enfants intersexués, même lorsque celles-ci ne sont pas nécessaires sur le plan thérapeutique et qu'elles sont non volontaires. Les délits de lésion corporelle et de mutilation, de même que les atteintes à la santé, s'appliquent à la pratique de la MGF dans tous les pays couverts par le rapport, et peuvent servir de base à des poursuites pénales – ce qui pourrait, théoriquement, s'appliquer également à d'autres formes d'interventions génitales non consensuelles mais, étant donné que les victimes sont rarement informées de ces interventions qui ne sont pas mentionnées dans leurs antécédents médicaux, cette violence s'avère souvent, dans la pratique, impossible à signaler.

Les définitions spécifiques de la MGF font référence à des actes très généraux tels que « toute forme de mutilation » ou se concentrent sur des types de pratiques spécifiques: elles se réfèrent aux organes génitaux en général ou à des parties spécifiques de ceux-ci. La moitié au moins des délits spécifiquement décrits concernent expressément les femmes et les filles, mais d'autres restent muets quant au genre. Un pays seulement reconnaît explicitement la possibilité d'une dissociation des organes génitaux et de l'identité de genre, admettant ainsi que certaines personnes pourraient être soumises à la pratique sans s'identifier elles-mêmes comme femmes. Le consentement n'est pas pertinent dans la plupart des pays, alors que dans plusieurs autres le fait d'inciter, de forcer, voire même de « convaincre » quelqu'un de soumettre à la pratique est considéré comme un délit.

Dans la plupart des pays, la MGF entraîne des poursuites d'office, bien que des lignes directrices en matière de poursuites n'existent que dans un seul d'entre eux. Le principe d'extraterritorialité est d'application dans la plupart des pays sans exigence de double incrimination. Indépendamment de l'existence de délits spécifiques, de poursuites d'office et d'extraterritorialité, la jurisprudence reste rare en la matière, sauf dans des dossiers d'asile – ce qui conduit à penser que la pénalisation de la MGF n'est pas réellement mise en application au niveau national mais qu'elle est invoquée pour motiver l'octroi ou le refus du statut de réfugié. Ceci tend en outre à pointer un écart entre le risque et la prévalence de MGF tel qu'établis par l'Institut européen pour l'égalité entre les hommes et les femmes (EIGE) et le nombre de poursuites et de condamnations.

Chapitre 6 Mariage forcé

Les mariages forcés sont pénalisés dans la grande majorité des pays, récemment surtout, et le plus souvent en réponse aux exigences de la convention d'Istanbul. De façon plus précise, presque tous les pays ont incorporé la définition de la convention d'Istanbul, qui englobe à la fois l'acte consistant à forcer un adulte ou un enfant de contracter un mariage et l'acte consistant à attirer un adulte ou un enfant sur le territoire d'un État Partie ou d'un État autre que celui de résidence dans le but de forcer cet adulte ou cet enfant à contracter un mariage. L'âge auquel une personne peut contracter un mariage est généralement de 18 ans avec quelques exceptions admises en justice. Les mariages d'enfant ne sont généralement pas pénalisés en tant que tels, hormis en Suède, mais le fait de commettre le délit de mariage forcé à l'encontre d'un mineur est considéré dans certains pays comme une circonstance aggravante.

Le délit du mariage forcé est habituellement décrit en législation nationale de manière neutre en termes de genre, et n'est pas considéré comme une forme de violence à l'égard des femmes. Douze pays sont allés au-delà de la notion de mariage pour inclure les unions civiles et les mariages extrajudiciaires. Dans ce dernier cas, le concept combine l'interdiction de mariages forcés avec l'interdiction de justifications fondées sur l'honneur. Les pays prennent généralement en considération les conséquences civiles des mariages forcés et/ou des mariages de mineurs. Très peu de cas de mariages forcés ont été portés

devant les tribunaux, ce qui conduit à penser qu'ils sont rarement signalés aux autorités. Même si la plupart des lois sont très récentes, ce très faible contentieux suggère que la pénalisation ne suffit pas.

Chapitre 7 Traque furtive (*stalking*)

La traque furtive ou *stalking* a été spécifiquement pénalisée par la grande majorité des pays couverts par notre analyse (27), et un débat est en cours à propos de cette pénalisation dans deux autres. L'augmentation du nombre de pays pénalisant ce comportement a été enclenchée par la ratification, ou le débat concernant la ratification, de la convention d'Istanbul, ce qui confirme les conclusions de précédentes études. Le nombre de cas signalés a connu, selon certains experts, une très forte hausse à la suite de la pénalisation.

Les définitions de la traque furtive sont neutres en termes de genre dans tous les pays couverts par le rapport. En ce qui concerne les éléments du délit, le caractère répétitif ou systématique des actes s'avère essentiel, et la jurisprudence a joué un rôle déterminant dans l'interprétation de cette composante. Plusieurs dispositions nationales font référence au fait que l'acte doit être commis sur une longue période; l'une d'elles précise « à deux reprises au moins ». Mais les tribunaux ont considéré qu'une série d'actes sur une courte période suffit à démontrer le caractère répétitif. Les lois de plus de la moitié des pays étudiés contiennent une liste (exhaustive ou non) des actes qui peuvent relever du délit de traque furtive. Les types de comportements figurant sur ces listes varient considérablement.

En ce qui concerne le *stalking* facilité par les TIC, quelques tendances générales en faveur de la reconnaissance de la pertinence de la dimension en ligne de ce phénomène sont observées dans la formulation du délit; dans la liste des comportements pouvant être constitutif de traque furtive; dans sa prise en compte en tant que circonstance aggravante; dans la jurisprudence nationale; dans les lignes directrices ou en tant qu'évolution actuelle. Il apparaît qu'au-delà d'une reconnaissance explicite du *stalking* facilité par les TIC, certains actes perpétrés à l'aide de TIC relèvent du champ d'application de la disposition pénale relative au *stalking* par une référence générale à « tous moyens possibles » ou à « d'autres actes comparables ».

La grande question en ce qui concerne le délit de traque furtive porte sur la mise en application de la loi. Les problèmes recensés par les experts sont la difficulté de fournir en justice la preuve des éléments du délit, la sensibilité et la prise de conscience insuffisantes du phénomène de la part des pouvoirs publics et la clémence des condamnations (une simple amende parfois) bien que les peines maximales prévues par la loi soient importantes. Les experts nationaux font valoir que ces éléments sont à l'origine du faible nombre de cas dont la justice est saisie. Des protocoles ont été adoptés pour assurer une mise en œuvre et une application adéquates.

Chapitre 8 Diffusion non consensuelle d'images intime/privées/ sexuelles

La diffusion non consensuelle d'images privées est essentiellement une forme de violence à l'égard des femmes **facilitée par les TIC**. En phase avec les développements technologiques, les actes relevant de ce délit évoluent, eux aussi, très rapidement. La divulgation d'images intimes ou privées est genrée dans la mesure où les femmes et les filles en sont les cibles principales, et où son impact sur les femmes est plus marqué. Il est important de souligner que la nuisibilité de la diffusion d'images intimes/privées/ sexuelles devrait être prise en compte **indépendamment de tout consentement initial donné à la création de l'image**.

Des pays de plus en plus nombreux ont pénalisé – ou sont sur le point de pénaliser – la diffusion non consensuelle d'images privées. Onze des pays couverts par le rapport ont spécifiquement pénalisé la

diffusion/publication/divulgation d'images intimes/privées/sexuelles. Il n'est pas expressément stipulé dans toutes les dispositions pénales que les images doivent avoir été obtenues avec ou sans le consentement des victimes. Certaines définitions nationales précisent que la diffusion doit comporter une intention de nuire. On peut néanmoins faire valoir que le délit est délibérément nuisible qu'il y ait eu ou non cette intention de la part de l'auteur. La pénalisation de la diffusion non consensuelle d'images intimes/privées/sexuelles s'est intensifiée ces dernières années dans les pays couverts par notre analyse. Dans deux États où se pratique une pénalisation non spécifique, la jurisprudence a abordé la diffusion/publication non consensuelle d'images intimes/privées/sexuelles en se référant à la législation préexistante. Des réformes sont en cours dans quatre pays pour traiter spécifiquement de ce type d'acte.

Une pénalisation insuffisante de cette pratique se répercute directement sur l'*accès des victimes à la justice*, étant donné que leur seule alternative est apparemment de porter plainte auprès de la plateforme en ligne concernée par la diffusion des images en réclamant leur retrait – la décision de donner suite ou non restant largement la prérogative de la plateforme en question. Si certaines plateformes ont instauré des procédures pour l'introduction de plaintes, les victimes ne disposent souvent d'aucun recours pour la révision d'une décision négative, ni d'aucun accès à une quelconque indemnisation. La faculté de cibler le contrevenant (et de supprimer son compte, par exemple) dépend en outre, elle aussi, d'une décision de la plateforme. La pénalisation de l'acte permettrait une intervention de l'État garantissant un accès à la justice pour la victime et le droit à une procédure régulière pour le contrevenant. Des mesures de droit civil peuvent également être appliquées, en ce compris le retrait de la diffusion non consensuelle d'images ou d'enregistrements sur ordre d'un tribunal. En tout cas, la pénalisation ne peut se faire en vase clos mais doit s'accompagner de l'adoption de mesures de prévention et de protection.

Chapitre 9 Discours de haine fondé sur le sexe/le genre (« discours de haine sexiste »)

Le discours de haine, entendu comme l'incitation publique à la violence ou à la haine visant un groupe de personnes ou un membre d'un tel groupe défini par certains motifs, selon la définition consacrée par la décision-cadre 2008/913, est largement pénalisé. Quatorze pays ont actuellement inclus le genre ou le sexe parmi les motifs protégés à l'encontre du discours de haine tandis que 23 pays y ont inclus l'orientation sexuelle et l'identité et/ou l'expression de genre, et/ou le changement de sexe.

Le discours haineux diffusé sur Internet ou utilisant des technologies numériques a une incidence particulièrement négative sur les droits fondamentaux et l'autonomisation des femmes et des filles et, dès lors sur l'égalité des genres. Or les législations nationales font rarement référence à la dimension en ligne du délit, et il semble que très peu d'États se soient dotés de lois réglementant les communications par internet, médias ou TIC. Il n'existe aucune information quant aux procédures disponibles au niveau national pour réclamer le retrait d'un contenu haineux d'une plateforme.

Chapitre 10 Féminicide/meurtres de femmes en raison de leur genre

Le crime consistant à **assassiner des femmes en raison de leur genre est de plus en plus souvent décrit comme un « féminicide »**. Il ne s'agit ni d'une nouvelle forme de violence ni d'un phénomène isolé mais bien d'un acte marquant l'aboutissement ultime d'un continuum de violences. Le concept de féminicide met en lumière le caractère structurel et systémique de la discrimination subie par les femmes, y compris les femmes transgenres, et l'inaction ou la réponse insuffisante de l'État pour la prévenir. Le GREVIO (organe chargé de suivre la mise en œuvre de la convention d'Istanbul), le système interaméricain des droits de l'homme et le Rapporteur spécial des Nations unies sur la violence contre les femmes (SRVAW-UN) ont encouragé l'adoption d'une législation sur le féminicide.

Il existe **deux catégories de féminicide**. La catégorie *active ou directe* qui comprend les meurtres intentionnels, les meurtres liés à des conflits armés et des meurtres basés sur l'orientation sexuelle et l'identité de genre des femmes; et la catégorie des féminicides *passifs ou indirects*, qui inclut la mortalité maternelle et d'autres formes de décès résultant de la négligence et affectant les femmes de manière disproportionnée ou résultant de pratiques nocives. **Le féminicide ne se produit donc pas seulement dans la sphère privée**.

Aucun des États étudiés n'a instauré de délit spécifiquement relatif aux meurtres de femmes fondés sur le genre, même si quelques-uns font de ces actes des circonstances aggravantes et que les débats s'amplifient autour de ce phénomène. La plupart des pays s'appuient sur les aggravations applicables en cas de meurtre d'un partenaire ou d'un conjoint, ou de meurtre dans le contexte de violences conjugales. Cette approche réduit toutefois la portée du féminicide à la sphère des rapports intimes en ignorant d'autres types d'assassinats de femmes motivés par le genre. Il est préoccupant de constater que non seulement le meurtre de femmes lié au genre est rarement reconnu, mais que la peine infligée peut encore admettre des circonstances atténuantes en raison de l'état émotionnel de l'auteur des faits. Le rapport montre que les définitions juridiques et aggravations différentes utilisées selon les États membres peuvent empêcher une collecte et une comparaison des données entre eux. Une facilitation de la collecte de données s'impose pour répondre à l'appel à la création d'observatoires des féminicides. Le rapport recommande l'adoption de lignes directrices spécifiques pour les poursuites en cas de meurtres de femmes liés au genre, même en l'absence de délit fondé sur le genre. Le rapport recommande également la mise en place d'observatoires nationaux ainsi que d'un observatoire européen des féminicides.

Chapitre 11 Approche générale de la mise en application et des sanctions

Le dernier chapitre du rapport contient un aperçu des aspects généraux de la mise en application et des sanctions en matière de violence fondée sur le genre. A propos des poursuites, il met en lumière les **divergences entre États en termes de délai de prescription** des différents délits analysés mais constate une évolution positive à cet égard avec la suppression du délai de prescription en ce qui concerne les délits de violence sexuelle. Dans la plupart des États, en outre, le moment où le délit débute est retardé lorsqu'il s'agit de délits (*ex parte*) à l'encontre de mineurs, le plus souvent en rapport avec des violences sexuelles. La période de démarrage varie dès lors entre l'âge de la majorité et des périodes plus longues selon que la victime atteint un âge déterminé. En ce qui concerne l'extraterritorialité, alors que la convention d'Istanbul requiert la suppression de l'exigence de double incrimination pour plusieurs délits (violence sexuelle et viol, mariage forcé, MGF, avortement forcé et stérilisation forcée) un seul pays respecte totalement cette obligation. D'autres reconnaissent des exceptions à la double incrimination mais imposent certaines restrictions à la suppression de ce principe, qui ne s'applique par exemple qu'à certains délits. Trois pays exigent la double incrimination.

Les **approches en matière de sanctions et de circonstances aggravantes varient également** selon les États. Il convient d'entendre par « circonstances aggravantes » tout facteur pris en compte par le législateur ou le juge au moment de statuer sur la gravité du délit et la sévérité de la sanction, que le dit facteur soit considéré comme une qualification du délit, comme un élément d'un délit plus grave ou comme un facteur aggravant. Plusieurs pays précisent des aggravations spécifiques pour des délits spécifiques, en sus des aggravations générales applicables à tous les délits, tandis que d'autres établissent une distinction entre des délits de base et des délits plus graves (souvent dits « qualifiés ») tout en s'appuyant sur des facteurs aggravants.

Des différences ont également été mises en lumière en termes de protection. Des **ordonnances de protection** à moyen et long terme existent dans toutes les juridictions couvertes par la présente analyse, hormis dans une seule. Il peut s'agit de mesures conservatoires ou d'ordonnances de restriction relevant du *droit civil* dans certains pays, et d'ordonnances de protection relevant du *droit pénal* dans d'autres.

Des ordonnances de protection d'urgence sont en vigueur dans 21 pays. De nouvelles réglementations ont été adoptées partout, mais les exigences pour la délivrance d'ordonnances de protection d'urgence diffèrent cependant; elles font souvent référence à un « danger immédiat », à une « menace pour la vie », à une « menace contre l'intégrité physique », au « caractère flagrant » ou au « risque sérieux » à l'égard de la victime. L'étendue de la protection va de 24 heures à 20 jours et requiert le plus souvent une demande de mesure conservatoire de la part de la victime. Les lois adoptées par la plupart des pays couverts par le présent rapport conduisent à penser que les ordonnances de protection pourraient être applicables en situation d'urgence, mais l'accès à la protection n'en reste pas moins très difficile dans la pratique. Les difficultés concernent les délais moyens pour l'adoption de mesures ou la question de savoir qui peut demander une ordonnance et quelle autorité est compétente pour en prendre la décision.

Le rapport montre que les 31 juridictions examinées sont sur pied d'égalité en matière de **réparations**. Tous les États offrent aux victimes de criminalité la possibilité de requérir une indemnisation de la part de l'auteur des faits délictueux, que ce soit par une action civile dans le cadre de poursuites pénales ou par des poursuites civiles. Une approche genrée des réparations, intégrant l'idée que les violences subies par les femmes sont intrinsèquement différentes de l'expérience de violence que connaissent les hommes, et que la violence envers les femmes est le résultat de « rapports de force inégaux » et d'une discrimination structurelle sexospécifique, n'a pas encore trouvé sa place dans le cadre normatif européen. L'indemnisation financée par l'État n'est en outre guère répandue en Europe. Bien que cette indemnisation soit prévue dans 24 pays, conformément à la directive 2004/80/CE du Conseil du 29 avril 2004, elle n'est le plus souvent accordée qu'aux victimes de crimes violents et intentionnels, et ne constitue dans 12 pays au moins qu'une option uniquement accessible aux victimes ayant subi des lésions corporelles graves ou une altération grave de leur santé. Dans quelques cas, le financement par l'État se limite à des délits spécifiques. De surcroît, dans la majorité des pays, l'indemnisation financée par l'État est disponible à titre subsidiaire, uniquement lorsque la victime ne peut obtenir de paiement de la part de l'auteur parce que celui-ci n'a pas été identifié, parce qu'il n'a pas les moyens financiers de payer l'indemnisation ou encore parce que celle-ci a été refusée dans le cadre des poursuites pénales ou civiles.

Enfin, les États ont opté pour des approches différentes pour ce qui concerne la transposition de la **Directive 2012/29/UE relative aux droits des victimes**. Ils ont le plus souvent procédé par l'amendement de lois existantes en matière de procédure pénale, en combinaison parfois avec de nouvelles dispositions législatives, ou par l'adoption de plusieurs mécanismes différents pour transposer la directive. Plusieurs experts nationaux admettent que la directive n'a pas encore été intégralement ou effectivement transposée dans leur pays ou qu'elle y a été transposée mais d'une manière impliquant certaines restrictions pour les victimes de « crimes moins graves ».

Conclusions

La grande conclusion de ce rapport est **la nécessité urgente de lutter au niveau européen contre la violence sexiste à l'égard des femmes, y compris la violence facilitée par les TIC**. Les réponses des experts nationaux aux questionnaires le confirment sans équivoque. Les femmes sont confrontées en Europe à diverses formes de VFG sans possibilité d'obtenir justice, que ce soit faute d'une législation adéquate ou d'une mise en œuvre davantage sensible à la spécificité selon les genres. En conséquence, chaque chapitre du présent rapport formule des suggestions concrètes quant à l'adoption de délits et/ou d'aggravations ciblant différentes formes de violence sexiste à l'égard des femmes.

La pénalisation ne suffira cependant pas à remédier totalement à l'aspect discriminatoire de ce type de violence: l'adoption d'une approche holistique s'impose à cette fin. Le rapport montre qu'il existe aujourd'hui en Europe des niveaux de protection différents pour les victimes de violence fondée sur le genre, et qu'il est indispensable de garantir l'instauration de mesures de protection d'urgence avec

possibilité de requérir des ordonnances de protection à moyen et long terme en combinaison avec la mise à disposition de services de soutien pour la victime et l'auteur des faits délictueux.

Une action coordonnée au cours des prochaines années peut contribuer *à combler les lacunes actuelles.*

Zusammenfassung

Einleitung

Geschlechtsbezogene Gewalt gegen Frauen, einschließlich IKT-gestützter Gewalt, ist sowohl auf internationaler als auch auf europäischer Ebene ein dringendes Thema. Die COVID-19-Pandemie hat bestehende Muster der Diskriminierung von Frauen verschärft und dazu geführt, dass bestimmte Formen von Gewalt zugenommen haben. Auf internationaler Ebene ist Gewalt gegen Frauen als Menschenrechtsverletzung und als eine Form der geschlechtsbezogenen Diskriminierung von Frauen anerkannt. Gewalt gegen Frauen ist das Ergebnis ungleicher Machtverhältnisse zwischen Männern und Frauen und sowohl Ursache als auch Folge der Ungleichheit zwischen den Geschlechtern. Aufgrund des Übereinkommens zur Beseitigung jeder Form von Diskriminierung der Frau (CEDAW) sind Staaten gesetzlich verpflichtet, präventive, schützende und repressive Maßnahmen zur Bekämpfung von gegen Frauen gerichteter Gewalt zu ergreifen.

Auf europäischer Ebene ist das 2011 verabschiedete Übereinkommen des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (Istanbul-Konvention) das rechtlich bindende Instrument, das geschlechtsbezogene Gewalt gegen Frauen und häusliche Gewalt ganzheitlich und umfassend behandelt. Artikel 4 Absatz 1 der Istanbul-Konvention lautet wie folgt: „Die Vertragsparteien treffen die erforderlichen gesetzgeberischen und sonstigen Maßnahmen zur Förderung und zum Schutz des Rechts jeder Person, insbesondere von Frauen, sowohl im öffentlichen als auch im privaten Bereich frei von Gewalt zu leben." Die Europäische Union hat das Übereinkommen 2017 unterzeichnet. Zum Zeitpunkt dieses Berichts haben sämtliche EU-Mitgliedstaaten das Übereinkommen unterzeichnet, und 21 haben es ratifiziert.

Die EU hat, was Gewalt gegen Frauen betrifft, ebenfalls mehrere Appelle an die Mitgliedstaaten gerichtet. So wurden die Mitgliedstaaten in der Entschließung des Europäischen Parlaments vom 28. November 2019 aufgefordert, für eine ordnungsgemäße Umsetzung und Durchsetzung des Übereinkommens zu sorgen und ausreichende finanzielle sowie personelle Mittel für die Verhütung und Bekämpfung von Gewalt gegen Frauen und geschlechtsbezogener Gewalt wie auch für den Schutz der Opfer zur Verfügung zu stellen. Außerdem wurde die Kommission aufgefordert, einen Rechtsakt zur Verhütung und Bekämpfung aller Formen geschlechtsbezogener Gewalt, einschließlich Gewalt gegen Frauen und Mädchen, vorzulegen. Was den Schutz der Opfer von Straftaten betrifft, so ist auch die Richtlinie 2012/29/EU vom 25. Oktober 2012 über Mindeststandards für die Rechte, die Unterstützung und den Schutz von Opfern von Straftaten (Opferschutzrichtlinie) von besonderer Bedeutung, da in ihr das Engagement der EU für den Schutz der Opfer von Straftaten, einschließlich der Opfer geschlechtsbezogener Gewalt, und für die Festlegung entsprechender Mindeststandards zum Ausdruck kommt.

Gegenstand und methodisches Vorgehen dieses Berichts

Ziel dieses Themenberichts ist es, eine vergleichende Analyse der strafrechtlichen Bestimmungen vorzulegen, die auf nationaler Ebene in Europa auf geschlechtsbezogene Gewalt gegen Frauen, einschließlich häuslicher Gewalt und Online-Gewalt, angewendet werden. Der Bericht untersucht, ob geschlechtsbezogene Gewalt gegen Frauen als eine Form von Diskriminierung oder als ein Verstoß gegen den Gleichheitsgrundsatz definiert wird. Er identifiziert und definiert IKT-gestützte Gewalt und geht beispielhaft auf zwei ihrer Formen ein: die nicht einvernehmliche Verbreitung von intimen/privaten/sexuellen Bildern und geschlechtsbezogene Hasskommentare. Er beleuchtet darüber hinaus allgemeine

Aspekte der Durchsetzung und Sanktionierung, die im Kontext der Bekämpfung geschlechtsbezogener Gewalt gegen Frauen und häuslicher Gewalt von besonderer Bedeutung sind.

In dem Bericht werden 31 Länder untersucht: die Mitgliedstaaten des Europäischen Wirtschaftsraums (EWR), sprich die 27 Mitgliedstaaten der Europäischen Union (EU27) sowie Island, Liechtenstein und Norwegen, und das Vereinigte Königreich. Sofern nicht anders angegeben, bezieht sich der Bericht auf alle untersuchten Länder in ihrer Gesamtheit. Der Bericht stützt sich auf die Antworten der 31 nationalen Expertinnen und Experten für Geschlechtergleichstellung des Europäischen Netzwerks von Rechtsexpertinnen und Rechtsexperten für Geschlechtergleichstellung und Nichtdiskriminierung (EELN) auf einen detaillierten Fragebogen mit zwölf thematischen Frageblöcken. Der Fragebogen ist dem Bericht beigefügt. Die Länderberichte lieferten Informationen über bestehende Rechtsvorschriften, verwendete Definitionen von Straftatbeständen, Strafverfolgung und Sanktionierung, Rechtsprechung, Befristungen und aktuelle Debatten. Diese Informationen wurden ergänzt durch Informationen aus den von der Expertengruppe für die Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt (GREVIO) erstellten Referenzberichten über jene EU-Mitgliedstaaten, die die Istanbul-Konvention ratifiziert haben und bereits Gegenstand einer Evaluierung waren, sowie durch Informationen aus früheren Themenberichten des EELN, Berichten von EU-Agenturen und aus speziellen Mapping-Studien.

Im Folgenden werden die wichtigsten Ergebnisse der einzelnen Kapitel des Berichts kurz vorgestellt. Genauere Details zu den einzelnen Ländern werden im Hauptteil des Berichts erörtert.

Kapitel 1 Definitionen von geschlechtsbasierter Gewalt gegen Frauen

Die meisten der untersuchten Länder haben keine Definition von speziell gegen Frauen gerichteter Gewalt in ihre innerstaatlichen Rechtsvorschriften aufgenommen. Einige haben jedoch, in ihrer Gesetzgebung oder ihrer Politik, die in der Opferschutzrichtlinie enthaltene Definition des Konzepts „geschlechtsbezogene Gewalt“ umgesetzt. Die Umsetzung erfolgte zumeist in geschlechtsneutraler Form: Nur die wenigsten Staaten erkennen an, dass geschlechtsbezogene Gewalt gegen Frauen eine spezifische Form von geschlechtsbezogener Gewalt ist oder dass bestimmte Formen von Gewalt unverhältnismäßig starke Auswirkungen auf Frauen haben. Einige Vertragsstaaten der Istanbul-Konvention haben die in ihr enthaltenen Definitionen übernommen oder verweisen auf diese.

Obwohl die meisten Staaten die EU-Gleichstellungsrichtlinien umgesetzt und die Istanbul-Konvention ratifiziert haben, wird geschlechtsbezogene Gewalt gegen Frauen nur selten als eine Form von Diskriminierung und als Folge der Geschlechterungleichheit anerkannt, oder aber die Anerkennung ist indirekt und rein formal. Nur wenige Länder haben den Zusammenhang zwischen Gewalt und Diskriminierung ausdrücklich anerkannt, und wenn, dann zumeist nicht in Gesetzen, sondern in Politiken. Die meisten Länder haben in Bezug auf Gewalt gegen Frauen keinerlei Form von intersektioneller Diskriminierung anerkannt. Nur fünf Länder verweisen implizit auf die Überschneidung von Faktoren in bestimmten Situationen oder gehen auf die besondere Verletzlichkeit bestimmter Gruppen von Frauen, insbesondere im Zusammenhang mit dem Asylrecht, ein.

Der Bericht verwendet das rechtstechnische Konzept der **IKT-gestützten geschlechtsbezogenen Gewalt gegen Frauen**, um die zahlreichen Facetten dieser Form von Gewalt zu erfassen. Nur ein Land verfügt über eine spezifische Definition von digitaler Gewalt gegen Frauen; die übrigen haben entweder spezielle Rechtsvorschriften erlassen, die sich auf bestimmte Formen von IKT-gestützter Gewalt beziehen, oder bestehende Vorschriften zu Offline-Gewalt dahingehend abgeändert, dass diese die Online-Dimension als erschwerenden Umstand einbeziehen. Bei den Formen digitaler Gewalt, die als IKT-gestützte Gewalt gegen Frauen gelten, kann es sich entweder um ein spezifisches Verhalten handeln, das in der Regel online stattfindet und von dem Frauen und Mädchen unverhältnismäßig stark betroffen sind (z. B. die nicht einvernehmliche Verbreitung von intimen/privaten/sexuellen Bildern), oder um ein Verhalten, das üblicherweise offline stattfindet (und in den nationalen Rechtsvorschriften entsprechend

definiert ist), das aber insbesondere in den letzten Jahren eine Online-Dimension entwickelt hat (z. B. Belästigung und Stalking).

Kapitel 2 Häusliche Gewalt

Die Mitgliedstaaten haben im Hinblick auf häusliche Gewalt unterschiedliche Regulierungsansätze gewählt. Diese reichen von der Einführung spezifischer Straftatbestände bis zur Anwendung allgemeiner Straftatbestände in Verbindung mit bestimmten Formen von Erschwernis, die der Tragweite und Schwere der häuslichen Gewalt Rechnung tragen, oder können auch eine Kombination aus beidem sein. In den meisten Ländern gelten jedoch **geschlechtsneutrale Definitionen** von häuslicher Gewalt, ohne Anerkenntnis der Tatsache, dass Frauen von häuslicher Gewalt unverhältnismäßig stark betroffen sind; dies scheint Auswirkungen auf die Zahl der Strafverfolgungen und der rechtskräftigen Verurteilungen zu haben.

Ein weiterer Aspekt, der in den meisten innerstaatlichen Definitionen von häuslicher Gewalt zu finden ist, ist das Erfordernis der **Wiederholung bzw. Regelmäßigkeit von Gewalthandlungen**, damit diese als häusliche Gewalt gelten. Dies kann sekundäre Viktimisierung verstärken und die Strafverfolgung vor große Herausforderungen stellen. Der Bericht zeigt, dass Systeme, in denen jedes Auftreten einer wiederholten Form von gewalttätigem Verhalten kombiniert mit der Bestrafung häuslicher Gewalt – und nicht nur subsidiär – geahndet werden kann, dem systematischen Charakter der Gewalt wirksamer begegnen.

Psychische Gewalt wird in den Mitgliedstaaten auf unterschiedliche Weise strafrechtlich verfolgt, manchmal als spezifisches Element eines Vergehens häuslicher Gewalt, manchmal über andere Straftaten wie Beleidigung, Bedrohung oder Nötigung und manchmal als erschwerender Umstand anderer strafbarer Handlungen. Eine der Schwierigkeiten, die im Zusammenhang mit psychischer Gewalt hervorgehoben wurden, besteht darin, dass sich einige Länder dafür entschieden haben, sich auf die negativen Folgen zu konzentrieren, wodurch das Risiko einer sekundären Viktimisierung steigt und das Beweisverfahren erschwert wird. Die ausdrückliche Einbeziehung **wirtschaftlicher Gewalt** als ein Element häuslicher Gewalt ist nach wie vor rar. Stattdessen kommen häufig Eigentumsdelikte zur Anwendung, was zu einer eingeschränkteren Sicht auf diese Art von Gewalt führt als in der Istanbul-Konvention vorgesehen. Außerdem wird **sexuelle Gewalt in Paarbeziehungen** immer noch allzu häufig nicht als eine Form von häuslicher Gewalt anerkannt und daher auch nicht als Straftat behandelt. Ein weiterer großer Mangel ist schließlich die Tatsache, dass in den meisten Rechtsordnungen **Kinder, die Zeugen häuslicher Gewalt werden**, nicht als direkte Opfer gelten. Obwohl dies in einigen Ländern als erschwerender Umstand gilt, stellt sich ein weiteres Problem in Bezug auf elterliche Rechte und Schutzmaßnahmen, da häusliche Gewalt häufig nicht als Grund für den Entzug der elterlichen Rechte des missbrauchenden Elternteils angesehen wird.

Was den **persönlichen Geltungsbereich** von Straftaten häuslicher Gewalt betrifft, so wird in den meisten Rechtsordnungen – unabhängig davon, ob ein spezifischer oder ein allgemeiner Straftatbestand zur Anwendung kommt – auf die persönliche Beziehung zwischen Täter und Opfer abgehoben. Manchmal ist Zusammenleben eine Voraussetzung, wodurch frühere Partner oder Partner, die nicht im gleichen Haushalt leben, ausgeschlossen sind. Andere Definitionen sind geschlechtsspezifisch, was ein breiteres Verständnis von Paarbeziehungen ermöglicht, da ein Zusammenleben nicht erforderlich ist, manchmal gleichgeschlechtliche Paare jedoch ausschließt.

Kapitel 3 Sexuelle Gewalt, einschließlich Vergewaltigung

Die Definitionen des Straftatbestands der Vergewaltigung unterscheiden sich von einem untersuchten Land zum anderen. Einige wenige Länder legen den Schwerpunkt, wie von Menschenrechtsnormen und der

Istanbul-Konvention empfohlen, auf das fehlende **sexuelle Einverständnis**, andere wiederum stellen auf das Element Gewalt bzw. Bedrohung ab. In der Praxis führt dies dazu, dass die Opfer, was den Zugang zur Justiz und den Schutz vor Gewalt betrifft, in den unterschiedlichen Ländern sehr ungleich positioniert sind. In den letzten zehn Jahren scheint sich jedoch ein positiver Trend dahingehend abzuzeichnen, dass Länder ihre Strafvorschriften ändern und Definitionen einführen, die auf Einverständnis basieren. Bis heute haben elf Länder Definitionen eingeführt, die vollständig auf Einverständnis basieren. Ein sexuelles Einverständnis gilt in allen Ländern als nicht erteilt, wenn das Opfer wehrlos ist oder aufgrund von persönlichen Umständen oder Nötigung kein Einverständnis erteilen kann.

Die Definitionen von sexueller Gewalt und Vergewaltigung sind durchweg **geschlechtsneutral** in dem Sinne, dass Opfer sowohl Männer als auch Frauen sein können, mit Ausnahme der Slowakei, wo nur Frauen Opfer einer Vergewaltigung sein können. In drei Ländern können nur Männer eine Vergewaltigung begehen, da die Definition an das Eindringen mit einem Penis gebunden ist. In einigen Rechtsordnungen sind gleichgeschlechtliche Vergewaltigungen und Sexualstraftaten ausdrücklich anerkannt. Die Unterscheidung zwischen Vergewaltigung und anderen Sexualstraftaten hängt je nach Land von unterschiedlichen Faktoren ab, basiert jedoch weitgehend darauf, ob eine Penetration stattgefunden hat oder nicht.

Das **Schutzalter, ab dem eine Person als sexualmündig gilt,** variiert je nach Land leicht und reicht von 15 bis 18 Jahren, wobei die Schutzaltersgrenze in den meisten Ländern bei 16 Jahren liegt.

Was die **Verfolgung** dieser Straftaten anbelangt, so haben die meisten Länder zwar eine Strafverfolgung von Amts wegen vorgesehen, nur wenige verfügen jedoch über entsprechende spezielle Leitlinien. Bei der Einstufung bestimmter Handlungen als einvernehmlich bzw. nicht einvernehmlich scheint die Entscheidungspraxis der nationalen Gerichte sehr uneinheitlich zu sein. Insgesamt meldeten die nationalen Expertinnen und Experten sehr niedrige Zahlen von Verurteilungen auf Grund von Vergewaltigung.

Kapitel 4 Sexuelle Belästigung und geschlechtsbezogene Belästigung

Sexuelle Belästigung und geschlechtsbezogene Belästigung sind auf nationaler Ebene im Allgemeinen nach den EU-Richtlinien zur Geschlechtergleichstellung geregelt. Die EU-Gesetzgebung hat sich jedoch als nicht wirksam genug erwiesen, um diese Phänomene in der Praxis zu bekämpfen. Im geltenden EU-Recht ist das Konzept nach wie vor hauptsächlich auf den Bereich der Arbeit sowie auf die Versorgung mit und den Zugang zu Gütern und Dienstleistungen beschränkt. Die Herausforderung besteht darin, in Einklang mit der Istanbul-Konvention **das Konzept über den Arbeitsbereich hinaus zu erweitern**. In den meisten Ländern ist das Verbot geschlechtsbezogener Belästigung und sexueller Belästigung bereits heute umfassender geregelt als im EU-Recht, und in einigen dieser Länder sind Belästigung und sexuelle Belästigung in sämtlichen Lebensbereichen verboten. Dies scheint darauf hinzudeuten, dass manche Staaten den derzeitigen EU-Rechtsrahmen für unzureichend halten, um sexuelle Belästigung und geschlechtsbezogene Belästigung zu bekämpfen.

Verbote von sexueller Belästigung und geschlechtsbezogener Belästigung sind über verschiedene Rechtsbereiche verstreut. Zehn Länder verfügen über strafrechtliche Bestimmungen zu sexueller Belästigung in allen Bereichen, nicht nur im oder in Bezug auf den Arbeitsbereich; fünf Länder verfügen über strafrechtliche Bestimmungen zu sexueller Belästigung im Arbeitsbereich; sieben Länder haben allgemeine strafrechtliche Bestimmungen zu Belästigung; 20 Länder haben spezifische Gesetze zur Gleichstellung/Gleichbehandlung von Männern und Frauen verabschiedet; neun Länder haben Antidiskriminierungsgesetze verabschiedet; elf Länder haben spezifische Bestimmungen in ihre arbeitsrechtlichen Vorschriften bzw. Arbeitsgesetzbücher aufgenommen und acht Länder haben entsprechende Bestimmungen in anderen Regelwerken untergebracht. Vier Länder befassen sich ausdrücklich mit Cybermobbing, während in fünf Ländern ein neuer Trend zur Einführung von Gesetzen gegen Sexismus und Belästigung auf der Straße zu beobachten ist. Nach Einschätzung der nationalen

Expertinnen und Experten wird die Wirksamkeit dieser Gesetze durch die rechtliche Fragmentierung eingeschränkt.

Kapitel 5 Weibliche Genitalverstümmelung und andere nicht einvernehmliche Formen genitaler Eingriffe

Achtzehn Länder verfügen über spezielle Strafvorschriften, um gegen weibliche Genitalverstümmelung (englisch: *female genital mutilation*, kurz: FGM) vorzugehen. Mit Ausnahme von zwei Ländern existieren jedoch keine Vorschriften, die genitale Eingriffe an intersexuellen Kindern verbieten, selbst wenn diese therapeutisch nicht notwendig und unfreiwillig sind. Straftatbestände wie Körperverletzung und Verstümmelung oder Straftaten gegen die Gesundheit sind in allen untersuchten Ländern auf FGM anwendbar und können Grundlage einer Strafverfolgung sein. Theoretisch könnte dies auch für andere Formen von nicht einvernehmlichen genitalen Eingriffen gelten. Da die Opfer aber nur selten Kenntnis von diesen Eingriffen haben, weil die entsprechenden Informationen nicht in ihrer Krankengeschichte auftauchen, ist es in der Praxis häufig unmöglich, diese Gewaltanwendungen zur Anzeige zu bringen.

Die spezifischen Definitionen von FGM beziehen sich entweder auf sehr allgemeine Handlungen (z. B. „jede Form der Verstümmelung“) oder fokussieren sich auf bestimmte Praktiken. Sie beziehen sich auf Genitalien im Allgemeinen oder auf bestimmte Teile der Genitalien. Mindestens die Hälfte der spezifischen Straftatbestände bezieht sich ausdrücklich auf Frauen und Mädchen, manche enthalten jedoch keine Angaben zum Geschlecht. Nur ein Land sieht ausdrücklich die Möglichkeit vor, Genitalien und Geschlechtsidentität voneinander zu trennen, und erkennt damit an, dass Personen von dieser Praxis betroffen sein können, die sich selbst nicht als Frau bezeichnen. Eine Einwilligung ist in den meisten Ländern nicht relevant. Hingegen wird es in mehreren Ländern als Straftat gewertet, eine Person zu verleiten, zu zwingen und gar zu „überreden“, sich einer solchen Praxis zu unterziehen.

In den meisten Ländern wird FGM von Amts wegen verfolgt, spezielle Richtlinien zur Strafverfolgung existieren jedoch nur in einem Land. Der Grundsatz der Extraterritorialität gilt in den meisten Ländern ohne das Erfordernis der beiderseitigen Strafbarkeit. Ungeachtet der Existenz spezifischer Straftatbestände, der Strafverfolgung von Amts wegen und der Extraterritorialität gibt es kaum Rechtsprechung zu diesem Thema, außer in Asylfällen. Dies lässt darauf schließen, dass das Verbot von FGM auf nationaler Ebene nicht wirklich durchgesetzt, sondern darauf zurückgegriffen wird, um den Flüchtlingsstatus zu gewähren oder zu verweigern. Außerdem scheint dies auf eine Diskrepanz zwischen dem Risiko und der Häufigkeit von FGM, wie sie vom Europäischen Institut für Gleichstellungsfragen (EIGE) ermittelt wurden, und der Zahl der Strafverfolgungen und Verurteilungen hinzudeuten.

Kapitel 6 Zwangsheirat

Zwangsheiraten sind in den allermeisten Ländern unter Strafe gestellt, vor allem in jüngerer Zeit und insbesondere als Reaktion auf die Anforderungen der Istanbul-Konvention. Konkret haben fast alle Länder die Definition der Istanbul-Konvention übernommen, die sowohl Handlungen umfasst, durch die eine erwachsene Person oder ein Kind zur Eheschließung gezwungen wird, als auch Handlungen, durch die eine erwachsene Person oder ein Kind in das Hoheitsgebiet einer Vertragspartei oder eines Staates gelockt wird, das nicht das Hoheitsgebiet ihres bzw. seines Aufenthalts ist, um diese erwachsene Person oder dieses Kind zur Eheschließung zu zwingen. Das Mindestheiratsalter beträgt im Allgemeinen 18 Jahre, wobei auf Antrag bei Gericht gewisse Ausnahmen möglich sind. Kinderehen sind nicht generell *per se* verboten, außer in Schweden. Richtet sich die Straftat der Zwangsheirat jedoch gegen eine minderjährige Person, so wird dies in manchen Ländern als erschwerender Umstand gewertet.

Der Straftatbestand der Zwangsheirat wird in den nationalen Gesetzgebungen in der Regel geschlechtsneutral beschrieben und gilt nicht als eine Form von Gewalt gegen Frauen. Zwölf Länder sind

über das Konzept der Ehe hinausgegangen und haben eingetragene Partnerschaften und außergerichtliche Ehen mit eingeschlossen. In letzterem Fall verbindet sich das Verbot von Zwangsheiraten mit dem Verbot von Begründungen, die auf Ehrvorstellungen basieren. Die Länder sehen für Zwangsehen und/oder Kinderehen in der Regel zivilrechtliche Konsequenzen vor. Nur sehr wenige Fälle von Zwangsheirat sind vor Gericht gekommen. Das lässt darauf schließen, dass Zwangsheiraten den Behörden nur selten gemeldet werden. Auch wenn die meisten Gesetze sehr jung sind, deuten die geringen Fallzahlen darauf hin, dass ein Verbot nicht ausreicht.

Kapitel 7 Stalking

Die überwiegende Mehrzahl der untersuchten Länder (27) hat Stalking ausdrücklich unter Strafe gestellt, und in zwei weiteren Ländern wird derzeit über eine Kriminalisierung diskutiert. Die Tatsache, dass immer mehr Länder dieses Verhalten unter Strafe stellen, lässt sich auf die Ratifizierung der Istanbul-Konvention bzw. auf die Debatte über deren Ratifizierung zurückführen, was die Ergebnisse früherer Studien bestätigt. Nach Ansicht einiger nationaler Experten und Expertinnen ist die Zahl der gemeldeten Stalking-Fälle nach Einführung des Verbots drastisch gestiegen.

Die Definitionen von Stalking sind in allen untersuchten Ländern geschlechtsneutral. Bei den Tatbestandsmerkmalen hat sich die Wiederholung bzw. der systematische Charakter der Handlungen als entscheidend erwiesen, wobei der Rechtsprechung bei der Auslegung dieses Aspekts eine zentrale Rolle zukam. Einigen nationalen Vorschriften zufolge muss das Verhalten über einen längeren Zeitraum hinweg stattfinden, in einer Vorschrift heißt es „bei mindestens zwei Gelegenheiten“. Gerichte haben indes festgestellt, dass eine Reihe entsprechender Verhaltensweisen innerhalb eines kurzen Zeitraums ausreicht, damit der Wiederholungstatbestand erfüllt ist. In mehr als der Hälfte der untersuchten Länder enthalten die Rechtsvorschriften eine (abschließende oder nicht abschließende) Liste von Verhaltensweisen, die unter die Straftat des Stalkings fallen können. Die in den Listen aufgeführten Verhaltensweisen unterscheiden sich erheblich.

Was IKT-gestütztes Stalking betrifft, so ist ein gewisser allgemeiner Trend dahingehend zu beobachten, die Relevanz der Online-Dimension dieses Phänomens anzuerkennen, sei es in der Formulierung des Straftatbestands, in der Liste der Verhaltensweisen, die den Tatbestand des Stalking gegebenenfalls erfüllen, sei es als erschwerender Umstand, in der nationalen Rechtsprechung, in Leitlinien oder als aktuelle Entwicklung. Mehr als eine ausdrückliche Anerkennung von IKT-gestütztem Stalking zeigt sich, dass bestimmte IKT-gestützte Verhaltensweisen durch allgemeine Formulierungen wie „alle möglichen Mittel“ oder „andere, vergleichbare Handlungen“ von den Strafvorschriften über Stalking erfasst werden.

Zentraler Punkt in Bezug auf die Straftat des Stalkings ist die Durchsetzung der Rechtsvorschriften. Zu den von den nationalen Expertinnen und Experten festgestellten Problemen gehören die Schwierigkeit, die Tatbestandsmerkmale vor Gericht zu beweisen, die mangelnde Sensibilität und das mangelnde Bewusstsein für das Phänomen seitens der Behörden sowie die – trotz der vom Gesetz vorgesehenen erheblichen Höchststrafen – milden Urteile (manchmal nur eine Geldstrafe). Nach Ansicht der nationalen Expertinnen und Experten sind diese Elemente der Grund für die geringe Zahl von Fällen, die vor Gericht kommen. Es wurden Protokolle verabschiedet, um die Durchsetzung und korrekte Umsetzung zu fördern.

Kapitel 8 Nicht einvernehmliche Verbreitung intimer/privater/sexueller Bilder

Die nicht einvernehmliche Verbreitung privater Bilder ist im Wesentlichen eine **IKT-gestützte** Form von Gewalt gegen Frauen. Analog zu den technologischen Entwicklungen entwickeln sich auch die von diesem Straftatbestand erfassten Handlungen sehr schnell weiter. Die Verbreitung intimer oder privater Bilder ist insofern geschlechtsspezifisch, als Frauen und Mädchen die Hauptzielgruppe sind und die Auswirkungen

auf Frauen gravierender sind. Es ist wichtig zu betonen, dass die Schädlichkeit der Verbreitung von intimen/privaten/sexuellen Bildern **ungeachtet einer ursprünglich gegebenenfalls erteilten Zustimmung zur Erstellung des Bildes** geprüft werden sollte.

Immer mehr Länder haben die nicht einvernehmliche Verbreitung privater Bilder unter Strafe gestellt oder sind im Begriff, dies zu tun. Elf der untersuchten Länder haben speziell die nicht einvernehmliche Verbreitung/Veröffentlichung/Weitergabe von intimen/privaten/sexuellen Bildern verboten. Nicht in allen Strafvorschriften ist ausdrücklich festgelegt, dass die Bilder mit oder ohne Zustimmung des Opfers erlangt werden können. Einigen innerstaatlichen Definitionen zufolge muss bei der Verbreitung ein Schädigungsvorsatz bestehen. Dagegen ließe sich einwenden, dass die Straftat an sich eine schädliche Handlung ist, unabhängig davon, ob der Täter dies beabsichtigt oder nicht. In den untersuchten Ländern hat die Kriminalisierung der nicht einvernehmlichen Verbreitung von intimen/privaten/sexuellen Bildern in den letzten Jahren zugenommen. In zwei Ländern, in denen ein unspezifischer Straftatbestand existiert, haben die Gerichte auf bereits bestehende Rechtsvorschriften zurückgegriffen, um gegen die nicht einvernehmliche Verbreitung/Veröffentlichung von intimen/privaten/sexuellen Bildern vorzugehen. In vier Ländern sind Reformen im Gange, die sich speziell mit dieser Art von Verhalten befassen.

Eine unzureichende Kriminalisierung dieses Verhaltens hat direkte Auswirkungen auf den *Zugang der Opfer zur Justiz*, da ihre einzige Alternative anscheinend darin besteht, eine Beschwerde bei der Online-Plattform einzureichen, die die Bilder verbreitet, und deren Entfernung zu verlangen – wobei die Entscheidung, diesem Verlangen stattzugeben oder nicht, jedoch weitgehend im Ermessen der betreffenden Plattform liegt. Einige Plattformen haben zwar Verfahren zur Einreichung von Beschwerden eingerichtet, oft haben Betroffene jedoch weder die Möglichkeit, eine negative Entscheidung überprüfen zu lassen, noch erhalten sie irgendeine Form von Entschädigung. Auch die Möglichkeit, gegen den Täter vorzugehen (z. B. durch Löschung seines Accounts), hängt von der Entscheidung der Plattform ab. Eine Kriminalisierung des Verhaltens würde es dem Staat hingegen erlauben einzugreifen, um den Zugang der Opfer zur Justiz und auch den Anspruch des Täters auf ein ordentliches Verfahren zu gewährleisten. Auch zivilrechtliche Maßnahmen, beispielsweise die Entfernung nicht einvernehmlich verbreiteter Bilder oder Aufnahmen per Gerichtsbeschluss, sind möglich. So oder so kann eine Kriminalisierung nicht isoliert erfolgen, sondern muss mit entsprechenden Präventiv- und Schutzmaßnahmen einhergehen.

Kapitel 9 Hassreden aufgrund des Geschlechts („sexistische Hassreden“)

Hassreden im Sinne einer öffentlichen Aufstachelung zu Gewalt oder Hass gegen eine Gruppe von Personen oder gegen ein Mitglied einer solchen Gruppe aufgrund bestimmter Merkmale gemäß der im Rahmenbeschluss 2008/913 enthaltenen Definition stehen weitgehend unter Strafe. In vierzehn Ländern zählt Geschlecht zu den Merkmalen, die vor Hassreden geschützt sind; 23 Länder haben sexuelle Orientierung und Geschlechtsidentität und/oder Geschlechtsausdruck und/oder Geschlechtsangleichung in die Liste der geschützten Merkmale aufgenommen.

Hassreden im Internet oder unter Verwendung digitaler Technologien haben besonders negative Auswirkungen auf die Menschenrechte und Selbstbestimmung von Frauen und Mädchen in der Gesellschaft, und sie beeinträchtigen die Geschlechtergleichstellung. In den nationalen Rechtsvorschriften wird jedoch kaum auf die Online-Dimension dieser Straftat Bezug genommen, und nur sehr wenige Länder scheinen über Gesetze zur Regulierung der Internet-, Medien- oder IKT-Kommunikation zu verfügen. Informationen über die Verfahren, die auf nationaler Ebene zu Verfügung stehen, um die Entfernung hasserfüllter Inhalte von Plattformen zu verlangen, liegen nicht vor.

Kapitel 10 Femizid/Tötung von Frauen aufgrund ihres Geschlechts

Die Straftat, eine Frau aufgrund ihres Geschlechts zu töten, wird zunehmend als „Femizid" bezeichnet. Dabei handelt es sich weder um eine neue Form von Gewalt, noch um ein isoliertes Phänomen, sondern vielmehr um den ultimativen Höhepunkt eines Kontinuums von Gewalt. Das Konzept des Femizids unterstreicht den strukturellen und systemischen Charakter, der aus der Diskriminierung von Frauen, einschließlich Transfrauen, und der Untätigkeit des Staates bzw. den unzureichenden staatlichen Maßnahmen zur Verhinderung dieser Diskriminierung resultiert. GREVIO (die für die Überwachung der Umsetzung der Istanbul-Konvention zuständige Stelle), das Interamerikanische Menschenrechtssystem und die UN-Sonderberichterstatterin zu Gewalt gegen Frauen haben die Verabschiedung von Rechtsvorschriften zum Thema „Femizid" unterstützt.

Es gibt **zwei Kategorien von Femiziden**: *aktive bzw. direkte* Formen von Femizid, die vorsätzliche Tötungen, Tötungen im Zusammenhang mit bewaffneten Konflikten, weibliche Kindstötungen und Tötungen aufgrund der sexuellen Orientierung und Geschlechtsidentität von Frauen umfassen, und *passive bzw. indirekte* Formen, die Müttersterblichkeit und andere Formen des Todes aufgrund von Vernachlässigung umfassen, von denen Frauen unverhältnismäßig stark betroffen sind oder die aus schädlichen Praktiken resultieren. **Femizid findet also nicht nur im privaten Bereich statt**.

Keines der untersuchten Länder hat einen spezifischen Straftatbestand eingeführt, der die geschlechtsbezogene Tötung von Frauen erfasst, wenngleich in einigen wenigen Ländern die geschlechtlich motivierte Tötung von Frauen als erschwerender Umstand gilt und eine zunehmende Debatte über dieses Phänomen stattfindet. Die meisten Länder stützen sich auf die erschwerenden Umstände, die bei Tötung durch einen Partner oder Ehegatten bzw. bei Todesfällen im Kontext häuslicher Gewalt zur Anwendung kommen. Dieser Ansatz reduziert das Phänomen des Femizids jedoch auf die Sphäre der Paarbeziehungen und lässt andere Arten der geschlechtsbezogenen Tötung von Frauen außer Acht. Es ist besorgniserregend, dass die geschlechtsbezogene Tötung von Frauen nicht nur selten anerkannt wird, sondern dass bei der Bestrafung einer solchen Tat auch noch die emotionale Befindlichkeit des Täters strafmildernd berücksichtigt werden kann. Der Bericht unterstreicht die Tatsache, dass die unterschiedlichen Legaldefinitionen und Erschwernisse, die in den einzelnen Mitgliedsstaaten angewendet werden, die Erhebung von Daten und deren Vergleich zwischen den Ländern erschweren können. Eine Erleichterung der Datenerhebung ist von entscheidender Bedeutung, um dem Appell zur Einrichtung von Beobachtungsstellen für Femizide nachzukommen. Der Bericht empfiehlt, auch dann spezielle Richtlinien für die strafrechtliche Verfolgung geschlechtsspezifischer Tötungen von Frauen zu erlassen, wenn kein geschlechtsbezogener Straftatbestand existiert. Der Bericht empfiehlt des Weiteren, nationale Beobachtungsstellen und eine europäische Beobachtungsstelle für Femizide einzurichten.

Kapitel 11 Allgemeiner Ansatz bezüglich Durchsetzung und Sanktionierung

Das letzte Kapitel des Berichts enthält einen Überblick über allgemeine Aspekte der Durchsetzung und Sanktionierung im Zusammenhang mit geschlechtsbezogener Gewalt. Was die Strafverfolgung betrifft, so wird aufgezeigt, dass zwischen den Ländern **Unterschiede hinsichtlich der Verjährungsfristen** für die verschiedenen untersuchten Straftaten existieren. Eine positive Entwicklung in diesem Zusammenhang ist die Abschaffung der Verjährungsfristen für sexuelle Gewaltverbrechen. In den meisten Ländern wird zudem bei (*ex parte*) Straftaten gegen Minderjährige, meist im Zusammenhang mit sexueller Gewalt, die Verjährung hinausgeschoben. Der Verjährungsbeginn schwankt dann zwischen dem Eintritt der Volljährigkeit und späteren Zeitpunkten, an denen das Opfer ein bestimmtes Alter erreicht. Was Extraterritorialität betrifft, so verlangt die Istanbul-Konvention zwar, das Erfordernis der beiderseitigen Strafbarkeit für mehrere Straftaten (sexuelle Gewalt und Vergewaltigung, Zwangsheirat, FGM, Zwangsabtreibung und Zwangssterilisation) abzuschaffen, allerdings kommt nur ein Land dieser

Forderung in vollem Umfang nach. Einige andere Länder lassen zwar Ausnahmen von der beiderseitigen Strafbarkeit zu, schränken die Abschaffung des Grundsatzes jedoch ein, indem diese beispielsweise nur für bestimmte Straftaten gilt. Drei Länder verlangen eine beiderseitige Strafbarkeit.

Die **Ansätze in Bezug auf Sanktionen und erschwerende Umstände unterscheiden sich ebenfalls** von Land zu Land. Unter „erschwerender Umstand" ist jeder Faktor zu verstehen, den der Gesetzgeber oder das Gericht bei der Entscheidung über die Schwere der Straftat und die Höhe der Strafe berücksichtigt, unabhängig davon, ob der besagte Faktor als eine Qualifikation des Tatbestands, als Element eines erschwerten Tatbestands oder als strafverschärfendes Tatbestandsmerkmal gewertet wird. Einige Länder sehen neben allgemeinen erschwerenden Umständen, die auf alle Straftaten angewendet werden können, für bestimmte Straftaten spezielle erschwerende Umstände vor. Andere Länder wiederum unterscheiden zwischen einfachen Straftaten und schwereren, „qualifizierten" Straftaten und setzen auch auf erschwerende Umstände.

Unterschiede wurden auch hinsichtlich des Schutzniveaus festgestellt. Mittel- und langfristige **Schutzanordnungen** existieren in allen untersuchten Rechtsordnungen, mit Ausnahme einer. In einigen Ländern handelt es sich dabei um *zivilrechtliche* einstweilige Maßnahmen oder Anordnungen, in anderen um *strafrechtliche* Schutzanordnungen. Eilschutzanordnungen existieren in 21 Ländern. Überall wurden neue gesetzliche Bestimmungen geschaffen, die Voraussetzungen für den Erlass von Eilschutzanordnungen unterscheiden sich jedoch. In vielen Fällen beziehen sie sich auf „unmittelbare Gefahr", „Lebensgefahr", „Bedrohung der körperlichen Unversehrtheit", „flagranten Charakter" oder „ernsthafte Gefahr" für das Opfer. Die Dauer des Schutzes reicht von 24 Stunden bis zu 20 Tagen, wobei es in den meisten Fällen erforderlich ist, dass das Opfer eine einstweilige Schutzanordnung beantragt. Den Gesetzen zufolge könnten in den meisten der in diesem Bericht behandelten Länder in Notsituationen Schutzanordnungen verhängt werden, in der Praxis ist das Erlangen von Schutz jedoch mit zahlreichen Schwierigkeiten verbunden. Diese betreffen die durchschnittlichen Fristen für den Erlass der Maßnahmen oder die Frage, wer eine solche Anordnung beantragen kann und welche Behörde für die Entscheidung zuständig ist.

Was **Entschädigungen** betrifft, so sind alle 31 Rechtsordnungen, auf die sich der Bericht bezieht, auf gleicher Augenhöhe. Alle Länder bieten Opfern von Straftaten die Möglichkeit, auf zivilrechtlichem oder strafrechtlichem Wege eine Entschädigung vom Täter zu fordern. Ein geschlechtsspezifischer Ansatz in Bezug auf Entschädigung, der den Gedanken einbezieht, dass die Gewalterfahrungen von Frauen sich grundsätzlich von den Gewalterfahrungen von Männern unterscheiden und dass Gewalt gegen Frauen das Resultat „ungleicher Machtverhältnisse" und struktureller Geschlechterdiskriminierung ist, hat im europäischen Rechtsrahmen noch keinen Einzug gehalten. Hinzu kommt, dass staatliche Entschädigungen in Europa nicht weit verbreitet sind. Obwohl solche Entschädigungen gemäß der Richtlinie 2004/80/EG des Rates vom 29. April 2004 in 24 Ländern vorgesehen sind, werden sie in den meisten Fällen nur Opfern von vorsätzlichen Gewaltverbrechen gewährt. In mindestens zwölf Ländern ist diese Option auf Fälle beschränkt, in denen das Opfer eine schwere Körperverletzung oder gesundheitliche Beeinträchtigung erlitten hat. In einigen wenigen Fällen sind staatliche Entschädigungen auf bestimmte Straftaten beschränkt. In den meisten Ländern werden staatliche Entschädigungen zudem subsidiär nur dann gewährt, wenn das Opfer keine Entschädigung vom Täter erwirken kann, entweder weil dieser nicht identifiziert wurde, nicht über die erforderlichen finanziellen Mittel verfügt oder weil eine Entschädigung im Straf- oder Zivilverfahren abgelehnt wurde.

Bei der Umsetzung der **EU-Opferschutzrichtlinie 2012/29/EU** schließlich haben die Staaten unterschiedliche Ansätze gewählt. Meist erfolgte die Umsetzung durch Abänderung bestehender Strafprozessvorschriften, manchmal in Kombination mit neuen Rechtsvorschriften. In anderen Fällen wurden mehrere verschiedene Mechanismen eingeführt, um die Richtlinie umzusetzen. Einige nationale Expertinnen und Experten stellten fest, dass die Richtlinie in ihrem jeweiligen Land noch nicht vollständig oder noch nicht wirksam umgesetzt wurde oder dass sie zwar umgesetzt wurde, jedoch in einer Weise, die für Opfer „minder schwerer Straftaten" gewisse Einschränkungen mit sich bringt.

Schlussfolgerungen

Wichtigste Schlussfolgerung des Berichts ist **die dringende Notwendigkeit, geschlechtsbezogene Gewalt gegen Frauen, einschließlich IKT-gestützter Gewalt, auf europäischer Ebene zu bekämpfen**. Dies wird durch die Antworten der nationalen Expertinnen und Experten auf die ihnen vorgelegten Fragen zweifelsfrei bestätigt. Frauen in Europa sind mit verschiedenen Formen von geschlechtsbezogene Gewalt konfrontiert, ohne die Möglichkeit, zu ihrem Recht zu kommen, was entweder auf einen Mangel an adäquaten Rechtsvorschriften oder auf eine mangelhafte geschlechtersensible Umsetzung zurückzuführen ist. Dementsprechend enthält jedes Kapitel des vorliegenden Berichts konkrete Vorschläge für die Einführung von Straftatbeständen und/oder strafverschärfenden Umständen, die auf verschiedene Formen von geschlechtsbezogener Gewalt gegen Frauen abzielen.

Kriminalisierung allein reicht jedoch nicht aus, um den Diskriminierungsaspekt von geschlechtsbezogener Gewalt gegen Frauen vollständig zu beseitigen. Es ist vielmehr erforderlich, einen ganzheitlichen Ansatz zu wählen. Der Bericht zeigt, dass die Opfer von geschlechtsbezogener Gewalt derzeit in Europa unterschiedlich gut geschützt sind. Diesbezüglich ist es unbedingt erforderlich, den Zugang zu sofortigen Schutzmaßnahmen zu gewährleisten, mit der Möglichkeit, mittel- und längerfristiger Schutzanordnungen zu beantragen, in Kombination mit der Bereitstellung von Unterstützungsdiensten für Opfer und Täter.

Ein koordiniertes Vorgehen in den nächsten Jahren kann dazu beitragen, die derzeitigen Defizite zu überwinden.

Introduction

Women face multiple forms of violence in all areas of their lives: in the private sphere, at school, at the workplace, in public spaces, and online. Studies repeatedly confirm this reality, despite numerous efforts to combat violence against women (VAW).[1] For many women, violence constitutes a continuum, which, in extreme cases, ends in their death.

International human rights law recognises VAW as the result of the unequal balance of power between women and men and as both a cause and a consequence of gender inequality. Although the final text of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979, did not require states to eliminate violence against women, the CEDAW Committee later explicitly included VAW as a matter falling under the scope of the Convention in General Recommendation 19 (1992), updated and reinforced by General Recommendation 35 (2017).[2] The clear underlying idea of these recommendations is that violence stems from discrimination against women and contributes to the perpetuation of such discrimination. GR 19 recommends that States Parties take 'appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act',[3] and GR 35 stresses further that States Parties must have an 'effective and accessible legal and services framework in place to address all forms of gender-based violence against women'.[4] At a minimum, 'effective measures' entail:

1. Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence;
2. Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;
3. Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.[5]

At the European level, the Council of Europe Convention on Violence against Women and Domestic Violence (Istanbul Convention), adopted in 2011, is the legally binding instrument addressing the issue. It states in Article 4(1) that States Parties 'shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere.' It should be noted that the European Union signed the Convention in 2017,[6] and that at the time of writing, all EU Member States have signed it, with 21 of them having ratified it.[7]

1 See: European Union Agency for Fundamental Rights (FRA), (2019) *Women as victims of partner violence – Justice for victims of violent crime, Part IV*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-justice-for-victims-of-violent-crime-part-4-women_en.pdf; World Health Organization (2021*), Violence Against Women Prevalence Estimates, 2018*, available at: https://www.who.int/publications/i/item/9789240022256. Also see: 'Violence against women and the girl child', https://worlds-women-2020-data-undesa.hub.arcgis.com/pages/violence-against-women-and-the-girl-child.

2 General Recommendation (GR) No. 19 (CEDAW), eleventh session, 1992, Violence against women; General Recommendation No. 35 (CEDAW), sixty-seventh session, 2017, on gender-based violence against women, updating General Recommendation No. 19 (CEDAW/C/GC/35 (2017)).

3 GR 19, Para. 24(a).

4 GR 35, CEDAW/C/GC/35 (2017), Para. 22.

5 GR 19, Para. 24(t)(i-iii).

6 Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters, OJ L 131/2017, pp. 11–12. Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement, OJ L 131, pp. 13–14. On the ratification byt the EU, see also De Vido, S. (2017) 'The ratification of the Council of Europe Istanbul Convention by the EU: a step forward in the protection of women from violence in the European legal system' *European Journal of Legal Studies* 9(2), pp. 69-102.

7 As of November 2021, the following EU Member States have ratified the Istanbul Convention: Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden. The following EU Member States have signed the convention but are yet to ratify it: Bulgaria, Czechia, Hungary, Latvia, Lithuania and Slovakia. The United Kingdom has also signed the Convention but has not yet ratified it.

The EU has also made several calls to Member States in relation to violence against women. For example, the Resolution of the European Parliament of 28 November 2019, called on the Member States to ensure the proper implementation and enforcement of the Convention, and to allocate adequate financial and human resources to preventing and combating violence against women and gender-based violence, as well as to the protection of victims; and called on the Commission to submit a legal act on the prevention and suppression of all forms of gender-based violence, including violence against women and girls.[8]

With regard to the protection of victims of crime, Directive 2012/29/EU of 25 October 2012 (the Victims' Rights Directive) is particularly relevant, since it expresses the EU's commitment to the protection of victims of crime, including victims of gender-based violence, and establishes minimum standards in that regard. The Victims' Rights Directive, which will be discussed throughout the different chapters of this report, includes a definition of gender-based violence (GBV) in its preamble, and recognises it as a form of discrimination and a violation of fundamental rights and freedoms. The preamble explains that gender-based violence includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'.[9] In addition to these specific forms of violence, it also includes 'violence in close relationships',[10] without making reference to specific forms of violence covered by that term, further suggesting that the forms of violence previously mentioned do not constitute an exhaustive list and that other forms of violence could be considered to be based on gender.

Aim and structure of the report

The aim of this thematic report is to carry out a comparative analysis of the criminal law provisions that are applied to gender-based violence against women, including domestic violence and online violence, in the EU-27, the three EEA countries and the United Kingdom. It explores whether gender-based violence is defined as a form of discrimination or a violation of the principle of equality. It also examines general aspects of enforcement and sanctioning that are particularly salient in the context of combating gender-based violence against women and domestic violence.

The report draws from the replies of 31 national experts on gender equality of the European network of legal experts in gender equality and non-discrimination (EELN) to a detailed questionnaire containing 12

8 European Parliament Resolution on EU accession to the Istanbul Convention and other measures to combat gender-based violence (2019/2855(RSP)). See also (selected list of resolutions): EP resolution of 26 November 2009 on the elimination of violence against women P7_TA(2009)0098; EP resolution of 5 April 2011 'New EU policy framework to fight violence against women' P7_TA(2011)0127; EP resolution of 14 June 2012 on ending female genital mutilation (2012/2684(RSP)); EP resolution of 6 February 2013 on the 57th session on UN CSW: Elimination and prevention of all forms of violence against women and girls. EP resolution of 6 February 2014 on the Commission communication entitled 'Towards the elimination of female genital mutilation' (2014/2511(RSP)). EP resolution of 26 February 2014 on sexual exploitation and prostitution and its impact on gender equality (2013/2103(INI)). EP resolution of 4 October 2017 on ending child marriage (2017/2663(RSP)); European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897(RSP)). EP Resolution 11 September 2018 Measures to prevent and combat mobbing and sexual harassment at the workplace, in public spaces, and in political life in the EU P8_TA(2018)0331: 'Reiterates its call on the Commission to submit a proposal for a directive to tackle all forms of violence against women and girls and gender-based violence, which should include common definitions of the different types of VAW, including an updated and comprehensive definition of harassment (be it sexual or otherwise) and mobbing, and common legal standards on criminalising VAW; calls on the Commission to present a comprehensive EU strategy against all forms of gender-based violence, including the sexual harassment and abuse of women and girls, drawing on testimonies in the form of women's stories and first-hand experience;' EP resolution of 14 December 2017 on the implementation of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography 2018/C 369/1; EP resolution of 7 February 2018 on zero tolerance for Female Genital Mutilation (FGM) (2017/2936(RSP); EP resolution of 30 May 2018 on the implementation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2016/2328(INI)) (2020/C 76/12) Minimum standards on the rights, support and protection of victims of crime; EP resolution of 12 February 2020 on an EU strategy to put an end to female genital mutilation around the world (2019/2988(RSP)).

9 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, (Victims' Rights Directive) preamble, paragraph 17.

10 Victims' Rights Directive, preamble, Para. 18.

sets of thematic questions, reproduced in Annex I. These country questionnaires provided information on existing legislation, criminal definitions used, prosecution and sanctioning, case law, limitations, and emerging debates. This information was supplemented with information from the existing baseline reports of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) on those EU Member States that have ratified the Istanbul Convention and have been already evaluated, and with information gathered from previous thematic reports by the EELN, EU agencies and specific mapping studies.

Chapter 1 of the report explores the existing definitions of gender-based violence agaist women in the international and European normative framework, establishes their main elements and considers the extent to which they are used in the relevant domestic jurisdictions. It also examines definitions of gender-based online violence and their reception at national level. This chapter sets out the overarching concepts that guide the examination of specific forms of violence. Chapter 2 starts with a detailed examination of the criminalisation of domestic violence. It explores the offences used, the types of prosecution and sanctions that follow, and provides recommendations based on the analysis. Chapter 3 is dedicated to the analysis of sexual violence, including rape, and follows a similar structure. The prohibition of sexual harassment and harassment based on sex is examined in Chapter 4, followed by a discussion of the criminalisation of female genital mutilation and the scarce measures prohibiting other forms of non-consensual genital interventions on children in Chapter 5. Chapter 6 explores the prohibition of forced marriages, both in criminal and civil law. Stalking is discussed in Chapter 7. Chapters 8 and 9 explore two types of ICT-facilitated forms of violence: the prohibition of the non-consensual dissemination of private images, and hate speech based on sex or gender, including when committed online. Chapter 10 explores the criminalisation of femicide. Finally, Chapter 11 provides an overview of general aspects of enforcement and sanctioning applicable to GBV. The report concludes with a final reflection and overarching recommendations.

1 Definitions of gender-based violence against women

This chapter describes the main concepts currently used in international law to address the issue of violence against women and explores the extent to which these are adopted at the domestic level in the 31 states under review. It also gives an account of whether the concepts used at national level recognise the interconnection between violence against women and gender inequality and discrimination, and to what extent they take into account intersectional or multiple forms of discrimination. Finally, the chapter introduces emerging ideas to address the increasing and rapidly changing phenomenon of online violence against women, and details their adoption in the domestic jurisdictions under consideration.

CEDAW General Recommendation 19 defines gender-based violence (GBV) as 'violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.'[11] A similar definition is also found in subsequent international soft law instruments. General Recommendation 35 explicitly uses the expression 'gender-based violence against women' (GBVAW), as 'a more precise term that makes explicit the gendered causes and impacts of the violence,' because it 'strengthens the understanding of this violence as a social rather than an individual problem, requiring comprehensive responses, beyond those to specific events, individual perpetrators and victims/survivors.'[12]

At the European level, the Istanbul convention introduced two definitions, both in line with CEDAW GR 19 and GR 35. The Istanbul Convention defines *violence against women* (VAW) as 'a violation of human rights and a form of discrimination against women' meaning 'all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life,' (Article 3(a)) and *gender-based violence against women* as 'violence that is directed against a woman because she is a woman or that affects women disproportionately' (Article 3(d)). Both definitions highlight the gendered nature of the violence, that is, the connection with gender discrimination, and the disproportionate impact on women.

VAW and GBVAW are not defined by any binding instruments of the EU, although the Declaration annexed to the Treaty of Lisbon expresses a commitment to adopt policies to combat all forms of *domestic violence*, which it connects to gender inequality:

> The Conference agrees that, in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence. The Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims.[13]

Several EU directives have introduced definitions of *gender-based violence* (GBV). Most notably, Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (the Victims' Rights Directive) defines it as:

> Violence that is directed against a person because of that person's gender, gender identity or gender expression or that affects persons of a particular gender disproportionately, is understood as gender-based violence. It may result in physical, sexual, emotional or psychological harm, or economic loss, to the victim. Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human

11 GR 19, Para. 4.
12 GR 35, Para. 9.
13 Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, signed on 13 December 2007, No. 19. Declaration on Article 8 of the Treaty on the Functioning of the European Union.

beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'.[14]

This definition of GBV explicitly recognises it as a form of discrimination, and acknowledges the special position of women victims and their children who 'often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence.'[15] The same directive also stresses the disproportionate impact on women of what is called 'violence in a close relationship' (intimate partner violence), which could cover 'physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss.'[16] This definition, however, seems only partially aligned with international standards since it recognises only the disproportionate impact on women in relation to violence that occurs in 'close relationships,' ignoring the different power dynamics that are based on the structural discrimination against women and that subject them to other forms of violence where no 'close relationship' exists.

These definitions, derived from the international and European normative framework guided the analysis of country questionnaires from each of the 31 jurisdictions under review. From them, the report identifies which definitions are used at domestic level to address gender-based violence against women (1), to what extent gender-based violence against women is recognised as an issue of inequality or a form of discrimination (2), to what extent gender-based violence against women is connected to ideas of intersectional or multiple discrimination (3), and which definitions are used domestically to address online gender-based violence against women (4).

1.1 GBVAW definition in national laws

National experts of the European Equality Network were asked whether there was a definition of VAW or GBVAW in their respective national legal systems or emerging from national jurisprudence. Where a definition was available, the experts were also asked to indicate whether it was gender neutral or gender specific. Comparing the results, it becomes clear that the approach adopted towards such violence varies significantly among the 31 jurisdictions. The adoption of *national laws* that would provide a general framework in relation to gender-based violence against women is not yet widespread, since in the majority of cases this is approached through *policies*, setting a *strategy* or a *plan of action*. Several states, however, have chosen to adapt laws that already exist to meet specific legal requirements deriving from international treaties or EU law, for instance, to accommodate the Victims' Rights Directive. This diverse approach towards violence against women is reflected in the legal definitions used in each of the jurisdictions to address the issue. As shown in Table 1, and discussed below, there are states where no 'guiding' definition is to be found at domestic level, states where the preferred definition is gender-based violence, sometimes in gender-neutral terms, sometimes with a gender-specific reference, and a minority of states where there is an overarching gender-specific definition that covers *all* forms of violence, not only domestic violence.

14 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, preamble.
15 Directive 2012/29, preamble, Para. 17.
16 Directive 2012/29, preamble, Para. 18.

Table 1 Definitions of violence applicable in each jurisdiction

State	GBV in law	GBVAW in law	VAW in law	Def. in policy	No def	Gender-specific	Gender-neutral	Definition
Austria	X						X	GBV entails all acts of physical and psychological violence
Belgium				X			X	Definition from Directive 2012/29/EU
Bulgaria					X			-
Croatia					X			-
Cyprus	X						X	Definition from Directive 2012/29/EU
Czechia				X		X		GBV is any act of physical, sexual, psychological, economic, and other violence aimed at women based on the fact that they are women, or aimed at men based on the fact that they are men; or any act of such violence which affects disproportionately women or men
Denmark					X		X	-
Estonia				X			X	GBV definition from Directive 2012/29/EU; VAW and GVAW definitions from Istanbul Convention
Finland					X		X	-
France		X	X			X		Definitions from Istanbul Convention.
Germany		X	X			X		Definitions from Istanbul Convention
Greece		X	X			X		Definitions from Istanbul Convention
Hungary					X			-
Iceland	X						X	Definition from Directive 2012/29/EU
Ireland					X			-
Italy					X			-
Latvia					X			-
Liechtenstein					X			-
Lithuania					X		X	-
Luxembourg					X			-
Malta	X						X	Definition from Directive 2012/29/EU
Netherlands					X		X	-
Norway					X			-
Poland					X		X	-
Portugal					X			-

State	GBV in law	GBVAW in law	VAW in law	Def. in policy	No def	Gender-specific	Gender-neutral	Definition
Romania	X	X				X		While GBV is gender neutral, GBVAW is defined as 'violence that affects women disproportionally'
Slovakia					X			-
Slovenia					X		X	-
Spain	X					X		GBV entails all acts of physical and psychological violence, including aggressions against sexual freedom, threats, coercion o arbitrary deprivation of freedom exerted over women by those who are or have been their spouses or have been linked to them by similar emotional relationships
Sweden			X			X		Men's violence against women entails all kinds of physical, psychological and sexual violence, and threats thereof made by men against women.
United Kingdom				X		X		VAW and Girls is a gendered crime and a fundamental issue of human rights, and a cause and consequence of women's broader inequality within society.

a) No definition of violence against women or gender-based violence in laws

No specific legal definition of GBVAW or VAW was found in 18 states (**Bulgaria**, **Croatia**, **Denmark**, **Estonia**, **Finland**, **Hungary**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Luxembourg**, **Netherlands**, **Norway**, **Poland**, **Portugal**, **Slovakia**, **Slovenia**). However, some states make references to either GBVAW or VAW in their policies. For instance, in **Hungary**, while no definition has been adopted in law, the National Strategy for the Promotion of Gender Equality – Guidelines and Objectives 2010-2021 uses the term of 'violence against women', however the strategy does not provide a definition and no national plans have been adopted since 2011.[17] In the **Netherlands**, where the gender-neutral approach to VAW has been critiqued by GREVIO and the CEDAW Committee, the Policy on Gender Equality 2018-2021 by the Minister of Education, Culture and Science mentions that 'GBVAW finds its roots in unequal power relations and unequal opportunities'.[18]

Several of these states address violence affecting women using regular norms with gender-neutral definitions (**Denmark**, **Finland**, **Liechtenstein**, **Lithuania**, **Netherlands**, **Slovenia**). For instance, in **Denmark**, no definitions have been introduced in law, and general offences apply, which are framed in a gender-neutral way. The national expert also explains that even the approach towards intimate partner violence (IPV) is becoming more gender neutral, triggering the criticism of the expert group

17 Hungary, Government Resolution No. 1004/2010 (I. 21) on the National Strategy for the Promotion of Gender Equality – Directions and Goals 2010–2021 (*Korm. határozat a Nők és Férfiak Társadalmi Egyenlőségét Elősegítő Nemzeti Stratégia – Irányok és Célok 2010–2021*), Annex, part IV. Available in Hungarian at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=134035.194182.

18 https://www.rijksoverheid.nl/documenten/kamerstukken/2018/03/29/emancipatienota-2018-2021.

monitoring the implementation of the Istanbul Convention (GREVIO). In **Lithuania**, the only definition of violence existing in the relevant law is that of domestic violence, which is defined in gender-neutral terms.[19]

That said, in most states there is some form of recognition of the disproportionate impact of the violence on women and girls. For instance, in **Norway**, the strategy is to 'mainstream' gender equality policy, incorporating it into the general legislation, policy and administrative practice, but the wording in the legislation is gender neutral. Despite the gender-neutral understanding and policy approach, Norway has explicitly adopted gender equality policies addressing GBVAW and acknowledged that such forms of violence disproportionately affect women.[20] In **Croatia**, while there is no definition in law, there are references to GBV in regulations addressing sexual violence or domestic violence, which are recognised as forms of GVB impacting disproportionately on women.[21] According to the national questionnaires, only **Finland** has not yet adopted any legislation specifically addressing domestic violence.

b) Definitions of gender-based violence

Eight states have introduced a definition of 'gender-based violence' (GBV) into their laws or policies (**Belgium**, **Cyprus**, **Czechia**, **Estonia**, **Iceland**, **Malta**, **Spain**, **United Kingdom**). In six of these countries the definition is a gender-neutral one. In some cases, the adoption of a gender-neutral notion of gender-based violence is the result of transposing the Victims' Rights Directive into laws or policies. **Cyprus** adopted the Directive's gender-neutral definition in Article 2 of Law 51(I)/2016 on the establishment of minimum standards for the rights, protection and support of victims of crime, and even the definition of domestic violence in Law 119(1)/2000 on domestic violence (prevention and protection of victims) is gender neutral. The same definition of GBV is found in the Gender-Based Violence and Domestic Violence Act of **Malta** of 14 May 2018[22] and in Article 2(5) of the **Icelandic** Gender Equality Act No. 10/2008[23] (which has not transposed the Directive into domestic law). **Belgium** also explicitly adopted this definition in its GBV plan for 2015-2019. **Estonia**, on the other hand, has adopted not only the GBV definition from the Directive in its policy documents, but also the definitions of 'gender-based violence against women' and 'violence against women' from the Istanbul Convention.

In contrast, **Spain** has adopted a gender-specific definition or concept under the GBV umbrella. The Spanish approach, however, is unique among the Member States. In Spain, gender-based violence is defined in specific framework legislation – Organic Law 1/2004 on Comprehensive Protection against Gender Violence[24] – and entails 'all acts of physical and psychological violence, including aggressions against sexual freedom, threats, coercion or arbitrary deprivation of freedom'.[25] However, the purpose of the law is limited to violence that is exercised over women by those who are or have been their spouses or in similar emotional relationships, including where there was no cohabitation. Thus, besides intimate partner violence, no other form of violence against women falls under the Spanish definition of gender-based violence. In relation to such violence (phrased as gender-neutral offences), gender will be considered as an aggravating circumstance.

Conversely, **Czechia** has adopted a definition of GBV only in its policies. The conceptualisation, however, is gender-specific in a different sense. As shown in the table, the definition of GBV introduced in the

19 Law No. XI-1425 of 26 May 2011. State Gazette (*Valstybės žinios*), 2011, No. 72-3475. Consolidated version (in Lithuanian) is available at: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.400334/asr.
20 See GREVIO (2020) *Report of 17 September 2020 submitted by Norway pursuant to Article 68 paragraph 1 of the Council of Europe Convention* (hereinafter GREVIO Report Norway 2020) p. 4; https://www.ldo.no/globalassets/_ldo_2019/_bilder-til-nye-nettsider/jenter/norway-to-grevio.pdf.
21 *Protokol o postupanju u slučaju seksualnog nasilja* (Protocol on the procedure in cases of sexual violence), *Narodne novine* no. 70/2018.
22 https://legislation.mt/eli/cap/581/eng/pdf.
23 Act No. 62/2014, Article 1.
24 Organic Law 1/2004, on integrated protection measures against gender violence (*Ley Orgánica 1/2004, de medidas de protección integral contra la violencia de género*), 28 December 2004, https://www.boe.es/buscar/act.php?id=BOE-A-2004-21760.
25 Organic Law 1/2004, on integrated protection measures against gender violence, Article 1(3).

'Action Plan of Prevention of Domestic Violence and Gender-Based Violence 2019-2022' makes explicit reference to men,[26] although the action plan acknowledges at times that studies indicate that 'women are disproportionately affected'. This recognition, however, is later contradicted:

> 'The action plan is based on a gender-specific approach to these forms of violence. It therefore recognises the gender-specific needs of women and men, both at risk of violence. The intention of the Action Plan is to cover all forms of domestic and gender-based violence, regardless of the sex of persons at risk of these forms of violence. The implementation of the measures set out in the Action Plan will thus contribute to improving the position of all victims (men, women, children, seniors and other groups).'[27]

According to the national expert, this compromised definition of GBV and the ambivalent approach of the action plan could be explained by the current tensions within the state in relation to the ratification of the Istanbul Convention and the ongoing gender backlash.

c) Definitions of gender-based violence against women

The notion of 'GBVAW' has been incorporated into the legal systems in only four states (**France**, **Germany**, **Greece**, **Romania**) following the ratification of the Istanbul Convention. In **Romania**, GBVAW is covered in the Gender Equality Law[28] and stipulated as a sub-category of gender-based violence, the legal definition of which is gender neutral.[29] Gender-based violence against women is defined within that context as 'violence that affects women disproportionally'.[30] The law also gives examples of gender-based violence that are exclusively experienced by women, such as female genital mutilation, forced abortion and forced sterilisation.[31] However, in practice, the Domestic Violence Law is the current legal basis for addressing violence against women.[32] In **France**, Act No. 2014-476 of 14 May 2014 authorising the ratification of the Istanbul Convention[33] implies the full application of the definition of violence against women and gender-based violence against women (Article 3) within the French legislative framework, without requiring, in principle, a specific definition in a national law. In **Greece**, it was the ratification of the Istanbul Convention that introduced (without transposing) the definitions in Article 3 to the domestic system. In **Germany**, the definitions of VAW and GBVAW are part of the federal Law implementing the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which entered into force on 1 February 2018.[34] Conversely, while **Croatia** and **Poland** have also ratified the Convention, the Convention's definitions have not been incorporated in domestic legislation, which maintain a definition of domestic violence in gender-neutral terms.[35]

In fact, before the ratification of the Istanbul Convention, **France**, **Greece** and **Germany** used other concepts in their domestic systems. **France** adopted Act No. 2010-769 of 9 July 2010 on violence specific to women, violence in couples and their effect on children,[36] improving existing provisions rather

26 Office of the Government (2019) *Akční plán prevence domácího a genderově podmíněného násilí na léta 2019-2022*, Chapter 6. Available at: https://www.vlada.cz/assets/ppov/rovne-prilezitosti-zen-a-muzu/Aktuality/AP-DN---grafikaFINAL.pdf.
27 Office of the Government (2019) *Akční plán prevence domácího a genderově podmíněného násilí na léta 2019-2022*, Chapter 3.
28 Law 202/2002 on equal opportunities and treatment between women and men (*Legea 202/2002 privind egalitatea de şanse şi de tratament între femei şi bărbaţi*), as amended by Law 178/2018, Article 1(2), enacted on 22 July 2018.
29 Romania, Gender Equality Law, Article 4(l), first sentence.
30 Romania, Gender Equality Law, Article 4(l), second sentence.
31 Romania, Gender Equality Law, Article 4(l), last sentence.
32 Law 217/2003 on prevention and combating domestic violence (*Legea 217/2003 privind prevenirea şi combaterea violenţei domestice*), as amended by Law 106/2020, Article I(1), enacted on 9 July 2020.
33 France, Act No 2014-476 of 14 May (*Loi n° 2014-476 du 14 mai 2014 autorisant la ratification de la convention du Conseil de l'Europe sur la prévention et la lutte contre les violences à l'égard des femmes et la violence domestique*), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000028933504.
34 See https://www.bmfsfj.de/resource/blob/122280/cea0b6854c9a024c3b357dfb401f8e05/gesetz-zu-dem-ueberein kommen-zur-bekaempfung-von-gewalt-gegen-frauen-istanbul-konvention-data.pdf (German, French, English).
35 Poland, Act of 29 July 2005 on combating domestic violence (unified text in JoL no 2020, item. 218).
36 France, Act No. 2010-769 of 9 July 2010 (*Loi n° 2010-769 du 9 juillet 2010 relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants*), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000022454032.

than introducing new definitions or new measures. It defined the specific gendered nature of the violence in its preamble: 'gendered violence is committed specifically against women and stems from persistent inequalities between women and men: domestic violence, violence in public spaces, in the workplace, or forced marriage and sexual mutilation.' Unlike France, **Greece** had incorporated gender-neutral definitions of 'violence at work', 'gender discrimination', 'harassment' and 'sexual harassment', in Act 4604/2019, which transposes the relevant EU directives.[37] Similarly, the 2002 Protection Against Violence Act in **Germany** used the gender-neutral term of 'domestic violence'.[38] Interestingly, according to the national questionnaire, German jurisprudence makes reference to the 'gender-based' nature of violence exclusively when foreign social and political structures are scrutinised in order to determine the existence of persecution or violence against asylum seekers, in line with Section 3b of the German Asylum Act implementing Article 9(2)(f) of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

d) Violence against women

Sweden has adopted the concept of 'men's violence against women,' which has been defined as an umbrella concept covering, for example, violence in intimate relations, honour-related violence, prostitution, trafficking, sexual exploitation of the female body in commercials and pornography, as well as violence in same-sex relationships and – quite counterintuitively – women's violence against men.[39] According to the GREVIO Committee, the concept is fully aligned with Article 3 of the Istanbul Convention, in particular as far as the recognition of the gendered nature of violence against women and domestic violence is concerned.[40] In addition, Swedish policy documents and legislation were found to use definitions of 'violence against women', 'domestic violence', and 'gender', which are either in line with or more extensive than the definitions set out in Article 3 of the convention.[41] Similarly, as noted above, while **France** has by now incorporated the definitions of GBVAW and VAW as a result of the ratification of the Istanbul Convention, earlier legislation already referred to VAW.[42]

In the **United Kingdom**, the notion of VAW has only been incorporated into policies. The recently published strategy on violence against women and girls (VAWG) of the Crown Prosecution Service recognises that some forms of violence disproportionately affect women.[43] This strategy does not provide a specific definition, however, it is presented as

> 'an overarching framework to address crimes that have been identified as being committed primarily but not exclusively by men against women. These crimes include domestic abuse, rape, sexual offences, stalking, harassment, so-called "honour-based" violence including forced marriage, female genital mutilation, child abuse, human trafficking focusing on sexual exploitation, prostitution, pornography and obscenity.'[44]

However, the strategy follows a gender-neutral approach.

37 Act 4604/2019, on promoting substantive gender equality and preventing and combating gender violence, OJ A 50/26.03.2019.
38 Protection Against Violence Act of 11 December 2001, entering into force on 1 January 2002, Official Journal 2001, p. 3513, https://www.gesetze-im-internet.de/gewschg/BJNR351310001.html.
39 Swedish Gender Equality Agency (2020), *Inget att vänta på. Handbok i våldsförebyggande arbete* (Nothing to wait for. Handbook for violence prevention), p. 53.
40 GREVIO (2019) *Baseline Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Sweden*, (hereinafter GREVIO Report Sweden 2019), p. 11.
41 This description is to be found in the GREVIO Report Sweden 2019, p. 12.
42 Act 2010-769 of 9 July 2010. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000022454032.
43 https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/VAWG-Strategy-2017-2020-R01.pdf.
44 Crown Prosecution Service (2017) *Violence Against Women and Girls: Strategy 2017-2020* (CPS, September 2017) available at: https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/VAWG-Strategy-2017-2020-R01.pdf.

Most of the states under review have not incorporated any specific definitions into their domestic jurisdictions (17 states). However, several of them have transposed the definition of 'gender-based violence' from the Victims' Rights Directive, either in law or policy. This is mostly done in gender-neutral terms, with only a minority of states recognising gender-based violence against women as a specific type of GBV, or recognising the disproportionate impact of certain forms of violence on women. Some States Parties to the Istanbul Convention have adopted or refer to the Convention's definitions.

1.2 GBVAW as an equality/discrimination issue

CEDAW explicitly recognised violence against women as a form of discrimination in General Recommendation 19 (1992).[45] The interpretation of the CEDAW Committee has been endorsed by subsequent international instruments addressing violence against women.[46]

The Explanatory Report of the Istanbul Convention acknowledges that 'discrimination against women provides a breeding ground for tolerance towards violence against women. Any measures taken to prevent and combat violence against women need to promote equality between women and men as only substantive equality will prevent such violence in the future.'[47] It also recognises that 'the enjoyment of the right to be free from violence is interconnected with the parties' obligation to secure equality between women and men to exercise and enjoy all civil, political, economic, social and cultural rights.'[48] The European Court of Human Rights has also recognised the connection between violence against women and discrimination based on sex or gender in its case law.[49]

National experts were asked whether VAW/GBVAW was defined as a form of discrimination or as a violation of the principle of equality in national legislation or jurisprudence, and what the consequences of categorising it as a form of discrimination were. According to the country questionnaires, only 12 states recognise to some extent (gender-based) violence against women as a form of discrimination or an equality issue (**France**, **Germany**, **Greece**, **Liechtenstein**, **Malta**, **Norway**, **Poland**, **Portugal**, **Romania**, **Spain**, **Sweden**, **United Kingdom**), while in 11 states there is no explicit recognition of GBVAW as an equality/discrimination issue (**Belgium**, **Croatia**, **Cyprus**, **Czechia**, **Denmark**, **Finland**, **Ireland**, **Latvia**, **Lithuania**, **Slovakia**, **Slovenia**). In the rest of the states it is unclear whether there is such a recognition or lack thereof. This is a surprising result, considering that all states have transposed the EU directives on gender equality[50] into their national legislations, although with different levels of compliance.[51] The country questionnaires indicate that specific laws on equality and equal treatment have

45 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations No. 19, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), A/47/38, available at: www.refworld.org/docid/453882a422.html.

46 See: the Declaration on the Elimination of Violence against Women, in 1993; and the Beijing Declaration and Platform for Action, in 1995, and its five-year reviews; and regional conventions and action plans, such as the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, in 1994; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, in 2003; and the Convention on Preventing and Combating Violence against Women and Domestic Violence, in 2011.

47 Council of Europe (2011) *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence* (Explanatory Report to the Istanbul Convention), CETS 210, Para. 49.

48 Explanatory Report to the Istanbul Convention, Para. 50.

49 ECtHR, *Opuz v Turkey*, Application No. 33401/02, judgment of 9 June 2009; *Eremia v the Republic of Moldova*, Application No. 3564/11, judgment of 28 May 2013; *Halime Kılıç v Turkey*, Application No. 63034/11, 28 June 2016; *M.G. v Turkey*, Application No. 646/2010, 22 March 2016.

50 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast), OJ L 204, 26.7.2006, pp. 23-36. See also Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37-43; and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp. 1–6. See also below on sexual harassment.

51 See: National transposition measures communicated by the Member States concerning: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, pp. 23-36, available at: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32006L0054.

been adopted in no fewer than 23 states (**Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Ireland**, **Italy**, **Latvia**, **Liechtenstein**, **Malta**, **Netherlands**, **Norway**, **Romania**, **Slovakia**, **Spain**, **United Kingdom**).

That said, in a few countries, GBVAW as an encompassing concept covering different types of violence has been addressed under the domestic equality laws. In **France**, the Act on real equality between women and men of 2014 includes measures to reinforce sanctions against violence against women, suggesting that gender-based violence is a violation of the principle of equality.[52] Most laws on violence against women, sexist and sexual violence include in their preambles the idea that violence, including sexist and sexual violence, has a disproportionate impact on women and is a question of combating inequalities between women and men.[53] As a result, some case law implicitly combines references to both norms relating to protection from harassment based on sex and prohibition of discrimination. In **Norway**, the Equality and Anti-Discrimination Act (GEADA)[54] applies to all areas of society, including family life and other purely personal relationships, and it includes gender-based violence in the prohibition of discrimination on grounds of gender and the prohibition of harassment or sexual harassment in Article 13.[55]

In a few states, there seems to be only a formal and indirect recognition of the connection between discrimination and violence against women resulting from the ratification of the Istanbul Convention (**Germany**, **Greece**, **Malta**, **Poland**). In **Germany**, however, the jurisprudence has not adopted the concepts of VAW/GBVAW explicitly, nor has it recognised the connection between discrimination and such violence. Courts apply domestic laws and have only addressed gender-based violence, such as forced marriage, female genital mutilation, honour killings, severe punishment for wrong clothing or moral misconduct, as gender-based persecution in asylum law.

So, to date, it appears that the connection between GBVAW and equality and discrimination is found predominantly in policies. For instance, the **Portuguese** national plans for gender equality, approved and implemented by the Government, indicate that a clear link between VAW/GBVAW and sex discrimination is established in the Portuguese system, despite the absence of a legal definition of those concepts in law.[56] The Crown Prosecution Service in the **United Kingdom**, recognises VAWG as a form of discrimination against women and a fundamental issue of human rights arising from gender inequality. Similarly, according to the questionnaire, violence against women in Sweden is framed as a gender equality issue and the gendered nature of such violence is fully incorporated into official documents, policies and, to some extent, legislation. Besides constituting criminal offences, violence against women in **Sweden** qualifies as harassment or sexual harassment.[57] It can thus be a form of discrimination if it occurs in a situation covered by the Discrimination Act, such as in working life, education, health and medical care, national military service etc. Equality bodies are also promoting this approach, particularly in states that are adopting gender-neutral definitions. In **Norway**, the 2020 report of the Equality Ombudsperson explicitly addressed gender-based violence as a form of discrimination.[58] Similarly, the **Polish** Ombudsperson (RPO) refers in official statements to the definition of VAW as a form of gender

52 Law No. 2014-873 of 4 August 2014 on real equality between women and men, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000029330832/: for example, Title III on victims of violence and Article 54 on forced marriages.

53 See for example, Law on combating sexist and sexual violence (*LOI n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes*) in its preamble: 'the persistance of sexist and sexual violence, which affect more massively women and children is intolerable in a State which respects the principle of equality between women and men.' See https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000037284450/.

54 Act of 2017-06-16-51 https://lovdata.no/dokument/NLE/lov/2017-06-16-51 (English).

55 See GREVIO Report Norway 2020 p. 4. https://www.ldo.no/globalassets/_ldo_2019/_bilder-til-nye-nettsider/jenter/norway-to-grevio.pdf.

56 See for instance: *Estratégia Nacional para a Igualdade e Não Discriminação 2018-2030* – ENIND (National Strategy for Equality and Non-Discrimination' 2018-2030 – ENIND), approved by Government Resolution No. 61/2018, of 21 May 2018.

57 Discrimination Act (2008:567) Chapter 1, Section 4, pp. 4-5.

58 See the Equality Ombud policy where violence against women is defined as gender based violence; https://www.ldo.no/globalassets/brosjyrer-handboker-rapporter/diverse-pdf1/diverse-pdf/kjonnsbasert-vold-policy-20-juni--nettet.pdf (only in Norwegian).

discrimination as determined in the Istanbul Convention,[59] emphasising that 'violence against women and domestic violence are violations of fundamental human rights and freedoms – the right to life and health, respect for private and family life, the prohibition of inhuman and degrading treatment – and is a form of discrimination on grounds of sex'.[60]

The positive implications of recognising GVAW as an equality or discrimination issue are not always evident, however. In **Romania**, GBVAW is addressed under the Gender Equality Law. However, framing it as inequality/indirect discrimination has no consequence in reality because the law that is applied in practice to VAW is the Domestic Violence Law. This appears to be a missed opportunity, since categorising VAW/GBVAW as a form of gender discrimination could broaden the procedural and substantive protective provisions offered to victims of violence,[61] particularly for non-violent types of offences.

One clear example of a non-discrimination approach adopted in laws on gender-based violence is provided in **Spanish** legislation, which explicitly considers violence against women as a 'manifestation of discrimination, the situation of inequality and the power relations of men over women'.[62] Similarly, the introduction of gender as an aggravating factor by the 2015 amendment to the Criminal Code[63] was justified in the preamble in connection with the purpose of the Istanbul Convention, considering that 'gender understood as "the socially constructed roles, behaviours or activities and attributions that a specific society considers to be those of women or men", may constitute a basis for discriminatory actions different from that covered by the reference to sex'.[64]

All of the EU Member States have transposed the EU directives on gender equality law, and 23 of the states examined in this study have ratified the Istanbul Convention. However, in the majority of them, gender-based violence against women is not recognised as a form of discrimination and the result of gender inequality, or the recognition is indirect and merely formal. Only a few states have explicitly recognised this connection, and mostly in policies rather than laws.

a) Intersectional discrimination

The CEDAW Committee, the Declaration of the Beijing Conference, and the UN Special Rapporteur on Violence against Women consistently promote an intersectional approach to violence against women, that is, the recognition that women face intersecting forms of discrimination based on their gender and other categories of social distinction, and that solely addressing gender or any other category in isolation yields deficient responses to the violence.[65] In General Recommendation No. 28 and General

59 RPO (2020): *Odpowiadamy na najważniejsze pytania o Konwencję Stambulską* (We answer the most important questions about the Istanbul Convention), Ombudsman's report for GREVIO, 2020-07-16, https://www.rpo.gov.pl/pl/content/pytania-i-odpowiedzi-konwencja-stambulska-raport-rpo-dla-grevio.

60 RPO (2013) *Przeciwdziałanie przemocy wobec kobiet, w tym kobiet starszych i kobiet z niepełnosprawnościami analiza i zalecenia,* (Counteracting violence against women, including elderly women and women with disabilities, analysis and recommendations), Bulletin of the Ombudsman 2013, No. 7, p. 5 https://www.rpo.gov.pl/sites/default/files /Biuletyn_Rzecznika_of_Obywatelskich_2013_Nr_7.pdf.

61 Petroglou, P. (2020), 'Η Δ.Σ.Ε. 190 και η Σύσταση 206 του Ιουνίου 2019: Αναγνώριση της σεξουαλικής παρενόχλησης και της παρενόχλησης λόγω φύλου στην εργασία ως μορφών έμφυλης βίας' (The ILO Convention 190 and the Recommendation 206 of June 2019: Recognition of sexual harassment and harassment related to sex at work as forms of gender-based violence), Επιθεώρησις Εργατικού Δικαίου (*Labour Law Review*), vol. 9/2020, pp. 993-1008.

62 Organic Law 1/2004.

63 Organic Law 1/2015, modifying Organic Law 10/1995 on the Criminal Code (*Ley Orgánica 1/2015, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*), 30 March 2015, https://www.boe.es/buscar/doc.php?id=BOE-A-2015-3439.

64 Organic Law 1/2015, modifying Organic Law 10/1995 on the Criminal Code, 30 March 2015, https://www.boe.es/buscar/doc.php?id=BOE-A-2015-3439, preamble, Numbered Article XXII.

65 For a detailed overview of the adoption of intersectionality in violence against women legislative frameworks, see: Sosa, L. (2017) *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?*, Cambridge University Press.

Recommendation No. 33,[66] the CEDAW Committee confirmed that discrimination against women is inextricably linked to other factors that affect their lives. In its jurisprudence, the Committee has highlighted factors such as women's ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital status, maternity, parental status, age, urban or rural location, health status, disability, property ownership, being lesbian, bisexual, transgender or intersex, illiteracy, seeking asylum, being a refugee, internally displaced or stateless, widowhood, migration status, heading households, living with HIV/AIDS, being deprived of liberty, and being in prostitution, as well as trafficking in women, situations of armed conflict, geographical remoteness and the stigmatisation of women who fight for their rights, including human rights defenders.[67] Since women experience 'varying and intersecting forms of discrimination, which have an aggravating negative impact,' the Committee recognises that gender-based violence may affect some women to different degrees, or in different ways, meaning that appropriate legal and policy responses are needed.[68]

While there are no explicit references to intersectionality or to 'multiple' or 'intersecting discrimination' in the Istanbul Convention, Article 4(3), reads:

> 'The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.'

Article 4(3) requires States Parties to secure the implementation of the convention without any discrimination, and that multiple forms of discrimination affecting certain groups of women must be prevented and addressed. Clarifying the scope of the article, the Explanatory Report to the Istanbul Convention explicitly states that women experience 'multiple forms of discrimination' and that 'this is no different when they become victims of gender-based violence.'[69] In addition, the Istanbul Convention makes references to the special vulnerability of some women in relation to the implementation of preventive measures, and measures for protection and support.[70] The GREVIO Committee has taken a clear intersectional approach in the baseline reports, examining the general approach to violence taken by the states in a section called 'intersectional discrimination,' and in the availability of protection and provision of services to specific groups of women, such as women from national minorities, women with addictions, women with disabilities, or based on a woman's sexual orientation and gender identity.[71]

It should be noticed that the initial grounds of discrimination covered in EU law – sex and nationality – have been extended since 2000 to include racial and ethnic origin, disability, sexual orientation, religion and belief, and age, thanks to the Charter of Fundamental Rights of the EU. These new incorporations might facilitate the recognition of multiple discrimination within EU law. However, as

66 General Recommendation No. 28 (CEDAW) forty-seventh session, 2010 – The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 33 (CEDAW) sixty-first session, 2015 - on women's access to justice.

67 General Recommendation No. 33, Paras. 8 and 9. See also: General Recommendation No. 15 (1990) on the avoidance of discrimination against women in national strategies for the prevention and control of AIDS, General Recommendation No. 18 (1991) on disabled women, General Recommendation No. 21 (1994) on equality in marriage and family relations, General Recommendation No. 24 (1999) on women and health, General Recommendation No. 26 (2008) on women migrant workers, General Recommendation No. 27 (2010) on older women and protection of their human rights, General Recommendation No. 30, Joint General Recommendation No. 31/general comment No. 18, General Recommendation No. 32 and General Recommendation No. 34. Intersecting forms of discrimination are also relevant in the Committee's views on *Jallow v Bulgaria*, *S.V.P. v Bulgaria*, *Kell v Canada*, *A.S. v Hungary*, *R.P.B. v Philippines* and *M.W. v Denmark*.

68 General Recommendation No. 28, Para. 18.

69 Explanatory Report to the Istanbul Convention, Para. 53.

70 See Istanbul Convention, Articles 12(3) and 18(3).

71 See for instance, GREVIO (2019) *Baseline Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Finland* (hereafter GREVIO Baseline Report Finland 2019), p. 12.

noted in previous reports, EU directives are segmented into three different sets of directives: the Racial Equality Directive (2000/43/EC); the Employment Directive (2000/78/EC), concerning religion or belief, disability, age or sexual orientation; and several directives on gender equality,[72] making the adoption of an intersectional approach to discrimination challenging.[73]

In relation to violent crime in particular, however, it is the Victims' Rights Directive which encourages the adoption of an intersectional approach to gender-based violence. First, it determines that victims of crime should be recognised and treated without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health.[74] But more importantly, it dictates that, when victims come into contact with criminal authorities and service providers, their personal situation and immediate needs, age, gender, possible disability and maturity should be taken into account.[75] States need to make an initial assessment to establish whether specific measures need to be adopted for their protection, to facilitate their participation in the proceedings and which services should be provided.

Reinforcing the relevance of the intersectional approach in relation to gender-based discrimination and gender equality, the EU Gender Equality Strategy 2020-2025 clarifies that the strategy will be implemented 'using intersectionality as a cross-cutting principle', and that 'the intersectionality of gender with other grounds of discrimination will be addressed across EU policies [...] and therefore respond to the specific needs and circumstances of women and girls in different groups'.[76]

National experts were asked whether VAW/GBVAW were linked in any way to any form of intersectional discrimination in the legislation or jurisprudence. Despite the references to 'multiple' or 'intersectional' discrimination that may exist at the domestic level as a result of the transposition of different equality and non-discrimination directives,[77] according to the country questionnaires, 15 states do not recognise any form of intersectional discrimination in relation to GBVAW (**Belgium**, **Croatia**, **Cyprus**, **Czechia**, **Denmark**, **Finland**, **Iceland**, **Italy**, **Latvia**, **Liechtenstein**, **Malta**, **Portugal**, **Romania**, **Slovenia**, **United Kingdom**). This is no surprise considering the lack of recognition of GBVAW as a form of discrimination in those states, as shown in the previous section. In the rest of the states it is unclear whether or not there is such a recognition.

A few exceptions, however, were found. The **Greek** expert reports a direct reference to 'multiple discrimination' in the Law on promoting substantive gender equality and preventing and combating gender violence, in relation to the provision of services to victims of violence[78] and shelters,[79] yet no other direct references were reported by the national experts. Although the **Polish** legal system has not defined the concept of multiple discrimination and no measures to protect victims of multiple discrimination have

72 Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast); Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

73 Fredman, S. (2016) *Intersectional discrimination in EU gender equality and non-discrimination law*, Report for the European network of legal experts in gender equality and non-discrimination, p. 62. Available at: https://www.equalitylaw.eu/downloads/3850-intersectional-discrimination-in-eu-gender-equality-and-non-discrimination-law-pdf-731-kb.

74 Victims' Rights Directive, preamble, Para. 9.

75 Victims' Rights Directive, preamble, Para. 9.

76 EU Gender Equality Strategy 2020-2025, pp. 2 and 16. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN.

77 Fredman (2016), p. 51.

78 Act 4604/2019, 25(1).

79 Act 4604/2019, 26(1).

been provided,[80] the Polish Ombudsperson refers to the concept of 'multiple discrimination' in the context of violence against women, arguing that older women, women with disabilities and migrant women are particularly exposed to violence.[81] In **Bulgaria**, while intersectionality is not mentioned explicitly in legislation, the national plans on equality of women and men address issues affecting specific vulnerable groups of women (such as those of different ethnic origins, migrants and women seeking international protection), and propose initiatives.

There are, however, indications that, regardless of the (non)existence of explicit references to intersectionality or multiple discrimination, attention is sometimes paid to the intersection of different categories of social difference and their impact on cases of violence. As mentioned above, the Gender Equality Act (GEADA) in **Norway** applies to gender-based violence against women. Article 6 of this law prohibits discrimination on the basis of gender, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age *or the combinations of these factors.* These will also be considered by Norwegian criminal courts as aggravating factors in violent crimes. Similarly, indirect discrimination case law in **France** has highlighted the differential impact of certain acts or measures on specific groups of women, such as undocumented migrants,[82] and special protection has been granted to refugee and asylum-seeking women.[83] The emergence of 'intersecting factors' has also been observed in connection to migration or asylum claims in other states. In the **Netherlands**, the *Vreemdelingencirculaire 2000* (Foreigners Act implementation guidelines)[84] takes several factors into account when migrant women request a residence permit, such as domestic violence in their home country, honour-related violence, sexual exploitation, forced marriages and sexual violence. Similarly, **German** courts have only parted from the traditional gender-neutral approach to violence in asylum law cases, by addressing forced marriage, female genital mutilation, honour killings and severe punishment for wrong clothing or moral misconduct as 'gender-based persecution'. Table 2 indicates states that regard GBVAW as a non-discrimination issue with an X. States for which we gathered no information appear in grey.

Table 2 Consideration of GVAW as an equality/non-discrimination issue in each jurisdiction

State	GBVAW as an equality/non-discrimination issue	Intersectional discrimination
Austria	-	-
Belgium	-	-
Bulgaria	-	-
Croatia	-	-
Cyprus	-	-
Czechia	-	-
Denmark	-	-
Estonia	-	-
Finland	-	-
France	X	X

80 RPO (2013) *Przeciwdziałanie przemocy wobec kobiet, w tym kobiet starszych i kobiet z niepełnosprawnościami analiza i zalecenia,* (Counteracting violence against women, including elderly women and women with disabilities, analysis and recommendations), Bulletin of the Ombudsman 2013, No. 7, p. 93, https://www.rpo.gov.pl/sites/default/files /Biuletyn_Rzecznika_of_Obywatelskich_2013_Nr_7.pdf.

81 RPO (2020) *Raport alternatywny Rzecznika Praw Obywatelskich do sprawozdania rządu Rzeczypospolitej Polskiej z działań podjętych w celu wprowadzenia w życie Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej* (Alternative report of the Ombudsman to the report of the Government of the Republic of Poland on actions taken to implement the Council of Europe Convention on preventing and combating violence against women and domestic violence), p. 5, https://www.rpo.gov.pl /sites/default/files/raport_alternatywny_rpo_dla_grevio_czerwiec_2020.pdf.

82 Act of 29 July 2015 reforming the refugee statute (*Loi n°* 2015-925 du 29 juillet 2015 relative à la réforme du droit d'asile): https://www.legifrance.gouv.fr/loda/id/JORFTEXT000030949483/.

83 On this, see: Mercat-Bruns, M. (2021) 'Discrimination intersectionnelle: une notion émergente en droit du travail?' *Bulletin Joly Travail*, April 2021, p. 52.

84 https://wetten.overheid.nl/BWBR0012289/2021-01-01.

State	GBVAW as an equality/non-discrimination issue	Intersectional discrimination
Germany	X	-
Greece	X	X
Hungary	-	-
Iceland	-	-
Ireland	-	-
Italy	-	-
Latvia	-	-
Liechtenstein	X	-
Lithuania	-	-
Luxembourg	-	-
Malta	X	-
Netherlands	-	-
Norway	X	X
Poland	X	-
Portugal	X	-
Romania	X	-
Slovakia	-	-
Slovenia	-	-
Spain	X	-
Sweden	X	-
United Kingdom	X	-

Based on the country questionnaires, none of the states under examination explicitly recognises the relevance of intersectional forms of discrimination against women in relation to the violence they suffer, and 16 states make no implicit recognition of it either. Only five states implicitly refer to the intersection of factors in some situations, or have addressed the special vulnerability of certain groups of women, particularly in relation to asylum law.

1.3 Gender-based ICT-facilitated violence against women

This report also addresses online forms of gender-based violence against women. The first aspect to address is the terminology to be used (cyber violence, online violence, gender-based online violence, online gender-based violence, gender-based cyber violence etc.), and the second aspect concerns the

types of behaviours to be tackled under the umbrella definition. Recent studies suggest that women are disproportionately the targets of certain forms of cyber violence compared to men.[85]

a) The terminology

In a 2018 report, the UN Special Rapporteur on violence against women (UN SRVAW) provided a broad definition of online/ICT-facilitated forms of violence:

> The definition of *online violence against women* [...] extends to any act of gender-based violence against women that is committed, assisted or aggravated in part or fully by the use of ICT, such as mobile phones and smartphones, the Internet, social media platforms or email, *against a woman because she is a woman, or affects women disproportionately*.[86]

This definition is broad enough to: a) emphasise the continuum of gender-based violence against women both online and offline; b) to be considered as a framework concept to which several forms of GBVAW online can be referred. In one paragraph, the Special Rapporteur refers to 'online and ICT-facilitated forms of gender-based violence against women' as the most inclusive concept.[87] She mentions that in several UN documents, including the 2030 Agenda for Sustainable Development, reference is made to 'the general and inclusive term "information and communications technology" (or ICT), while in other reports "online violence", "digital violence" or "cyberviolence" are used.'[88] Recently, in General Comment No. 25 (2021) on children's rights in relation to the digital environment, the UN Committee on the Rights of the Child used the expression 'violence in the digital environment.'[89]

In the Victim's Rights Strategy 2020-2025, the European Commission has defined cybercrime or online crime as 'any type of a criminal offence that is committed online or with a use of computer or online tools',[90] which 'may include serious crimes against persons such as online sexual offences (including against children), identity theft, online hate crime and crimes against property (such as fraud and counterfeiting

85 See, in that respect, Citron, D. K. (2014) *Hate Crimes in Cyberspace*, Harvard University Press; Henry, N. and Powell, A. (2018), 'Technology-Facilitated Sexual Violence: A Literature Review of Empirical Research', in *Trauma, Violence & Abuse*, vol. 19:2, pp. 195-208: 'Women and lesbian, gay, bisexual, trans, intersex (LGBTI) persons are more likely to be targeted for *specific forms of digital abuse*' (emphasis added). Online forms of sexual violence and harassment 'likewise stem from the socially constructed beliefs and attitudes about gender and sexuality (including victim blaming and victim shame and stigma) as well as perpetrator motivations for power and control'; Barker, K. and Jurasz, O. (2020), 'Online violence against women as an obstacle to gender equality: a critical view from Europe', in *European Equality Law Review*, vol. 1, pp. 47-60. See, further, European Union Agency for Fundamental Rights (FRA) (2014), 'Violence against women survey', survey data explorer, available at http://fra.europa.eu/en/publications-and-resources/data-and-maps/survey-data-explorer-violence-against-womensurvey?mdq1=dataset. On data analysis at national level, see van der Wilk, A. (2018) *Cyber Violence and Hate Speech Online Against Women*, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs. https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf, p. 42 ff. The report shows however that 'data and statistics on cyber violence and hate speech online against women in the EU are therefore extremely scarce and diluted.' See also the study by the Economist Intelligence Unit (EIU) completed in 2020, developing a measurement of the global prevalence of online violence against women (https://onlineviolencewomen.eiu.com/). According to the European Parliamentary Research Service (2021) *Combating gender-based violence: Cyber violence*, European Added Value Assessment, March 2021, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662621/EPRS_STU(2021)662621_EN.pdf: 'While there are gaps in the evidence available, the research undertaken indicates that the problem is significant in terms of the extent to which women in the EU face such violence and the scale of the damage done to society and the economy. Studies at the EU level using different indicators show that roughly 1 in 10 women face some form of cyber-violence in their lives. However, limited quantitative data exists at the EU level and the majority of national level data collection exercises have produced incomparable data.' The Advisory Committee on Equal Opportunities for Women and Men' opinion of April 2020 recommends that European Union and its Member States increase data collection and promote more comprehensive studies (https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/opinion_online_violence_against_women_2020_en.pdf).

86 UNHRC (2018) *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, A/HRC/38/47, Para. 23 (emphasis added).

87 UNHRC (2018) *Report of the Special Rapporteur on violence against women*, Para. 27.

88 UNHRC (2018) *Report of the Special Rapporteur on violence against women*, Para. 15.

89 General comment No. 25 (2021) on children's rights in relation to the digital environment, CRC/C/GC/25.

90 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims' rights (2020-2025), footnote 32, COM/2020/258 final.

of non-cash means of payment).'[91] Despite online-based definitions being the most common and popular ones, their scope is more restrictive, because online means 'connected to a network, especially the internet.'[92] Similarly, in a report for the European Parliament, published in March 2021,[93] the expression 'gender-based cyber violence' has been used, stressing the gendered nature of cyber violence. The use of the word 'cyber' is useful to connect the definition to cybercrimes, most notably to the Council of Europe Convention on Cybercrime (Budapest Convention).[94] 'Cyber' involves computers or computer networks (such as the internet) – 'computer systems, networks and computer data.'[95] *A Dictionary of Computer Science* identifies cyberspace as 'any large collection of network-accessible computer-based data.'[96] Information and communication technology (ICT) is the broader term to 'cover both computing and telecommunication technologies, with an emphasis on their combined use in information processing and transmission.'[97] These could be linked in a network or not.

Thus, the terms more commonly used so far are online violence against women,[98] online and ICT-facilitated forms of gender-based violence against women, gender-based cyber violence and cyber gender-based violence against women. These seem to be used interchangeably. This report will use the expression '**gender-based ICT-facilitated violence against women**' to encompass the different forms of violence committed through computer and communication systems, hardware and software. It includes both online and off-line activities involving any ICT devices, whether connected to networks or not. We consider it to be the most accurate technical and legal concept to capture the multiple facets of these forms of violence, and it also emphasises our focus on behaviours that are directed against women because they are women or that disproportionately affect women.

The forms of violence committed online that qualify as 'gender-based ICT-facilitated violence against women' can be either specific behaviours that are generally executed online and disproportionately negatively affect women and girls (such as non-consensual dissemination of intimate/private/sexual images), or behaviours that are commonly executed offline (and have been defined in that sense in national legislation) but have presented, especially in recent years, an online dimension (e.g. cyberharassment and cyberstalking). Incitement to hatred and violence, otherwise referred to as 'hate speech', is a more specific offence, because the behaviour was originally conceived as a form of violence that required certain forms of dissemination (public dissemination or distribution of tracts, pictures or other material). In recent years, this behaviour has spread and become exacerbated due to the use of ICT and is increasingly targeted at individuals on the basis of their gender, sexual orientation or gender identity.[99]

Among the types of behaviour amounting to ICT-facilitated violence, the UN Special Rapporteur on VAW, in the 2018 report mentioned above, notes the following forms of violence committed online: emerging

91 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Strategy on victims' rights (2020-2025), footnote 33, COM/2020/258 final, Para. 1.
92 Butterfield, A., Ngondi, G.E. and Kerr A. (2016), *A Dictionary of Computer Science* (OUP, 7. ed.), p. 1051.
93 European Parliamentary Research Service (2021) *Combating gender-based violence: Cyber violence*, European Added Value Assessment, March 2021, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662621/EPRS_STU(2021)662621_EN.pdf.
94 CETS No.185.
95 Budapest Convention, preamble and Article 1.
96 Butterfield, A., Ngondi, G.E. and Kerr A. (2016), p. 582.
97 Butterfield, A., Ngondi, G.E. and Kerr A. (2016), p. 842: 'ICT-facilitated refers more broadly to all forms of communication technologies, including the internet, wireless networks, cell phones, computers, software, middleware, video-conferencing, social networking, and other media applications and services enabling users to access, retrieve, store, transmit, and manipulate information in a digital form. See also: http://aims.fao.org/information-and-communication-technologies-ict.
98 See also Barker, K. and Jurasz, O. (2020), 'Online violence against women', p. 49: 'OVAW is not a new phenomenon – rather, it exemplifies the long pre-existing forms of VAW taking place in a different (online) environment.'; and Harris, B.A. (2020), 'Technology and Violence Against Women', in *The Emerald Handbook of Feminism, Criminology and Social Change*.
99 See Chapter 9 on hate speech, below.

forms, such as doxing,[100] sextortion,[101] and trolling;[102] some forms of violence against women which carry the prefix 'online', such as online mobbing, online stalking and online harassment; or newly emerging forms, such as the non-consensual distribution of intimate contents.[103] In another study for the European Parliament, additional behaviours were included, such as cyber bullying, non-consensual pornography, image-based sexual abuse, creepshots,[104] upskirting,[105] digital voyeurism, non-consensual/unwanted sexting,[106] etc.[107] In the most recent study for the European Parliament, the following behaviours were mentioned: cyber stalking, trolling, cyber harassment and bullying, hate speech online, flaming,[108] image-based sexual abuse/non-consensual pornography, and doxing.[109] In line with current studies,[110] cyber violence in the context of gender-based violence is understood as online harassment, online incitement to hatred based on gender through, online stalking, online threats, publishing information or content having a graphic intimate nature without consent, illegal access to intercepted communication and private data and any other form of abusive use of information technology and communications by the use of computers, smart mobile phones or other similar devices that use telecommunications or are able to connect to the internet and can send email or use social platforms, with the aim of shaming, humiliating, scaring, threatening or silencing the victim.

In the questionnaires, national experts of the EELN were asked whether there was any definition of online violence in their legal systems and if there were measures (criminal or non-criminal) adopted in national legislation specifically with regard to two forms of ICT-facilitated violence against women: online hate speech and non-consensual dissemination of intimate/private/sexual images. For crimes generally committed offline, the experts were asked whether a reference to the use of ICT-facilitated technology has been introduced at national level. For the purposes of this chapter, national experts were specifically asked: (1) if there is any definition of gender-based online/cyber violence in the national legal system or emerging from national jurisprudence; (2) where such definitions were available, to indicate whether they were gender neutral or gender specific; (3) which forms of online violence against women are addressed by their country's national legislation. National experts, when reporting specific laws on online violence against women adopted or under discussion in their country of origin, most commonly mentioned non-consensual dissemination of intimate/private/sexual images, and gendered online hate speech. The answers to the questionnaires have confirmed the initial proposition: gender-based hate speech and non-consensual dissemination of intimate/private/sexual images are indeed the most commonly criminalised behaviours that fall under the category of 'ICT-facilitated violence against women,' and these will be discussed in detail in the chapters dedicated to specific forms of violence. Below, the current chapter provides an overview of the 'umbrella' definitions used at domestic level.

100 Doxing is the act of revealing identifying information about someone online, such as their real name, home address, workplace, phone, financial, and other personal information, with the purpose of harassing, threatening or damaging the person.
101 Sextortion can take different forms, but it generally entails a threat to expose sexual images in order to make a person do something. These threats may come from strangers or (former) intimate romantic partners attempting to harass, embarrass and control victims.
102 Trolling is the act of leaving an insulting message on the internet with the intention to upset, refute, discredit or silence someone.
103 UNHRC (2018) *Report of the Special Rapporteur on violence against women*, A/HRC/38/47, Para. 33.
104 Creepshots are photos of women taken discreetly in public by men.
105 Upskirting is the act of taking a photograph or video from a position that allows someone to look up inside a woman's dress or skirt, without the woman's permission.
106 Sexting is the act of sending, receiving, or forwarding sexually explicit messages, photographs or videos.
107 See the complete analysis, based on the characteristics of victims, and perpetrators here: van der Wilk, A. (2018) *Cyber Violence and Hate Speech Online Against Women*. Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs. https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf.
108 Flaming consists of 'vitriolic content, denoted by explicit language and misogyny': Jane, E. (2015) 'Flaming? What flaming? The pitfalls and potentials of researching online hostility', in *Ethics and Information Technology*, 65-87.
109 European Parliamentary Research Service (2021) *Combating gender-based violence: Cyberviolence*, p. 6.
110 On this, see: Citron, D. K. (2014); Nussbaum, M. C. (2011) 'Objectification and Internet Misogyny', in *The Offensive Internet: Speech, privacy and reputation*. Harvard University Press, pp. 68-88.

b) No specific definition of gender-based ICT-facilitated violence against women

None of the countries, except **Romania**, have a specific definition of online violence. As reported by the **Croatian** expert, among others, all online illicit behaviours that may be described as online violence against women are so far criminalised only under the wide scope of general criminal offences for 'offline' crimes. The online dimension emerges either in the jurisprudence or as aggravating circumstance of crimes committed offline. As the report will show with regard to hate speech and non-consensual dissemination of intimate/private/sexual images, several states have adopted specific legislation to address *some* forms of gender-based ICT-facilitated violence.

c) Gender-neutral definition of gender-based ICT-facilitated violence against women

The results of the questionnaire show us one specific definition of online violence: in **Romania**, Article 4(1) (h) of the Domestic Violence Law, as amended by Article I(2) of Law 106/2020, which entered into force on 9 July 2020, defines cyber violence in a gender-neutral way. There is no criminalisation, but the law gives the victim the possibility to ask for civil protections, such as the issuing of a protection order against the perpetrator, which, as the national expert emphasises, might not be an adequate and effective remedy in cases of cyber violence in practice, because protection orders are designed to ensure physical distance in real life and not online.

d) Non-legal definitions of gender-based ICT-facilitated violence against women

In **France**, a guide prepared in 2017 by the Government as part of the 5th interministerial plan on violence against women defined 'cyber violence' as 'every form of violence (harassment, threats, injuries, dissemination of images, etc) that are produced in the digital space.' The guide also stressed that 'very often, cyber violence suffered by the users[111] is rooted in sexism. Women, and in particular young women, are exposed to amplified forms of violence online'.[112] Cyber-sexism is conceived in the guide as a series of behaviours carried out online with the scope of insulting, harassing, humiliating, spreading rumours: insults and humiliating comments on the physical appearance and sexuality, messages or images having a sexual nature, dissemination of stolen information, dissemination of intimate images taken unbeknownst to or in the intimate sphere without consent, etc.[113]

e) Draft laws and possible developments

The debate on some forms of gender-based online violence is ongoing, though, as the report will show with specific regard to hate speech and non-consensual dissemination of intimate/private/sexual images. In **Germany**, for example, there is a draft law on stalking and cyberstalking of 15 February 2021[114] covering stalking by use or means of telecommunication, by abusing personal data of the victim to order goods or services on the victim's behalf or to make third persons contact the victim, by espionage of private or specially protected data, by publishing a picture of the victim or persons close to the victim or by distributing, under pretence of the victim's authorship, any content which is likely to bring the victim into contempt or to disparage the victim in the eyes of public opinion. In **Iceland**, the current coalition Government has plans to criminalise digital sexual violence, as part the coalition agreement.[115] A steering committee's report for the Prime Minister published in January 2020[116] recommended an amendment

111 In fact, the guide refers to '*utilisatrices*', so using the female form.
112 Ministry of Equality between Women and Men (2017) *Guide d'information et de lutte contre les cyber-violences a caractere sexiste*, https://www.egalite-femmes-hommes.gouv.fr/wp-content/uploads/2017/04/GuideCyberviolences-3.pdf.
113 Ministry of Equality between Women and Men (2017) *Guide d'information et de lutte contre les cyber-violences a caractere sexiste*.
114 See https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Cyberstalking.pdf. Comment and critique by the German Women Lawyers' Association, Statement of 1 March 2021, https://www.djb.de/fileadmin/user_upload/st21-05_Cyberstalking.pdf.
115 https://www.stjornarradid.is/lisalib/getfile.aspx?itemid=a5aa63d9-d5b4-11e7-9422-005056bc530c.
116 https://www.stjornarradid.is/library/04-Raduneytin/ForsAetisraduneytd/KynferðislegFriðhelgi_MRB.pdf.

to the General Penal Code chapter on sexual offences by a new provision (Article 199) concerning sexual privacy. The main findings of the report are that the in light of societal and technological changes, the Icelandic General Penal Code is not adequate to ensure the efficient protection of sexual privacy. This is based on a court case analysis highlighting a fractured application of current provisions, interviews with stakeholders, survivors' perspectives, and an extensive comparative legal analysis exposing gaps and overlaps in the current legal framework. The report suggests a comprehensive response to enhance the protection of sexual privacy in Iceland. It calls for criminal law reform combined with threefold policy reform addressing preventative measures, victim support and adjustments to the process and resources attributed to the issue within the criminal justice system. In the **United Kingdom**, in 2020, the Law Commission of England and Wales launched a consultation from 11 September 2020 until 18 December 2020 in order to develop recommendations for a legal reform of communications offences to incorporate harmful online behaviour.[117] The results of this consultaion will be published in 2021.[118] The Law Commission raises concerns that existing offences do not criminalise certain conduct adequately, including 'cyberflashing' and 'pile-on harassment' as well as concerns that freedom of speech is inadequately protected by the overcriminalisation of certain forms of behaviour. In **Slovakia**, an amendment to the Criminal Code is currently under discussion in the Parliament: it will introduce the crime of 'serious harassment' (Section 360 b), which occurs when a person 'intentionally significantly degrades quality of life of another person via an electronic communication service, a computer system or a computer network (a) through long-term contempt, intimidation, acting on his/her behalf without authorisation or any other similar long-term harassment; (b) by unauthorisedly publishing or making available to another person a video, audio or video-audio recording of his/her expression of a personal nature obtained with his/her consent, capable of endangering his/her seriousness or causing him/her other serious harm.'

States have not yet defined gender-based ICT-facilitated violence (against women) in their legislation. The only gender-neutral definition in a legal instrument is found in Romanian law. Instead, states have adopted specific legislation that addresses certain forms of ICT-facilitated violence or have amended existing laws on offline violence to include the online dimension as an aggravating circumstance.[119] The forms of violence committed online that qualify as 'gender-based ICT-facilitated violence against women' can be either specific behaviours that are generally carried out online and that disproportionately affect women and girls (such as non-consensual dissemination of intimate/private/sexual images), or behaviours that are commonly carried out offline (and have been defined in that sense in national legislation) but have presented, especially in recent years, an online dimension (e.g. cyber (or ICT-facilitated) harassment and cyber (or ICT-facilitated) stalking).

117 https://www.lawcom.gov.uk/greater-protections-for-victims-of-online-abuse-proposed-by-law-commission/.
118 https://www.lawcom.gov.uk/project/reform-of-the-communications-offences/.
119 See Table 29 below. For more detail, see the chapters on stalking (Chapter 7) and hate speech (Chapter 9).

2 Domestic violence

The aim of this chapter is to provide a detailed examination of existing legislation on domestic violence, including intimate partner violence (IPV) or 'violence in close relationships'. The first part of the chapter introduces the main instruments addressing the issue, describes the definitions they use and explains the different elements taken into account in the examination of the domestic jurisdictions under consideration. The second part of the chapter presents the results from the national questionnaires. It describes the general approach adopted in the jurisdictions towards domestic violence, the criminal definitions used, the preferred forms of prosecution and the sanctions imposed on perpetrators of domestic violence. It concludes with a summary of the main findings and recommendations for harmonisation.

2.1 Introduction and main concepts

Regulation of domestic violence and violence in close relationships, including intimate partner violence, is currently underdeveloped in European Union law. Article 8 of the Treaty on the Functioning of the European Union (TFEU), however, establishes that 'the Union shall, in all its activities, aim to eliminate gender inequality.' When signing the Lisbon Treaty in December 2007, the intergovernmental conference stated that, in the struggle to eliminate gender inequalities, 'the Union will aim in its different policies to combat all kinds of domestic violence' and that 'Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims.'[120] The European Parliament has adopted several resolutions urging Member States and the European Commission to adopt measures to combat domestic violence.[121] A significant step forward is Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (Victims' Rights Directive), which recognises 'violence in close relationships' as a form of gender-based violence, and defines it as violence

> 'committed by a person who is a current or former spouse, or partner or other family member of the victim, whether or not the offender shares or has shared the same household with the victim. Such violence could cover physical, sexual, psychological or economic violence and could result in physical, mental or emotional harm or economic loss. Violence in close relationships is a serious and often hidden social problem which could cause systematic psychological and physical trauma with severe consequences because the offender is a person whom the victim should be able to trust. Victims of violence in close relationships may therefore be in need of special protection measures. Women are affected disproportionately by this type of violence and the situation can be worse if the woman is dependent on the offender economically, socially or as regards her right to residence.'[122]

The definition used in the recitals of the Victims' Rights Directive is in line with the conceptualisation of 'domestic violence' in Article 3(b) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), which defines domestic violence as

> 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.'[123]

120 Declaration 19, OJ C 202, 07.06.2016, p. 345.
121 Notably, Resolution of 26 November 2009 on the elimination of violence against women, OJ C 285E, 21.10.2010; Resolution of 25 February 2014 with recommendations to the Commission on combating violence against women, OJ C 285, 29.08.2017.
122 Victims' Rights Directive, preamble, Para. 18.
123 Council of Europe Convention on preventing and combating violence against women and domestic violence, 11 May 2011, available at: https://www.refworld.org/docid/4ddb74f72.html.

This definition is described in detail in the Explanatory Report to the Istanbul Convention (Explanatory Report), clarifying its personal and material scope.

In relation to the personal scope of domestic violence, the Explanatory Report clarifies that Article 3(b) addresses 'violence between members of the family or domestic unit, irrespective of biological or legal family ties. [...] Domestic violence includes mainly two types of violence: intimate-partner violence between current or former spouses or partners and inter-generational violence which typically occurs between parents and children.'[124] In addition, although the term 'domestic' may appear to limit the context of where such violence can occur, a joint residence of the victim and perpetrator is not required. Since IPV often continues after a relationship has ended, it includes violence between current or former spouses or partners. Similarly, inter-generational domestic violence includes violence by a person against their child or parent (elder abuse) or between any other two or more family members of different generations regardless of whether they share a residence.[125] Notably, the Explanatory Report clarifies that, while the overarching definition of domestic violence is gender neutral and encompasses victims and perpetrators of both sexes, the drafters of the Convention recognise that intimate partner violence constitutes a form of violence that affects women disproportionately and is therefore distinctly gendered.[126]

In relation to the material elements of the violence, the Istanbul Convention explicitly calls on states to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised,[127] and to criminalise the intentional conduct of committing acts of physical violence against another person,[128] in addition to the other behaviours enumerated in the definition of domestic violence. Furthermore, domestic violence may also amount to torture or cruel, inhuman or degrading treatment in certain circumstances.[129] The jurisprudence of the European Court of Human Rights (ECtHR) has clarified that inhuman treatment must attain a 'minimum level of severity'.[130] The assessment of the minimum level of severity of inhuman treatment is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.[131] By addressing the context, this provision could allow for the disadvantaged position of victims to be taken into account, while at the same time enabling an intersectional view of their situation in consideration of their 'special vulnerability'.[132]

The definition of domestic violence in the Istanbul Convention and its interpretation in the Explanatory Report are in line with the jurisprudence of the ECtHR. In *Opuz v. Turkey,* the Court held that

> '...domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse ... is a general problem which concerns all Member States and which does not

124 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11.V.2011, available at: https://rm.coe.int/16800d383a, Para. 41.
125 Explanatory Report to the Istanbul Convention, Para. 41.
126 Explanatory Report to the Istanbul Convention, Paras. 41-42.
127 Istanbul Convention, Article 33.
128 Istanbul Convention, Article 35.
129 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57); report of the Special Rapporteur (A/HRC/7/3), Para. 36; concluding observations of the Committee against Torture on the following periodic reports of States Parties under the Convention against Torture: Burundi (CAT/C/BDI/CO/1); Guyana (CAT/C/GUY/CO/1); Mexico (CAT/C/MEX/CO/4); Peru (CAT/C/PER/CO/5-6); Senegal (CAT/C/SEN/CO/3); Tajikistan (CAT/C/TJK/CO/2); and Togo (CAT/C/TGO/CO/1); Human Rights Committee, general comment No. 28 (2000) on the equality of rights between men and women; concluding observations of the Human Rights Committee on the following periodic reports of States Parties under the International Covenant on Civil and Political Rights: Slovakia (CCPR/CO/78/SVK); Japan (CCPR/C/79/Add.102); and Peru (CCPR/CO/70/PER), among others. Also, see the case law of the European Court of Human Rights regarding violations of Article 3 in cases of domestic violence: *E.S. and Others v Slovakia* (No. 8227/04); *Opuz v Turkey* (No. 33401/02); *Eremia and Others v the Republic of Moldova* (No. 3564/11); *Munteanu v the Republic of Moldova* (No. 34168/11); *M.G. v Turkey* (No. 646/10).
130 *Ireland v United Kingdom*, Judgment of 18 January 1978, Series A, No. 25; (1979–80) 2 EHRR 25, Para. 167 of Judgment.
131 ECtHR, *Costello-Roberts v The United Kingdom*, 25 March 1993, 30, Series Ano. 247-C; *Opuz v Turkey*, Para. 158.
132 Sosa, L. P. A. (2017) *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* Cambridge University Press. doi:10.1017/9781316771525, p. 129.

> always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly.'[133]

In the analysis of the case, the Court has also recognised that 'the State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.'[134]

The definition of domestic violence as described in this section guided the analysis of the country questionnaires, from which the report draws (1) the existing offences in all jurisdictions of study relating to domestic violence, (2) the elements of the crimes (material and personal scope) (3) the applicable sanctions and aggravations, and (4) aspects relating to the prosecution of the crimes (the main shortcomings). These aspects, lightly restructured, are presented in Section 2.2. below.

2.2 Results from the country questionnaires

a) Areas of law addressing the issue

Before moving to the examination of criminal law legislation, the section first examines the general approach to domestic violence adopted in national legal frameworks. In 2010, the European Commission funded, through the Daphne programme, a study on violence against women that involved a mapping out and comparative analysis of legislation on violence against women in 28 states.[135] The study found that, apart from Estonia, Finland, Latvia and Lithuania, all Member States had at that point adopted some form of specific legislation on domestic violence. Eleven years later, the country questionnaires suggest that only **Finland** is still to adopt any legislation specifically addressing domestic violence. Nevertheless, in 2010, Finland adopted a comprehensive, cross-sector national action plan on violence against women (the National Action Plan to Reduce Violence against Women 2010-2015) to facilitate the ratification and implementation of the Istanbul Convention. According to the GREVIO Committee, 'its adoption reflects an important change in the Finnish policy discourse around violence against women, which has only gradually connected violence against women to gender inequalities.'[136] Further, since its adoption, there is no state in Europe without some form of regulation on domestic violence.

Among the states with legislation on domestic violence, two main general approaches were identified: a) the adoption of (several) specific laws introducing *partial modifications* to existing legislation in order to address domestic violence, in many cases including criminal measures, and b) the adoption of a dedicated law that establishes a *general framework*, which specifies acts of violence in a domestic context and mostly focuses on protection from violence (by establishing protection orders, for example), sometimes also in combination with the criminalisation of the practice. Twenty-two states have adopted general framework laws (**Austria**, **Bulgaria**, **Croatia**, **Cyprus**, **Czechia**, **Estonia**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Italy**, **Liechtenstein**, **Luxembourg**, **Malta**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, **United Kingdom**), which is three more than the previous study had shown. The specific configuration of the criminal definitions is discussed in detail in the next subsection.

133 *Opuz v Turkey*, No. 33401/02, judgment of 9 June 2009, Para. 132.
134 *Opuz v Turkey*, No. 33401/02, judgment of 9 June 2009, Para. 191.
135 European Commission (2010) *Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on violence against women, violence against children and sexual orientation violence*, https://op.europa.eu/en/publication-detail/-/publication/cc805fb4-c139-4ac0-99b7-b0dad60179f7.
136 GREVIO Baseline Report Finland, 2019.

b) Criminal definitions

In relation to the criminalisation of domestic violence, the country questionnaires indicate three approaches: (1) the adoption of *specific* criminal offence(s); (2) the consideration of violence committed within the family/household or against a close person or current or ex-partner as an aggravation of *general* criminal offences; (3) a combination of both *general* and *specific* measures. Section 2.2(b)(i) examines specific offences, followed by subsection (ii), which examines the general offences used to address domestic violence and a discussion of the applicable aggravations in subsection (iii). References to jurisdictions that combine specific and general offences are made throughout the different subsections. The personal scope of the offences is discussed in subsection (iv).

i) Specific offences on domestic violence

To date, 13 states have introduced a specific criminal offence of domestic violence in their legislation (**Austria**, **Croatia**, **Czechia**, **Hungary**, **Iceland**, **Liechtenstein**, **Norway**, **Poland**, **Portugal**, **Slovakia**, **Slovenia**, **Sweden**, **United Kingdom**). Four states have chosen a combination of specific offence and aggravation (**Croatia**, **Greece**, **Italy**, **Spain**). For instance, the **Spanish** Organic Law 1/2004 on integrated protection measures against gender-based violence, introduced a range of specific offences into the Criminal Code, aiming to capture the wide range of behaviours that typically form part of domestic violence, including varying degrees of physical and mental harm. In 2015, an additional set of specific offences were adopted.[137]

The material scope of these crimes is discussed in detail below. Jurisdictions which have a combination of specific and general criminal offences addressing domestic violence (DV) are included only in this section. Note, however, that in some cases, the specific criminal offence of domestic violence is established as a subsidiary crime, and thus only applicable if no criminal offence of greater gravity is committed. The section also includes specific definitions of domestic violence found in other areas of law, yet we indicate this in all cases. For example, the definition of domestic violence in **Romanian** law is found in Law No. 217/2003, which is of civil nature. It states that 'domestic violence refers to any action or omission to act intended by physical, sexual, psychological, economic, social or spiritual violence, which occurs in the family or domestic environment or between spouses or former spouses, as well as between current or former partners, regardless of whether the aggressor lives with or lived with the victim.' In **Slovakia**, although no law explicitly regulating domestic violence has been passed, in recent years, existing mechanisms addressing domestic violence have been legislatively revised including the Criminal Code and the Code of Criminal Procedure. In addition, the term 'domestic violence' has been introduced (although not defined) in the Victim's Rights Act[138] and the Social Services Act.[139] The Criminal Code prohibits the 'maltreatment of a close person and person in care', which includes all forms of violence covered by the Istanbul Convention with a relatively high sentence.[140]

Table 3 indicates the most common behaviours that fall under the offence of domestic violence, regardless of the terminology used in the legislation.[141] In 17 states, offences of domestic violence allow for the criminalisation of physical violence. This is sometimes phrased quite generally. For instance, in **Italy**, domestic violence is criminalised under Article 572 of the Criminal Code as 'ill-treatment in

137 GREVIO (2020) *Baseline Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Spain* (hereafter GREVIO Baseline Report Spain 2020).
138 Act No. 274/2017 on Victims of Criminal Offences and on Amendments and Supplements to certain Acts, Section 2(1)(e), effective from 1 January 2018. Available in Slovakian at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2017/274/20200101.html.
139 Act No. 448/2008 on Social Services and amending Act No. 455/1991 on trade licensing (the Trades Licensing Act), effective from 1 January 2009. Available in Slovakian at: https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2008/448/20200425.html.
140 Slovakia, Criminal Code, Section 208.
141 Common labels are 'ill-treatment' or 'family abuse', while Sweden has adopted the notion of 'gross violation'.

the family', which applies to the conduct of 'anyone who mistreats a person of the family or in any case a cohabiting person, or a person under his authority or entrusted to him for reasons of education, training, care, supervision or custody, or for the exercise of a profession or art'. **Norway** refers to abuse as entailing 'threats, force, deprivation of liberty, violence or other degrading treatment that seriously or repeatedly abuses a present or former spouse or cohabitant, a relative in direct line of descent or a present or former spouses or cohabitant relative in direct line of descent, a relative in direct line of ascent, a member of the person's household or anyone in the person's care.'[142] **Poland**, similarly, defines family abuse as committed by someone 'who physically or mentally abuses the person closest to him or her, or of another person in a permanent or transient relationship of dependence on the offender.'[143]

Table 3 Material scope of specific offences on domestic violence

Behaviours	States
Physical Violence	Austria,* Belgium,* Bulgaria,* Croatia, Cyprus, Czechia, Hungary, Iceland, Lithuania,* Malta, Norway, Poland, Portugal, Romania,* Slovenia, Spain, Sweden
Sexual Violence	Austria,* Belgium,* Bulgaria,* Croatia, Cyprus, Lithuania,* Malta, Portugal, Romania,* Spain, Slovakia, Sweden
Psychological Violence[144]	Austria,* Belgium,* Bulgaria,* Croatia, Cyprus, Greece, Lithuania,* Luxembourg,* Malta, Poland, Portugal, Romania,* Spain, Slovakia
Economic/financial Violence	Belgium,* Bulgaria,* Croatia, Hungary, Lithuania,* Malta, Romania,* Slovenia, Slovakia
Coercion/coercive control	Hungary, Iceland, Ireland, Malta, Spain, Slovakia
Restrictions to freedom/liberty	Austria,* Bulgaria,* Cyprus, Hungary, Iceland, Malta, Norway, Portugal, Slovenia, Slovakia, Sweden
Degrading treatment	Hungary, Norway, Slovakia
Threats	Greece, Iceland, Malta, Norway, Slovenia, Spain
Attempts	Bulgaria*
Children witnessing violence	Malta

* Definitions found in laws other than criminal laws.

Explicit reference to different forms of restrictions to the liberty and freedom of the person were found in 11 states (**Austria**,* **Bulgaria**,* **Cyprus**, **Hungary**, **Iceland**, **Malta**, **Norway**, **Portugal**, **Slovakia**, **Slovenia**, **Sweden**). Economic violence is included only in nine states (**Belgium**,* **Bulgaria**,* **Croatia**, **Hungary**, **Lithuania**,* **Malta**, **Romania**,* **Slovakia**, **Slovenia**), yet several experts explained that offences against property, such as material harm, or theft, can be applied in close relationships as well. In several of those cases, however, prosecution is *ex parte*. Explicit mention of sexual violence is also present in 11 states (**Belgium**,* **Bulgaria**,* **Croatia**, **Cyprus**, **Lithuania**,* **Malta**, **Portugal**, **Romania**,* **Slovakia**, **Spain**, **Sweden**). As discussed in the chapter dedicated to sexual violence, recognition of rape within the couple has only recently been achieved in some states, even when incest is commonly found in domestic legislation.

Psychological violence, understood as intentional conduct which seriously impairs a person's psychological integrity through coercion or threats, is explicitly included in 13 domestic violence definitions (**Belgium**,* **Bulgaria**,* **Croatia**, **Cyprus**, **Greece**, **Lithuania**,* **Luxembourg**,* **Malta**, **Poland**, **Portugal**, **Romania**,* **Slovakia**, **Spain**), while several others make reference to these elements (coercion and threats). Psychological violence, coercion and threats, however, entail different aims. For instance, as the German expert explains, in **German** criminal law, the existence of 'threats' is determined by the perpetrator's behaviour and not by the (psychological) effects on the victim. The corresponding psychological impairments are therefore not a constituent element of the offence, meaning they are not a prerequisite

142 Article 282 of the Norwegian Penal Code on 'abuse in close relationships.'
143 Article 207 of the Polish Penal Code, contained in Chapter XXVI.
144 See aggravations below.

for applicability on the one hand, but on the other hand do not necessarily lead to criminal liability even if they are present. Similarly, although the protected interest underlying the offence of coercion includes freedom of will and thus an aspect of psychological integrity, the offence does not take into account other serious impairments of psychological health which are not related to an impairment of freedom of will; such psychological impairments may only constitute 'side effects' of other offences that could, in some cases, constitute an aggravation.

The offence of coercive control available in some jurisdictions is also interesting in relation to psychological violence (**Ireland**, **United Kingdom**). **British** legislation criminalises patterns of coercive or controlling behaviour where the perpetrator and victim are 'personally connected.'[145] While 'coercive' and 'controlling' are not defined in the legislation, the Government has published statutory guidance for the investigation of the offence, providing a non-exhaustive list of behaviours which may amount to coercion or control: acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour. In addition, coercive behaviour is a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse used to harm, punish, or frighten their victim. In addition, unlike the use of threats considered in 'ordinary' threat offences, the behaviour in this one must have had a 'serious effect' on the victim, meaning either that it has caused the victim to fear violence will be used against them on at least two occasions, or that it has had a 'substantial adverse effect on the victims' day to day activities'.[146] Using a different technique, following the ratification of the Istanbul Convention, **Spain** amended the Criminal Code in 2015 and introduced a series of gender-specific offences in order to comply with the requirements of criminalisation of psychological violence: intimidation;[147] coercion, including light coercion[148] and mental damage or other harm inflicted without necessarily causing an injury.[149]

In several cases the specific offence of domestic violence requires the 'repetition' or 'regularity' of the behaviours (**Hungary**, **Iceland**, **Ireland**, **Italy**, **Norway**, **Portugal**, **Sweden**). This requirement is interpreted differently in several jurisdictions. While there is agreement that regularity is contrary to the occasional nature or incidental character of the behaviour, the **Hungarian** Curia, the highest judicial authority in Hungary, has determined that it calls for more than a repetition, as it entails 'the perpetrator's state of consciousness connecting the individual occasions, it expresses that the perpetrator "makes a system" of his behaviour, his behaviour is not extraordinary, so it can be established in at least two offences'.[150] The systematic nature of the violent conduct is also needed to qualify as ill-treatment in **Italy**, according to case law. If this element cannot be proven, the perpetrator might be held to account under other crimes such as battery,[151] bodily harm[152] and threat,[153] which are prosecutable *ex parte* and may fall within the jurisdiction of lower courts (justice of the peace).[154]

The element of the regularity or continuity of the behaviour plays a very different role in other jurisdictions, used to highlight the systemic and discriminatory nature of the violence. In some cases, the requirement of regularity is linked to the severity of the behaviours. For instance, in **Sweden**, the number of criminal acts required for the infringement to be considered *a repeated violation* is assessed on the basis of the nature of the acts. The more serious the criminal act, the fewer acts are required for the violation

145 Section 76 of the Serious Crime Act 2015, in force since December 2015.
146 Section 76(4) of the Serious Crime Act 2015.
147 Spanish Criminal Code, Article 171, paragraphs 4 and 5.
148 Spanish Criminal Code, Article 172, paragraph 2.
149 Spanish Criminal Code, Article 153.
150 See the related authoritative ruling, issued by the Criminal College of the Curia: EBH 2017.B.17 (in case No. Bfv.III.1.644/2016).
151 Italian Criminal Code, Article 581.
152 Italian Criminal Code, Article 582.
153 Italian Criminal Code, Article 612.
154 GREVIO (2019) Baseline Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Italy (hereafter GREVIO Baseline Report Italy, 2019), Para. 11.

to be considered as repeated.[155] In **Iceland**, however, while criminal law provides that anyone who repeatedly and seriously threatens the life, health or wellbeing of the victim will be punished,[156] the explanatory report of the law explains that violence in close relationships is no longer regarded as isolated incidents but rather as a continuous threat along with mental suffering. In other words, violence in close relationships is considered in a holistic context without having to prove each incident on its own.[157] This understanding is perhaps better illustrated in the **Spanish** context, where multiple specific offences can apply in combination. The jurisprudence of the Spanish Supreme Court has established that the characteristic element in the offence of domestic violence is the habitual character of violence (psychological or physical), which creates a climate of permanent aggression,[158] contrary to family life. It is not necessary to prove each single act of violence that creates that climate,[159] since the crime is thus configured by a repeated action, from which a single specific result of intimidation and permanent submission derives. This criminal consideration is autonomous, thus, the specific results from each behaviour could in fact constitute offences in themselves (such as injuries, homicide, threats, illegal detention).[160] Moreover, regular ill-treatment under the crime of domestic violence is a single offence whether the individual violent acts were directed towards just one person or different persons of the family home.[161]

That said, the requirement of regularity can have negative consequences in practice. **Italian** jurisprudence indicates that in certain cases, the regular nature of the behaviour is considered absent such as (1) when the repetitive violent conduct took place during a short lapse of time, for instance because the intimate partner relationship lasted for only a brief period; (2) when the violence reported occurred at the end of a relationship and was not preceded by any complaint, thus being ascribed to an occasional 'state of anger'; and, more commonly, (3) when the victim was not found to be reduced to a state of passive submission because of the violence. According to the GREVIO baseline report, in relation to the latter, whenever the victim demonstrated the capacity to resist and react to the violence, the violence tended to be reduced to a situation of 'conflict within the couple'. Conversely, where perpetrators dominated and controlled the victim, they were found guilty of ill-treatment.[162]

ii) General offences addressing domestic violence

Two states criminalise domestic violence exclusively with basic general offences (**Germany**, **Ireland**), but have still introduced domestic violence regulations in other areas of law. Moreover, these states sanction the breach of a protection order imposed in cases of domestic violence as a criminal offence. For instance, the **Irish** Domestic Violence Act 2018 was enacted in 2018 and entered into force in 2019. It provides no specific definition of domestic violence and does not contain any specific prohibition of domestic violence, however, it enables victims of violence to request barring orders (including interim and emergency orders), safety orders and protection orders in civil courts. The act also provides criminal penalties for breaches of protection orders, which include imprisonment and/or fines. The 2018 act further creates the offence of coercive control which is punishable by imprisonment and/or fines.

With the exception of **Germany** and **Ireland**, the rest of the states relying on general offences can combine them with specific aggravations based on the existence of family, intimate or dependency relationship, as discussed in more detail in subsection (iii) below. In the absence of specific offences of

155 Government Bill Prop 1998/99:55 p. 133. A similar situation is found in Poland. See: Judgment of the Court of Appeals in Wrocław, 25 April 2012, II AKa 405/11.
156 Icelandic Criminal Code, Article 218 b.1.
157 *Frumvarp til laga um breytingu á almennum hegningarlögum nr. 19/1940, með síðari breytingum, (Samningur Evrópuráðsins um forvarnir og baráttu gegn ofbeldi gegn konum og heimilisofbeldi), þskj. 547 – 145. löggjafarþingi, bls. 12.* https://ulfljotur.com/2019/08/29/kynbundid-ofbeldi-i-nanum-sambondum/.
158 Spanish Supreme Court, judgment 640/2017 of 28 September 2017, ECLI:ES:TS:2017:3528.
159 Spanish Supreme Court, judgment 280/2015 of 5 May 2015, ECLI:ES:TS:2015:2172.
160 Similarly, **Sweden** has crimes of 'gross violation of integrity' (Criminal Code, Chapter 4, Section 4a(1)) and 'gross violation of a woman's integrity' (Criminal Code, Chapter 4, Section 4a(2)). Government Bill Prop 1998/99:55, p. 133.
161 Spanish Supreme Court, judgment 66/2021 of 28 January 2021, ECLI:ES:TS:2021:232.
162 GREVIO Baseline Report Italy, 2019, Para. 13.

domestic violence, a broad variety of general offences are used to punish domestic violence. Table 4 shows which offences are most commonly used in all these states. The table (and this section) exclude jurisdictions where general offences can be applied either in combination or subsidiary to the specific offence.

That said, it should be pointed out that one of the consequences of using general offences instead of specific offences on domestic violence is that the type of prosecution that ensues, varies.

Table 4 General offences used for the prosecution of domestic violence

Offence	States
Injuries, assault, battery	Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Lithuania, Netherlands, Romania
Sexual violence, including rape	Austria, Belgium, Denmark, Estonia, France, Germany, Greece, Latvia, Lithuania, Netherlands, Romania
Insult	Austria, Germany, Luxembourg
Threats	Austria, Belgium, Bulgaria, Estonia, Finland, Germany, Greece, Lithuania, Luxembourg, Netherlands, Romania
Arbitrary detention/personal liberty	Belgium, Bulgaria, Germany, Lithuania, Luxembourg, Slovakia
Inhuman & degrading treatment	Belgium
Stalking	Bulgaria, Netherlands
Trespassing/violation of private home	Germany, Lithuania, Luxembourg
Children witnessing violence	Austria, Greece, Italy, Malta, Romania
Material damage/crimes against property	Netherlands
Murder, manslaughter, killing	Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Netherlands, Romania

iii) Aggravations

The general approach in relation to sanctioning and aggravating sanctions for offences varies among the states under examination. In some states, there is a distinction between the basic offence and more serious offences, often called 'qualified' offences, in addition to aggravating factors applying to each of them. In this section, 'aggravating factors' refer to any circumstances that the legislature or judge takes into account to decide on the seriousness of the offence and the severity of the sanction, regardless of whether this is considered as a qualification of the offence, or an aggravating factor. That said, it is important to clarify that some jurisdictions have chosen to address domestic violence through the imposition of specific aggravations rather than as specific offences, and for that reason we discuss aggravations separately rather than in combination with sanctions, as in the other chapters.

According to the national questionnaires, 13 Member States (**Belgium**, **Bulgaria**, **Cyprus**, **France**, **Greece**, **Hungary**, **Italy**, **Luxembourg**, **Malta**, **Netherlands**, **Romania**, **Slovakia**, **Spain**) have introduced aggravations of offences if they are committed within the family/household or against a close person or current or ex-partner. This approach allows for the use of all provisions of criminal law while imposing a higher sentence but, as a rule, it does not entail a gender-specific dimension.

For instance, there are no specific provisions of criminal law prohibiting domestic violence in **Bulgaria**, but there is a qualifying concept for aggravating circumstances to several offences, introduced at the beginning of 2019 through the amendments to the Penal Code.[163] Article 93 of the Penal Code, which contains the definitions of some terms, states in Recital 31 that:

163 Amendment of the Penal Code with S.G. 16/2019.

> 'The criminal offence shall be deemed to have been committed *in conditions of domestic violence*, if it is preceded by systematic physical, sexual or psychological violence, placing the person in economic dependence, coercive restriction of personal life, personal liberty and personal rights, and is enforced against persons in ascending and descending order, a spouse or ex-spouse, a person with whom one shares a child, a person with whom one is or has been in a de facto marital cohabitation, or a person with whom one lives or has lived in a common household.' (emphasis added)

Similarly, in **Luxembourg**, domestic violence is an aggravating circumstance with respect to the offences of insult (Criminal Code, Article 448), threat (Article 330-1 CC) and arbitrary detention (Article 438-1 CC), such as, an insult uttered at home or anywhere else, in the presence of the offended person and before witnesses. In **Finland**, although there is no specific offence and no aggravation taking into consideration the relationship, the Supreme Court has considered that the perpetrator and victim in a case of domestic violence are not in an equal position, and that harmful and dangerous acts intentionally committed in such circumstances suggest that the sentence should be aggravated.[164] In one case, however, the Finnish Supreme Court referred to the legality principle as excluding that international human rights conventions could as such be applied in national criminal law.[165] That said, according to the national expert, although when the Istanbul Convention was transposed to national law by Act 375/2015, no specific provision was adopted to implement Article 46 of the Convention, the provisions in the Finnish Criminal Code that refer to the proportionality of the punishment to harmfulness and dangerousness of the offence could be used to fulfil the requirements of Article 46.

Aggravating factors are also used in some states in order to address psychological violence. In **France**, psychological trauma is punished as aggravation. However, proving psychological violence is one of the biggest challenges in litigation.[166] That said, the psychological trauma of children has been recognised in case law,[167] and it is now considered as an aggravated circumstance of domestic violence.[168]

In addition, as mentioned previously, since the adoption of legislation on domestic violence, rape within marriage or a similar relationship is not only recognised as rape at the domestic level, but is in some cases considered as an aggravated offence based on the personal relationship. For instance, in **Luxembourg**, case law had already acknowledged that rape between spouses was punishable before the adoption of the Law of 8 September 2003 on domestic violence,[169] yet since its adoption, domestic violence is considered as an aggravating circumstance of the crimes of sexual violence.[170] Similarly, in **Portugal**, the possibility of criminalising marital rape is not only not questioned anymore, it is more severely punishable than rape of an ascendant, descendant, adopted child, adoptive parent, brother or sister.[171]

Lastly, several 'general' aggravations apply to the specific offence of domestic violence, or the general offences used to prosecute violence taking place in the context of family or intimate relationships. All offences applicable in these situations, based on the country questionnaires, are enumerated in Table 5. In cases where there is no specific offence but general offences are used, this is indicated with an asterisk.

164 See Supreme Court decisions KKO 2002:2, KKO 2012:9, KKO 2018:22, and most recently, KKO 2020:20.
165 See Supreme Court decision KKO 2020:20.
166 The Court of Cassation considers that beyond verbal violence and fear, the focus of the judicial scrutiny is the situation of imminent danger for the victim and the children, in a case where the evidence was not sufficient. Court of Cassation Civil Chamber 1, 13 February 2020 No. 1922192, https://www.legifrance.gouv.fr/juri/id/JURITEXT000041620400/.
167 Court of Cassation, Criminal Chamber 4 June 2019, No. 18-84.720, cited in Journal Dalloz actualité, 2 July 2019, Comment by L. Priou-Alibert.
168 Law No. 2020-936 of 30 July 2020, https://www.vie-publique.fr/loi/273137-loi-du-30-juillet-2020-proteger-les-victimes-de-violences-conjugales.
169 Appeal Court of 21 June 1994, Judgement No. 223/94.
170 Criminal Code of Luxembourg, Article 377.
171 Penal Code, Article 197(3)(3).

Table 5 Aggravations in cases of domestic violence

Aggravations in cases of domestic violence	States
Victim is a former or current spouse or partner	Austria,* Belgium,* Bulgaria,* Denmark, Estonia,* France,* Greece, Ireland, Liechtenstein, Lithuania, Luxembourg,* Netherlands,* Norway, Romania,* Slovakia, Spain,* Sweden
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria,* Belgium,* Bulgaria,* Denmark, Estonia,* France,* Greece, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg,* Netherlands,* Norway, Slovenia, Slovakia, Spain,* Sweden, United Kingdom
The offence, or related offences, were committed repeatedly	Croatia, Czechia, Denmark, Estonia,* Iceland, Liechtenstein, Lithuania, Norway, Portugal, Slovakia, Sweden, United Kingdom
Victims was made vulnerable by particular circumstances	Denmark, Estonia, France,* Germany, Italy, Liechtenstein, Lithuania, Luxembourg,* Norway, Poland, Portugal, Slovakia, Sweden, United Kingdom
Child victim or witness	Austria,* Croatia, Denmark, Estonia,* France,* Greece, Italy,* Liechtenstein, Lithuania, Luxembourg,* Netherlands,* Norway, Portugal, Spain, Sweden, United Kingdom
Multiple perpetrators	Denmark, Estonia,* France,* Germany, Liechtenstein, Lithuania, Norway, Slovakia, Sweden, United Kingdom
Extreme levels of violence	Austria,* Cyprus,* Czechia, Denmark, Estonia, Finland,* France,* Germany,* Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg,* Norway, Poland, Portugal, Slovakia, Spain*
Use or threat of a weapon	Austria,* Denmark, Finland,* France,* Germany, Italy, Liechtenstein, Lithuania, Norway, Slovakia, Spain, Sweden, United Kingdom
Severe physical or psychological harm for the victim	Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg,* Netherlands, Norway, Portugal, Slovakia, Sweden, United Kingdom
Previous conviction for similar offences	Denmark, Liechtenstein, Norway, Portugal, Slovakia, Spain,* Sweden, United Kingdom
Offence has been committed online	-
Offence committed on the grounds of the victim's gender	France,* Lithuania, Malta, Spain,* Sweden
Other aggravations	Death of the victim (Czechia, Iceland, Netherlands, Slovakia), (Attempted) suicide (Liechtenstein, Poland) Witnessed by a disabled person or person older than 65 (Croatia) Multiple victims (Czechia, Slovakia) Victim is a public official (France, Slovakia) Victim is pregnant (Greece, Italy, Lithuania) Victim with disabilities (Italy) Breach of protection order (Spain)

* No specific offence on domestic violence, thus general offences used.

iv) Personal scope of the offences addressing domestic violence

All Member States define offences of domestic violence, whether in the specific offences or the general offences combined with aggravations, with reference to the intimate or family relationship, the household

or cohabitation. **British** legislation requires that the perpetrator and victim are 'personally connected', which entails either having an intimate relationship or having previously been in an intimate relationship, or living together or being family members. All definitions are phrased in gender-neutral terms, with the exception of those used in **Spain** and **Sweden**, where a combination of gender-specific offences addressing IPV and gender-neutral offences of domestic violence are found.

Table 6 Persons covered by domestic violence

Persons covered	States
Spouse	Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, France, Greece, Hungary, Iceland, Ireland, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom
Ex-spouse	Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, France, Greece, Hungary, Iceland, Ireland, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden, United Kingdom
Co-habiting partner	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, France, Greece, Hungary, Iceland, Ireland, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden, United Kingdom
Former cohabitation partner	Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, France, Greece, Hungary, Iceland, Ireland, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom
Partner, regardless of co-habitation or sex	Austria, Belgium, Bulgaria, Cyprus, Greece, Iceland, Ireland, Malta, Norway, Portugal, Romania, Slovakia, Spain, Sweden
Same-sex partners	Austria, Belgium, Croatia, Estonia, France, Greece, Iceland, Ireland, Liechtenstein, Lithuania, Malta, Norway, Portugal, Slovenia, Spain, Sweden
Heterosexual partners	Austria, Belgium, Bulgaria, Croatia, Cyprus, Estonia, France, Greece, Hungary, Iceland, Ireland, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden
Ascendants	Austria, Bulgaria, Croatia, Cyprus, Estonia, France, Greece, Hungary, Iceland, Liechtenstein, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain, Sweden
Descendants	Austria, Bulgaria, Croatia, Cyprus, Estonia, France, Greece, Hungary, Iceland, Liechtenstein, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain, Sweden
Collateral descendants[172]	Austria, Belgium, Bulgaria, Croatia, Estonia, Greece, Hungary, Liechtenstein, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain, Sweden
Relatives by affinity[173]	Bulgaria, Croatia, Estonia, Hungary, Iceland, Liechtenstein, Lithuania, Malta, Poland, Slovakia, Slovenia, Spain
Household/cohabitation (present or past)	Belgium, Croatia, Cyprus, Czechia, Greece, Hungary, Iceland, Italy, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden

Regardless of the apparently broad personal coverage suggested in Table 6, several limitations regarding the personal scope were found in a few states. For instance, some jurisdictions require cohabitation. According to the country questionnaire, in **Czechia**, domestic violence is strictly tied to the condition that the victim and perpetrator live in the same household, excluding any violence occurring in a couple who

172 Such as siblings, cousins, nephews, nieces, aunts, and uncles.
173 Affinity (as opposed to consanguinity) is the relationship which each party to a marriage/partnership has to the relations of the other partner.

do not live together. Similarly, **Bulgarian** jurisprudence refers to 'factual marital co-habitation,' which means people living together, relatively steadily, in a manner close to marital relations but without a formal marriage. In **Hungary**, non-cohabiting partners and former non-cohabiting partners are included only if they have a children together.

Another important element to determine whether the offence of domestic violence is applicable is whether the relation continues or is in the past. In **Poland**, the offence of 'family abuse' does not cover the protection of former spouses and partners, who are taken into account only if they reside or run a household together. In **Estonia**, the Supreme Court ruled that the mere existence of a previous marriage or cohabitation cannot lead to the conclusion that 'the close relationship' continues after the separation, and rather the contrary should be assumed. This is established on a case-by-case basis, taking into account the specific circumstances. In **Norway**, if a couple do not live together, it must be determined whether the ex-partners spend sufficient time together in one residence, for example, by establishing whether they keep personal items there.

In **Spain**, courts have required that the couple had reached a certain level of 'seriousness' in their relationship to fall under the category of 'kinship' as aggravating factor,[174] however any intimate partner, regardless of cohabitation, would qualify for the offences introduced by Organic Law 1/2004 (gender-based violence against the intimate partner) or in the aggravated types related to domestic violence, which are also gender-specific. This highlights the different scope of protection provided by gender-specific definitions, which do not rely on cohabitation or sharing the household, and gender-neutral definitions that do so.

Despite this positive implication, the application of 'gendered' definitions of domestic violence to same-sex partners could be problematic. However, the national questionnaire on **Spain** suggests that it is possible to apply either Article 173(2) or the aggravating circumstance of Article 23 to same-sex partners, because they are termed gender neutrally; nevertheless some of the provisions regarding minor offences of domestic violence modified by the Organic Law 1/2004 refer explicitly to the 'wife' or the 'woman' in a similar relationship of intimacy. The Supreme Court has ruled that these norms cannot be interpreted extensively to the detriment of the accused because it would violate the principle of legality.[175] On the other hand, gender identity is the main determinant of the protection of Organic Law 1/2004, and as such, transgender women are protected by it, even in the absence of rectification of the sex in the Civil Registry.[176]

Domestic violence and children

One aspect that deserves special attention is the handling of children in situations of domestic violence, who can be affected in multiple ways. Children can be the target of violence as a form of retaliation, in particular towards their mothers, and fatal cases have reached international jurisdictions.[177] Regardless of this reality, some national experts highlighted that although the formal possibility to limit the custodial and parental rights of the abusive parent exists in their domestic system, it is seldom used. Contact between children with their abusive parent is often justified as being in line with parental rights. The **Belgian** expert points out that the shadow report of the GREVIO monitoring process[178] notes that 'parental alienation syndrome' – whether explicitly named or with reference to its principles – has been

174 Spanish Supreme Court, judgment 241/2021 of 2 February 2021, ECLI: ES:TS:2021:241.
175 Spanish Supreme Court, judgment 1068/2009 of 4 November 2009, ECLI: ES:TS:2009:6980.
176 Public Prosecutor's Office, Instruction 6/2011 on common criteria for the specialised action of the Public Prosecutor's Office in relation to violence against women (*Circular 6/2011, sobre criterios para la unidad de actuación especializada del Ministerio Fiscal en relación a la violencia sobre la mujer*), 2 November 2011, https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-C-2011-00006.pdf.
177 See, for instance: UN Committee on the Elimination of Discrimination Against Women, *González Carreño v Spain*, 16 July 2014, CEDAW/C/58/D/47/2012.
178 Ensemble contre les violences (Together Against Violence) (2019) *Évaluation de la mise en œuvre de la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique par la Belgique,* alternative report of the *Ensemble contre les violences* coalition, February 2019, p. 78.

used in judgments to remove custody of the child from the mother and give it to the abusive father. Another justification found for keeping abusive parent-child contact relies on the principle of the best interest of the child. The **Greek** expert points out that custodial rights are often decided based on the assumption that keeping contact with both parents is in the best interest of children, regardless of the history of abuse.[179] A new bill entitled 'Reforms regarding parent-child relations and other family law issues' submitted to the Greek Parliament explicitly adopts such an approach.[180] Conversely, in **Norway**, Article 48 of the Children Act mandates that civil decisions made by the courts concerning parental responsibility must be in accordance with the best interests of the child, yet in making such decisions, courts must ensure that children are not subjected to violence or in any other way treated in such a manner as to impair or endanger their physical or mental health.

A more common situation is that children become witnesses to the violence directed towards their parent. Studies show that this can have long-lasting consequences.[181] To date, however, only four jurisdictions explicitly punish such situations (**Greece**, **Italy**, **Malta**, **Romania**). Article 312(3) of the **Greek** Criminal Code provides that acts of physical injury committed in the presence of a minor are considered acts of physical violence against the minor. The **Italian** Criminal Code also establishes in Article 572 that anyone under the age of 18 who witnesses the mistreatment is considered a person offended by the crime. **Malta**[182] and **Romania**[183] have taken a similar approach. In **Norway**, case law recognises children witnessing violence as offended parties.

In a few cases, domestic violence offences are aggravated when a child is witness to the violence. The **Italian** legislature has provided for a common aggravating circumstance for the general crime of injuries and the specific offence of ill-treatment, increasing the penalty up to a third if the offence is committed in the presence of, or to the detriment of, a child under the age of 18.[184] Moreover, in **Spain**, all domestic violence offences entail increased sentences where these offences have been committed in the presence of a child. **France** has recognised in case law the psychological trauma of children witnessing violence[185] and now it is an aggravated circumstance of domestic violence.[186] Similarly, in **Denmark**, it must be considered an aggravating circumstance when a child has witnessed violence committed against a person close to the child, although this is established according to general sentencing principles. In such cases, the prosecution must explicitly invoke the circumstances as an aggravating factor when arguing the case.[187]

Another aspect to consider relates to the protective measures needed in the examination of child witnesses. In **Bulgaria**, a draft law amending and complementing the Law on Protection from Domestic Violence was presented by the Ministry of Justice in January 2021 for official public discussion. Among other measures, the law seeks to increase the protection of child victims and witnesses of domestic violence. No additional measures were reported by other experts.

179 European Network of legal experts in gender equality and non-discrimination. Flash Report Greece: *A new Bill for mandatory shared custody for all children in breach of the IC*, available at: https://www.equalitylaw.eu/downloads/5437-greece-mandatory-shared-custody-for-all-children-in-breach-of-the-istanbul-convention-and-eu-law-172-kb.

180 Available at: https://www.hellenicparliament.gr/Nomothetiko-Ergo/Katatethenta-Nomosxedia?law_id=19720d08-12e1-421f-9756-ad2100bb4f18.

181 See for instance, Dodaj, A. (2020), 'Children witnessing domestic violence', *Journal of Children's Services*, Vol. 15 No. 3, pp. 161-174. https://doi.org/10.1108/JCS-04-2019-0023.

182 Gender-Based and Domestic Violence Act, Chapter 581 of the Laws of Malta, available at: https://legislation.mt/eli/cap/581/eng/pdf.

183 Law 217/2003 on prevention and combating domestic violence (*Legea 217/2003 privind prevenirea şi combaterea violenței domestice*), enacted on 29 August 2003, Article 5(2).

184 Italian Criminal Code, Article 61(11*quinquies*).

185 Court of Cassation, Criminal Chamber 4 June 2019, No. 18-84.720, Dalloz actualité, 2 juill. 2019, obs. L. Priou-Alibert.

186 Law No. 2020-936 of 30 July 2020, https://www.vie-publique.fr/loi/273137-loi-du-30-juillet-2020-proteger-les-victimes-de-violences-conjugales.

187 See: Danish Prosecution Service (2019), 'Guidelines No. 9445 of 10 May 2019 pertaining to domestic disputes', sections 244-246, on violence against children.

Besides being direct targets of, or witnessing the violence, children can also be affected in other ways, for instance, by indirectly suffering the consequences of violence imposed on their mothers. For example, economic violence, exercised through keeping back family allowance, has a direct effect on children. Children can also experience some forms of harassment when the abusive parent keep track of their mother through them, by calling them repeatedly, asking questions about the other parent's actions, whereabouts, etc. According to the country questionnaires, such acts are not yet explicitly considered in naitonal legislation.

c) Prosecution of domestic violence

This section shows the most common types of prosecution attached to each offence. The issue of statute of limitations applicable to domestic violence offences is discussed in the final chapter on enforcement and sanctioning. For the purposes of this section, *ex parte* prosecution, that is, the action that necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings, has been conflated with *private prosecution,* which not only depends on initiation by the victim, but has to be carried out through private counsel, since no public prosecution is involved. As indicated in Table 7, based on the country questionnaires, the majority of the offences used to punish domestic violence result in *ex officio* prosecution, namely the formal complaint of the victim is not required to initiate the proceedings, since the process can be triggered purely by the decision of the prosecutor or state official. That is clearly the case where criminalisation of domestic violence is carried out through specific offences.

In practice, however, the consequence of establishing one or another type of action are not always straightforward. For instance, country questionnaires indicate that in some states, while domestic violence offences are, in principle, prosecuted *ex parte*, the action may be continued even if the victim withdraws the complaint (**Belgium**, **Bulgaria**). Conversely, in the **Netherlands**, the GREVIO baseline report noted that in most cases the factual outcome in cases of intimate partner violence is that criminal prosecution is waived or that a punishment is imposed by the Public Prosecution Service without reaching the court, and there is a persistent gap between the number of charges and the number of convictions.

Table 7 Types of prosecution of domestic violence

Prosecution[188] / **Offence**	**Ex officio**	**Ex parte**[189]
Threats	Austria, Bulgaria, Estonia, Finland, Greece, Netherlands, Slovakia, Spain, Sweden	Germany, Romania
Coercion	Austria, Netherlands, Hungary, Slovakia, Spain, Sweden	Germany, Ireland
Injuries/Assault	Austria, Denmark, Estonia, Finland,*-** Germany,*** Greece, Hungary,* Latvia, Netherlands, Slovakia, Sweden	Bulgaria,*-** France, Hungary,* Romania, Spain*
Sexual violence/rape	Austria, Bulgaria, Denmark, Estonia, Germany, Greece, Hungary,* Latvia, Netherlands, Slovakia, Spain, Sweden	France, Hungary,* Romania
Arbitrary detention	Bulgaria, Germany, Slovakia, Spain	
Inhuman & degrading treatment	Belgium, Slovakia	
Insult	Hungary	Hungary, Spain

188 * Depending on severity;
** Depending on relationship with the abuser;
*** Depending whether the offence triggers 'public interest.'
189 In this case, *ex parte* and/or private prosecution, since in any case the initiation of the action depends on the victim's claim.

Prosecution[188] / Offence	Ex officio	Ex parte[189]
Murder	Austria, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Latvia, Netherlands, Romania, Slovakia, Spain, Sweden	
Domestic violence	Croatia, Cyprus, Czechia, Greece, Italy, Liechtenstein, Malta, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden	Hungary, Lithuania

Also crucial for an effective prosecution is the adoption of prosecutorial guidelines. In five states (**Cyprus**, **Iceland**, **Italy**, **Latvia**, **Malta**), no prosecutorial guidelines have been adopted to encourage the effective and appropriate prosecution of domestic violence, while **Greece** and **Hungary** have only adopted police guidelines. That said, prosecutorial guidelines exist in several of the states under study (**Belgium**, **Bulgaria**, **Croatia**, **Denmark**, **France**, **Germany**, **Iceland**, **Lithuania**, **Norway**, **Poland**, **Portugal**, **Slovakia**, **Spain**, **Sweden**, **United Kingdom**). According to the GREVIO baseline report on **Sweden**, the Swedish prosecution services have set up a prosecution development centre to develop methods for the investigation and prosecution of domestic violence cases and sexual offences. In co-operation with the Swedish Police Authority, checklists have been introduced to standardise procedures and to ensure effective co-operation between law enforcement agencies and prosecution services.

All these prosecutorial guidelines are gender neutral, with the exception of those of **Spain**, where the Public Prosecutor's Office has issued several instructions for the prosecution of violence against women since 1998. The most important among these are Instruction 7/2005 of the Public Prosecutor against violence against women,[190] Circular 4/2005 regarding the criteria for applying the Organic Law against gender violence,[191] and Circular 6/2011 on common criteria for the specialised action of the Public Prosecutor's Office in relation to violence against women.[192] In addition, the **British** Crown Prosecution Service (CPS) has published guidance on the prosecution of offences of coercive or controlling behaviour.[193] This notes that '[t]he offence of controlling or coercive behaviour, and other prosecutions related to domestic abuse, should be addressed within an overall framework of VAWG and human rights. The gendered patterns and dynamics involved in these cases need to be understood in order to provide an appropriate and effective response.' However, it goes on to note that '[t]he recognition of these dynamics does not neglect abuse towards men or abuse perpetrated by women. All CPS polices are gender neutral and all victims should receive the same access to protection and legal redress.'

d) Sanctions

The sanctions applicable to domestic violence vary based on the offences used. In all states, the majority of offences lead to imprisonment, while fines, sometimes replaced with community service (**Belgium**, **Norway**), are applicable only in cases where no physical violence was used, or when injuries or other harmful consequences of the crime are minor. In some states, less severe offences can lead to a conditional sentence, or even probation (**Belgium**, **Finland**). Interestingly, the sanctions for specific offences on domestic violence discussed in Section 2.b.i are often subsidiary to other more severe offences, so those

190 Instruction of the Public Prosecutor against violence against women and for the specialised anti-violence units of public prosecution offices (*Instrucción 7/2005, sobre el Fiscal contra la Violencia sobre la Mujer y las Secciones contra la violencia de las Fiscalías*), 23 June 2005, https://www.boe.es/buscar/doc.php?id=FIS-I-2005-00007.

191 Circular 4/2005 regarding the criteria for applying the Organic Law on comprehensive protection measures against gender violence (*Circular 4/2005, relative a los criterios de aplicación de la Ley Orgánica de Medidas de Protección Integral contra la violencia de género*), 18 July 2005, https://www.boe.es/buscar/doc.php?id=FIS-C-2005-00004.

192 Public Prosecutor's Office, Circular 6/2011 on common criteria for the specialised action of the Public Prosecutor's Office in relation to violence against women (*Circular 6/2011, sobre criterios para la unidad de actuación especializada del Ministerio Fiscal en relación a la violencia sobre la mujer*), 2 November 2011, https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-C-2011-00006.pdf.

193 https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship.

offences with a higher sentence will be preferred. Also, general offences can be sanctioned with the aggravations as discussed in subsection 2.2(b)(iii). That said, milder forms of domestic violence are in practice rarely prosecuted when there are no specific offences, thus while a lower sentence may be applied, prosecution seems more plausible.

In addition to imprisonment, the imposition of protection measures such as restraining orders, a ban on contact with the victims or electronic surveillance or compulsory treatments, as punitive measures, or as part of the punishment, is possible in most states.[194] For instance, in **Spain**, when the victim is the spouse, ex-spouse, partner, ex-partner (even without cohabitation), a descendant, an ascendant, sibling (own or of the cohabiting partner), or any other person included in the family cohabitation core, or an especially vulnerable person under the guardianship of the perpetrator, restraining orders will be imposed for a maximum of 10 years after the prison sentence. In **Greece**, these measures include the prohibition to carry weapons. In a few states, there are additional sanctions for perpetrators who are public servants (**Germany**, **Hungary**).

In **France**, parental authority can be taken away from parents who are sentenced for domestic violence.[195] Moreover, the new 2020 law allows not only for the suspension of parental authority, but also the visitation rights of the violent parent.[196] While restricting parental rights – custody or visiting rights – as a consequence of the violence is possible in several states (**Croatia**, **Finland**, **France**, **Hungary**, **Iceland**, **Poland**, **Portugal**), in practice this appears to be seldom applied. The GREVIO Baseline Evaluation Report on **Spain**[197] has remarked that, notwithstanding the availability of legal measures regarding women and child victims of domestic violence, there are deficiencies in the implementation due to shared custody rights and extensive visiting rights still being granted to convicted perpetrators in divorce proceedings (although the Spanish Civil Code bans shared custody in cases where a parent is subject to criminal proceedings for domestic violence in Article 92(7) of the Civil Code).[198] GREVIO has thus called on Spain to update guidelines for judges on the implementation of Organic Law 1/2004 against gender violence, and to limit the margin of discretion of criminal and civil judges when deciding on custody and visitation rights for convicted perpetrators of intimate partner violence and those awaiting trial in cases where the level of evidence confirms the abuse of either the child or the mother. Similarly, according to the GREVIO experts, while the new **Finnish** Act on children's custody and visiting rights stipulates that children are to be protected against all physical and mental violence and abuse,[199] and that custody and visiting rights are to be decided by a court,[200] it establishes that attention shall be paid to 'the ability of the parents to together take responsibility for the matters concerning the child, and to protect the child against violence'. GREVIO has urged **Finland** to consider all issues related to violence against women when determining custody and visitation rights; to ensure the recognition of witnessing violence against a close person as jeopardising the best interest of the child, and to restrict custody and visitation rights where this is warranted to guarantee the safety and best interest of the child.[201] Similarly, in **Iceland**, the justice system has been criticised for inflexibility in its adherence to the concept of equal shared parental responsibility, and for downplaying violence against children in order to consistently allow unsupervised access to children for physically or sexually abusive fathers.[202] In a relatively recent case where parents disagreed on the custody of their children, the Supreme Court, based on professional psychological validation, decided that it was in the best interest of the children to be in the custody of their mother due to ongoing conflicts, confrontations and fights between the parents.[203]

194 The domestic regulation of protection measures is discussed in detail in the final chapter of the report.
195 Amendment to Article 378 of the Civil Code (Law No. 2020-936 of 30 July 2020).
196 Law No. 2020-936 of 30 July 2020.
197 GREVIO Baseline Report on Spain, 2020, https://rm.coe.int/grevio-s-report-on-spain/1680a08a9f.
198 Civil Code, Article 92(7), https://www.boe.es/buscar/act.php?id=BOE-A-1889-4763#art92.
199 Act on children's custody and visiting rights, Section 1(2).
200 Act on children's custody and visiting rights, Section 10.
201 GREVIO Baseline Report Finland, 2019.
202 https://skemman.is/bitstream/1946/16844/1/BA%20ritgerð%20loka2.pdf.
203 Supreme Court, No. 482/2017, judgment 15 February 2018.

2.3 Main findings

√ All states under review are party to CEDAW and 21 have ratified the Istanbul Convention. In addition, all EU Member States are bound by the Victims' Rights Directive, which has introduced a working definition of 'violence in close relationships'. While these documents use similar notions and take a similar approach, we find a great variety of approaches at domestic level: the adoption of domestic violence-specific offences, reliance on general offences in combination with some form of aggravation that acknowledges the importance and severity of the violence, or a combination of both. All these domestic approaches have shown potential and limitations.

√ A close analysis of the elements of crime reveal that, in relation to the behaviours included in the definition of the offences of domestic violence, in a majority of jurisdictions, the repetition or regularity of the violent acts is required. This, however, poses significant challenges for prosecution and seems to reinforce secondary victimisation. In a few cases, the repetition of violence was regarded as an indication of the systematic nature of the violence, rather than simply raising the probative threshold. This systematic nature of the violence is addressed more effectively in systems where repetitive violent behaviours can be punished in combination with the criminalisation of each individual act, rather than subsidiarily.

√ Regarding the prohibition of psychological violence, this is sometimes addressed as a specific element of the crime, (particularly in domestic violence-specific offences) and sometimes through other offences such as insults, threats or coercion. It can also be addressed as an aggravating factor. Some definitions addressing psychological violence, whether directly or indirectly, seem to focus on the harmful results, or on the (persistent) behaviour of the perpetrator. Focusing on the results, however, seems to increase the possibilities of victimisation, while imposing a more taxing probative process. Definitions of economic violence are still scarce, and instead, general offences against property seem to be applied. This presents a more limited view of economic violence than the standards promoted by the Istanbul Convention, and in some cases requires *ex parte* or private prosecution, given the close relationship between victim and perpetrator. While in some cases it is either explicitly mentioned as behaviour falling under specific offences on domestic violence, sexual violence within marriage or similar relationships is still not recognised as a form of domestic violence, and therefore also ignored as an offence, since victims often do not report such violence.

√ Regarding the personal scope of the offences, most definitions highlight the personal connection between perpetrators and victims (family or intimate relationship) regardless of whether they are specific offences or specific aggravations. Several definitions rely on cohabitation, making it difficult to include past intimate relationships or relationships where no cohabitation exist. This is particularly relevant for intimate partner violence cases, and especially in relation to young couples who may not cohabit. Gender-specific definitions seem to allow for broader and more open ideas of relationships (without requirements such as cohabitation), yet they might exclude same-sex couples by excluding either the abuser or the victim due to their gender not matching the personal scope of the offence (male offence, female victim).

√ An important shortcoming relates to children witnessing violence, who are not recognised as direct victims in all jurisdictions. In some states, however, violence carried out in the presence of children is considered as an aggravating factor. Furthermore, national experts point out that in terms of protection measures, parental rights are rarely limited in practice, even when the law contemplates such a possibility. In fact, domestic violence is often not considered as precluding the parental rights of the abusive parent.

√ As discussed in the previous chapter, our research indicates that even in states that have transposed the EU directives on gender equality, or ratified the Istanbul Convention, the interconnection of discrimination and violence that affects women disproportionately, such as domestic violence, is seldom recognised.

√ This chapter also shows that gender-neutral definitions of domestic violence prevail, not only in relation to the elements of the specific offences, but also to a large extent in relation to aggravations and prosecutorial practices. Particularly in relation to prosecutorial guidelines, based on the comments of the national experts, it appears that the lack of a gender-sensitive approach, at the very least

acknowledging that domestic violence affects women disproportionately, can impact on the number of prosecutions and final sentences imposed.

√ Finally, besides the need to criminalise domestic violence and violence in close relationships, victims of domestic violence require protection against the violence. As discussed in detail in the last chapter of this report, the requirements for accessing protection orders, their duration and scope of protection vary significantly. More importantly, they are adopted under different laws (civil and criminal), which makes mobility difficult, even considering the European Protection Order and the Mutual Recognition of Protection Measures.

2.4 Recommendations

Taking into account the findings discussed in this chapter, a harmonising definition of domestic violence addressing physical, psychological, sexual and economic violence *across states* is desired. In outlining such a definition, the following elements should be considered.

√ First, the requirement of *repetitive behaviour* for the criminalisation of domestic violence must be considered only to prove 'a context of violence' and challenge 'incidental' views of domestic violence. This should be used particularly in relation to milder forms of violence (psychological violence, economic violence) and not in cases of physical or sexual violence. It should allow for a combination of punishment for the repetitive violence, and a separate punishment of the single behaviours.

√ Secondly, in order to prevent secondary victimisation, when criminalising *psychological violence* through threats, coercion or intimidation, the focus should lie on the perpetrator's behaviour rather than the harmful results.

√ Thirdly, *sexual violence and rape* in the context of domestic violence need to be criminalised explicitly and/or recognised as aggravating circumstances of rape, as discussed in the chapter of sexual violence and rape.

√ Fourthly, *economic violence* should be explicitly included, and if considered in an aggravation for crimes against property, any exemption of criminality due to the relationship between victim and perpetrator should be explicitly waived.

√ Finally, children witnessing domestic violence should be recognised as direct victims of the violence, or this should be recognised as an aggravation of the offence. Consideration of parental restrictions should be also possible.

In addition to the specific elements of a potential definition, three important aspects should also be considered.

√ Regardless of whether a specific offence or a specific aggravation is adopted, reference should be made to the disproportionate impact that domestic violence has on women, and a recognition that domestic violence is a form of discrimination. This could be done in policy documents, such as national action plans, prosecutorial guidelines or explanatory reports.

√ Similarly, in order to encourage *prosecution* of domestic violence against women, prosecutorial guidelines need be gender-sensitive.

√ Lastly, in addition to the criminalisation of domestic violence, the provision of long-term and emergency protection orders is of the essence.

3 Sexual violence, including rape

This chapter provides a detailed examination of existing legislation on sexual violence and rape. The first part of the chapter introduces the main instruments addressing the issue, describes the definitions they use and explains the different elements that are taken into account in the examination of the domestic jurisdictions of study. The second part of the chapter presents the results from the national questionnaires. It describes the criminal definitions used to address the violence with a detailed discussion of the different elements, the forms of prosecution established for such cases of violence and the main difficulties in that respect, as well as the sanctions imposed on perpetrators. It concludes with a summary of main findings and recommendations.

3.1 Introduction and main concepts

The trajectory towards the recognition of sexual violence and rape as a violation of women's rights and a form of gender-based violence has been a long one, fuelled by outrage following knowledge about specific cases. Rape was first addressed by international law in the context of armed conflicts,[204] then slowly entered the realm of human rights as a violation of the right to private life,[205] an act of torture and inhuman and degrading treatment or punishment,[206] and later on, as a form of gender-based violence in the form of discrimination in breach of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[207]

Although at the domestic level, sexual violence and rape have been criminalised in a large number of Member States using very different definitions, different scopes of protection (women, men) and various behaviours (all types of penetrations, marital rape), different sanctions and different aggravating and mitigating circumstances, diverse international and regional bodies have developed a set of international standards.[208] The CEDAW Committee has clarified that states need to 'ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity and that the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances.'[209] Within the EU, there is no binding definition of sexual violence or rape, although sexual assault and rape are recognised as specific forms of gender-based violence in Directive 2012/29/EU of 25 October 2012 (the Victims' Rights Directive), while rape is listed in the annex of offences to which Article 11

204 Recognised as crime of sexual violence, a war crime, a crime against humanity and/or genocide. See: International Criminal Tribunal for Rwanda (ICTR), *Prosecutor* v *Akayesu*, case no. ICTR-96-4-T, trial judgment, 2 September 1998, Para. 731; International Criminal Tribunal for the former Yugoslavia (ICTY) *Furundzija*, case no. IT-95-17/1-T, trial judgment, 10 December 1998, Para. 185; ICTY, *Kvocka et al*., case no. IT-98-30/1-T, trial judgment, 2 November 2001, Para. 180; ICTY, *Kunarac et al*., case no. IT-96-23-T & IT-96-23/1-T, trial judgment, 22 February 2001, Para. 460.

205 As seen in: ECtHR, *X and Y v The Netherlands*, No. 8978/80, 26 March 1985*;* Inter-American Court of Human Rights (IACHR), *Raquel Martín de Mejía v Peru* Report No. 5/96 Case 10.970, 1 March 1996.

206 See for instance: ECtHR, *Aydın v Turkey*, No. 23178/94 25 September 1997; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998.

207 United Nations Committee on the Elimination of Discrimination Against Women (1992), 'General recommendation No. 19: Violence Against Women', UN Doc A/47/38.

208 See for instance, the reports of the United Nations Special Rapporteur on violence against women, its causes and consequences (Ertürk, Y. (2006) 'Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk', 20 January 2006, UN Doc E/CN.4/2006/61), the work of the Human Rights Council's concerns on the prevalence of rape and lack of accountability (Human Rights Council (2013) 'Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence', 25 June 2013, UN Doc A/HRC/RES/23/25) and the Human Rights Committee (UN Human Rights Committee (2000), 'General Comment No. 28. Article 3 (The equality of rights between men and women)', 29 March 2000, UN Doc HRI/GEN/1/Rev.9 (Vol. I)); the United Nations Economic and Social Council, (ECOSOC (2016) 'General comment No. 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights', 2 May 2016. UN Doc E/C.12/GC/22); and the Committee Against Torture (United Nations Committee against Torture (CAT) (2008), 'General Comment No. 2 Implementation of Article 2 by States Parties', 24 January 2008, UN Doc CAT/C/GC/2). Also on rape as torture, see: Gaer, F. D. (2012) 'Rape as a Form of Torture: The Experience of the Committee Against Torture' *CUNY Law Review*, 15(2) L 293 https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1301&context=clr.

209 CEDAW Committee (2017), 'General recommendation No. 35 on gender-based violence against women, updating General recommendation No. 19', 26 July 2017, UN Doc CEDAW C/GC/35, Para. 29(e).

refers in Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order (EIO) in criminal matters. At the Council of Europe, however, different elements of the offences of sexual assault and rape have been outlined. The European Court of Human Rights recognised lack of consent as the essential element in determining rape and sexual abuse for the first time in *M.C. v. Bulgaria*, and established that states must prosecute any non-consensual sexual acts, including when the victim had not physically resisted, as had occurred in that case.[210] This element lies at the core of Article 36(1) of the Istanbul Convention, which defines sexual violence as:

> 'a. engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
> b. engaging in other non-consensual acts of a sexual nature with a person;
> c. causing another person to engage in non-consensual acts of a sexual nature with a third person.'[211]

The Explanatory Report to the Istanbul Convention explains the meanings attributed by the drafters to these definitions. It explains that the 'penetration may be performed with a bodily part or an object,' and that 'the term *of a sexual nature* describes an act that has a sexual connotation'. Article 36(1)(b) covers all acts of a sexual nature 'which fall short of penetration'.[212]

The Convention adds in Article 36(2) that 'consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances'. In this regard, the Explanatory Report clarifies that 'in accordance with contemporary standards and trends in that area', States must penalise and prosecute effectively 'any non-consensual sexual act, including in the absence of physical resistance by the victim.'[213]

These definitions were used to guide the analysis of the country questionnaires, from which this report draws: (1) the existing offences addressing rape and sexual assault in all jurisdictions of study, (2) the elements of the crimes (material and personal scope) (3) the applicable sanctions and aggravations (4) aspects relating to the prosecution of the crimes and (5) main shortcomings. These aspects, lightly restructured, are discussed in Section 3.2 below.

3.2 Results from the country questionnaires

a) Areas of law addressing the issue

As expected, all states have a specific crime of rape and additional adult sexual offences. According to the country questionnaires, sexual violence is framed as a 'sex crime' in eight states (**Estonia**, **France**, **Malta**, **Netherlands**, **Norway**, **Slovenia**, **Sweden**, **United Kingdom**), and in a majority it is understood as a crime against sexual freedom (**Croatia**, **Czechia**, **Finland**, **Germany**, **Greece**, **Iceland**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Portugal**, **Slovakia**, **Spain**), but in four states (**Bulgaria**, **Denmark**, **Luxembourg**, **Malta**), sexual violence and rape are still connected to ideas of 'morality'. For instance, **Bulgaria** lists the offences under the section 'Debauchery', and in **Luxembourg** the offence is listed in the chapter on 'Indecent assault and rape' (*De l'attentat à la pudeur et du viol*). In three states (**Cyprus**, **Poland**, **Slovakia**), experts explain that sexual violence and rape are considered as crimes against morality and a crime against a person's dignity or sexuality.

210 ECtHR, *M.C. v Bulgaria*, No. 39272/98, 4 December 2003.
211 Istanbul Convention, Article 36(1).
212 Explanatory Report to the Istanbul Convention, Para. 190.
213 Explanatory Report to the Istanbul Convention, Para. 191.

b) Criminal definitions

i) Rape

Regarding the specific behaviours that are included in the crime of rape in different Member States, most definitions make reference to sexual intercourse (**Croatia**, **Cyprus**, **Czechia**, **Denmark**, **Estonia**, **Finland**, **Germany**, **Iceland**, **Latvia**, **Lithuania**, **Norway**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Sweden**) and/or penetration (**Belgium**, **Cyprus**, **Czechia**, **France**, **Luxembourg**, **Netherlands**, **Romania**, **United Kingdom**). **Italy** makes reference to the broader concept of 'sexual acts', while **Croatia** refers to 'sexual intercourse or equivalent sexual act'.[214] In the majority of states, case law suggests that sexual penetration is established even if it is not complete or total penetration.[215] Some definitions explicitly characterise what type of penetration is covered (vaginal, anal, oral) (**Lithuania**, **Romania**). In **Lithuania**, different offences criminalise 'vaginal penetration', which is considered as rape, and other forms of penetration, which would not constitute rape but other offences. Article 150 of the Criminal Code of the Republic of Lithuania punishes 'a person who tried to fulfil his/her sexual desires with another person against his/her will regarding anal, oral sex or other physical contact by using physical force (or threatening to use it or stopping that person from defending him or herself in any way, or using the fact that the person is weak/cannot defend herself/himself)'. Similarly in **Denmark**, sexual intercourse covers both vaginal and anal intercourse, while the reference to 'other sexual activity than sexual intercourse' encompasses oral intercourse as well as other actions similar to sexual intercourse and that act as a surrogate for intercourse. Several definitions of rape specify that penetration of any nature or by any means includes any organs and/or with any objects (**Belgium**, **France**). Conversely, **Cyprus** and the **United Kingdom** include any type of penetration, yet *with the penis*, thus only males can be the perpetrators of rape, while any person can be the victim.

Concerning the personal scope of the definitions, the country questionnaires indicate that rape definitions are consistently gender neutral across all states as concerns who can be a victim of rape. Only **Slovakia** indicates that only women can be victims of rape.[216] Three states retain a gender definition, but only with respect to perpetration (**Cyprus**, **Slovakia**, **United Kingdom**). In the **United Kingdom**, the law clarifies that the penis can be surgically constructed, including through gender reassignment surgery. Some states use specific offences to address same-sex sexual violence or rape (**Bulgaria**, **Cyprus**).

Beside the specific type of acts and who can be perpetrator and a victim, key to the analysis is whether the crimes are defined in terms of use of force or threats, or consent. In this respect, a positive trend towards the incorporation of consent-based definitions is evident. Compared to the Commission's 2010 feasibility study,[217] seven more states now have laws that contain definitions of rape and sexual violence that rely *solely* on the absence of consent of the victim without any reference to force or threats, raising the total number to 11 (**Belgium**, **Croatia**, **Cyprus**, **Denmark**, **Germany**, **Iceland**, **Ireland**, **Luxembourg**, **Malta**, **Sweden**, **United Kingdom**). One example of this trend is **Croatia**, where prior to amendments which entered into force on 1 January 2020, the use of force was a constituent element of the criminal offence of rape, while now it is a qualifying circumstance.[218] Undergoing a similar reform, the explanatory report of **Icelandic** Law No. 16/2018, formally adopting the consent-criteria, states that

214 Criminal Code, Article 153(1) as amended by the Act on Amendments to the Criminal Code, *Narodne Novine* no. 126/2019, in force since 1 January 2020.
215 For instance, in Belgium this has been established by the Court the Cassation, see: Cass., 8 April 2008, T. Strafr., 2008, p. 461.
216 Slovakia, Criminal Code, Section 199 Rape.
217 European Commission (2010) *Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on violence against women, violence against children and sexual orientation violence*, Luxembourg: Publications Office of the European Union.
218 Criminal Code, Article 153(1), as amended by the Act on Amendments to the Criminal Code, NN no. 126/2019, in force since 1 January 2020.

the amendment 'was not a fundamental change but a natural part of the evolution of the justice system in accordance with the justice awareness of the public'.[219]

Based on the country questionnaires, however, 15 states retain a definition limited to *use of force or threat* (**Czechia**, **Estonia**, **Finland**, **France**, **Italy**, **Latvia**, **Liechtenstein**, **Lithuania**, **Netherlands**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**). The majority of force-based definitions make reference to using violence or threat of violence (**Czechia**, **Finland**, **France**, **Italy**, **Netherlands**, **Portugal**, **Slovakia**), or going against the person's will by using force (**Estonia**, **Latvia**, **Lithuania**, **Slovenia**) or by constraint (**Romania**). That said, it should be noted that, in all jurisdictions, including those where the legal definition is force based, *situations which invalidate consent* are also recognised in the criminal law or introduced by case law. Some forms of annulment of consent refer to the helpless state of the victim, with formulations such as 'taking advantage' or 'abusing the vulnerability'. This 'helpless' state is connected in most cases to some kind of unconsciousness (alcohol, drugs) or the particular situation of the victim (illness or mental disability, detention of some form). **Italy** describes this act of taking advantage as 'abusing the conditions of physical or mental inferiority of the injured person'.[220] In **France**, besides the use of force, reference is also made to penetration achieved by 'coercion and surprise', and it is left to the judge to determine its meaning on a case by case basis. Hence, references to the inability of victims to consent are present in all definitions, regardless of whether they are force or consent based. These result in the alleviation of the need for the victim to the prove their resistance. However, national experts reported that courts do not interpret these 'non-consensual' elements consistently, and the threshold of proof remains high, often resulting in secondary victimisation.

Sexual consent is also invalidated by young age, which in principle does not require any additional proof. With the exception of **France**, all states establish the presumption of impossibility of consenting to sexual acts below a certain age. Ages of sexual consent start from 14 years old (**Belgium**, **Bulgaria**, **Estonia**, **Germany**, **Italy**, **Liechtenstein**, **Lithuania**), to 15 years old (**Croatia**, **Czechia**, **Denmark**, **Greece**, **Iceland**, **Poland**, **Slovakia**, **Sweden**) and 17 years old (**Ireland**), with the majority of states considering that 16 is the age at which children can truly consent to sexual acts (**Cyprus**, **Denmark**, **Finland**, **Latvia**, **Luxembourg**, **Malta**, **Netherlands**, **Norway**, **Portugal**, **Romania**, **Spain**, **United Kingdom**). In some cases, sexual acts between minors below that age are not prohibited, as long as the age difference is no more than two to three years (**Greece**, **Spain**).

The ambiguous determination of the minimum age of sexual consent in **France**, which required proof of coercion through 'violence, constraint, threat or surprise,' resulted in a controversial case where the judge did not recognise sexual acts with a minor of 11 years old as rape. The case is pending for a requalification as rape, following a new inquiry.[221] Worryingly, a report by the highest Administrative Court suggested that a presumption of lack of consent based on age violated the due process rights of possible offenders.[222] GREVIO has expressed concern regarding the application of the elements of 'coercion and surprise' in relation to minors of 15 years of age, since these are characterised as an abuse of vulnerability of the victim, who is perceived as not having the required judgment to participate in these acts, yet this is assessed on a case by case basis.[223] A new bill defining rape as any act of sexual

219 Supreme Court, No. 30/2020, judgment 18 February 2020. https://www.haestirettur.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=d3406746-8a3a-4dbe-a611-af5ac4f01883.
220 Italian Criminal Code, Article 609 bis 1.
221 https://www.lemonde.fr/police-justice/article/2018/02/13/le-consentement-sexuel-d-une-fille-de-11-ans-en-debat-devant-le-tribunal-correctionnel-de-pontoise_5255868_1653578.html.
222 https://www.conseil-etat.fr/ressources/avis-aux-pouvoirs-publics/derniers-avis-publies/projet-de-loi-renforcant-la-lutte-contre-les-violences-sexuelles-et-sexistes-commises-contre-les-mineurs-et-les-majeurs.
223 GREVIO (2019) *Baseline Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) France*, Paras. 192-193.

penetration between an adult and a minor under 15, punishable by up to 20 years in jail, was passed in April 2021, and has now set the minimum age of sexual consent indisputably at 15.[224]

In four countries, definitions defy the division between forced-based and consent-based offences, since they *include either both some kind of force and consent* (**Bulgaria**, **Greece**) or *require coercion or intimidation* (**Hungary**, **Spain**). In **Greece**, the new Article 336[225] of the Penal Code refers to two different behaviours – one forced based and, the most recent one, consent based, introduced in 2019 following an intense campaign by women's and human rights NGOs. One offence requires physical violence or threat of serious and direct danger, and another that refers to anyone who engages in an act of a sexual nature without the consent of the victim.[226] The potential confusion created by this legislative technique of combining two opposing definitions in one article will be measured in future case law. There are three other definitions that neither rely on force nor depend on lack of consent either. **Hungary** has opted for coercion as constitutive element,[227] while in **Bulgaria**, the definition of rape requires that the act is carried out when the victim is unable to defend herself and without her consent; by compelling her by force or threat or by bringing her to a helpless state.

Similarly, in **Spain**, the definition of 'sexual aggression', which forms the basis for the definition of rape and also sexual abuse, requires either violence or intimidation. In this respect, the Spanish Supreme Court has ruled that intimidation might be created by environmental factors or by the fear of the victim of some harm which must be assessed in the context.[228] The existence of a common act for both offences appear to have negative consequences in practice. The national expert explains that the Spanish Supreme Court recognises the difficulty of drawing the distinction between 'intimidation' as required by in the offence of sexual aggression, and the abuse of a situation of superiority or undue influence, which is the typical element of the offence of sexual abuse.[229] In some situations, therefore, judges apply the less severe offence of sexual abuse in cases of rape. The GREVIO Baseline Evaluation Report on Spain[230] has noted that the application of the offence of sexual abuse to rape cases, especially at the level of first-instance courts, has caused widespread public indignation and illustrates an improper understanding by judges of the element of intimidation. Even the modifications proposed in the draft law for the comprehensive guarantee of sexual freedom and the decisions of the Supreme Court on 'coercive environment', suggest that gender-sensitive training for judges remains necessary to avoid stereotypes regarding victims' behaviour or excessively formalistic interpretations that diminish the liability of the perpetrator or turn into an accusation against the victim.

Moving towards the definitions that are *fully and solely based on the lack of consent* by the victim, which are phrased as a person who does not consent, a person who is not participating voluntarily or without consent. The definition of rape applicable in the **United Kingdom** provides that:

> 'A person (A) commits an offence if—
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
> (b) B does not consent to the penetration, and
> (c) A does not reasonably believe that B consents.
> Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.'[231]

224 See: Law 2021-478 of 21 April 2021 to protect minors from sex crimes and offences, and incest (*Loi n° 2021-478 du 21 avril 2021 visant à protéger les mineurs des crimes et délits sexuels et de l'inceste*). Avaialable at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043403203?r=bSuUu2CiRU.
225 Penal Code, Article 336(1), introduced through Law 4619/2019.
226 Penal Code, Article 336(5).
227 Hungarian Criminal Code, Article 196.
228 Spanish Supreme Court, judgments 37/2021 of 21 January 2021, ECLI: ES:TS:2021:223; ECLI:ES:TS:2016:2601; ECLI:ES:TS:2008:6095.
229 Spanish Supreme Court, judgment 1259/2004 of 2 November 2004, ECLI:ES:TS:2004:7018.
230 GREVIO, Baseline Report on Spain, 2020, Para. 220, https://rm.coe.int/grevio-s-report-on-spain/1680a08a9f.
231 Sexual Offences Act 2003, Section 1, available at: https://www.legislation.gov.uk/ukpga/2003/42/contents.

How to establish consent is a crucial question arising in the determination of these offences, and states establish certain parameters to do so. This is sometimes done by including a definition of consent in the law. For instance, in the **United Kingdom**, Section 74 of the Sexual Offences Act 2003 briefly establishes that 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.' Yet we see other approaches emerging. **Croatia** defines consent in both the positive and the negative sense. Article 153(5) of the Criminal Code states that 'consent exists if the person has decided to enter into sexual intercourse or equivalent sexual act by his/her own will and was capable of expressing such decision.' It also introduces a description of when consent is absent: 'it is deemed that consent is lacking especially where sexual intercourse or an equivalent sexual act has been performed through the use of threat, fraud, abuse of position against a person who is in relation of dependency towards the perpetrator, abuse of condition of a person who was not capable of expressing his/her refusal or against a person who was unlawfully deprived of liberty.'[232] This clarification confirms that in any of the situations previously recognised in case law as allowing for the prosecution of rape, no consent exists. The same approach is followed in **Luxembourg**,[233] confirmed by the Court of Cassation as standard cases of the lack of consent.[234]

Parameters to establish the lack of consent are also given in case law. In **Iceland**, the Supreme Court has confirmed that consent is lacking if violence, threats or other unlawful coercion is used, and that deprivation of freedom, confinement, medication and other comparable means constitute violence.[235] A similar approach is taken in **Sweden**, where several acts are listed as undoubtedly ruling out consent, yet other situations may also indicate its absence. The determinant is whether the victim was expressing an active will to participate. If this is not the case, the perpetrator had reason to believe that consent was lacking, and thus the act constitutes rape. Jurisprudence in **Luxembourg** has established that the lack of consent can be determined 'from different types of evidence whose conjunction carries the court's conviction'. The expert explains that the testimony of the victim is often the determining element on which the court bases its firm belief. In this regard, it depends of the credibility of the victim, which is gauged with regard to her or his personality and to objective elements present in the file of the proceedings, such as a police report and collected testimony.[236] Similar to the situation explained in relation to Spain above, this example from Luxembourg emphasises the crucial importance of eliminating gender biased and stereotyped interpretations of rape and rape victims.

In **Denmark**, the preparatory works of the law provide guidelines on how to establish the existence or lack of consent. It clarifies that consent must be given voluntarily and be an expression of the person's free will, the assessment being based on the circumstances of the specific situation. Unlike the previous examples, Danish legislation takes it a step further and clarifies that rape is not about coercion or the duty to say no, but about whether the parties voluntarily consent to a sexual activity during the entire intercourse. Consent can be expressed through words or action, and there is no requirement that it is done directly or in any particular way. Furthermore, it establishes that in principle, there is a presumption that a person who consents to intercourse does not behave completely passively, but participates to some extent. Actions that may express consent to sexual intercourse could be e.g. kissing, touching, relevant sounds or movements, etc.

The Danish approach parts from judicial interpretations that require active resistance from the victim and takes into account that a person who is exposed to e.g. a sexual assault, can act on the basis of an unconscious fearful state in which the person does not resist but 'freezes', and is unable to speak

232 Croatia, Criminal Code, Article 153(5).
233 Criminal Code of Luxembourg. Article 375(1) gives non-exhaustive examples regarding the lack of consent: 'in particular, by using violence or serious threats, ruse or artifice, by abusing a person incapable of giving free consent or putting up resistance'.
234 Conclusions of the Court of Cassation regarding Case No. 167/2020.
235 Icelandic Supreme Court, case no. 30/2020. https://www.haestirettur.is/default.aspx?pageid=347c3bb1-8926-11e5-80c6-005056bc6a40&id=d3406746-8a3a-4dbe-a611-af5ac4f01883.
236 District Court Luxembourg 30 July 2020, No. 1858/2020. Available at: https://judoc.public.lu/ECLI_LU_TAL_2020_01858-0730.pdf.

or move. In such a state, passivity on the part of the victim is thus not an expression of consent or of a conscious strategy or action on the part of the victim, but an expression of fear. Based on this assessment, the Danish legislator warns that total passivity may indicate lack of consent to intercourse. That said, although these remarks in the preparatory works can be used by the courts in a purposive interpretation, they are not binding guidelines to which the courts must adhere. It is the judge who will make the overall assessment of all the circumstances of the case and decide whether there is consent in the specific case.

ii) Other sexual offences

Twenty-two states criminalise other forms of sexual violence, in addition to rape (**Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Czechia**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Hungary**, **Italy**, **Latvia**, **Lithuania**, **Luxembourg**, **Netherlands**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Sweden**). The differentiation between rape and other sexual offences is not consistent between states. In particular, there are distinctions based on whether or not there is penetration, and in some cases based on the severity of the coercion or force used. In most states which distinguish between rape as an act involving penetration and other sexual offences, regardless of the name associated with the offences (indecent assault, fornication, lewd acts), the distinction is expressed by reference to *acts of a sexual nature* (**Belgium**, **Finland**, **Germany**, **Latvia**) *sexual contact* (**Czechia**), *acts without copulation* (**Bulgaria**), *acts of the same gravity as intercourse* (**Greece**) or a *sexual act other than intercourse* (**Sweden**). In **Croatia**, however, the distinction from rape is explicit: Article 155 criminalises 'a lewd act, where not even an attempt of criminal offence of rape or serious criminal offence against sexual freedom can be established.' A similarly explicit distinction is found in **Slovenia**. In **Luxembourg**, 'indecent assault' requires an act 'contrary to moral standards in society', which must have begun to have been carried out.

Interestingly, the **Danish** Criminal Code provides a general clause that can be used in relation to any sexual act of a certain severity, which is nevertheless not covered by the other specific provisions of the Criminal Code, but which the courts consider should still be punished. Other forms of sexual assault distinguished from rape focus specifically on the work environment. For instance, Section 220 of the Criminal Code criminalises the offence of grossly exploiting another person's dependency, for employment, financial, treatment or care reasons, in order to engage in sexual intercourse with that person. Similarly, Article 153 of the **Bulgarian** Penal Code, on 'severe sexual harassment', criminalises intercourse 'with another person by using his/her employment or material dependence on him/her – imprisonment of up to three years.' Despite the possibility of penetration, the punishment for this offence in the Bulgarian Penal Code is much lower than that for the offence of rape.

c) Sanctions and aggravations

As noted in previous sections, in respect of sanctions, while violence and threats are constitutive elements of the offences in some states, in others, these are considered as aggravating factors. The same applies to the element of taking advantage of the helplessness of victims. For instance, in **Croatia**, these elements would constitute 'serious offences against sexual freedom'.[237] In **Cyprus**, rape and sexual abuse via penetration are punishable with life imprisonment. In some cases, penetration is also considered as a qualified act or aggravation. Table 8 shows the elements aggravating the offences, both as elements of the crime and as aggravations *stricto sensu*. States that possess a force-based definition of sexual violence or rape are marked with an asterisk.

However, some aggravating factors are worth mentioning specifically, such as those that consider the repetitive nature of the offence, which can capture rape committed within relationships or similar. For

237 Criminal Code, Article 154.

instance, **Croatia** applies a more severe sentence to the commission of several acts of sexual intercourse or equivalent sexual acts committed against one and the same person.[238]

Sanctions for sexual offences include imprisonment, protection measures and in cases where the victim is a minor, restrictions to paternal rights. Several states, however, have adopted additional measures. For instance, in **Cyprus**, Law 119(1)/2000 on Domestic Violence contemplates an order for the removal of a child[239] and a restriction order to remove the perpetrator from the household.[240] Similarly, in **Belgium**, a person convicted of acts of voyeurism, indecent assault, rape, corruption of youth and prostitution or public indecency committed against a minor may be subject to certain prohibitions for a period of between 1 and 20 years, including, for example, being prohibited from teaching minors or residing in a specific area, or perpetrators can be barred from specific designated areas.[241] In **Luxemburg**, additional measures include a prohibition on holding posts, employment or public office, being part of a family council, fulfilling a function in a protective regime of incapable minors or adults, except in respect of her/his children and with the assent of the family judge, or running schools, teaching or being employed in any educational institution.[242] Courts may also impose a lifetime ban or a prohibition of up to 10 years on carrying out professional, voluntary or social activities involving regular contact with minors.[243] Similar measures can be imposed in **Portugal**.

Table 8 Aggravating factors for sexual violence

Aggravating factors for sexual violence	States
Victim is a former or current spouse or partner	Austria, Belgium, Croatia, Estonia,* France,* Hungary, Ireland, Liechtenstein, Luxembourg, Malta, Norway, Portugal,* Slovakia, Spain,* Sweden
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria, Belgium, Croatia, Estonia,* France,* Germany, Italy,* Liechtenstein,* Lithuania,* Luxembourg, Malta, Netherlands,* Norway, Romania,* Slovakia, Spain,* Sweden, United Kingdom
The offence, or related offences, were committed repeatedly	Denmark, Estonia,* Liechtenstein,* Lithuania,* Malta, Norway, Sweden, United Kingdom
Victim was made vulnerable by particular circumstances	Austria, Belgium, Croatia, Denmark, Estonia,* France,* Germany, Greece, Italy,* Liechtenstein,* Lithuania,* Luxembourg, Malta, Netherlands,* Norway, Portugal,* Slovakia, Spain,* Sweden, United Kingdom
Child victim or witness	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Sweden, United Kingdom
Multiple perpetrators	Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Liechtenstein, Lithuania,* Luxembourg, Malta, Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom
Extreme levels of violence	Austria, Belgium, Croatia, Denmark, Estonia,* France,* Germany, Iceland, Italy,* Liechtenstein,* Lithuania,* Malta, Netherlands,* Norway, Poland,* Portugal,* Spain,* Sweden, United Kingdom
Use or threat of a weapon	Austria, Croatia, Czechia,* Denmark, Estonia,* France,* Germany, Liechtenstein,* Lithuania*, Luxembourg, Malta, Norway, Portugal,* Spain,* Sweden, United Kingdom

238 Criminal Code, Article 154.
239 Law 119(1)/2000 on Domestic Violence, Article 21.
240 Law 119(1)/2000 on Domestic Violence, Article 22.
241 Criminal Code, Article 382*bis*.
242 Criminal Code, Article 378(1).
243 Criminal Code, Article 378(2).

Aggravating factors for sexual violence	States
Severe physical or psychological harm for the victim	Croatia, Czechia,* Denmark, Estonia,* Finland,* France,* Germany, Iceland, Italy,* Liechtenstein,* Lithuania,* Luxembourg, Malta, Netherlands,* Norway, Portugal,* Romania,* Sweden, United Kingdom
Previous conviction for similar offences	Denmark, Estonia,* Germany, Liechtenstein,* Malta, Norway, Portugal, Spain,* Sweden, United Kingdom
Offence committed on the grounds of the victim's gender	France, Lithuania, Malta, Slovakia, Spain,* Sweden
Other	Hate (France, Malta, Portugal, Slovenia, Spain,* Sweden) Resulted in pregnancy (Croatia, United Kingdom) Under custody (Czechia, Iceland, Italy, Sweden) Death (Czechia, Greece, Netherlands, Romania) Victim is under the influence (Estonia, France, Italy), Perpetrator was under the influence (France, Lithuania); Promise of gifts in exchange (France) Degrading or humiliating (Spain)

* Definitions based on the use of force.

d) Prosecution

In most states, prosecution of sexual offences and rape are carried out *ex officio* (**Bulgaria**, **Croatia**, **Cyprus**, **Czechia**, **Denmark**, **Finland**, **Germany**, **Iceland**, **Latvia**, **Liechtenstein**, **Malta**, **Netherlands**, **Norway**, **Poland**, **Slovakia**, **Slovenia**, **Sweden**, **United Kingdom**), with the minority requiring *ex parte* prosecution (**Belgium**, **France**, **Ireland**, **Italy**, **Lithuania**, **Portugal**, **Romania**, **Slovenia**). In **Greece**, however, a distinction is made between rape (*ex officio*) and sexual abuse (*ex parte*). In **Slovenia**, same-sex offences will only be prosecuted *ex parte*, which appears to be a discriminatory practice. Legislation in **Hungary** requires a private motion regarding basic, non-qualified cases of sexual coercion and sexual violence, except when the victim is incapable of self-defence or unable to express his/her will, or when the criminal offence is committed in combination with another criminal offence that is punishable without private proceedings.

Across the states, public prosecution established in the law, however, is not reflected in high conviction rates. This is the case even when amendments have been passed to adopt a consent-based definition. In **Germany**, the reporting rates rose slightly immediately after the reform, but still remain at the low level of 5 to 10 %, while the attrition rates have been rising since the 1980s.[244] As analysis shows, the case law of German courts (including the Federal Court of Justice) is still strongly influenced by gender stereotypes, rape myths and victim blaming and thus, the criminal law on rape and sexual assault is not very likely to become effective outside the statute books.[245] According to the national expert, it is an unfortunate and well-known phenomenon that improvements in the criminal law on rape and sexual assault have led to the rise of attrition rates as the police, state attorneys and judges redefine, negate and restrict the scope of application of law on rape and sexual assault.[246]

Reluctance to report the offences and difficulties in undergoing the procedures are well documented in relation to sexual violence and rape. According to the country questionnaire for **Poland**, there are many

244 Seith, C., Lovett, J. and Kelly, L. (2009), *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries*, https://www.researchgate.net/publication/228847968_Different_systems_similar_outcomes_Tracking_attrition_in_reported_rape_cases_in_eleven_countries.

245 Analysis of respective rulings of the Federal Court of Justice by Lembke, U. (2014), 'Vergebliche Gesetzgebung. Die Reform des Sexualstrafrechts 1997/98 als Jahrhundertprojekt und ihr Scheitern in und an der sog. Rechtswirklichkeit' (Futile legislation. How the legislative reforms of sexual offences in 1997-1998 became a centennial project and failed in and due to legal reality), *Zeitschrift für Rechtssoziologie*, Vol. 34, No. 1+2, pp. 253-283.

246 Steinhilper, U. (1998) *Definitions- und Entscheidungsprozesse bei sexuell motivierten Gewaltdelikten. Eine empirische Untersuchung* (Definition and decision-making processes concerning sexually motivated violent crimes. An empirical study), 2nd edition.

reservations about the practice of law enforcement agencies in cases of sexual violence. Victims of sexual crimes have complained to the Ombudsman about the following irregularities on the part of the authorities conducting the preparatory proceedings:

- failure of the persons conducting the proceedings to believe the victims of sexual crimes, in particular as to whether they consented to sexual contact;
- negative attitude of prosecutors and judges towards the victim, manifested, *inter alia*, in deprecating the victim's testimony, lack of empathy;
- lack of training or instruction of law enforcement agencies (police) to conduct proceedings in the event of suspicion of the use of a 'rape pill' by the perpetrator; failure by the police to take into account the need to ensure that procedural activities in a rape case are performed by a person of the same sex as the victim.

The **Portuguese** Ombudsman emphasises that the observed behaviours reveal the scale of prejudice against women and harmful beliefs about people suffering from sexual violence.[247]

This demonstrates the importance of adopting prosecutorial guidelines in relation to these crimes, regardless of whether a consent or force-based definition of the crimes exists. However, only nine states are reported to have adopted such guidance (**Belgium**, **Croatia**, **Denmark**, **Ireland**, **Netherlands**, **Norway**, **Poland**, **Sweden**, **United Kingdom**). For instance, **Croatia** introduced the Protocol on the procedure in cases of sexual violence, which came into force in 2018.[248] Its aim is to standardise procedures and unify practices in cases of sexual violence, enable better coordination among various institutions and bodies, and to ensure timely and compassionate, victim-oriented care and emotional support. In **Belgium**, guidelines related to the collection of evidence were adopted in the 1990s and new guidelines from the Prosecutors-General are now in place.[249] The Prosecution Service in **Denmark** has also issued guidelines on sex crimes,[250] which include guidance on how and under which circumstances the prosecution should plead for a conditional sentence coupled with a requirement of dissuasive sexual treatment for the perpetrator.[251]

Sweden has taken a different approach, setting up a development centre for methods for the investigation and prosecution of domestic violence cases and sexual offences. The police and prosecutors have developed a common methodological support to ensure the quality and uniformity of investigations of sexual offences. A recent review shows that the highest levels of prosecution can be seen where the prosecution office has come the furthest in introducing methodological support.[252] In addition, Swedish Prosecution Services provides handbooks for prosecutors to guide the prosecution process of different crimes, including sexual crimes and crimes against children.

247 RPO (2020) *Raport alternatywny Rzecznika Praw Obywatelskich do sprawozdania rządu Rzeczypospolitej Polskiej z działań podjętych w celu wprowadzenia w życie Konwencji Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej* (Alternative report of the Ombudsman to the report of the Government of the Republic of Poland on actions taken to implement the Council of Europe Convention on preventing and combating violence against women and domestic violence), p. 45 https://www.rpo.gov.pl/sites/default/files/raport_alternatywny_rpo_dla_grevio_czerwiec_2020.pdf.

248 *Protokol o postupanju u slučaju seksualnog nasilja* (Protocol on the procedure in cases of sexual violence), *Narodne novine* no. 70/2018.

249 Col. 10/2005 and Col 4/2017. A 'Kit on Sexual Aggression' was made available, under guidelines from the Prosecutors-General in August 1992 and a ministerial circular of 15 September 1998, as an implementation of the Act of 4 July 1989 concerning rape.

250 Rigsadvokatmeddelelsen 'Seksualforbrydelser (08.02.2021)' issued on the 8 of February 2021, available here in Danish: https://vidensbasen.anklagemyndigheden.dk/h/6dfa19d8-18cc-47d6-b4c4-3bd07bc15ec0/VB/1724065f-71cc-4993-ad81-981c8816eeea?showExact=true#bb3f66778d.

251 The guidelines on sex offences refer to a specific set of guidelines issued by the Prosecution Service with the title '*RM 9-2005 Betinget dom med vilkår om behandling af personer der har begået visse seksualforbrydelser.docx*' issued on 13 August 2015, available here in Danish: https://vidensbasen.anklagemyndigheden.dk/h/6dfa19d8-18cc-47d6-b4c4-3bd07bc15ec0/VB/e8979f0a-48cf-4efa-a500-7c9646123dfb?showExact=true.

252 Swedish Prosecution Authority (2019), *Domestic violence and Sexual Crimes against Adults – A joint review of the police's and the prosecutor's handling* (Våldsbrott i nära relationer och sexualbrott mot vuxna – En gemensam granskning av polisens och åklagarens handläggning).

3.3 Main findings

√ Although sexual assault and rape are recognised as specific forms of gender-based violence in Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (Victims' Rights Directive), and in the annexed category of offences to which Article 11 refers in Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order (EIO) in criminal matters, the definitions used to criminalise rape vary across the states, some focusing on the lack of consent, as recommended by human rights norms and the Istanbul Convention, and some relying on the element of force or threats. In practice, this results in very unequal positioning of victims in terms of their access to justice and protection from violence.
√ That said, compared to previous research, in the last 10 years, and certainly since ratification of the Istanbul Convention, states are amending their criminal laws and introducing consent-based definitions, and, at this point, 11 states have adopted purely consent-based definitions of rape.
√ Across all states, consent is deemed lacking in situations where the victim is helpless or cannot consent, either due to personal circumstances or due to a coercive environment.
√ All states have a minimum age of sexual consent, which the majority of states have set at 16 years old.
√ Definitions of sexual violence and rape are consistently gender neutral, where both males and females can be victims.
√ Same sex rape and sexual offences are at times explicitly recognised.
√ The distinction between rape and other sexual offences relies on different factors, but is largely based on whether there is penetration or not.
√ The majority of states established *ex officio* prosecution for the crimes, yet only a tiny minority have any dedicated protocol guidelines.
√ National case law shows serious inconsistencies within states in the interpretation of whether acts are consensual or not.
√ Country questionnaires indicate very low conviction rates for rape cases.

3.4 Recommendations

Based on the gaps identified in this report at domestic level and in line with the case law of the European Court of Human Rights and the recommendations of the Istanbul Convention, the authors of the report:

√ Encourage a shift in the traditional approach to sexual violence, including rape, as requiring the use of force or threats to coerce the victims. Instead, the recognition of sexual violence and rape as an offence revolving around the lack of consent of the victim should be the main element of the crime.
√ Recommend that clarifications on how to determine the existence or lack of consent are included in the preparatory works, or, at the very least, prosecutorial guidelines.
√ Recommend the revision of the age of sexual consent in the context of other types of offences, such as forced marriage.
√ Call for consideration of the use of force, threats, coercion, intimidation or abuse of the helpless state of the victim as aggravating factors.
√ Call for consideration of the repetition of the acts, or the relationship between victim and perpetrator as aggravating factors.
√ Recommend expanding the statute of limitations for minor victims beyond the majority age.
√ Recommend the adoption of investigation and prosecutorial guidelines or protocols to prevent secondary victimisation.

4 Sexual harassment and harassment related to sex

This chapter provides a detailed examination of existing legislation on sexual harassment and harassment related to sex. The analysis from the country questionnaires shows that although there is EU legislation in relation to sexual harassment and harassment related to sex, it has not proven sufficiently effective in practice to combat these phenomena.[253] It also shows that while the implementation of the directives on gender equality is almost complete, some shortcomings remain.[254]

4.1 Introduction and main concepts

'The practice of sexual harassment is centuries old – at least, if we define sexual harassment as unwanted sexual relations imposed by superiors on subordinates at work.'[255] The history of the legal concept of sexual harassment starts in the United States, where the feminist lawyer Catherine MacKinnon, who spurred the legal debate in the US back in the 1970s, referred to sexual harassment as an 'unwanted imposition of sexual requirements in the context of a relationship of unequal power,' in particular at work.[256] Sexual harassment could manifest either through an isolated episode or a series of incidents at work. MacKinnon argued that sexual harassment derives its meaning and detrimental impact from the 'social context,' defined in the employer-employee relations and in the relationship between sexes of US society.[257] The concept of sexual harassment was formed in relation to employment and occupation, and this is the meaning that has been attributed to it – at least so far – in EU law as well.

At the international level, sexual harassment was defined in CEDAW General Recommendation No. 19 (1992) on violence against women as including 'such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions.' The conduct 'can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.'[258] Again in the field of work, Article 1 of the recent ILO Violence and Harassment Convention of 2019 (ILO Convention), reads as follows:

> 'the term "violence and harassment" in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment; the term "gender-based violence and harassment" means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.'[259]

253 See in that respect, Petroglou, P. (2019), 'Sexual harassment and harassment related to sex at work: time for a new directive building on the EU gender equality acquis', in *European Equality Law Review 2019*, vol. no. 2, p. 32.

254 See further, another interesting study, with a comparative analysis of legislation in France, Latvia, Slovakia, Spain, the Netherlands and Sweden on legal aspects and direct and indirect discrimination: Werner, H. (2015) *Gender equality in employment and occupation*, European Implementation Assessment. https://www.europarl.europa.eu/RegData/etudes/STUD/2015/547546/EPRS_STU(2015)547546_EN.pdf.

255 Siegel, R.B. (2003) 'Introduction – A Short History of Sexual Harassment', in MacKinnon, C. Siegel, R.B. *Directions in Sexual Harassment Law*, Yale, Yale University Press, p. 3.

256 MacKinnon, C. (1979) *Sexual Harassment of Working Women* (New Haven, Conn.: Yale University Press).

257 MacKinnon, C. (1979) *Sexual Harassment of Working Women*.

258 Committee on the Elimination of Discrimination against Women, General Recommendation 19 of CEDAW on Violence Against Women (llth session, 1992), U.N. Doc. A/47/38 at 1 (1993), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 243 (2003), Article 11(18).

259 ILO Violence and Harassment Convention, 2019 (No. 190) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190. It was ratified by Italy on 12 January 2021. At the ILO meeting of March 2020, Finland and Spain committed to ratifying it. https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_737414/lang--en/index.htm.

The ILO Convention considers sexual harassment to be present also after a single occurrence, irrespective of the contractual status of the victim/survivor. It also acknowledges that harassment can occur in public and private sectors, in the formal and informal economy, and in urban as well as in rural areas. It encompasses behaviour in public and private spaces where they are a place of work; in places where the worker gets paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; during work-related trips, travel, training, events or social activities; through work-related communications, including those enabled by information and communication technologies; in employer-provided accommodation; and when commuting to and from work.

The number of ratifications of the ILO Convention is increasing.[260] The ILO Convention encourages action aimed at equality and non-discrimination, highlighting intersectional forms of discrimination in the world of work.[261] Recommendation No. 206, accompanying the ILO Convention, stresses the 'inclusive, integrated and gender-responsive approach' enshrined in Article 4(2) of the Convention and that, based on this provision, 'Members should address violence and harassment in the world of work in labour and employment, occupational safety and health, equality and non-discrimination law, and in criminal law, where appropriate.'[262] The Recommendation is divided into: core principles; protection and prevention; enforcement, remedies and assistance; guidance, training and awareness-raising. This structure emphasises the holistic approach of the Convention and the importance of the participation of workers and their representatives in the design, implementation and monitoring of workplace policy. Remedies are also fundamental and include compensation, reinstatement, the right to resign with compensation, orders requiring the immediate cessation of a certain conduct, legal fees and costs. Stressing the element of intersectionality, the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of Persons with Disabilities recognised in a joint statement in October 2020 that 'sexual harassment is a human rights violation of gender equality principles that intersects with other dimensions of inequality, such as disability,' and that it involves 'unwelcome sexual conduct, from looks to words, to touching, to interfering with assistive devices, to physical contact, to sexual assault and rape.'[263]

Moving to the European (Council of Europe) level, in the Istanbul Convention, sexual harassment is considered as a form of violence that might occur anywhere and consists of 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment' (Article 40). The Explanatory Report points out that 'verbal conduct refers to words or sounds expressed or communicated by the perpetrator, such as jokes, questions, remarks, and may be expressed orally or in writing. Non-verbal conduct, on the other hand, covers any expressions or communication on the part of the perpetrator that do not involve words or sounds, for example facial expressions, hand movements or symbols. Physical conduct refers to any sexual behaviour of the perpetrator and may include situations involving contact with the body of the victim.'[264] The behaviour must be of a sexual nature, unwanted on the part of the victim, and must have 'the purpose or the effect of violating the dignity of the victim.' It means that sexual harassment manifests when the conduct creates an intimidating, hostile, degrading, humiliating or offensive environment. The scope of the provision is not limited to work, however. The Convention adopts a holistic approach that encompasses

260 Five at the time of writing. https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:16070605983317::::P11300_INSTRUMENT_SORT:3 Italy ratified the Convention on 12 January 2021, after approval by the Senate.

261 ILO Violence and Harassment Convention, preamble: 'recognizing that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to ending violence and harassment in the world of work.'

262 Recommendation No. 206 concerning the elimination of violence and harassment in the world of work, 108th ILC session (21 Jun 2019).

263 UN Women, the Committee on the Elimination of Discrimination Against Women, and the Committee on the Rights of Persons with Disabilities (2020) 'Ending sexual harassment against women and girls with disabilities', joint statement, 22 October 2020. https://www.unwomen.org/en/news/stories/2020/10/statement-joint-un-women-cedaw-and-crpd.

264 Explanatory Report to the Istanbul Convention, Para. 208.

measures of prevention, protection, victim support and policy coordination that are very relevant for sexual harassment. Criminal or other legal sanctions can be envisaged as well.

In EU law, harassment related to sex and sexual harassment have been addressed as a form of discrimination in matters of employment and occupation – access to employment, including promotion, and vocational training, working conditions, including pay, occupational social security schemes, and self-employment – and in the provision of and access to goods and services. These behaviours are defined as follows:[265]

> '"harassment": where unwanted conduct related to the sex of a person occurs with the purpose, or effect, of violating the dignity of that person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
>
> "sexual harassment": where any form of unwanted verbal, non-verbal, or physical, conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.'

As reported by the European network of legal experts in gender equality and non-discrimination (EELN), in cases of harassment on the ground of a person's sex, 'the person is ill-treated because he or she is a man or a woman (or, presumably, because they identify as non-binary).'[266] In the case of sexual harassment, a person is subject to unwelcome sexual advances or other forms of conduct having a sexual nature. In real-life situations, 'the distinction between the two may be unclear.'[267]

For the purpose of the EU gender equality directives, harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex. Directive No. 2006/54 requires states to designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights (Article 20). It should be noted that the Directive is legally based on Article 157(3) TFEU, which ensures 'the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.'

The approach taken in the gender equality directives, however, is more limited than that of the conventions previously discussed. The directives call for the prohibition of harassment as a form of discrimination and the imposition of sanctions, yet they do not establish obligations that are sufficiently precise, allowing for adequate monitoring and enforcement in the Member State or at the EU level.[268] Moreover, the holistic approach of the Council of Europe Istanbul Convention and the ILO Convention is missing in EU gender equality law. In that regard, the European Commission's proposal for States to ratify the ILO Convention in the interest of the European Union, currently pending authorisation, is a promising step.[269]

265 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.07.2006, pp. 23–36, Article 2(c) and (d)). See also Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43, Article 2; and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, *OJ L 180,* 15.07.2010, pp. 1–6, Article 3.

266 European network of legal experts in gender equality and non-discrimination (EELN) (2019), *A Comparative Analysis of Gender Equality Law in Europe*, https://www.equalitylaw.eu/downloads/5119-a-comparative-analysis-of-gender-equality-law-in-europe-2019-1-35-mb.

267 EELN (2019), *A Comparative Analysis of Gender Equality Law in Europe*.

268 See also Petroglou, P. (2019), 'Sexual harassment and harassment related to sex at work: time for a new directive building on the EU gender equality acquis' *European Equality Law Review 2019*, vol. no. 2, pp. 16-34.

269 See: Proposal for a Council Decision authorising Member States to ratify, in the interest of the European Union, the Violence and Harassment Convention, 2019 (No. 190) of the International Labour Organization. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0024.

4.2 Sexual harassment and harassment related to sex: the transposition of EU Directives on Gender Equality

In 2011, EELN published a very detailed study on *Harassment related to sex and sexual harassment law in 33 European Countries*,[270] concerning the implementation of the relevant provisions of EU Directives No. 2006/54/EC (Recast) and Directive No. 2004/113 on the principle of equal treatment between men and women in the access to and supply of goods and services. It explored the concept of harassment as discrimination and how EU law was transposed into national law, it also investigated the possible added value of combating harassment related to sex and sexual harassment in the form of a prohibition of discrimination, and the 'double approach' to sexual harassment – namely both the 'dignity harm' and 'discrimination' approach.[271] Some main findings of the report were:

- All EU Member States except **Hungary**, **Latvia** and **Poland** had implemented the Recast Directive in the sense that harassment related to sex and sexual harassment are two separate concepts characterised as forms of discrimination. The same findings were basically confirmed for Directive 2004/113. The EEA countries had also in principle implemented harassment related to sex and sexual harassment as two separate concepts amounting to discrimination.[272]
- Many countries reported a very low level of awareness – and even lack of acceptance – of the legal protection against discriminatory harassment related to sex and sexual harassment.[273]
- Case law was generally scarce.
- Most countries had implemented the rules through specific anti-discrimination legislation of some kind. In many cases this was done through sex equality acts, covering working life and related areas and/or goods and services (like **Belgium**, **Cyprus**, **Denmark**, **Estonia**, **Finland**, **Greece**, **Iceland**, **Liechtenstein**, **Malta**, **Norway** and **Spain**)[274] Another model was to include the ban on harassment related to sex and sexual harassment in an anti-discrimination act also covering grounds other than sex and various areas of society including working life and goods and services (**Bulgaria**, **Czechia**, **France**, **Germany**, **Poland**, **Slovakia**, **Slovenia**, **Sweden** and the **United Kingdom**).[275]
- Most experts gave a positive answer to the question of whether national legislation, in their view, was in compliance with EU law. This was not the case, however, with regard to **Belgium**, **Finland**, **Germany**, **Latvia**, **Lithuania**, **Luxembourg**, **Slovakia** and **Slovenia**.[276]

Eight years later, in the *Comparative Analysis of Gender Equality Law in Europe*, published in 2019, it emerged that all countries covered by the report had prohibited both harassment and sexual harassment in national legislation. The report also found that in most countries, the scope of the prohibition on harassment and sexual harassment was wider than in EU law (**Belgium**, **Bulgaria**, **Croatia**, **Denmark**, **Estonia**, **Finland**, **Germany**, **Greece**, **Hungary**, **Iceland**, **Latvia**, **Norway**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, **Spain**, **Sweden**, **United Kingdom**), and that in some of these countries harassment and sexual harassment were prohibited in all spheres of life.[277] As regards sexual harassment, only **Germany**

270 European Network of Legal Experts in the Field of Gender Equality (2011), *Harassment related to Sex and Sexual Harassment Law in 33 European Countries, Discrimination versus Dignity*, https://www.equalitylaw.eu/downloads/4541-harassment-related-to-sex-and-sexual-harassment-law-in-33-european-countries.

271 The dignity approach emphasises how sexual harassment and sex-based harassment affect the dignity of the targeted individual, whereas the discrimination approach highlights how sexual harassment and harassment related to sex at work are related to systemic discrimination against women, in competitive job markets, and 'clearly recognises that women may be disproportionally affected by sexual harassment and harassment related to sex' (cfr. Petroglou, P. (2019), 'Sexual harassment', pp. 22-23).

272 European Network of Legal Experts in the Field of Gender Equality (2011), *Harassment related to Sex and Sexual Harassment Law in 33 European Countries*, p. 1.

273 European Network of Legal Experts in the Field of Gender Equality (2011), *Harassment related to Sex and Sexual Harassment Law in 33 European Countries*, p. 2.

274 Please note that both the Recast Directive and the Goods and Services Directive were made a part of the EEA Agreement.

275 European Network of Legal Experts in the Field of Gender Equality (2011), *Harassment related to Sex and Sexual Harassment Law in 33 European Countries*, p. 11.

276 European Network of Legal Experts in the Field of Gender Equality (2011), *Harassment related to Sex and Sexual Harassment Law in 33 European Countries*, p. 13.

277 EELN (2019), *A Comparative Analysis of Gender Equality Law in Europe*, p. 20.

prohibited it in the employment context (and not in the access to and supply of goods and services). In terms of discrimination, the **Belgian** expert reported that harassment and sexual harassment were rarely perceived as a form of gender-based discrimination in case law, and legislation in **Portugal** did not consider harassment as a form of discrimination.[278] Case law was scarce, as were measures addressing harassment in employment.

It should be noted[279] that **Spain** had, and still has – willingly – no reference to the 'unwanted conduct' which is commonly present in the definition of sexual harassment and harassment based on sex.[280]

a) Recent developments in the transposition of EU directives

From the questionnaires, compared to the previous reports, we can register some recent developments (**Denmark**, **France**, **Greece**, **Norway**, **Spain**) and also confirm some previous trends (**Germany**, **Hungary**, **Latvia**, **Poland**). It should be noted that the changes concern the definitions (**Greece**, **Norway**, **Spain**), and the measures adopted in order for national law to be more effective in countering sexual harassment and harassment related to sex (**Denmark** and **France**).

In terms of new measures, for example, in **France**, Article L1153-5 of the Labour Code was amended by the 2018 Law on the freedom of choosing a future professional life:[281] employers must inform, by any means, their workers, candidates for employment or any person in training or internship of Article 222-33 of the Criminal Code. They must also provide information about possible legal action, both civil and criminal, in cases of sexual harassment, as well as the addresses and phone numbers of the company doctor, the labour inspector, the contact person for cases of sexual harassment or sexist behaviour (companies with more than 250 employees) and the contact person named on these issues appointed by the works council (*comité social et* économique).[282] In **Denmark**, through amendment to the Act on Equal Treatment of Men and Women with regard to access to employment, of 2018, a new provision was added in Section 4(2), stating that the right to equal working includes a prohibition of sexual harassment.[283] Another amendment to the Act on Equal Treatment of Men and Women (Section 14(2)) provides that 'if there has been a violation in the form of sexual harassment, this can be given weight in determining the compensation.'

On definitions, **Greece** is an interesting case, because the definition of 'sexual harassment' provided by Article 2(d) of Act 3896/2010, transposing Directive 2006/54/EC, was amended by Article 22(1) Act 4604/2019[284] and replaced by the following definition: 'any form of unwanted verbal, *psychological* or physical conduct of a sexual nature, *with the effect* of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment' (emphasis added). This definition, compared to the definition of the Directive, is narrower in that it does not stipulate 'with the purpose or effect' as the Directive does, but only 'with the effect'; it has also replaced the 'non-verbal' form of conduct with 'psychological' conduct, even though these two terms do not coincide. The national expert reports that this is a serious regression with respect to the EU gender equality *acquis*. Further developments might come soon as a consequence of the Greek #MeToo movement, including the introduction of sexual harassment as distinct crime in the Penal Code,[285] the ratification of the ILO

278 EELN (2019), *A Comparative Analysis of Gender Equality Law in Europe*, p. 21.
279 See also below.
280 This aspect was highlighted in the GREVIO Baseline Report on Spain, 2020, Para. 240.
281 Article L1153-5 amended by Article 105(V) of Act No. 2018-771 of 5 September 2018 on the freedom of choosing a future professional life (*Loi pour la liberté de choisir son avenir professionnel*).
282 Decree No. 2019-15 of 8 January 2019, (*Décret n° 2019-15 du 8 janvier 2019 portant application des dispositions visant à supprimer les écarts de rémunération entre les femmes et les hommes dans l'entreprise et relatives à la lutte contre les violences sexuelles et les agissements sexistes au travail*), https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037964765&categorieLien=id.
283 LOV no. 1709 af 27/12/2018. https://www.retsinformation.dk/eli/lta/2018/1709.
284 OJ A 50/26.03.2019.
285 https://www.dikastiko.gr/eidhsh/oi-allages-ston-poiniko-kodika-mesa-apo-tis-fraseis-toy-k-mitsotaki-poies-ypotheseis-the-ekdikazontai-kata-proteraiotita/.

Convention, and a transparent and clear complaints mechanism within companies, to be backed by the Labour Inspectorate with the support of the Ombudsman (Equality Body).[286] In **Spain**, the adjective 'unwanted' in the definition of sexual harassment is missing: the national expert explains that it should not be considered as a negative aspect, but that it rather improves the situation of victims of sexual harassment because it facilitates the proof of its existence. In fact, the Spanish Constitutional Court has interpreted that certain conduct may be considered as sexual harassment, even though there is no expressed and categorical opposition on the part of the victim and always if the behaviour concerned is serious enough to be considered offensive.[287]

In some countries (**Germany**, **Hungary**, **Latvia**, **Poland**, and **Slovakia**) no significant developments have taken place since previous reports. With regard to **Hungary**, **Latvia** and **Poland**, the findings of the previous reports are confirmed, in the sense that sexual harassment and harassment related to sex are not separately considered in the legislation. For example, in **Poland**, the Labour Code explicitly recognises harassment related to sex, as well as sexual harassment as discriminatory behaviour on the ground of sex. However, the formulation of Article 18^{3a}(6) of the Labour Code seems to suggest that the legislator (unlike the EU directives) classifies harassment on the basis of sex as sexual harassment.[288] Furthermore, the Anti-Discrimination Law[289] considers sexual harassment as an expression of unequal treatment (Article 3(6) in conjunction with Article 3(5)).[290] In **Polish** law, sex discrimination is regulated together with discrimination on other grounds. As a result, the national expert clarifies, existing legislation is unclear and vague, making it highly difficult to understand and interpret, even for lawyers. In **Slovakia**, the definition of sexual harassment in Section 2a(5) of the Anti-Discrimination Act is not fully in compliance with the definition contained in Directive 2006/54/EC.

The situation has not changed in **Germany**, where German laws do not use the term discrimination, but rather '*Benachteiligung*' (putting at a disadvantage): this definition is not meant to weaken the protection that must be granted according to the directives. The German expert also stresses that the prohibition of sexual harassment under Section 3(4) of the General Equal Treatment Act is restricted to the area of

286 A new bill on labour law was opened for public consultation from 14 to 27 May 2021 including *inter alia* the ratification of ILO Convention 190 and its draft implementing law. The latter introduces for the first time some innovative provisions on sexual harassment (SH): the obligation of companies with more than 20 employees to adopt preventive measures and special complaint procedures on SH; the recognition of SH as a disciplinary offence in the internal regulations of companies; the recognition of SH as a psychosocial risk in the health and safety legal framework. Despite these novelties, in the author's opinion the draft implementing law of ILO C190 is in blatant breach of the EU gender equality *acquis*, in particular Directive 2006/54 and its transposing law 3896/2010, OJ A 207/8.12.2010. Instead of building on the existing EU and national law by adding the added-value features of the ILO C190, such as the more extended scope, the new bill completely disregards the Directive and its transposing law with no reference thereto. Instead, it introduces new definitions of SH and harassment at work; it regulates SH with a totally health and safety approach without any reference to its legal nature as discrimination on the grounds of gender according to EU law; it re-regulates issues already covered by the Directive, such as the prohibition of victimisation, the locus standi of NGOs and trade unions and the reversal of the burden of proof without any reference to or consistency with the Directive and its transposing law, which will continue to apply in parallel creating a serious legal uncertainty; it designates the Labour Inspectorate as the main equality body for SH (the Ombudsman will be involved, 'as the case may be') whereas according to the transposing act, the Ombudsman is the only equality body; it provides for administrative sanctions only under the health and safety legislation but not under the anti-discrimination legislation; it provides civil sanctions only in the form of reparation and moral damages whereas according to the existing legal framework any dismissal or less favourable treatment due to SH or victimisation linked thereto is null and void and *restitutio in integrum* is provided. The new bill available at: http://www.opengov.gr/minlab/?p=4977.

287 Constitutional Court, Judgement 224/1999 of 13 December 1999, ECLI:ES:TC:1999:224.

288 The provision of Article 183a(6) of the Labour Code *in extenso* has the following wording: 'Discrimination on the grounds of sex also includes any form of unwanted conduct of a sexual nature, or, in relation to the sex of an employee, with the purpose or effect of violating the dignity of an employee, in particular when creating an intimidating, hostile, degrading, humiliating or offensive atmosphere; this conduct may include physical, verbal or non-verbal elements (sexual harassment)'.

289 Article 3(3) of the Anti-Discrimination Law stipulates that harassment is taken to include any form of unwanted conduct, the purpose or effect of which is violation of the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (atmosphere). Act of 3 December 2010 on the implementation of some provisions of the European Union related to equal treatment – JoL of 2010, no. 254, item. 1700, http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20102541700/U/D20101700Lj.pdf.

290 Less popular treatment of an individual stemming from rejection of the sexual harassment, or subordinate sexual harassment is considered as unequal treatment.

employment only, that legislation concerning education falls under the competence of the federal states, and rules concerning the conduct on campus are subject to the internal regulations of the individual academic institution. Although (female) students are disproportionately affected by sexual harassment, the legal protection they can obtain is fragmentary, inconsistent and often based upon the goodwill of the individual university's presidency or administration.[291]

4.3 Results from the country questionnaires

Having set the background of the analysis from the questionnaires, the report here considers: whether and how sexual harassment and harassment related to sex is covered by criminal law provisions, specific legislation, labour law, or other fields and highlighting whether such acts committed beyond the working environment fall under the provisions of the law (a); sanctions (b); new attempts to develop the concept of harassment (online dimension and new laws on sexism and street harassment) (c); whether sexual harassment and harassment related to sex is considered in the legislation as an occupational and health risk at work (d); whether there are specific procedures or bodies that can receive complaints with regard to possible cases of harassment and harassment related to sex in compliance with Article 20 of the Directive 2006/54/EC (e). The chapter concludes with a summary of main findings and recommendations.

a) Areas of law addressing sexual harassment and harassment related to sex

Sexual harassment and harassment related to sex are covered by: criminal law provision; specific laws on gender equality/equal treatment and on anti-discrimination (in compliance with the EU directives on gender equality); labour codes/acts; other laws. From a methodological point of view, the report will also refer to legislation that merely concerns 'harassment' without reference to the sexual nature of the conduct. This aspect is particularly challenging in countries where harassment is considered to amount to stalking.[292] It should be noted that in some cases, specific laws on gender equality or anti-discrimination have introduced criminal law sanctions for sexual harassment and harassment based on sex in the working environment and in the provision and access of goods and services.

Table 9 Areas of law adressing (sexual) harassment

State	Criminal provisions on sexual harassment in all spheres	Criminal provisions on sexual harassment in the working environment	Criminal provisions on harassment	Specific law on gender equality/equal treatment	Specific law on anti-discrimination	Labour code/acts
Austria	X			X		
Belgium			X	X		X
Bulgaria					X	
Croatia	X	X	X	X	X	X
Cyprus				X		
Czechia					X	
Denmark				X		
Estonia	X			X		X

291 A comprehensive survey and analysis of different regulations on federal, state and university level, and proposals for the future based upon best practices are provided by Kocher, E., Porsche, S. (2015), *Sexuelle Belästigung im Hochschulkontext – Schutzlücken und Empfehlungen* (Sexual harassment in the higher education context – protection gaps and recommendations), http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Expertisen/Expertise_Sexuelle_Belaestigung_im_Hochschulkontext.html?nn=6575434.

292 For more details, see Chapter 7 on stalking.

State	Criminal provisions on sexual harassment in all spheres	Criminal provisions on sexual harassment in the working environment	Criminal provisions on harassment	Specific law on gender equality/equal treatment	Specific law on anti-discrimination	Labour code/acts
Finland	X			X		
France	X				X	X
Germany				X		
Greece				X		
Hungary					X	
Iceland	X			X		
Ireland			X	X		
Italy			X	X		X
Latvia						X
Liechtenstein	X			X		
Lithuania	X			X		
Luxembourg			X			X
Malta	X			X		X
Netherlands				X		X
Norway	X		X	X	X	
Poland					X	X
Portugal					X	X
Romania		X		X		X
Slovakia					X	X
Slovenia		X			X	
Spain		X		X		X
Sweden		X			X	X
United Kingdom			X	X		

As shown in Table 9, criminal provisions on sexual harassment in all spheres, not limited to the working environment and to the provision and access to goods and services are included in nine countries (**Austria**, **Croatia**, **Estonia**, **Finland**, **France**, **Iceland**, **Liechtenstein**, **Lithuania**, **Malta** and **Norway**).[293] For example, in **Croatia**, Article 156 of the Criminal Code punishes 'whoever sexually harasses another person who is his or her subordinate or who is in a situation of dependence with respect to him or /her or who is especially vulnerable due to age, illness, disability, addiction, pregnancy, a severe physical or mental impairment.' In **France**, the law on sexual harassment refers to the repetition of conducts 'having sexual nature' which affect the dignity of the victim owing to their degrading and humiliating character or because they create an intimidating, hostile or offensive situation.[294] In **Finland**, Chapter 20, Section 5 of the Criminal Code is translated as 'Harassment', but the title in Finnish (*Ahdistelu*) requires committing *sexual acts* by touching another person. The GREVIO report on Finland noted that Section 5(a) of Chapter 20 of the Criminal Code does not require a violation of the dignity of a person as required by the Istanbul Convention but a violation of a person's self-determination.[295] In **Iceland**, the definition refers, amongst other things, to stroking, fingering or probing the genitals or breasts of another person, whether under or through clothing, and also to suggestive behaviour or language which is extremely offensive, repeated

293 Working environment includes all spheres contemplated by the EU directives.
294 Law No. 2012-954 of 6 August 2012 on sexual harassment, (*Loi n° 2012-954 du 6 août 2012 relative au harcèlement sexuel*).
295 GREVIO Baseline Evaluation Report on Finland, GREVIO/Inf(2019)9 2, Para. 180.

or of such a nature as to cause fear (Article 199 of the Criminal Code). In **Liechtenstein**, Article 203 of the Criminal Code, as amended in 2019, covers sexual acts that are carried out, directly or indirectly, with the support of communication technology, in front of another person who does not expect it and thereby creating justified annoyance, or in verbal acts ('*in grober Weise durch Worte sexuell belästigt*'). **Lithuania** refers to 'vulgar or similar acts, offers or allusions' committed against a person dependent on the service or otherwise, 'for sexual intercourse or satisfaction' (Law no VIII-1968 of 26 September 2020). The law requires the dependence of the victim as a prerequisite for incrimination of sexual harassment. **Malta** has a very detailed definition in its Criminal Code (Article 251A), which stresses the types of conduct amounting to sexual harassment: subjecting another person to an act of physical intimacy; requesting sexual favours from another person; subjecting another person to any act and, or conduct with sexual connotations, including spoken words, gestures and, or the production, display or circulation of any written words, pictures, and, or any other material, where such act, words, and, or conduct is unwelcome to the victim, and could be reasonably be regarded as offensive, humiliating, degrading, and, or intimidating towards that person. **Norway** (Article 298 of the Criminal Code) defines sexual harassment as 'sexually abusive or other obscene behaviour in a public place or in the presence of or before anyone who has not consented to such.'

The definitions are not uniform and do not precisely correspond to the requirements of the Istanbul Convention, in particular, no definition addresses the purpose or the effect of violating the dignity of a person creating an intimidating, hostile, degrading, humiliating or offensive environment (**Malta** only mentions the conduct as being 'offensive, humiliating, degrading, and, or intimidating').

Criminal provisions on sexual harassment in the working environment are provided by Croatia (as 'workplace maltreatment' Article 133, Criminal Code); **Romania** (Article 223 Criminal Code); **Slovenia** (Article 197, Criminal Code); **Spain** (Articles 184(1) and 443 (for civil servants) of the Criminal Code); **Sweden** (Chapter 3, Section 10 of the Discrimination Act).[296]

Criminal provisions on harassment, without reference to the sexual nature of the behaviour, are present in **Belgium** (Article 442, Criminal Code);[297] **Ireland**;[298] **Italy** (Article 660, Criminal Code); **Luxembourg** (Article 442-2, Criminal Code);[299] **Norway** (Article 266, Criminal Code);[300] the **United Kingdom**.[301] A specific case is **Denmark**, whose criminal code indirectly addresses sexual harassment with the crime of indecency, (Section 232, Criminal Code).[302] In 9 countries there is a specific law on anti-discrimination, in 20 countries a specific law on equality/equal treatment and provisions on sexual harassment are included in the labour code/acts of 11 countries. Other laws have been used in the following countries:

296 Three types of crimes may qualify as a working environment crime if they have resulted from an employer or education provider intentionally or carelessly neglecting his or her duty under the Work Environment Act to prevent sickness or accidents. The crimes are: causing another's death; causing bodily injury or illness; and creating danger to another. Discrimination Act, Chapter 3, Section 10.
297 For more detail, see Chapter 7 on stalking.
298 Non-Fatal Offences Against Person Act 1997. See also the provisions on stalking.
299 '*Harcèlement obsessionnel*'. See Chapter 7 on stalking.
300 See also Chapter 7 on stalking.
301 The Protection from Harassment Act 1997. See also Chapter 7 on stalking.
302 Because it covers any sexual act of some severity, such as sexual harassment, which is not covered by the other provisions in Chapter 24 of the Criminal Code on sex crimes.

Croatia;[303] **Finland**;[304] **Greece**;[305] **Iceland**;[306] **Latvia**;[307] **Luxembourg**;[308] the **Netherlands**;[309] **Spain**.[310] In Spain, the recent draft law for the comprehensive guarantee of sexual freedom of 2020[311] is intended to modify Article 184 of the Criminal Code: it expands the relationships in which the offence of sexual harassment may occur from labour, education and service provision through the introduction of the phrase 'or analogous relationships.'

Some of the current shortcomings in addressing sexual harassment derive from the current fragmentation of provisions adopted in different areas of law, as discussed above. The national experts mentioned numerous gaps in addressing sexual harassment and harassment related to sex at work, despite a general compliance with EU gender equality directives. Here is a list of the main weaknesses that have been identified. This section shows in brackets the country of the expert that highlighted the relevant aspect, but several of these elements might be extended, *mutatis mutandis*, to more, if not all, countries under analysis.

- Low level of compensation for victim/survivors of sexual harassment and harassment related to sex (**Denmark**, **Italy**).
- Very few cases and difficulties in court prosecutions (**Belgium**, **Spain**).
- Case law fails to define sexual harassment or to provide a correct interpretation (**Belgium**, **Italy**).
- Overregulation – in the sense that too many different legal instruments address the issue – which in theory increases the number of protection measures, but in practice might cause more difficulties and confusion (**Croatia**, **France**).
- Fear of losing job as retaliation (**Denmark**).
- Retaliation – 'legal retaliation,' defamation cases (**Finland**, **France**, **Greece** where some defamation cases have been successful).
- Secondary victimisation (**Netherlands**).
- Little knowledge of the problem (**Estonia**, **Germany**, **Lithuania**).
- Under-staffed bodies (**Belgium**, **Estonia**, **Netherlands**).
- Police lack knowledge and training (**Estonia**).
- Negative 'sexual culture' in the police and abuse of power (**Norway**).
- Lack of intersectional dimension (**France**).
- Legal protection against sexual harassment is merely theoretical (**Germany**).
- Media backlash (**Italy**, **Spain**).
- No disaggregated data available (**Finland**, **Spain**).
- Use of non-disclosure agreements to silence victims of sexual harassment (**United Kingdom**).
- Some experts also stressed that there is no general criminalisation of sexual harassment in line with the Istanbul Convention in the domestic legislation, that sexual harassment and harassment related to sex are limited to the working environment, and that it should be expanded to other sectors, such as education.

303 Act on protection against domestic violence (*Zakon o zaštiti od nasilja u obitelji*), *Narodne novine* nos. 70/2017 and 126/2019.
304 Occupational Safety and Health Act (738/2002), Section 28.
305 Act 4531/2018, OJ A 62/5.4.2018, ratification of the Istanbul Convention.
306 Bullying in the workplace, Regulation no. 1009/2015 (replacing Regulation No. 1000/2004) on measures to counter bullying in the workplace as well as gender-based harassment and sexual harassment defined in the same manner as in the Gender Equality Act No. 10/2008.
307 Article 2^1(5) of the Unemployed and Job-seekers Support Act (the definition is provided by Article 2^1(6)); Article 3^1(7) of the Protection of Consumer Rights Act; Article 2^1(2) of the Social Security Act; Article 4(3) of the Law on prohibition of discrimination of natural persons – performers of economic activity.
308 Law of 26 May 2000 on the protection against sexual harassment at work. Memorial A N°50 of 30 June 2000.
309 Dutch Civil Code, Article 646, Paras. 1 and 6 of Book 7 (prohibition on sexual harassment), enacted on 10 January 1997, https://maxius.nl/burgerlijk-wetboek-boek-7/artikel646.
310 Royal Decree 5/2000, adopting the Recast text of the Law on Offences and Penalties in the Social Order (*Real Decreto Legislativo 5/2000, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social*), 4 August 2000, https://www.boe.es/buscar/act.php?id=BOE-A-2000-15060#a8.
311 Draft law for the comprehensive guarantee of sexual freedom (*Anteproyecto de Ley Orgánica de Garantía Integral de la Libertad Sexual*), https://www.igualdad.gob.es/normativa/normativa-en-tramitacion/Documents/APLOGILSV2.pdf.

b) Sanctions and prosecution

With regard to equality and anti-discrimination laws, there are both criminal and civil penalties. Compensation can be awarded to the victim of sexual harassment or harassment related to sex at work. Compensation is present in all jurisdictions as a civil and/or criminal law measure. In **Ireland**, a victim of sexual harassment is awarded with up to two years of remuneration if the complaint is successful. That is similar to the provision in the **Belgian** Gender Act, according to which a victim of discrimination may claim compensation for the prejudice suffered or, alternatively, fixed damages equal to six months' gross pay (in employment matters) or EUR 1 300 (in other matters), but these amounts may be halved if the perpetrator succeeds in demonstrating that the adverse treatment would still have occurred in the absence of discrimination. Employers may be subjected either to criminal (imprisonment) or administrative sanctions, the latter in the form of a monetary fine (e.g. in the **Czechia**, **Finland**, **Hungary**). However, in **Finland**, for example, the requirement is that the sexual harassment has damaged the health of the victim: as reported by the national expert, this suggests a high threshold. In cases of victimisation of victims of sexual harassment and/or their witnesses, a civil law measure might also be the declaration of a court that a dismissal or a denial of promotion is null and void (such as in **Greece**). In some cases, a penalty consists in putting an end to the behaviour – such as in **Belgium**, **Czechia**, **Hungary**, and **Slovakia**. In **Slovakia**, adequate satisfaction is also contemplated (e.g. an apology). In **Belgium**, the failure to comply with an order of termination of the illicit behaviour constitutes a crime. Disciplinary sanctions can also be envisaged (in **Belgium**, **Greece**, and **Italy**, for example). Restraining orders can be imposed to protect victims of sexual harassment (for example in **Norway**, **Poland**, and **Sweden**).

With regard to the criminalisation of sexual harassment in national criminal codes, penalties range from 10 days minimum imprisonment (for those systems envisaging a minimum) to up to 2 years (excluding aggravating circumstances). The maximum imprisonment varies significantly: e.g. 45 days in **Lithuania**, 5 months in **Spain**, 6 months in **Liechtenstein** and **Estonia**, 1 year in **Norway** and **Romania**, and 2 years in the remaining countries. In **Slovenia**, where sexual harassment at the workplace is criminalised, the maximum imprisonment is up to two years; if it results in mental, psychosomatic or physical illness up to three years. This means that, in most jurisdictions, parties can opt for alternative resolution mechanisms.[312] With such low sentences, probation or conditional sentencing is possible.

Table 10 Aggravating factors for sexual harassment & harassment based on sex

Aggravating factors for sexual harassment & harassment based on sex	**States**
Victim is a former or current spouse or partner	Austria, Belgium, Estonia, Iceland, Liechtenstein, Malta, Norway, Spain, Sweden
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria, Belgium, Croatia, Estonia, Italy, Liechtenstein, Malta, Netherlands, Norway, Poland, Spain, Sweden, United Kingdom
The offence, or related offences, were committed repeatedly	Denmark, Estonia, France, Liechtenstein, Lithuania, Malta, Norway, Portugal, Sweden, United Kingdom
Victim was made vulnerable by particular circumstances	Austria, Belgium, Estonia, Croatia, Denmark, France, Greece, Italy, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Spain, Sweden, United Kingdom
Child victim or witness	Austria, Denmark, Estonia, France, Greece, Italy, Liechtenstein, Malta, Netherlands, Norway, Poland, Sweden, United Kingdom
Multiple perpetrators	Austria, Denmark, Estonia, France, Germany, Iceland, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Slovenia, Sweden, United Kingdom

312 See, in detail, Chapter 11 below.

Aggravating factors for sexual harassment & harassment based on sex	States
Extreme levels of violence	Austria, Denmark, Estonia, Italy, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Spain, Sweden, United Kingdom
Use or threat of a weapon	Austria, Denmark, Liechtenstein, Malta, Norway, Sweden, United Kingdom
Severe physical or psychological harm for the victim	Austria, Denmark, France, Italy, Liechtenstein, Malta, Netherlands, Norway, Portugal, Sweden, United Kingdom
Previous conviction for similar offences	Denmark, Liechtenstein, Malta, Norway, Portugal, Spain, Sweden, United Kingdom
Offence has been committed online	France, Greece
Offence committed on the grounds of the victim's gender	France, Lithuania, Malta, Norway, Spain, Sweden, United Kingdom

c) New attempts to grasp ICT-facilitated forms of harassment and sexism

According to the FRA, in the report published in 2014 using data from 2012, cyber harassment refers to women's experiences of sexual harassment that involve 1) unwanted offensive sexually explicit emails or SMS messages; 2) inappropriate offensive advances on social networking websites such as Facebook, or in internet chat rooms.[313]

New developments also concern the legal prohibition of sexism. An increasing number of states have adopted laws to prohibit street harassment and sexism. Sexism was defined in the Council of Europe Recommendation on Preventing and Combating Sexism of 2019:

> 'Any act, gesture, visual representation, spoken or written words, practice or behaviour based upon the idea that a person or a group of persons is inferior because of their sex, which occurs in the public or private sphere, whether online or offline, with the purpose or effect of:
> i. violating the inherent dignity or rights of a person or a group of persons; or
> ii. resulting in physical, sexual, psychological or socio-economic harm or suffering to a person or a group of persons; or
> iii. creating an intimidating, hostile, degrading, humiliating or offensive environment; or
> iv. constituting a barrier to the autonomy and full realisation of human rights by a person or a group of persons; or
> v. maintaining and reinforcing gender stereotypes.'[314]

Table 11 shows the few countries (at least for the moment) that have recently addressed these aspects of sexual harassment.

Table 11 Sexual harassment – ICT-facilitated harassment and sexism

State	ICT-facilitated harassment (explicitly stated in the legislation)	Sexism and street harassment
Belgium		X
Cyprus		X
France	X	X
Iceland	X	
Liechtenstein	X	

313 European Union Agency for Fundamental Rights (FRA) (2014), *Violence against women: an EU-wide survey*, p. 97, available at: https://bit.ly/23atuf9.
314 https://www.coe.int/en/web/genderequality/combating-and-preventing-sexism.

State	ICT-facilitated harassment (explicitly stated in the legislation)	Sexism and street harassment
Luxembourg	X	
Netherlands	X*	X*
Spain		X*
Slovakia	X*	

* proposals.

The ICT-facilitated dimension of sexual harassment has been grasped by the legislation of only four countries: **France**, banning cyber harassment with a fine of up to EUR 45 000 and up to three years' imprisonment (Article 222-33-2-2 of the Criminal Code);[315] **Iceland** (Article 202 of the Penal Code No. 19/1940 as amended with Law No. 58/2012 concerning sexual intercourse or other sexual relations with children – 'by communications over the Internet'); **Liechtenstein** (Article 203 of the Criminal Code as amended in 2019, 'with the help of information or communication technology'); **Luxembourg** (Law of 19 June 2012 amending the Law of 21 December 2007 transposing Directive 2004/113/EC to include the internet).

In **Belgium**, a law against sexism in the public space was adopted in 2014,[316] which defines as sexism 'any gesture or behaviour which, in the circumstances referred to in Article 444 of the Criminal Code, is manifestly intended to express contempt for a person because of his or her sex, or to consider him or her, for the same reason, as inferior or essentially reduced to his or her sexual dimension and which results in a serious violation of his or her dignity.' Penalties amount to imprisonment (one month minimum – one year maximum) and/or to a fine ranging from EUR 50 to 1 000. A new law on sexism was approved in **Cyprus** on 28 December 2020, according to which sexism consists of any public or private sexist behaviour against a person or group of persons, and includes any action, gesture, representation, practice, written or verbal communication based on the idea or belief a person or group of persons are inferior because of their gender.[317] Penalties consist of imprisonment for up to one year or a fine of up to EUR 5 000 or both. In **France**, the Criminal Code provides for sanctions in case of harassment concerning behaviours having a sexual or sexist connotation[318] (Article 222-33 Criminal Code, as amended) and street harassment (*outrage sexiste*, Article 621-1 Criminal Code).[319] In the **Netherlands**, there are two draft laws.[320] One law, promoted by Ferdinand Grapperhaus, Minister of Justice and Security, aims at criminalising sexual harassment in a substantive manner. The proposed law contains two provisions, one criminalising physical and one criminalising (non-)verbal sexual harassment in public. The latter also applies to sexual harassment online. The Dutch expert reports that certain behaviour, such as wolf-whistling, hissing and extensive staring would not be prohibited under the proposal, which also does not address non-intentional sexual harassment. The other pending draft law prohibits all forms of sexual harassment through a single article, which would become Article 429ter of the Dutch Criminal Code. Waiting for one of the reforms to be approved, certain municipalities decided to criminalise *street harassment* by means of a local regulation. These regulations were found to be legally void in court, because a restriction of freedom of expression requires formal national legislation. The court also ruled that the wording of the local regulations did not meet the requirements of foreseeability within the meaning of Article 10 ECHR.[321] In **Spain**, the draft law for the comprehensive guarantee of sexual freedom[322] proposes the introduction of a new provision dealing with 'street harassment' or occasional

315 Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence, (*Loi n° 2018-703 du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes*).
316 https://igvm-iefh.belgium.be/sites/default/files/downloads/loi_sexisme_fr.pdf.
317 Law 209(I)2020 in relation to combating sexism, sexist behaviours and related issues.
318 'Sexist' was added with the introduction of Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence.
319 Act No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and sexist violence.
320 https://www.tweedekamer.nl/kamerstukken/detail?id=2018Z04362&did=2018D18968.
321 Hof Rotterdam, 19 December 2019, ECLI:NL:GHROT:2019:3293.
322 Draft law for the comprehensive guarantee of sexual freedom (*Anteproyecto de Ley Orgánica de Garantía Integral de la Libertad Sexual*), https://www.igualdad.gob.es/normativa/normativa-en-tramitacion/Documents/APLOGILSV2.pdf.

harassment in Article 173(4) of the Criminal Code, which currently regulates the offence of insults and vexation. The draft law extends the punishment for this offence: permanent location of five to thirty days, always at a different address and away from the victim's, or community work from five to thirty days, or a fine of one to four months, to those who address another person with expressions, behaviours or propositions of a sexual nature that create the victim an objectively humiliating, hostile or intimidating situation, without constituting other more serious crimes.

d) Sexual harassment or harassment related to sex as an occupational and health risk at work

Council Directive No. 89/391/EEC of 12 June 1989 introduced measures to encourage improvements in the safety and health of workers at work. The national experts were asked whether harassment related to sex and/or sexual harassment have been considered as a psychological occupational safety and health risk within the meaning of this Framework Directive, despite not being expressly mentioned in the legislative text.[323] As was reported in a 2016 study, 'while the European Framework Directive on health and safety at work 89/391/EEC does not explicitly mention "psychosocial risks" nor "harassment and violence", such risks are covered as employers need to carry out an overall risk assessment taking into account any risk,' and 'risk assessment must be holistic and also assess social relationships and all factors related to the work environment, taking account of changes in the workplace and environment.'[324] According to the same study:

> 'violence and harassment are specifically mentioned in 11 national health and safety legislation of the studied countries. Among these eleven countries, **France**, **Portugal** and **Iceland** only include a reference to harassment. Other countries included both violence and harassment in their national health and safety legislation. This concerns **Belgium**, **Denmark**, **Finland**, **Luxemburg**, the **Netherlands**, **Iceland** and **Norway**. Again, other countries refer to harassment or violence. In the case of **France**, the Labour Code refers only to moral harassment and sexual harassment without referring to violence at the workplace. Other countries refer to violence and harassment but also go further in their definition about specific forms of harassment and violence. This includes **Slovenia** whose legislation refers also to mobbing or **Denmark** whose legislation refers to mobbing and bullying.'[325]

From the questionnaires, it is possible to highlight some improvements, compared to the situation in 2012 as analysed in the previous report, in **Denmark** and **Estonia**. In **Denmark**, Sections 22 and 23 of Executive order No. 1406 of 26 September 2020 on psychosocial working environment provide that the employer, at all stages, must plan, organise and execute responsibly with due regard to health and safety in both the short and long term in relation to offensive behaviour, meaning a situation where one or more persons expose one or more other persons in the company to bullying, sexual harassment or other degrading behaviour in the workplace. The behaviour must be perceived as degrading by the victim/survivor. Other legislation introduced in 2020 includes the **Estonian** Occupational Health and Safety Act, which mentions among psychosocial hazards, violence, unequal treatment, bullying and harassment at work (Article 9(1)).[326] In other cases, sexual harassment can be indirectly considered as an occupational and health risk, for example through the use of the word 'mistreatment' (*maltretiranje*) in **Croatia**,[327]

323 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29/06/1989 P. 0001 – 0008, Article 1(2).

324 European Commission (2016) *Study on the implementation of the autonomous framework agreement on harassment and violence at work*, https://op.europa.eu/en/publication-detail/-/publication/09cef40c-0954-11e7-8a35-01aa75ed71a1/language-en, p. 39.

325 European Commission (2016) *Study on the implementation of the autonomous framework agreement on harassment and violence at work*, p. 42.

326 Occupational Health and Safety Act, RT I, 29.12.2020, 13, https://www.riigiteataja.ee/en/eli/530122020005/consolide.

327 Ordinance on the elaboration of risk assessment (*Pravilnik o izradi procjene rizika*), *NN* nos. 112/2014 and 129/2019. In force since 1 October 2014.

in the interpretation by courts (**Italy**), in provisions on occupational risks referring to 'certain damage derived from work' (**Spain**).[328]

In the **United Kingdom** the situation is more complex because, in theory, sexual harassment and harassment related to sex are considered as occupational and health risks – employers are under relevant obligations to ensure the health (including mental health), safety and welfare of workers under the Health and Safety at Work Act 1974[329] and the Management of Health and Safety at Work Regulations 1999 (duty to assess and control risks including foreseeable harassment/violence)[330] – however, the acts are not applied where there is more specific legislation, so cases of bullying and harassment would more commonly be dealt with as issues of discipline e.g. breaches of policies on expected behaviours, discrimination, victimisation or equality.[331]

e) Bodies receiving complaints of sexual harassment or harassment related to sex

In compliance with Article 20 of Directive 2006/54/EC, States established bodies or expanded the functions of pre-existing bodies/commissions/ombudspersons to address issues of discrimination at work, including sexual harassment.

Except for **Iceland** and **Liechtenstein**, which have no equality body, **all other states** under the scope of this study have established an equality mechanism. In all but five countries, they can receive complaints from victims of sexual harassment, deciding in either a binding or non-binding way.[332] This is illustrated in more detail in the final chapter of the report (Chapter 11).

4.4 Main findings

√ Compared to EU law, the Istanbul Convention and ILO Convention No. 190 have widened the scope of the protection from sexual harassment and harassment based on sex to include behaviours in spheres of life that are not limited to employment, occupation, and the provision of and access to goods and services.

√ Sexual harassment and harassment related to sex are generally prohibited at national level as a response to the EU directives on gender equality. The origin of sexual harassment is rooted in the employment sector and in its inherent inequal power relations. In current EU law, the concept continues to be limited mainly to the field of work, along with the provision of and access to goods and services.

√ Despite all EU Member States – and EEA countries, given the fact that the Recast Directive and the Goods and Services Directive were made a part of the EEA Agreement – having implemented the gender equality directives, there is uneven protection from sexual harassment and harassment based on sex at domestic level, in addition to difficulties in enforcing the application of the measures:

- In most countries, the scope of prohibition on sex-based harassment and sexual harassment has been broader than in EU law (including additional measures), and in some of these countries harassment and sexual harassment are prohibited in all spheres of life. This seems to indicate that states consider the current EU legal framework as insufficient to address the phenomena.
- EU gender equality law has been generally implemented by the countries under analysis. All countries except two have an equality body/ombudsperson/tribunal that can formulate recommendations. In all states but five, the equality body can receive sexual harassment complaints.
- National experts have highlighted several shortcomings in the effectiveness of the implementation of the EU directives. Among the main issues, 'legal retaliation' was highlighted, meaning the response through a complaint for defamation by the alleged perpetrators accused of sexual

328 Law on Prevention of Occupational Risks, Article 4(2) on Occupational risk.
329 https://www.legislation.gov.uk/ukpga/1974/37/contents.
330 https://www.legislation.gov.uk/uksi/1999/3242/regulation/3/made.
331 https://www.hse.gov.uk/stress/reporting-concern.htm.
332 Please see Table 30, in Chapter 11.

harassment; fragmentation of the provisions on sexual harassment and harassment based on sex in different legal instruments; and insufficient prevention, support and protection measures.

√ Prohibitions of sexual harassment and harassment based on sex are dispersed throughout different areas of law. Ten countries have criminal provisions on sexual harassment in all spheres, and not limited to the working or related environment (**Austria**, **Croatia**, **Estonia**, **Finland**, **France**, **Iceland**, **Liechtenstein**, **Lithuania**, **Malta** and **Norway**), 5 countries have criminal provisions regarding sexual harassment in the working environment (**Croatia**, **Romania**, **Slovenia**, **Spain**, and **Sweden**), 7 countries have general criminal provisions on harassment (**Belgium**, **Finland**, **Ireland**, **Italy**, **Luxembourg**, **Norway** and the **United Kingdom**), 20 countries have adopted a specific law on gender equality/equal treatment, 9 countries have adopted a law on anti-discrimination, 11 countries have specific provisions in labour codes or acts, while 8 have provisions in other legislation. Cyber harassment is expressly addressed by 4 countries (**France**, **Iceland**, **Liechtenstein** and **Luxembourg**), whereas a new trend regarding laws on sexism and street harassment can be seen in 5 countries (**Belgium**, **Cyprus**, **France**, **Netherlands**, and **Spain**).

√ In the legislation of countries that criminalised the behaviour in any circumstance, the definitions are not uniform and do not precisely correspond to the requirements of the Istanbul Convention, in particular no definition addresses the purpose or the effect of violating the dignity of a person creating an intimidating, hostile, degrading, humiliating or offensive environment.

√ Regarding sexual harassment as an occupational health risk, two recent developments occurred in **Denmark** and **Estonia**, where specific laws in the field have been adopted.

4.5 Recommendations

Based on the findings in this report, the authors suggest:

√ Consideration in future legislation on sexual harassment and harassment based on sex of the broad scope of application of the ILO Convention on violence and harassment, in particular its Article 3 (in the workplace, including public and private spaces where they are a place of work; in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities; during work-related trips, travel, training, events or social activities; through work-related communications, including those enabled by information and communication technologies; in employer-provided accommodation; and when commuting to and from work) and the broad meaning of sexual harassment in the Istanbul Convention.

√ Introduction of preventive and protective measures to effectively counter the phenomena. Some examples taken from national practice might constitute a good starting point: obliging corporations – but also educational and sport centres, and activities related to theatre, culture and television – to include the fight against sexual harassment in their codes of conduct; creating an internet page where complaints can be filed; raising awareness through campaigns among workers and the general public (Greece proposed these actions in February 2021);[333] adopting a national plan to fight sexist and sexual violence to improve the measures to support victims of sexual harassment and harassment related to sex; and introducing a hotline for sexual harassment in public sector employment (as in France).

√ Enforcement of mechanisms of compliance to guarantee protection for victims. In general, equality bodies remain ineffective because they are understaffed and lack resources. Allocating adequate resources to the functioning of these mechanisms is essential.

√ Stimulation of debate on how to better address sex-based harassment and sexual harassment at work, also in terms of protection of victims' rights, access to justice, and preventive measures.

√ Consideration of the possibility to address sexism and street harassment in civil and administrative law, since the criminalisation of these behaviours might be complex and ineffective. The development

333 https://www.dikastiko.gr/eidhsh/deite-live-ti-syzitisi-sti-voyli-mitsotakis-se-tsipra-na-apantiseis-an-katigoreis-tin-kyvernisi-oti-kalyptei-paiderastes-foto/.

of codes of conduct or best practices of cities and municipalities, as well as enabling national equality bodies to address sexual harassment and harassment based on sex should also be considered.

√ Promotion of campaigns raising awareness of the problem, along with education in school and lifelong learning programmes.

√ Creation of guidelines for public authorities and lawyers to endorse a gender-sensitive and trauma-sensitive approach in addressing sexual harassment and harassment based on sex.

5 Female genital mutilation, and other non-consensual forms of genital interventions

5.1 Introduction and main concepts

In 2009, European Parliament resolution of 26 November on the elimination of violence against women drew attention to female genital mutilation (FGM), warning that the practice was 'a reality in the EU.'[334] European Parliament Resolution of 5 April 2011 later outlined a policy framework to fight violence against women, including FGM, as a basis for future legislative criminal-law instruments and the adoption of a Union action plan. FGM was also included as a form of violence falling under the definition of gender-based violence against women of Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. A year later, building on the studies and efforts from previous years, the Commission issued a Communication on developing a holistic, integrated approach, with particular emphasis on prevention (COM Communication 'Towards the elimination of female genital mutilation').[335] Since then, the European Parliament has adopted several relevant resolutions: of 6 February 2014 entitled 'Towards the elimination of female genital mutilation'; of 14 June 2012 on ending female genital mutilation, calling for strong action towards combating the practice; and of 8 February 2018 on zero tolerance for female genital mutilation. The Commission re-emphasised its commitment to combating FGM yearly on the International Day of Zero Tolerance for Female Genital Mutilation. Despite the persistent attention paid to the practice and the explicit reference in Directive 2012/29/EU, no definition of FGM is provided in EU documents. That said, as part of the Gender Equality Strategy 2020-2025, the Commission has expressed its intention to propose additional measures to prevent and combat specific forms of gender-based violence, including FGM.[336]

In the Council of Europe, Article 38 of the Istanbul Convention considers FGM as the intentional 'excising, infibulating or any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris'; 'coercing or procuring a woman to undergo any of these acts'; and 'inciting, coercing or procuring of a girl to undergo any of these acts'. The Istanbul Convention is the first treaty to recognise that FGM exists in Europe and that it needs to be systematically addressed. It requires States Parties to make FGM a criminal offence, and to ensure that criminal investigations are effective and child-sensitive.[337] According to the Explanatory Report, 'excising' refers to the partial or total removal of the clitoris and the labia majora. 'Infibulating', on the other hand, covers the closure of the labia majora by partially sewing together the outer lips of the vulva in order to narrow the vaginal opening. The term 'performing any other mutilation' refers to all other physical alterations of the female genitals.

In the Explanatory Report to the Istanbul Convention, the drafters explained the importance of establishing female genital mutilation as a criminal offence in this convention since it causes irreparable and lifelong damage and is usually performed without the consent of the victim.[338] In this regard, an aspect of importance in the criminalisation of FGM is the possibility of prosecuting in cases when the acts were not committed in the territory of the state. In this regard, the Istanbul Convention has established that, in relation to this offence, extraterritorial requirements should allow for the national prosecution of

334 European Parliament resolution of 26 November 2009 on the elimination of violence against women (2010/C 285 E/07), preamble recital k.

335 Communication from the Commission to the European Parliament and the Council, *Towards the elimination of female genital mutilation* COM (2013) 833, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0833&from=en.

336 See: EU Gender Equality Strategy 2020-2025, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152&from=EN.

337 For a detailed analysis of the obligations arising from the Istanbul Convention in relation to FGM, see: https://www.endfgm.eu/content/documents/studies/Istanbul-Convention-FGM-guide.pdf. See also: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52013DC0833.

338 Explanatory report to the Istanbul Convention, Para. 198.

the practice regardless of where it is consummated, when the victim or perpetrators are nationals or residents of that state, without any double criminalisation requirement.[339]

More recently, non-consensual forms of genital interventions have started to gain visibility, particularly those affecting intersex children. By 'intersex children' we refer to children whose sex characteristics are atypical or at variance with commonly accepted norms. There are many forms of intersex variation and there is no consensus as to what variations of sex development should be regarded as intersex. That said, the number of children born with a gender that cannot be considered male or female account for only a small share of intersex children, since the majority are recognised as either boy or girl. The UN Special Rapporteur on torture pointed out that intersex children, including intersex girls, are often subject to non-consensual surgical interventions in the form of genital-normalising surgery, performed without their informed consent or that of their parents 'in an attempt to fix their sex' as they fail to conform to socially constructed gender expectations.[340] This leaves them with permanent, irreversible infertility and causes severe mental suffering.

These concepts guided the analysis of the country questionnaires, from which the report draws (1) the existing offences in all jurisdictions under study addressing FGM and other non-consensual forms of genital interventions, (2) the elements of the crimes (3) the applicable sanctions and aggravations (4) aspects relating to the prosecution of the crimes and (5) main shortcomings.

5.2 Results from the country questionnaires

a) Areas of law addressing the issues

Two very distinct approaches emerge from the country questionnaires in relation to female genital mutilation on the one hand, and non-consensual and unnecessary genital interventions of intersex children on the other. In recent years, a trend towards recognising FGM as a criminal act has been noticeable across EU Member States. In 18 states (**Austria**, **Belgium**, **Croatia**, **Cyprus**, **Denmark**, **Estonia**, **Germany**, **Greece**, **Iceland**, **Ireland**, **Italy**, **Luxembourg**, **Malta**, **Norway**, **Portugal**, **Spain**, **Sweden**, **United Kingdom**) a specific criminal law has been introduced to address FGM, while in all states under review, offences dealing with bodily injury, mutilation, and crimes against health are applicable to the practice of FGM and may be a basis for criminal prosecution.

From the information gathered from the country questionnaires, it appears that no significant developments are taking place at the domestic level to prohibit non-consensual and unnecessary genital interventions in intersex children. According to the country questionnaires, only two states have adopted specific legislation on this issue. **Malta** famously adopted the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Bill)[341] in 2015, which provides in Article 14(1) that:

> 'It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent[.]'

Article 14(3) further establishes that 'in exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority of the minor who is still unable to provide consent'. However, it cautions that 'medical intervention which is driven by social factors without the consent of the minor, will be in violation of this Act'. The sanction

339 Istanbul Convention, Article 44(3).
340 UNHRC (2013) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 1 February 2013. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.
341 ACT XI of 2015, as amended by Acts XX of 2015 and LVI of 2016 and XIII of 2018, available at: https://legislation.mt/eli/cap/540/eng.

for this violation is imprisonment (up to five years) and the imposition of fines. A sanction notably lower than that imposed on cases of female genital mutilation, as discussed below.

Iceland has also recently adopted a specific law prohibiting non-consensual genital interventions, applicable to any sex. The recent 'Act on Gender Autonomy' entered into force in the summer of 2019 and is intended to protect people's right to physical integrity.[342] However, Article 11 of the act prohibits 'permanent changes to genitals, gonads and other sex characteristics of persons 16 years or older without their written consent,' leaving interventions on children below the age of 16 at the discretion of the parents or legal guardians.

As it can be seen, these laws prohibit different behaviours. The Maltese law is directed to the act, 'sex assignment or surgical intervention which can be deferred until the minor can consent', while the Icelandic law focuses on the result, 'permanent changes to genital, gonads and other sex characteristics'.

The laws also differ in relation to the personal scope of protection. **Malta** protects children who *cannot consent*, while **Iceland** protects children from age 16 who *do not consent,* suggesting that unnecessary interventions carried out before that age without the child's consent are allowed. In relation to perpetrators, while **Iceland** remains silent about who can be a perpetrator, **Malta** explicitly targets medical personnel, excluding parental responsibility.

The country questionnaires did not provide information about the statute of limitations applicable to these forms of violence, to allow infants to report the violence once they reach adulthood, or whether the laws impose any obligation on health centres to record the information and provide access to those subjected to the interventions. This appears to be a crucial aspect, since sex characteristics variations are often surrounded by secrecy.

Besides these two examples of legal initiatives, **Spain** has adopted a policy approach. Non-consensual forms of genital interventions (surgical or hormonal) on intersex children are allowed in **Spain** regardless of children's consent when they are performed by the medical staff in charge of the case. However, while there is no specific health regulation at the national level, Autonomous Communities possess competence to regulate the public health system and several have adopted laws regarding LGBTI rights that include provisions either prohibiting surgical interventions on intersexual newborns or promoting the eradication of genital modification practices in newborn babies, with the only exception of medical criteria based on the protection of the health of the newborn.[343] In its 2018 review of compliance with the International Convention on the Rights of the Child, the Committee recommended prohibiting the performance of unnecessary medical or surgical treatment on intersex children, where those procedures entail a risk of harm and can be safely deferred until the child can actively participate in the decision-making process. It also recommends that the State Party ensure that intersex children and their families receive adequate counselling and support.[344]

Despite the growing awareness raised and claims of the intersex community at European level,[345] no other similar laws have been passed. The French national expert explains that in **France**, although there was a debate in connection to a pending bill on bioethics, the amendment to incorporate a ban on the mutilation of intersex children was finally rejected.[346] A recent study examines the current law

342 Law No. 80/2019.

343 LGBTI laws in the Autonomous Community of Galicia (2014), Extremadura (2015), Madrid (2016), Murcia (2016), Balearic Islands (2016), Navarra (2017) and Andalucía (2017).

344 UN Committee on the Rights of the Child (2018), *Concluding Observations on the combined fifth and sixth periodic reports of Spain*, 5 March 2018, Para. 24, https://cutt.ly/OkNDlA0.

345 Reference to OII Europe and international bodies.

346 https://www.allodocteurs.fr/se-soigner/politique-sante/loi-bioethique-les-deputes-ont-vote-contre-linterdiction-des-mutilations-des-personnes-intersexes_29755.html; previously amendments: https://cia-oiifrance.org/amendements-concernant-les-enfants-intersexes-ceux-quon-aime-et-les-autres/; hearings in Parliament by specialists advocating changes: https://cia-oiifrance.org/amendements-concernant-les-enfants-intersexes-ceux-quon-aime-et-les-autres/.

and proposed amendments in light of the resistance to allowing intersex children to avoid treatment.[347] On similar lines, the Council of States issued an opinion in 2018 that the administrative guidelines to postpone the assignment of sex for civil identification before the age of one or two years might be illegal without a proper legislative change.[348]

b) Criminal definitions

As mentioned above, 18 states have specific offences criminalising FGM. While some definitions refer more broadly to 'any form of mutilation' (**Belgium**, **Cyprus**, **Germany**), some make reference to the specific acts involved. For instance, the **Belgian** Penal Code refers in Article 409 to 'any form of mutilation' and the national action plan redirects the reader to the broad definition used by the World Health Organisation.[349] The **German** Criminal Code distinguishes between 'mutilation' and 'less serious offences.'[350] In **Cyprus**, the Criminal Code refers to 'the cutting or mutilation', combining two acts that have triggered so much discussion in feminist circles.[351] References to acts also vary from general references such as 'removal or change' (**Croatia**, **Denmark**), 'operation or intervention' (**Malta**, **Sweden**) or 'a procedure on the genitalia' (**Norway**), to references of specific practices such as clitoridectomy, excision and infibulation (**Denmark**, **Ireland**, **Italy**, **Luxembourg**, **United Kingdom**). In some cases, 'infibulation' would constitute an aggravation (**Denmark**).

Reference to subjective elements appears only in the legislation in **Sweden**, which requires that the practice is carried out with 'the view to mutilating or of bringing about some other permanent change in female sexual organs'.[352] A much lower requirement is set by **Italy**, which is satisfied with the fact that the practice is not carried out for 'therapeutic reasons.'

In some states, a certain consequence should follow from the practice in order for it to constitute the offence. In **Estonia**, Article 118(1) of the Penal Code provides that *disabling* genital mutilation of a woman or a girl is prohibited. Similarly, Article 218a of the **Icelandic** Penal Code No. 19/1940 criminalises 'any person who, in an assault, causes physical injury or damage to the health of a girl child or woman.' **Malta** makes reference to 'a permanent change.'[353] In a similar sense, **Norway** requires that the act 'damages the genitalia or permanently modifies them', and also 'the reestablishment of genital mutilation is subject to the same penalty', which according to the national questionnaire, would encompass the reconstruction of any female genital mutilation.

Most definitions include references to the consensual element regarding the practice, either by establishing that the prohibition applies 'regardless of consent' (**Belgium**, **Denmark**, **Luxembourg**, **Norway**, **Sweden**) or by incorporating references to acts invalidating consent, such as incitement, coercion or procurement. In some states, the commission of FGM and the incitement or coercion to do so constitute separate actions, each amounting to a crime (**Croatia**, **Estonia**). In **Greece**, the act was originally committed by the incitement or coercion of a woman to undergo the practice, without any requirement that it was effectively performed. However, since the entry into force (1 July 2019) of the

347 See, for an excellent study with no changes to the bioethics law: Catto, M-X. (2020) 'La loi bioéthique et les intersexes', https://hal.archives-ouvertes.fr/hal-02541116.
348 Conseil d'État, *Rapport du 28 juin 2018. Révision de la loi de bioéthique: quelles options pour demain ?, la Doc fr., 2018, p. 131*, available at: https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/etudes/revision-de-la-loi-de-bioethique-quelles-options-pour-demain.
349 Act of 28 October 2000 (MB/BS 17.3.2001) regarding youth protection.
350 See German Criminal Code, Section 226a.
351 See on this: Hernlund, Y., Shell-Duncan, B. (eds.) (2007) *Transcultural Bodies: Female Genital Cutting in Global Context*, Rutgers University Press; Boyle, E.H. (2002) *Female Genital Cutting: Cultural Conflict in the Global Community*, Baltimore: Johns Hopkins University Press; Bekers, E. (2010) *Rising Anthills: African and African American Writing on Female Genital Excision, 1960-2000*, University of Wisconsin Press; Mestre, R. M. (2020) 'Exploring intersectionality: Female genital mutilation/cutting in the Istanbul Convention', in Niemi, J., Peroni, L., and Stoyanova, V. (eds) *International Law and Violence Against Women*, Routledge.
352 Act (1982:316) Prohibiting the Genital Mutilation of Women, Section 1.
353 Criminal Code of the Republic of Malta, Article 251 E(1), introduced by Act I of 31 January 2014 amended by Act XVIII of 30th April 2018. Available at: https://legislation.mt/eli/act/2014/1/eng/pdf.

new Penal Code (Act 4619/2019), Article 315 now criminalises 'whoever *convinces* a woman to undergo female genital mutilation is punished with imprisonment,' suggesting that even less invasive acts than coercion or incitement would constitute the crime. The probatory implications of such phrasing are yet to be discovered since no case law exists. Conversely, in **Luxembourg**, the use of threats, force or other forms of coercion, including kidnapping, fraud, and deceit constitutes an aggravating circumstance. In a few cases, the impossibility of consent is excluded by requiring an 'assault on another' (**Denmark**, **Iceland**). **Danish** legislation, criminalises 'any person who *assaults* the person of another by cutting or otherwise removing external female genitals in full or in part, with or without consent.'

It is unclear from the country questionnaires whether preparatory acts, such as taking the child to another jurisdiction with the intention of performing the practice, are also criminalised. Preparatory acts are indeed criminalised in **Portugal** and **Luxembourg**, with the latter criminalising the 'facilitating or promoting' of the practice, allowing for the prosecution of any person who, for instance, organises the trip to a foreign country for the realisation of the practice. In **Spain**, taking someone abroad or preparing to take them in order to have a mutilation performed is not a specific offence; however, these acts could be considered an attempted offence of genital mutilation. Under the Spanish law both consummated crimes and attempted crimes are punishable (Article 15, Criminal Code). A similar situation may apply in other states, where taking the child 'with the intention' could qualify as an attempted crime. Yet, it appears that such an approach would be possible only in states where there is a specific offence of FGM, since not all states recognise the possibility of attempted *injuries*. In any case, the intent and degree of execution will be key in the punishment of the attempt.

References to body parts have concrete implications for the personal scope of protection offered by the offences. According to the country questionnaires, some definitions refer broadly to 'female genitalia' or 'female sexual organs' (**Croatia**, **Germany**, **Iceland**, **Italy**, **Malta**, **Norway**, **Sweden**) and others specifically mention the labia majora, labia minora, prepuce of the clitoris, clitoris or vagina (**Cyprus**, **Ireland**, **Luxembourg**, **Portugal**, **United Kingdom**). In half of the cases, definitions refer explicitly to women and girls (**Cyprus**, **Estonia**, **Germany**, **Ireland**, **Luxembourg**, **Malta**, **Norway**, **Portugal**). That said, several definitions remain silent about the gender identity of the person with female genitalia. The underlying presumption is most probably that such a person *is* a woman, yet other possibilities are not ruled out. For instance, **Germany** refers to 'a female person,' while the **Danish** provision refers to 'another.' Similarly in **Spain**, although Organic Law 11/2003 amended the Criminal Code in 2003 with the aim of combating female genital mutilation, Article 149(2) of the code punishes any form of genital mutilation, in gender-neutral terms.[354] Only **Iceland**, however, explicitly recognises the possibility of disconnecting genitalia from gender identity, since the new amendment introduced by Law No. 153/2020, Article 7 clarifies that the prohibition applies also if the victim is a person who has female sexual organs and has registered a new gender identity.

States which have not incorporated specific offences rely mostly on the general offences criminalising assault ('assault', 'premeditated assault', 'severe assault') and injuries ('average bodily harm', 'serious bodily harm') recognising different degrees of severity. While in **France**, criminalisation of FGM could require the existence of serious harm to qualify as 'intentional mutilation', in most states the serious impairment of health would lead to a higher sentence (**Bulgaria**, **Latvia**, **Netherlands**, **Poland**, **Romania**).
Regardless of whether the state has adopted a specific offence or relies on general offences against bodily integrity to punish FGM, the principle of extraterritoriality criminalising female genital mutilation when committed abroad without the requirement of double criminality, is applied in every State with the exception of **Bulgaria**, **Czechia** and **Luxembourg**.

354 Organic Law 11/2003, of concrete measures regarding public order, domestic violence and social integration of aliens (*Ley Orgánica 11/2003, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros*), 29 September 2003, https://www.boe.es/buscar/doc.php?id=BOE-A-2003-18088.

c) Sanctions and aggravations

As indicated in Table 13, aggravating circumstances apply to the criminalisation of FGM, regardless of whether there is a specific offence or if it is addressed through general offences against bodily integrity. In all states, FGM is punished depending on the severity of the injuries. According to the country questionnaires, applicable sanctions include the imposition of fines, imprisonment, and measures aimed at the protection of minors, which will carry limitations to parental rights. In **Italy**, this would also entail a perpetual disqualification from any office pertaining to guardianship, curatorship and support administration.

In some cases, sanctions will include residence related limitations. For instance, in **Germany**, if perpetrators are not German nationals, they can lose their residence permit. Migrant perpetrators can also be refused entry to Germany. Similar measures are used to prevent the commission of the crime. Since 2017, under Sections 7 and 8 of the German Passport Act, authorities can refuse to issue a passport or revoke a passport when there are reasonable grounds to believe that the passport applicant intends to perform an act described in Section 226a of the Criminal Code or will cause such an act to be performed by a third party.[355]

Punishing health professionals participating in the practice can have positive and negative consequences in practice. It is unclear from the country questionnaires if there are any specific sanctions applied to health professionals participating in the commission of the offence. In **Italy**, the sentence against a health practitioner would carry the accessory penalty of interdiction from the profession from three to ten years.[356] Legal persons involved in the commission would also face sanctions. For instance, institutions where the practice is carried out are subject to a pecuniary sanction, a prohibition on exercising the activity, the suspension or revocation of the licences to function, a ban on contracting with the public administration, and the exclusion from any concessions, loans, contributions and subsidies or the revocation of those already granted, as well as a ban on advertising goods or services.[357]

Table 13 Aggravations applicable in cases of female genital mutilations*

Aggravations	States
Victim is a former or current spouse or partner	Austria, Belgium, Croatia, France, Ireland, Liechtenstein, Lithuania, Malta, Norway, Slovakia, Spain
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria, Belgium, Croatia, France, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom
The offence, or related offences, were committed repeatedly	Bulgaria, Czechia, Denmark, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Sweden
Victim was made vulnerable by particular circumstances	Austria, Belgium, Bulgaria, Denmark, France,* Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom
Child victim or witness	Belgium, Bulgaria, Croatia, Czechia, Denmark, France, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom
Multiple perpetrators	Bulgaria, Denmark, France, Iceland, Liechtenstein, Lithuania, Malta, Norway, Slovakia, Sweden, United Kingdom
Extreme levels of violence	Bulgaria, Denmark, Finland, Germany, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Portugal, Slovakia, Spain, Sweden

355 See Passport Act of 19 April 1986, Official Journal 1986, p. 537, https://www.gesetze-im-internet.de/pa_g_1986/.
356 Italian Penal Code, Article 583*ter*.
357 Article 25 I 1 of Decree No. 231/2001 on the administrative liability of legal persons, introduced by Article 8 of Act No. 7/2006.

Aggravations	States
Use or threat of a weapon	Denmark, Finland, France, Liechtenstein,* Lithuania, Luxembourg, Malta, Norway, Portugal, Sweden, United Kingdom
Severe physical or psychological harm for the victim	Belgium, Denmark, Finland, Hungary, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Portugal, Slovakia, Slovenia, Sweden, United Kingdom
Previous conviction for similar offences	Bulgaria, Czechia, Denmark, Germany, Liechtenstein, Malta, Norway, Portugal, Spain, Sweden, United Kingdom
Offence committed on the grounds of the victim's gender	France, Lithuania, Malta, Spain, Sweden
Other	Hate (Croatia) Pregnant victim (Czechia, Lithuania), Multiple victims, Death (Czechia, Iceland, Netherlands, Poland) Profit (Finland, Italy) Organised Crime (Finland) Public official (Netherlands)

d) Prosecution

In relation to the prosecution of FGM through specific offences, in all states this is carried out *ex officio*, with the exception only of **Ireland**. Among those states relying on general offences for criminalisation, only **France** and **Bulgaria** indicate that prosecution would require the complaint of the victim for less severe injuries or when the perpetrators are close relatives. This brings into question whether child support or healthcare personnel have the obligation to report any cases, or what other mechanisms would allow children to report the offence. As discussed in the final chapter, however, the statute of limitation in most cases is suspended at least until reaching adulthood.

Interestingly, despite establishing *ex officio* prosecution in the majority of states, only **Belgium** has adopted specific prosecutorial guidelines.[358]

e) Relevant case law

Based on the country questionnaires, it becomes evident that case law is very scarce, even in those states where a specific criminal offence and public prosecution have been introduced. For instance, while **Ireland** incorporated the specific offence in 2012, the first reported conviction was in November 2019.[359] It is reported that the case involved the female genital mutilation of a one-year old infant by her parents who were convicted and sentenced to five-and-a-half years' imprisonment for her father and four years and nine months' imprisonment for her mother.[360] It is understood that the infant's father is currently appealing his conviction.[361] Interestingly, without having a specific offence, the criminal chamber of the **French** Court of Cassation recognised, in a famous case of 20 August 1983, the criminal dimension of sexual mutilation, considering that the removal of the clitoris of a minor under 15 by her mother entailed a mutilation under the French Criminal Code.[362] According to the national questionnaire, France is one of the countries where there have been the most criminal cases of FGM (over 29 since 1979). That said, it appears that most cases that touch upon FGM actually relate to asylum procedures rather than criminal ones. A recent exception is the **Danish** Supreme Court judgment of 2 May 2018, in which a parent couple

358 Joint Circular from the Minister of Justice and the College of Public Prosecutors on the policy of investigation and prosecution of honour-related violence, female genital mutilation and forced legal marriages and cohabitations (COL 06/2017).
359 Statement-29112019_Ireland.pdf (endfgm.eu) https://www.endfgm.eu/editor/files/2019/11/Statement-29112019_Ireland.pdf.
360 'Parents jailed over female genital mutilation of daughter', *Irish Times*, 27 January 2020. https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/parents-jailed-over-female-genital-mutilation-of-daughter-1.4152765.
361 'Father convicted of female genital mutilation of daughter, aged 1, to appeal conviction and sentence', *Irish Examiner*, 26 May 2020. https://www.irishexaminer.com/news/arid-31001777.html.
362 Court of Cassation 20 August 1983 No. 83-92.616 https://www.legifrance.gouv.fr/juri/id/JURITEXT000007060684/.

were sentenced for letting their two daughters undergo FGM during a stay in Africa in 2015.[363] FGM in the specific case entailed removal of the outer part of the clitoris as well as parts of the small labia, categorised as a category II circumcision. As mitigating circumstances, however, the Supreme Court emphasised that the interventions were probably carried out in a hospital and in a way which, according to the Medical Examiner's Council, means that there has been 'a nice healing without visible scar tissue' and that no immediate nuisances or pain are expected during sexual life.

Discussions on mitigating circumstances are likely to continue to arise, considering the broadness and low tolerance expressed in the criminal definitions above, and the diversity of practices and health consequences. Worth mentioning in this regard is a decision by the Corte d'Appello of Venezia, **Italy**, which recognised that the practice of *aruè*[364] does not constitute a crime as it produces only minimal physical damage, consisting in a transient weakening of the protective function performed by the clitoral mucosa, while, on the other hand, it satisfies the important 'cultural' purposes attributed to this practice by the Edo-bini.[365] This decision overturned a decision by the Tribunal of Verona in which the judge had, in contrast, considered that culture could not result in exonerating circumstances 'because an interpretation of this kind would in fact end up emptying the sense of the norm and making the reasons for its introduction in our legal system vain', and that 'carrying out a conduct obeying its own cultural tradition, not acceptable in the light of the values and principles of our legal system, far from constituting an excuse, constitutes precisely the reason for the incrimination and punishment'.

5.3 Main findings

- √ In all states under review, offences dealing with bodily injury, mutilation, and crimes against health are applicable to the practice of FGM and may be a basis for criminal prosecution. This could in theory also apply to other forms of non-consensual genital interventions, however, victims are rarely informed of these interventions – which are regularly performed in medical facilities – because their medical histories do not provide the information, and thus, reporting the violence is not possible in practice.
- √ In 18 states a specific criminal law has been introduced to address FGM.
- √ Except for two states, there is no legislation in place prohibiting genital interventions on intersex children, even when these are therapeutically unnecessary and involuntary.
- √ Specific definitions of FGM refer to broad behaviours such as 'any form of mutilation' or name specific types of practices. They also refer broadly to 'genitalia' or name specific parts of the genitalia.
- √ In all or most states, consent from the victim is irrelevant.
- √ In several states, incitement, coercion, and even 'convincing' someone to undergo the practice is considered as an offence.
- √ At least half of the specific offences refer explicitly to women and girls, while some remain silent. Only one state has explicitly acknowledged the possibility to disconnect the genitalia from gender identity, recognising that some persons could be subject to the practice without self-identifying as a woman.
- √ In most states, FGM carries *ex officio* prosecution, however, specialised prosecutorial guidelines are present in only one state.
- √ In most states, the extraterritoriality principle applies without the requirement of double criminality.
- √ Regardless of the existence of specific offences, *ex officio* prosecution and extraterritoriality, there is scarce jurisprudence on the issue, except for in asylum cases. This suggests that the criminalisation of FGM is not truly enforced at domestic level, but rather used in relation to granting or denying refugee status. That said, there seems to be a contradiction between the risk of FGM as established in studies by EIGE, and the numbers of prosecutions and sentencing.

363 Available here in Danish: https://domstol.fe1.tangora.com/S%C3%B8geside---H%C3%B8jesteretten.31488.aspx?recordid31488=1560.

364 A local term in Nigeria for a procedure involving a shallow incision in the clitoris (Basile 2013). According to the World Health Organization, the practice would constitute a form of FGM type IV which include 'all other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterization'.

365 Corte d'Appello of Venezia, No. 1485/2012.

5.4 Recommendations

Given that more than half the states have adopted specific criminal offences to address FGM, and the remaining countries can make use of general offences, and yet there are very low rates of prosecution, we recommend that:

- √ Consideration be given to the adoption of specific prosecutorial guidelines that are gender and child-sensitive, regardless of whether there is a specific offence or general offences are applied. Moreover, it appears necessary to highlight the independence of the criminalisation of the practice beyond the asylum law dimension.
- √ Given the scarcity of regulation in relation to non-consensual genital interventions, there is a need to adopt specific prohibitions on unnecessary and involuntary genital interventions on children, including girls. To prevent revictimisation, such prohibitions should take as a basis that interventions are not needed or urgent, and that they can be deferred until children can consent, rather than requiring acts to cause a specific harm or result. Measures to address the lack of access to personal health information in hospitals and health centres, and the secrecy surrounding the practice are also needed.
- √ Besides criminalisation, actions for prevention, such as raising awareness, and providing training for authorities, are needed.
- √ Statute of limitations should be extended at the very least until after the children have reached the age of majority.

6 Forced marriage

This chapter provides a detailed examination of existing legislation on forced marriages. The scope of the chapter is to see whether and to what extent forced marriages have been criminalised at national level, in line with the Istanbul Convention, and whether civil consequences have been envisaged. The first part of the chapter introduces the main normative framework addressing the issue, describes the definitions used and explains criminal and civil consequences. The second part of the chapter presents the results from the national questionnaires. The chapter concludes with a summary of main findings and recommendations.

6.1 Introduction and main concepts

Forced marriage is the name that is commonly given at the international level to the 'intentional conduct of forcing an adult or a child to enter into a marriage' (Article 37(1) Istanbul Convention). The Convention also prohibits the intentional conduct of luring or forcing an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage (Article 37(2)). Article 32 of the Istanbul Convention also needs to be taken into account: 'Parties shall take the necessary legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim.' Article 42 of the Istanbul Convention is also relevant, as it requires Parties to ensure that, 'in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called "honour" shall not be regarded as justification for such acts.' In some cases, forced or child marriages are celebrated to 'save the family honour.'[366]

Child or early marriage is any marriage 'where at least one of the parties is under 18 years of age'.[367] As reported by the United Nations Children's Fund in 2014, girls are disproportionately affected by child marriages, even though boys are also married as children.[368] In the joint General Recommendation No. 31 elaborated by the CEDAW and CRC Committees, a child marriage can be considered as a form of forced marriage 'given that one or both parties have not expressed full, free and informed consent.'[369] A marriage of a 'mature, capable child below 18 years of age' may be authorised by a judge in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are based on legitimate exceptional grounds defined by law and on the evidence of maturity, 'without deference to culture and tradition.'[370] 'Forced marriage' is the expression that is commonly used, though the adjective 'coerced' also grasps the phenomenon. As the report will show, the crime of coercion has been used to address forced marriages in the absence of a specific provision in that respect. Coercion refers to the existence of circumstances that compel a person to enter into a marriage without his/her genuine will.

366 This case was reported by the Greek expert, who mentioned the migration of a couple (the girl was 11) to Germany, where a court in Düsseldorf ordered the separation of the spouses and placed the girl in an institution to protect her. Charges were brought against the man. The marriage had been celebrated by a Mufti in North-Eastern Greece. A member of the Parliament reported that it was an exceptional case to save the 'family honour' after a rape.

367 Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General comment No. 18 of the Committee on the Rights of the Child on harmful practices, 14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18, Para. 20.

368 UNICEF (2014), *Ending Child Marriages*, https://data.unicef.org/resources/ending-child-marriage-progress-and-prospects/.

369 Joint General Recommendation No. 31, Para. 19.

370 Joint General Recommendation No. 31, Para. 19.

The phenomenon is present in Europe, especially in migrant communities or within minority groups.[371] Forced marriage (or a similar relationship) and/or child marriage affects women and girls' autonomy and self-determination, has effects on the girls' right to education and right to health, and has been argued as imposing an economic and social burden for women: 'forced marriages often result in girls lacking personal and economic autonomy and attempting to flee or commit self-immolation or suicide to avoid or escape the marriage.'[372]

In the resolution adopted on 28 June 2018 by the Parliamentary Assembly of the Council of Europe, Member States of the Council of Europe were encouraged to 'criminalise, as a specific offence, intentional conduct forcing an adult or a child to enter into a marriage, as well as luring an adult or a child abroad for the purpose of forcing him or her to enter into a marriage, and provide for effective sanctions against the perpetrators and those who aid, abet, or attempt to commit such offences;' to prohibit 'without exceptions' child marriages; to abolish differences between girls and boys in terms of the minimum age for marriage; to establish mechanisms to verify true consent by both spouses; to adopt civil law measures, such as protection orders against forced marriages, 'together where appropriate with a ban on leaving the country,' 'in order to prevent forced marriages when cases involving persons at risk are reported.'[373] Similar to the Istanbul Convention, the resolution recommends that Member states take measures to ensure that forced marriages may be 'voidable, annulled or dissolved without undue financial or administrative burden placed on the victim.'[374] The resolution also recommends that forced marriages are recognised as a ground for international protection and that States collect accurate and comparable data on forced marriages.[375] At EU level, the Committee on Women's Rights and Gender Equality for the Committee on Foreign Affairs took steps toward an EU external strategy against early and forced marriages when it condemned child, early and forced marriages and other harmful coercive practices imposed on women and girls, recognising that child and forced marriages are a 'real problem' within the EU.[376] On 4 July 2018, the European Parliament adopted a resolution which acknowledged that child, early and forced marriages constitute a 'serious violation of human rights and, in particular, women's rights,'[377] then it called on Member States and third countries to 'set the minimum uniform age for marriage at 18 years,' and 'to adopt necessary administrative, legal and financial measures to ensure effective implementation of this requirement.'[378] It encouraged the ratification of the Istanbul Convention and asked Member States to include a complete ban on child, early and forced marriages.[379] The resolution also encouraged Member States 'to guarantee migrant women and girls an autonomous

371 The questionnaires have reported several examples. For example, according to a survey (2018), Roma people in Greece are married at the age of 16-18 years; an unmarried girl over the age of 17 is considered a spinster. In the region of Larissa, where a large population of the Roma people reside, a survey among 1 500 Roma people showed that the average age of marriage was 15-16 years for women and 18 years for men, while 8 out of 10 women were married before the age of 15 years. There are no qualitative data on whether these marriages were forced or not. Δίκτυο Πρόληψης Ενάντια στον Πρόωρο Γάμο (Network for the Prevention of Early marriage) (2018), 'Συγκριτική Μελέτη της νομοθεσίας, της διαθεσμικής συνεργασίας και των δραστηριοτήτων πρόληψης που σχετίζονται με τους πρόωρους γάμους στη Βουλγαρία, την Ελλάδα, τη Σλοβενία και την Ισπανία' (Comparative study of the legislation, the interinstitutional collaboration and of prevention activities related to early marriages in Bulgaria, Greece, Slovenia and Spain), http://chancebg.org/wp-content/uploads/2018/03/Comparative-Analysis_GR.pdf. Moreover, it seems that marriages of girls from the age of twelve and of boys from the age of fourteen are common among Greek Muslims. Koukoulis-Spiliotopoulos, S. (2007), 'The Limits of Cultural Traditions', *Annuaire international des Droits de l'Homme*, Volume III, 2008, Ed. Sakkoulas-Bruyland, Athens-Brussels, pp. 411-443.

372 Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General comment No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, Para. 23.

373 Resolution of the Parliamentary Assembly of the Council of Europe No. 2233 (2018), 28 June 2018, Para. 7.5.

374 Resolution of the Parliamentary Assembly of the Council of Europe No. 2233 (2018), Para. 7.5.6. The resolution also recommends States ratify the Istanbul Convention.

375 Resolution of the Parliamentary Assembly of the Council of Europe No. 2233 (2018), Paras. 7.8, 7.10. See also the Declaration of the Committee of Ministers of the Council of Europe on the need to intensify efforts to prevent and combat female genital mutilation and forced marriage in Europe, 13 September 2017, Decl (13/09/2017).

376 Opinion of the Committee on Women's Rights and Gender Equality for the Committee on Foreign Affairs Towards an EU external strategy against early and forced marriages – next steps 2017/2275(INI) Rapporteur Daniela Aiuto, 18 April 2018, Paras. 1-3.

377 European Parliament Resolution of 4 July 2018, Towards an EU external strategy against early and forced marriages – next steps (2017/2275(INI)), letter A.

378 European Parliament Resolution of 4 July 2018, Para. 1.

379 European Parliament Resolution of 4 July 2018, Para. 6.

residence permit which is not dependent on the status of their spouse or partner, in particular for victims of physical and psychological violence.'[380]

a) Criminalisation and civil consequences

With regard to forced marriages, the report will specifically consider both criminal and civil consequences as clearly stated in the Istanbul Convention, and encouraged in the soft law acts mentioned above.

i) Criminal consequences

Article 37 of the Istanbul Convention criminalises forced marriages in a way that encompasses both its internal and cross-border dimension. According to the Explanatory Report to the Istanbul Convention, 'forcing' refers to 'physical and psychological force where coercion or duress is employed. The offence is complete when a marriage is concluded to which at least one party has – due to the above circumstances – not voluntarily consented to.'[381] Arranged marriage may fall outside this definition provided that spouses are left free to withdraw their consent without suffering any form of infringement of their personal dignity.[382] As it was correctly argued, 'it seems that, at least in cases where the refusal to marry the chosen spouse is met with sanctions, even when these are "limited" to social stigmatisation, tracing a line of demarcation between this practice and forced marriage may prove to be highly problematic.'[383] With regard to the cross-border dimension, the Explanatory Report explains that 'the term "luring" refers to any conduct whereby the perpetrator entices the victim to travel to another country, for example by using a pretext or concocting a reason such as visiting an ailing family member. The intention must cover the act of luring a person abroad, as well as the purpose of forcing this person into a marriage abroad.'[384] The Istanbul Convention stresses the subjective element of 'intention' to be included in the definition of the crime. This report investigates through the questionnaires sent by the national experts whether forced marriages are specifically criminalised and, if so, which elements characterise this crime.

ii) Civil consequences

State Parties of the Istanbul Convention must ensure that forced marriages may be 'voidable, annulled or dissolved.' The Explanatory Report to the Istanbul Convention further explains that a voidable marriage is 'a marriage considered to be valid but which may be rendered void if challenged by one of the parties,' while a marriage is annulled when 'deprived of its legal consequences, whether challenged by a party or not,' and is dissolved if 'deprived of legal consequences only from the date of dissolution.' Measures adopted by States must avoid any undue financial or administrative burden placed on the victim. In the case of migration, Article 59(4) of the Istanbul Convention provides that 'Parties shall take the necessary legislative or other measures to ensure that victims of forced marriage brought into another country for the purpose of the marriage and who, as a result, have lost their residence status in the country where they habitually reside, may regain this status.' This report will not specifically differentiate between forced marriages being voidable, annullable or dissolved, because this is a strict matter of national law and the attempt to differentiate might pose legal challenges in terms of translation of the different legal institutes. Nonetheless, the report will stress cases in which forced marriages are only dissolved through divorce, because this procedure might impair the rights of victims/survivors to be free from forced marriages.

380 European Parliament Resolution of 4 July 2018, Para. 12.
381 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence Istanbul, 11.5.2011, p. 34.
382 Ragni, C. (forthcoming) 'Comment on Article 37 of the Istanbul Convention', in S. De Vido, A. Di Stefano, M. Frulli(eds) *The Istanbul Convention. A Commentary*, Elgar Publishing.
383 Ragni, C. (forthcoming) 'Comment on Article 37 of the Istanbul Convention'.
384 Explanatory Report, p. 34.

Having set the background, the national questionnaires were analysed to determine the approach – criminalisation of the behaviour, no specific criminalisation but reference to forced marriages under other criminal law provisions, no specific criminalisation and use of general criminal law provisions to address the phenomenon – and sanctions, both civil and criminal, and other measures in use.

6.2 Results from the country questionnaires

a) Areas of law addressing forced marriages

Eighteen countries (**Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **France**, **Germany**, **Ireland**, **Italy**, **Liechtenstein**, **Luxembourg**, **Malta**, **Norway**, **Portugal**, **Slovenia**, **Spain**, **Sweden**, **United Kingdom**) have specific provisions on forced marriages. Six countries (**Denmark**, **Estonia**, **Greece**, **Iceland**, the **Netherlands**, and **Slovakia**), despite not having introduced a specific provision on forced marriages, address this specific behaviour under other general criminal provisions (as an aggravating circumstance, or as one of the purposes of human trafficking, for example). Seven countries only rely on civil law or on general provisions of criminal law without any reference to forced marriages (**Czechia**, **Finland**, **Hungary**, **Latvia**, **Lithuania**, **Poland** and **Romania**). The general criminal law provisions commonly used are coercion and human trafficking. **Sweden** specifically included 'child marriages' as a separate crime.[385]

Table 14 Forced marriages – areas of law

State	Specific provisions on forced marriages	Specific provision on child marriages	Forced marriages as aggravating circumstance or as one of the purposes of human trafficking	Forced marriage only addressed in civil law or through general provisions of criminal law
Austria	X			
Belgium	X			
Bulgaria	X			
Croatia	X		X	
Cyprus	X			
Czechia				X
Denmark			X	
Estonia			X	
Finland				X
France	X			
Germany	X			
Greece			X	
Hungary				X
Iceland			X	
Ireland	X			
Italy	X			
Latvia				X
Liechtenstein	X			
Lithuania				X
Luxembourg	X			
Malta	X			

385 See below.

State	Specific provisions on forced marriages	Specific provision on child marriages	Forced marriages as aggravating circumstance or as one of the purposes of human trafficking	Forced marriage only addressed in civil law or through general provisions of criminal law
Netherlands			X	
Norway	X			
Poland				X
Portugal	X			
Romania				X
Slovakia			X	
Slovenia	X			
Spain	X		X	
Sweden	X	X		
United Kingdom	X			

b) Criminal definitions

i) Specific criminalisation of the behaviour

Countries have mainly used the word 'forced marriage' or 'forcing someone to marry' to identify the crime under analysis. It is interesting however to observe the evolution, which might occur in other countries as well through amendments of existing laws or through judicial interpretation, that the concept of 'marriage' might have (see Table 15 on forced marriages – types of relationships).

Table 15 Forced marriages – types of relationships

State	Reference to partnership and cohabitation	Reference to comparable ceremonies, extrajudicial or religious ceremonies
Austria	X	
Belgium	X	
Denmark		X
Iceland		X
Italy	X	
Liechtenstein	X	
Luxembourg	X	
Netherlands		X
Norway		X
Slovakia	X	
Slovenia		X
Sweden		X

In **Belgium**, the law refers to 'forced habitation' as of the adoption of the law of 2 June 2013. **Denmark**, despite not having the specific offence of forced marriages, has included forced 'participation in a religious marriage ceremony' in the aggravating circumstance of a general offence. **Italy** also mentions 'civil unions' along with 'marriages.' Similarly, **Liechtenstein** and **Luxembourg** refer to 'partnership' along with marriages. **Iceland** added 'a comparable consecration ceremony, even if it has no validity in law.' In the **Netherlands**, the debate centres around an amendment to the 2015 Act against forced marriages. The amendment is aimed at making the provision on annulment of religious marriages as inclusive as possible. That way other requests, aimed at undoing a 'religious marriage,' but not specifically using

these words, can be taken into account as a request to undo a religious marriage.[386] **Norway** decided on 8 March 2021 to criminalise 'extrajudicial forced marriages,' with the consequent change in the Criminal Code – Article 253 – entering into force on 1 April 2021. In assessing whether there is a marriage-like connection, the following elements must be considered: whether the connection is lasting, perceived as binding and establishes rights and obligations between the parties of a legal, religious, social or cultural nature. Legislation in **Slovenia** covers both marriages and 'similar community' which, in accordance with the law, is equated with marriage in certain legal consequences. The definition in **Sweden** also covers cases where a person is induced to enter into a relationship similar to marriage governed by rules that apply within a group and that mean that the parties are regarded as spouses and are deemed to have rights and obligations in relation to one another, including as regards the question of the dissolution of the relationship. The approach attempts to address forms of marriages which are not formally regulated, combining the prohibition of forced marriages with the prohibition of honour-related crimes.

All the criminal provisions on forced marriages that are mentioned in this paragraph have been framed in a gender-neutral way.

Table 16 Forced marriages – the element of 'luring'

State	Specific provisions on forced marriages		
	Forced marriages and luring	No provision on luring	Only a provision on luring
Austria	X		
Belgium	X		
Bulgaria	X		
Croatia	X		
Cyprus		X	
Czechia			
Denmark			
Estonia			
Finland			
France			X
Germany	X		
Greece			
Hungary			
Iceland			
Ireland	X		
Italy	X		
Latvia			
Liechtenstein	X		
Lithuania			
Luxembourg		X	
Malta	X[387]		
Netherlands			
Norway	X		
Poland			
Portugal	X		

386 https://www.rijksoverheid.nl/onderwerpen/huwelijksdwang/documenten/rapporten/2020/10/29/tk-bijlage-1-nvw-huwelijkse-gevangenschap.

387 Luring is included as aggravating circumstance.

State	Specific provisions on forced marriages		
	Forced marriages and luring	No provision on luring	Only a provision on luring
Romania			
Slovakia	X		
Slovenia		X	
Spain	X		
Sweden	X		
United Kingdom	X		

In terms of elements of the crime (Table 16), almost all countries have incorporated the definition of the Istanbul Convention – or had a similar definition before the entry into force of the Convention – which encompasses both the act of forcing an adult or a child to enter into a marriage and of luring an adult or a child to the territory of a Party or State other than the one of residence with the purpose of forcing this adult or child to enter into a marriage. Hence, for example, in **Belgium**, the crime of forced marriage was introduced in the Criminal Code (in Article 391sexies) in 2007. It consists in forcing someone to enter into a marriage, through 'violence or threats.'[388] Belgium has jurisdiction (Col 6/2017) in cases of forced marriage or forced cohabitation concluded abroad if elements of violence or threats have taken place on Belgian territory or in cases of forced marriage or forced cohabitation concluded in Belgium if elements of violence or threats have been committed abroad. **Bulgaria** has combined in the same provision (Article 177 of the Criminal Code as amended by SG 16/19) the act of forcing another person into a marriage using violence, threats or misuse of power, the act of kidnapping another person in order to force him/her to marry, the act of misleading a person to move into the territory of another country in order to force him/her to marry, the act of inciting unable to understand the nature or the significance of the act to marry or to travel into the territory of another State with the aim of coercing him/her into forced marriage.

'Violence or threats' is commonly mentioned as a way through which the act of forcing or luring occurs. In **Germany**, for example, the act of forcing someone into marriage must occur 'by force or threat of serious harm' and must be unlawful – where unlawful consists in the act being committed with force or threat of harm deemed reprehensible in respect of the desired objective' – and luring is described as being committed 'by force of serious harm or through deception' (Section 237, Criminal Code). 'Violence or threat' is also mentioned in the crime of forced marriage as introduced in **Italy** by Law No. 69/2019, known as the 'Red Code', adding Article 558*bis* to the Criminal Code; it also applies to persons, 'taking advantage of the conditions of vulnerability or psychic inferiority or of the need of a person, with abuse of family, domestic, working relationships or of the authority deriving from the custody of the person for reasons of care, or education, supervision or custody, leads a person to contract marriage or civil union.' The 'threat of breaking family contacts' has been included in Article 106a of the Criminal Code in **Liechtenstein**, as amended in 2019 (LGBL 2019/124). **Maltese** legislation (Section 251G of the Criminal Code) refers to 'force, bribery, deceit, deprivation of liberty, improper pressure or any other unlawful conduct or by threats of such conduct.' In **Spain**, forced marriage is a criminal offence under Article 172*bis* of the Criminal Code, introduced in the reform of 2015.[389] The offence of forced marriage is defined as compelling another person to marry through serious intimidation or violence (Article 172*bis*(1)). Article 172*bis* addresses the conduct of using violence, serious intimidation or deceit to force someone to leave Spanish territory or not to return in order to compel them to marry. 'Serious intimidation' has raised some concerns according to the national expert, because the adjective is not used in any other offence that uses intimidation as means.[390]

388 Law of 25 April 2007 (*Loi du 25 avril 2007 insérant un article 391sexies dans le Code pénal et modifiant certaines dispositions du Code civil en vue d'incriminer et d'élargir les moyens d'annuler le mariage forcé*), *M.B.*, 15 June 2007, p. 32654.

389 Organic Law 1/2015, modifying Organic Law 10/1995 of Criminal Law (*Ley Orgánica 1/2015, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*), 30 March 2015, https://www.boe.es/buscar/doc.php?id=BOE-A-2015-3439.

390 GREVIO Baseline Report on Spain 2019, https://rm.coe.int/grevio-s-report-on-spain/1680a08a9f.

Sweden has incorporated the specific crime of child marriage, which occurs when a minor (below 18 years of age, even when the perpetrator was ignorant about his/her age) is induced or allowed to enter into a valid marriage or relationship similar to a marriage. Deception for the purpose of marriage abroad is also covered by the legislation.[391]

It is interesting to note that **Croatia** also has a provision that combines the act of forcing someone to marry and of luring a person to a State other than the State where the person habitually resides (Article 169(1) and (2) of the Criminal Code),[392] but also considers forced marriages as a motive or purpose for human trafficking (Article 106(1) and (2) Criminal Code). It was introduced upon a proposal of the Ombudsperson for Children, who explained that such marriages are not uncommon in certain ethnic communities.[393]

It should be noticed that 'intention' – present in the definition ex Article 37 of the Istanbul Convention – is rarely mentioned in the definition of the crime. It might be derived by general provisions of domestic criminal law. *Dolus* is mentioned in the **French** definition (*manoeuvres dolosives*), and intention is present in the specific offence of luring in **Ireland**, **Liechtenstein**, **Norway** and **Portugal**. The 'purpose' and the 'specific purpose' is part of the offence as elaborated in the **United Kingdom**.

ii) Non-specific criminalisation but express reference to forced marriages under other criminal law provisions

The criminal provision on duress in the Criminal Code of **Denmark** (Section 260(1)) is relevant in covering cases of forced marriages, which are explicitly mentioned in paragraph 2 of the same section as an aggravating circumstance (coercion into marriage or participation in a religious marriage ceremony). The criminal act is committed by whomever 'coerces someone to do, accept or refrain from doing something through the use of violence or through threat of violence, of considerable damage to property, of deprivation of liberty, of making an incorrect allegation of a criminal or defamatory act, or of disclosing private details; and any person who coerces someone to do, accept or refrain from doing something through threat of reporting or disclosing a criminal act, or of making true defamatory accusations, and such coercion is considered not to be properly justified by the underlying cause of the threat.' The **Estonian** Criminal Code refers to forced marriages in Article 133 on trafficking in human beings. The crime consists in the act of placing a person, 'for the purpose of gaining economic benefits or without it, in a situation where he or she is forced to marry …'. **Greece** has included 'forced marriage' among the purposes of human trafficking (Article 323A(1), Criminal Code, as amended), which can be committed inside or outside the country. Forcing another person to conclude a marriage is also included in the definition of 'exploitation' under Article 323 A(5) of the new Criminal Code, which entered into force on 1 July 2019: 'obtaining illegal material benefit from […] forcing another person to conclude a marriage.' Thus, a forced marriage for reasons of 'honour' (e.g. in the case of rape, sexual intercourse, pregnancy) is not punishable under the new provision. In **Iceland**, the crime of forcing a person to do something, to suffer from something or not to do something (Article 225 of the Penal Code No. 19/1940 as amended by Law No. 30/2016) might involve physical violence, threat of physical violence, deprivation of liberty against the person or his or her close relatives, false allegations even if they are true, 'where the compulsion involved is not sufficiently justified in terms of the end which the threat is intended to achieve,' or a threat 'to cause substantial damage to, or destruction of, the person's property.' The provision then adds 'forcing another person to enter into matrimony' or 'to undergo a comparable consecration ceremony.'

391 Criminal Code 1962:700, amended by 2014:381 and 2020:349. Coercion to marry, Chapter 4 Section 4c, enacted in 2014. Child marriage offence, Chapter 4, Section 4c, enacted in 2020. Deception for the purpose of marriage abroad, Chapter 6, Section 9, enacted in 2014 (amended 2020).

392 Criminal Code (*Kazneni zakon*), *NN* nos. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018 and 126/2019. In force since 1 January 2013.

393 Draft Act No. 866 (Criminal Code of 2011), available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080229/PZE_866.pdf, p. 173. See also Ombudsperson for Children (2020) *Annual Report for 2019*, p. 179, available at: https://dijete.hr/izvjesca/izvjesca-o-radu-pravobranitelja-za-djecu/.

The **Netherlands** criminalises forced marriages through the general provision of forcing someone into doing something without his/her consent (Article 284 of the Criminal Code). The Law of 7 March 2013 amending the Criminal Code and the Code of Criminal Procedure expanded the options for criminal proceedings against forced marriages, by adding that a Dutch national who has forced someone to marry abroad can be prosecuted in the Netherlands, even if forced marriage is not a criminal offence in the country where the marriage took place. The same applies to non-Dutch nationals who are permanent residents of the Netherlands. In **Slovakia**, Section 179 of the Criminal Code refers to 'forced marriages' as a specific form of trafficking in human beings.

iii) Non-specific criminalisation, and use of general criminal (or non-criminal) law provisions

In **Czechia**, forced marriages, which are not specifically criminalised, can fall under the crimes of trafficking in persons (Section 168, Criminal Code), forceful transportation into another country (Section 172, Criminal Code) or blackmail (Section 175, Criminal Code). In **Finland**, forced marriages can fall under the provisions of the Criminal Code regarding human trafficking (Chapter 25, Section 3), aggravated trafficking (Section 3a), and coercion (Section 8). In **Hungary**, forced marriages may be prosecuted using the general criminal provision of 'coercion.'[394] **Latvia**, **Lithuania**,[395] and **Romania** only provide for civil law consequences to forced marriages. In **Poland**, forced marriages can be qualified as coercion to certain conduct (Article 191(1) Criminal Code), luring as aiding or abetting unlawful coercion to certain conduct (Article 18(3) Criminal Code in conjunction with Article 191(1)). Article 191(1) of the Criminal Code penalises the use of unlawful violence or threats in order to force another person to act, omit or endure a specific act. It might also fall under the crime of human trafficking.[396]

c) Prosecution and sanctions

In countries where forced marriages are specifically criminalised, penalties vary from six months (minimum) to six years' imprisonment. The sentence might be increased when aggravating circumstances are present, for example, when the act is committed against a minor. **Bulgaria** has added as an aggravating circumstance the fact that the act is committed by a parent. Sanctions might also include – or be an alternative to – a fine.

> What emerges from the analysis is that sanctions are significantly higher when forced marriages are specifically criminalised. Where general criminal provisions, such as coercion, are used, the range of sanctions is significantly lower (on average, the maximum penalty is two years).

With regard to prosecution, countries that specifically criminalised forced marriages generally follow the *ex officio* type of prosecution. In **Finland**, for example, where the crime of coercion is applied to cases of forced marriages, this is not prosecuted *ex officio*.

394 Hungary, Act C of 2012 on the Criminal Code *(2012. évi C. törvény a Büntető Törvénykönyvről)*, 13 July 2012, Article 195. An unofficial English translation, as in force on 16 July 2020, published by the Ministry of Justice, is available at: https://njt.hu/translated/doc/J2012T0100P_20200716_FIN.PDF.

395 Other applicable provisions are: purchase or sale of a child, exploitation for forced labour or services; use of forced labour or services by a person.

396 Zielińska, E. (2012) *Konwencja Rady Europy o zwalczaniu przemocy wobec kobiet i przemocy domowej, jej ogólna ocena, oraz celowość przystąpienia do niej przez RP* (Council of Europe Convention on combating violence against women and domestic violence, its overall assessment, and the desirability of its accession by the Republic of Poland), Instytut Wymiaru Sprawiedliwości, Warsaw, p. 73, https://iws.gov.pl/wp-content/uploads/2018/08/IWS_Zieli%C5%84ska-E_Konwencja-RE.pdf.

Table 17 Aggravating circumstances for forced marriages

Aggravating factors for Forced Marriage	States
Victim is a former or current spouse or partner	Austria, Iceland, Liechtenstein, Malta, Norway, Spain
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria, Bulgaria, Italy, Liechtenstein, Lithuania, Malta, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom
The offence, or related offences, were committed repeatedly	Denmark, Liechtenstein, Malta, Norway, Sweden
Victim was made vulnerable by particular circumstances	Austria, Denmark, Italy, Liechtenstein, Lithuania, Malta, Norway, Portugal, Slovakia, Slovenia, Sweden, United Kingdom
Child victim or witness	Austria, Bulgaria, Denmark, Greece, Iceland, Italy, Liechtenstein, Lithuania, Malta, Norway, Spain, Sweden, United Kingdom
Multiple perpetrators	Czechia, Denmark, Iceland, Liechtenstein, Lithuania, Malta, Norway, Slovakia, Sweden, United Kingdom
Extreme levels of violence	Austria, Denmark, Italy, Liechtenstein, Lithuania, Malta, Norway, Spain, Sweden
Use or threat of a weapon	Austria, Denmark, Liechtenstein, Malta, Norway, United Kingdom
Severe physical or psychological harm for the victim	Austria, Czechia, Denmark, Greece, Italy, Liechtenstein, Malta, Norway, Sweden
Previous conviction for similar offences	Denmark, Liechtenstein, Malta, Norway, Spain, Sweden United Kingdom
Offence has been committed online	
Offence committed on the grounds of the victim's gender	Lithuania, Malta, Slovakia, Spain, Sweden

In terms of non-criminal penalties, it should be noted that countries commonly provide for some forms of civil consequences in case of forced marriages and/or marriages contracted by a minor. In **Finland** and **Sweden**, the dissolution of marriages can only occur through divorce. In **Finland**, it was reported that the Ministry of Justice has been assessing whether criminalisation of forced marriages is possible, and whether annulment of forced marriages might be an option. At present, even forced marriages must be terminated by divorce. In **Sweden**, even though there are no rules governing marriage annulment and a marriage can only be dissolved through divorce or in case of death of one of the spouses, when it is probable that the marriage was concluded under duress or that the spouse was below 18 years of age when entering into the marriage, the spouse has the right to immediate divorce.[397] Moreover, in these cases, a prosecutor may institute a claim for divorce. Sweden does not recognise marriages concluded abroad if it is probable that the marriage was concluded under duress. Since 2019, Sweden does not recognise marriages concluded abroad if one of the spouses was under 18 years of age at the time of the marriage. Exemptions from this rule can be made if there are extraordinary reasons, but never if one of the parties is still under 18.[398] It should be noted that in **Germany**, the 2017 Act to combat child marriages made amendments to marriage and family law within the Civil Code and the international private law to prohibit and prevent marriage of or with persons under the age of 18, to annul marriages concluded under foreign law with persons under the age of 16 and to introduce the possibility to challenge in court marriages concluded under foreign law with persons at the age of 16 or 17 years (under 18).[399]

397 Normally, a divorce must be preceded by a six-month period for reconsideration if the couple have children or if only one of the spouses wishes for the marriage to be dissolved.

398 Section 8 of Act (1904:26 s. 1) on certain international legal matters regarding marriage and guardianship.

399 In 2018, the Federal Court of Justice made a submission to the Federal Constitutional Court on the question whether Article 13(3)(1) of the Introductory Act to the Civil Code in the version of the Act to combat child marriages of 17 July 2017 is compatible with the Constitution to the extent that a marriage entered into with the participation of a minor who is of marriageable age under foreign law is qualified as a non-marriage under German law without a case-by-case examination if the minor had not reached the age of 16 at the time of the marriage. The Federal Constitutional Court has not decided yet.

The questionnaires have mentioned other measures that can be adopted to respond to forced marriages. Other sanctions might be deportation, such as in **Denmark**, where Section 22(1)(7) of the Aliens Act[400] provides that an alien, who has had legal residence in this country for more than the last 9 years, and an alien with a residence permit pursuant to Section 7 or Section 8(1) or (2) of the Aliens Act, who has had legal residence in the country for more than the last eight years, can be deported if the alien has forced someone to marry or into a religious marriage without civil validity against his/her own will. National experts mentioned the possibility that protective orders could be issued with regard to this specific crime: **Italy**, **France** (emergency protective order if threat or fear of forced marriage abroad),[401] **Norway**, **Sweden**, **United Kingdom**. In Sweden, since 2020, a 'prohibition to exit the country' can be issued for a person below 18 years of age who runs a considerable risk of being brought to another state to enter into a marriage or to be subject to genital mutilation. The prohibition is issued by court on application of the Social Services. In urgent cases, a temporary prohibition to exit the country may be issued by the Social Services themselves.[402]

6.3 Main findings

- √ Forced marriages are criminalised in the great majority of countries, mainly in recent times, and mainly in response to the requirements of the Istanbul Convention.
- √ Child marriages are not *per se* generally criminalised, except in Sweden, but the commission of the crime against a minor has been considered as an aggravating circumstance.
- √ Almost all countries have incorporated the definition of the Istanbul Convention, which encompasses both the act of forcing an adult or a child to enter into a marriage and of luring an adult or a child to the territory of a Party or State other than the one of residence with the purpose of forcing this adult or child to enter into a marriage.
- √ The age at which a person might enter into marriage is generally 18, with some exceptions approved in court.
- √ The crime of forced marriage is described in a gender-neutral way. It is not considered as a form of violence against women.
- √ With regard to the subjective element of the offence, intention has not always been expressly included in the definition of the offence.[403]
- √ Sanctions are higher where the behaviour is specifically criminalised.
- √ Twelve countries went beyond the idea of marriage, to include civil unions and extrajudicial marriages. In particular, in the latter case, the concept combines the prohibition of forced marriages with the prohibition of justifications based on honour.
- √ Countries commonly envisage civil consequences for forced marriages and/or underage marriages.

400 Consolidation Act No. 1513 of 22 October 2020 of the Alien Act, which is available here in Danish: https://www.retsinformation.dk/eli/lta/2020/1513.

401 See pamphlet of the Centre for Women's' Rights, http://www.cidff.fr/sites/default/files/atoms/files/ordonnance_de_protection_cnidff.pdf.

402 Care of Young Persons (Special Provisions) Act (1990:272), Sections 31a-34.

403 According to the Finnish expert, given that forced marriages can fall under the definition of human trafficking or coercion, the definition of trafficking requires the perpetrator to act intentionally, whereas in many cases parents believe they are acting in their children's best interest so it is difficult to show intention. It is also very difficult to identify because it takes place in social control which is not recognised by criminal law provisions.

√ Very few cases of forced marriage have been examined in court. This suggests that cases of forced marriages are rarely reported to the authorities.[404] Even though the majority of laws are very recent, the low number of cases suggests that criminalisation is not enough.

6.4 Recommendations

Based on the findings of this report, the authors consider that there is currently a need to:

√ Revise the age of marital consent in the context of other provisions of law, and other minimum ages, such as sexual consent.
√ Prohibit forced marriages in the entire territory of a state, without exceptions dictated by local laws or customs. In that sense, it would be important to stress in national legislation, in line with the Istanbul Convention, the prohibition of justifications based on honour and to broaden the concept of 'marriage' to include forms of extrajudicial marriages.
√ Consider the economic dimension of forced marriages, namely the burden of the marriage on a child or woman.
√ Address the gender dimension of forced marriages. From the information in the questionnaires, reflecting the trend at the international level, women and girls are disproportionately affected by forced and/or child marriages. For example, a gender perspective in migration might be lifesaving in detecting cases of forced marriages.[405]
√ Adopt effective preventive and protective measures. These include support services for girls and young women, such as shelters; return options in case of forced marriage or underage marriage abroad; accessible judicial procedures to allow the annulment of the marriage; free legal aid for victims/survivors of violence; effective protection measures; guidelines for the authorities, and helplines in more than one language to which victims of forced marriages can ask for information.

404 In Finland, according to the national rapporteur on trafficking, forced marriages have increased in Finland. In most cases, the marriage was entered into abroad, and continued after the family moved to Finland. In some cases, the marriage had taken place in Finland, or had been forced on a person residing in Finland. The rapporteur notes that forced marriages may also take place within certain (religious) minorities in Finland. Several international human rights bodies have expressed their concern about early marriages in the Muslim and Roma communities in Greece. The UN Committee on the Elimination of Discrimination against Women, in its concluding comments of 2 February 2007 on Greece (https://www.refworld.org/docid/45f6cfc52.html) expressed its concern about the non-application of Greek legislation on marriage and inheritance to the Muslim minority, fearing that that situation amounted to discrimination against Muslim women in breach of the Greek Constitution and Article 16 of the CEDAW. 6 years later, the same Committee in its concluding comments regarding Greece (2013) Committee on the Elimination of Discrimination against Women (2013), Concluding observations on the seventh periodic report of Greece adopted by the Committee at its fifty fourth session (11 February - 1 March 2013), https://digitallibrary.un.org/record/755896, *inter alia*, expresses its concern 'about the situation of women in Greece in the area of marriage and inheritance. The Committee remains concerned about the inconsistent application of the State law in all communities. In this regard, the Committee is concerned about the non-application of the general law of the State party to the Muslim community of Thrace regarding marriage and inheritance, as well as about the persistence of polygamy and early marriage in the Muslim and Roma communities'.

405 In Belgium, for example, gaps in the implementation have proved to be linked to asylum and refugee laws and policies. Strict criteria are applied in relation to evidence and in the assessment of the credibility of applications, which has consequences for the determination of the merits of the application. A rigorous examination of credibility on the part of the authorities does not take into account the influence of gender persecution and the difficulty for women to deliver a coherent and detailed account of the violence they have suffered as a result of post-traumatic stress.

7 Stalking

This chapter provides a detailed examination of existing legislation on stalking, including online (or ICT-facilitated)[406] stalking. The purpose of this chapter is to check whether countries have incorporated the crime of stalking into their criminal codes and, if so, which elements are included. The first part of the chapter introduces the main instruments addressing the issue, describes the definitions used in them and explains the different elements that are taken into account in the examination of the domestic jurisdictions under study. The second part of the chapter presents the results from the national questionnaires. The chapter concludes with a summary of main findings and recommendations for harmonisation.

7.1 Introduction and main concepts

Stalking is 'a persistent harassment in which one person repeatedly imposes on another unwanted communications and/or contacts'.[407] What characterises stalking is indeed 'the *repetitive or systematic* nature of the behaviour, aimed at a specific person, which is unwanted by the targeted person'.[408] In some laws, the legal terminology for stalking is harassment.[409] However, as van der Aa notes, 'while both offenses usually require a course of conduct, harassment is often used as a more general, umbrella concept, one that includes stalking behaviour, but that is not synonymous with stalking. Furthermore, stalking has a more serious connotation than harassment, which can include milder forms of pestering as well.'[410] In the Istanbul Convention, stalking is defined as 'the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety' (Article 34). The element of fear in the crime of stalking has been reported to be quite problematic. According to some authors, without fear, the behaviour might qualify as harassment and not as the crime of stalking. In the United States, more states have introduced the 'reasonable person standard', which means that what matters for the behaviour to amount to stalking is whether a reasonable person would have suffered emotional stress because of the repetitive conduct.[411] Examples of behaviours that amount to stalking range from repeatedly following another person to engaging in unwanted communication with another person, and it includes modern communication tools and the use of ICT. As reported in the Explanatory Report to the Istanbul Convention, the actions must be conducted intentionally and show a 'pattern of behaviour'.[412] As indicated in Article 78(3) of the Istanbul Convention, any ratifying State – and the EU, if and when it ratifies the Convention – may provide for non-criminal sanctions with regard to stalking, by appending a specific reservation to Article 78 of the Convention in that respect.

Several studies have been conducted on the criminalisation of stalking in Europe.[413] Anti-stalking legislation first appeared in the 1980s in the United States, at least a decade before the European developments.[414] At the time of the first study on stalking in 2007, only eight EU Member States had

406 In this chapter cyber and online stalking will be used interchangeably.
407 Mullen, P.E. Pathé, M. and Purcell, R. (2001) 'Stalking: New constructions of human behaviour', *Australian and New Zealand Journal of Psychiatry*, 35, pp. 9-16.
408 Van der Aa, S. (2018) 'New Trends in the Criminalization of Stalking in the EU Member States', *Eur J Crim Policy Res* 24, pp. 315-333.
409 On this behaviour, see Chapter 4 on harassment.
410 Van der Aa, S. (2018) 'New Trends in the Criminalization of Stalking in the EU Member States', *Eur J Crim Policy Res* 24, p. 323.
411 National Center for Victims of Crime (2007) *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, (Washington, DC). p. 34.
412 Explanatory Report to the Istanbul Convention, Paras. 184-185.
413 See, e.g., Modena Group on Stalking (2007) *Protecting women from the new crime of stalking; A comparison of legislative approaches within the European Union,* University of Modena and Reggio Emilia; de Fazio, L. (2009) 'The legal situation on stalking among the European member states', *European Journal on Criminal Policy and Research* (15), pp. 229-242; European Commission (2010), *Feasibility study to assess the possibilities, opportunities and needs to standardize national legislation on violence against women, violence against children and sexual orientation violence*, Luxembourg: Publications Office of the European Union; van der Aa, S., Römkens, R. (2013). 'The state of the art in stalking legislation: Reflections on European developments', *European Criminal Law Review*, 3(2), 232-256; van der Aa, S. (2018) 'New Trends in the Criminalization of Stalking in the EU Member States', *Eur J Crim Policy Res* 24.
414 Van der Aa, S., Römkens, R. (2013). 'The state of the art in stalking legislation: Reflections on European developments', p. 233.

introduced specific provisions criminalising stalking.[415] In 2012, the number had already increased: 13 countries (**Austria**, **Belgium**, **Czechia**, **Denmark**, **Germany**, **Hungary**, **Ireland**, **Italy**, **Luxemburg**, **Malta**, **Netherlands**, **Poland**, **United Kingdom**) had criminalised the behaviour, albeit with significant differences in the elements of the crime.[416] States that were reluctant to criminalise stalking argued that criminal law provisions already in force combined with protective measures served the purpose of countering the phenomenon. In the meantime, stalking has reached significant levels in recent years, mainly because of the widespread use of ICT, which has undoubtedly increased the number of cases of stalking,[417] as already highlighted in the discussion of definitions of ICT-facilitated violence against women in the first chapter. In 2016, at the time of van der Aa's research, at least 21 EU Member States had criminalised stalking, which is a significant increase and partly a consequence of the ratification – or the interest in the ratification – of the Istanbul Convention.[418] The elements of the crime differ from one country to another, as this report will show. The analysis of the questionnaires confirms the trend that has emerged in previous years, with an increasing number of countries criminalising the behaviour (all EU Member States except for **Cyprus**, **Denmark**, and **Lithuania**).

Based on the questionnaires, this chapter will focus on specific criminalisation, non-specific criminalisation, prosecution and sanctions, and the ICT dimension of stalking.

7.2 Results from the country questionnaires

Stalking is the common English word used by the media across the examined countries to identify the behaviour, even though the legislation at domestic level might have translated the expression into the national language (*Perseguição* in Portugal, *atti persecutori* in Italy, *Nachstellung* in Germany, to give a few examples). However, the questionnaires show – confirming the previous findings mentioned above – that some jurisdictions have placed the fight against stalking under anti-harassment action. Hence, for example, in **France**, stalking falls under the provisions of moral or phone harassment (*harcèlement moral ou téléphonique*) and in **Luxembourg** it comes under the provision on obsessive harassment (*harcèlement obsessionnel*). From a methodological point of view, even in those cases, provided that harassment is defined as repetitive or systematic, the report will consider that the criminalisation of stalking has been accomplished. The reasons are threefold. First, in the Baseline Evaluation Report on France, GREVIO did not consider the absence of a specific criminalisation of stalking as non-compliance with the Istanbul Convention (provisions on moral harassment and harassment outside a marital relationship 'make it possible to initiate criminal proceedings in the event of conduct characteristic of the "harassment" offence provided for in Article 34 of the convention'[419]). Secondly, this is also in line with previous analyses that compared anti-stalking legislation in Europe.[420] Thirdly, in answering this

415 Modena Group on Stalking (2007) *Protecting women from the new crime of stalking; A comparison of legislative approaches within the European Union*.

416 Van der Aa, S., Römkens, R. (2013). 'The state of the art in stalking legislation: Reflections on European developments', p. 233.

417 In 2014 (based on data from 2012), FRA had already acknowledged that 'cyberstalking – stalking by means of email, text messages or the internet – concerns young women in particular. Of all 18- to 29-year-old women, 4 % have experienced cyberstalking in the 12 months before the survey interview, compared with 0.3 % of women who are 60 years old or older.' (FRA (2014) *Violence against Women – An EU-wide survey,* https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf), p. 87. See also Parliamentary Assembly of the Council of Europe, Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the roles and responsibilities of internet intermediaries, adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies: 'the internet has facilitated an increase in privacy-related risks and infringements and has spurred the spread of certain forms of harassment, hatred and incitement to violence, in particular on the basis of gender, race and religion, which remain underreported and are rarely remedied or prosecuted.' In literature, Woodlock, D. (2017), 'The Abuse of Technology in Domestic Violence and Stalking', in *Violence against Women*, vol. 23(5), 584-602. On the increase of cyberstalking during the pandemic in 2020, see Bracewell, K., Hargreaves, P. and Stanley, N. (2020), 'The Consequences of the COVID-19 Lockdown on Stalking Victimisation', in *Journal of Family Violence* https://doi.org/10.1007/s10896-020-00201-0.

418 Van der Aa, S. (2018) 'New Trends in the Criminalization of Stalking in the EU Member States'.

419 GREVIO Baseline Evaluation Report, France, GREVIOInf (2019)16, p. 55.

420 Van der Aa, S. (2018) 'New Trends in the Criminalization of Stalking in the EU Member States'.

part of the questionnaire, the national experts mentioned criminal provisions on harassment because its definition covered the elements of the crime of stalking.

a) Areas of law

Table 18 Stalking – areas of law

State	Specific criminalisation	Provisions on harassment or amendments to anti-harassment laws applicable to stalking	Other criminal law provisions	Non-criminal provisions applicable to stalking
Austria	X			
Belgium	X	X		
Bulgaria	X			
Croatia	X			
Cyprus			X	
Czechia	X			
Denmark				X
Estonia	X			
Finland	X			
France	X	X		
Germany	X			
Greece	X			
Hungary	X			
Iceland				X
Ireland	X	X		
Italy	X			
Latvia	X			
Liechtenstein	X			
Lithuania			X	
Luxembourg	X	X		
Malta	X	X		
Netherlands	X			
Norway	X			
Poland	X	X		
Portugal	X			
Romania	X	X		
Slovakia	X			
Slovenia	X			
Spain	X			
Sweden	X	X		
United Kingdom	X	X		

b) Specific criminal law provisions

As previously mentioned, the crime of stalking can fall under provisions on harassment or constitute an amendment to the anti-harassment laws already in force. This is the situation in 9 countries out

of the 27 that have criminalised stalking, according to this report (as shown in Table 18). Hence, in **Belgium**, the Act of 30 October 1998[421] introduced Article 442bis (under the heading 'harassment') to the Criminal Code; in **France**, stalking is defined as 'moral harassment' in private life between spouses, partners, cohabitants or ex-partners (Article 222-33-2-1, Criminal Code), harassment outside a marital relationship (Article 222-33-2-2, CC), and phone harassment (Article 222-16, CC); in **Hungary**, Article 222 of the Criminal Code concerns 'harassment';[422] in **Ireland** the offence of harassment under the Non-Fatal Offences against the Person Act 1997 is applied to cases of stalking;[423] in **Luxembourg**, stalking is defined as obsessive harassment (*harcèlement obsessionnel*) under Article 442-2 of the Criminal Code (amended in 2009); **Malta** amended the Criminal Code in 2015, including Section 251 AA, which defines stalking as the conduct of a person that amounts to harassment; persistent harassment is the definition in Article 190a of the **Polish** Criminal Code;[424] in **Romania**, Article 208 of the Criminal Code prohibits harassment; in **Sweden** unlawful harassment amounts to a crime when each of the acts mentioned in Chapter 4, Section 4b of the Criminal Code, including violation of privacy, molestation, damage to property, is part of a 'repeated' violation of the person's integrity;[425] and in the **United Kingdom**, the crime of stalking was included in the form of two amendments (Sections 2A and 4A) to the Protection from Harassment Act of 1997.[426]

Out of the 31 questionnaires received, 27 countries have specific criminal provisions on stalking.

With regard to the elements of the crime, the repetition or the systematic nature of the behaviour must be demonstrated. This is commonly present in national legislation and can be clearly inferred from case law. Not all legislation use the words 'repetitive' and 'systematic': the **Croatian** provision refers to persistent acts and over a long period of time, for example; in **Czechia** it is a 'long-term persecution', which has been interpreted by courts as at least several forced harmful contacts;[427] similarly in **Liechtenstein**, stalking is an act taking place 'during a long period,' and in **Slovakia**, the crime of 'serious stalking' in Article 360a of the Criminal Code as amended in 2011 occurs when it is committed 'over an extended period of time.' In **Germany**, *'beharrliche Nachstellung'* was interpreted in 2009 by the Federal Court of Justice as repeated action;[428] the term 'persistent' is used in **Greece**, **Ireland** and **Poland**; 'regularly or permanently' in **Hungary**; 'repeatedly and insistently' in **Spain**; and in the **United Kingdom**, a behaviour amounts to stalking when it has occurred on at least two occasions. Courts also commonly refer to the repetition of the behaviour. In **Sweden**, a judgment rendered in 2013 concluded that unlawful harassment is present when separate acts that constitute minor offences are committed over a short period of time.[429] The 'quality' of the actions is also relevant. Hence, for example, in **Italy**, the

421 Law to insert Article 442*bis* into the Criminal Code to criminalise harassment (*Loi qui insère un article 442bis dans le Code pénal en vue d'incriminer le harcèlement*), 30 October 1998, available at: http://www.ejustice.just.fgov.be/eli/loi/1998/10/30/1998009993/moniteur.

422 The national expert reports that the concept of harassment is 'confusing'. The formulation in the Criminal Code corresponds however to the elements of stalking: Article 222 Criminal Code: '(1) A person who disturbs another person regularly or permanently for the purpose of causing fear or interfering with the private life or daily lifestyle of that person arbitrarily is guilty of a misdemeanour and shall be punished by imprisonment for up to one year, unless a criminal offence of greater gravity is established. (2) A person who, for the purpose of causing fear, a) threatens another person or, having regard to their relationship, a relative of another person with the commission of a punishable violent act against a person or an act causing public danger, or b) pretends that an event harming or directly endangering the life, physical integrity or health of another person is about to take place is guilty of a misdemeanour and shall be punished by imprisonment for up to two years.'

423 Non-Fatal Offences against the Person Act 1997, Section 10, as amended by Section 10 of the Harassment, Harmful Communications and Related Offences Act 2020. https://revisedacts.lawreform.ie/eli/1997/act/26/front/revised/en/html.

424 Act of June 6, 1997, the Penal Code, Article 190a. Penal Code (i.e. Journal of Laws of 2020, item 1444, as amended) http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf.

425 Unlawful harassment, Criminal Code, Chapter 4, Section 4b, amended in 2014. The translation 'harassment' is present in the unofficial translation of the Criminal Code provided in the questionnaire. https://www.government.se/4a8349/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf.

426 Modified by the Protection of Freedoms Act 2012.

427 Czech Supreme Court, Judgment of 31 May 2012, No. 11 Tdo 1671/2011.

428 Federal Court of Justice, judgment of 19 November 2009, 3 StR 244/09, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=2a8bfba745357f91049dc4e9f03b0780&nr=50476&pos=0&anz=1.

429 Supreme Court, Judgement NJA 2013 No. 1027.

crime of persecutory acts was assessed in respect of two actions (which could be either harassment or injuries) only, committed in a short period of time; in other words, it is not necessary for the persecutory acts to occur over a long period of time.[430]

To identify stalking, some countries have opted for a list of actions that amount to the offence under the criminal code. On the one hand, this choice allows more clarity in the application of the law, but on the other hand, where the list is exhaustive, it lacks flexibility. Nineteen countries provide a list of behaviours, which can be exhaustive or non-exhaustive.

Table 19 Stalking – list of behaviours

State	Exhaustive list of behaviours amounting to stalking	Non-exhaustive list of behaviours amounting to stalking
Austria	X	
Bulgaria	X	
Croatia	X	
Czechia	X	
Estonia		X
Finland		X
Germany		X
Greece		X
Ireland	X	
Latvia	X	
Liechtenstein	X	
Malta	X	
Norway		X
Romania	X	
Slovakia	X	
Slovenia	X	
Spain	X	
Sweden	X	
United Kingdom		X

Examples of countries with exhaustive lists are **Bulgaria**, where Article 144a of the Criminal Code (new – SG 16/19) defines 'following another person' as: 'any threatening behaviour towards a given person, which may consist in persecuting the other person, showing to the other person that they are being observed, initiating unwanted communication with them by all possible means of communication.' It seems that the list can be broadly interpreted (courts have for example considered online stalking by interpreting 'all possible means of communication'). **Croatia** also includes 'spying' on someone (Article 140, Criminal Code). **Ireland** defines stalking as the action of harassing another person by persistently following, watching, pestering, besetting or communicating with or about him or her, using 'any means,' including the phone.[431] The list included in Article 251 AA in **Malta** is very detailed, and includes the following actions: 'following a person, contacting or attempting to contact a person by any means, publishing, by any means, any statement or other material relating or purporting to relate to a person, or purporting to relate to a person or purporting to originate from a person, monitoring the use by a person of the internet, email or any other form of electronic communication, loitering in any place, whether public or private, interfering with any property in the possession of a person, watching or spying on a person.' **Spanish**

430 Cassazione Penale, No. 47038/2019.
431 Non-Fatal Offences against the Person Act 1997, Section 10 as amended by Section 10 of the Harassment, Harmful Communications and Related Offences Act 2020.

legislation also addresses 'surveillance, persecution or desire for physical proximity' and 'improper use of personal details, acquisition of products, goods or services, or putting third parties in contact with them;' offences against their freedoms or property, or against the freedoms or property of another person close to them. The **Swedish** list also includes breach of a non-contact order.[432]

An example of a non-exhaustive list is provided in the **Estonian** legislation, which defines stalking as: 'repeated or consistent attempts to contact another person, watching him or her or interference in the privacy of another person against the will of such person in *another manner*' (emphasis added). The list provided by Chapter 25, Section 7(a) of the **Finnish** Criminal Code is also non-exhaustive. The District Court of Helsinki, R18/4821 (2018) stated that it cannot be a general requirement that the victim explicitly asks the perpetrator to stop the unwanted behaviour, even though the preparatory works related to the amendment to the Criminal Code seemed to require that. Also non-exhaustive is the list in Section 238 of the **German** Criminal Code, as amended in 2017: 'or committing other comparable acts.' The **Greek** Criminal Code provides examples: 'e.g. in particular with the pursuit of a constant contact by use of a telephone or electronic media or with repeated visits in his/her family, social or working environment, despite his/her expressed contrary will.'[433] Another non-exhaustive list is provided in Article 266a of the Criminal Code in **Norway**: 'threatens, follows, observes, contacts or by other comparable acts.' The **United Kingdom** has a non-exhaustive list in Section 2A of the Protection from Harassment Act. It contains 'examples of acts or omissions which, in particular circumstances, are ones associated with stalking', such as 'following a person'.

In terms of consequences of the behaviour, instilling fear has been considered in literature as an important element of the definition of the offence, and it is also present in Article 34 of the Istanbul Convention. However, an explicit reference to fear is included in the legislation of only 14 countries: **Bulgaria**, **Croatia** (or state of anxiety), **Czechia**, **Finland**, **Hungary** (or interfering with private life), **Italy** (or state of anxiety), **Latvia**, **Malta**, the **Netherlands** (or compelling another person to do something, not to do something, or tolerate something), **Norway** (or anxiety), **Portugal** (or limiting one's liberty or self-determination), **Romania**, **Slovakia** ('reasonable fear'), **United Kingdom** (Section 4A of the Protection from Harassment Act, or causes another serious alarm or distress which has a substantial adverse effect on his or her usual day-to-day activities). Other legislation refers to effects on peace of mind (**Belgium**, **France**, **Luxembourg**[434]), effects of humiliating or intimidating the other person or disturbing him/her (**Estonia**), to terror or anxiety (**Greece**), to the interference with another person's privacy or causing alarm, distress or harm (**Ireland**), to the unacceptable interference in the person's life (**Liechtenstein**), to danger, humiliation or torment (**Poland**), to intimidation or threat (**Slovenia**), to a significant alteration of the person's life (**Spain**), and to a violation of the person's integrity (**Sweden**).

With regard to the subjective element, the Istanbul Convention defines stalking as an 'intentional conduct.'[435] Not all definitions analysed expressly refer to the intent of the offence, which might be derived from general rules of domestic criminal law. Limiting the analysis to the definitions of the offence provided by the questionnaires, national legislation uses terms such as *knowledge* (**Belgium** – 'knew or should have known'; **Luxembourg** – knowledge of the interference in another person's peace; **Malta** – knows or ought to know that the conduct amounts to harassment; the **United Kingdom** 'knows or ought to know … will cause such alarm or distress'), *recklessness* (**Ireland** – as alternative to intention plus 'his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's privacy or cause alarm, distress or harm to the other;' **Norway** – other 'reckless conduct'[436]), *intentionality* (**Ireland** – as alternative to recklessness; **Estonia** – intent or effect to intimidate, humiliate

432 Criminal Code 1962:700, Chapter 4, Section 4b.
433 Article 333(1) as amended by Act 4531/2018.
434 However, see District Court of Luxembourg, decision of 10 November 2016: The peace has to be appreciated *in concreto* (so the fact that one of the girls got scared was important).
435 Istanbul Convention, Article 34.
436 See, however, Norwegian Supreme Court, case HR-2019-563-A, which concluded, in a case of peeking at unidentified victims, that the condition for a conviction pursuant to Article 266 is that it is within the perpetrator's intention that victim is aware that he/she is being stalked/followed.

the other person or disturb him or her in any other manner; **Hungary** – 'for the purpose of;' **Portugal** – intentional conduct). The jurisprudence of national courts is also interesting in that respect. In **Germany**, the Federal Court of Justice in 2009 decided that persistent action within the meaning of Section 238 of the Criminal Code requires repeated action, and that it is necessary that the offender acts out of disregard of the opposing will or out of indifference towards the wishes of the victim with the intention of behaving accordingly in the future, too.[437] In **Poland**, in an order of 12 December 2013, the Supreme Court stated that: 'It is irrelevant in the context of the subjective side of this crime whether the perpetrator's act is motivated by feelings of love, hatred, desire to annoy the victim, malice or revenge. For the existence of this offence, it is irrelevant whether the offender intends to carry out his threats. The decisive factor here is the subjective feeling of the threatened person, which must be assessed in an objective manner.'[438]

c) Non-specific criminalisation of stalking

Four countries have not specifically criminalised stalking. In **Cyprus**, Article 91 of the Criminal Code is applicable: 'whoever causes fear or concern by threats for violence or other illegal act or omission commits an offence punishable with up to 3 years' imprisonment.' A legislative proposal to criminalise stalking has been pending since 2017. **Denmark** has declared to opt for non-criminal sanctions with regard to the behaviour referred in Article 34 of the Istanbul Convention. This is possible under Article 78(3) of the Istanbul Convention. According to Section 2(1) of the Restraining Order Act, a restraining order may be issued if there is probable cause that the person has violated another person's peace by stalking or disturbing that other person, or committed a criminal offence against that other person comparable to such a violation of peace, and there are reasons to assume that the person in question will continue to commit such violations against that other person. However, the national expert reported that the Government has been recently instructed by the Parliament to take legislative measures to resolve the gap arising from the non-criminalisation of stalking. **Iceland** adopted Law No. 85/2011 on restraining orders and eviction from the home,[439] according to which a restraining order can be issued to prohibit a person from entering a specific location or area, to follow, visit or contact in another manner another person if there is reason to believe that he/she will commit an offence or in another way violate the peace of the alleged victim. The violation of a restraining order is a crime. **Lithuania** only provides for the crime under Article 145 of the Criminal Code: 'Threatening to kill or seriously disrupt human health or terrorising a person.'

d) Prosecution and sanctions

With regard to penalties, the average penalties are a maximum of one to three years' imprisonment, and/or a fine. In **Italy**, the maximum penalty can be imprisonment from one year to six years and six months; **Poland** – maximum eight years; the **United Kingdom** – maximum eight years' custody, with regard to stalking involving fear of violence or serious alarm or distress. In **Hungary**, stalking is considered as a misdemeanour unless it is committed against the spouse, former spouse, cohabitant or former cohabitant; against a person raised by him or under his supervision, care or medical treatment; by abusing his power or influence; against a public officer. Penalties consisting of imprisonment and/or a fine can be combined with restraining orders. It is interesting to note that in **Italy**, according to Law No. 38/2009, the victim can request the issuance of a police warning before and/or without having to file a criminal lawsuit against the perpetrator.

437 Federal Court of Justice, judgment of 19 November 2009, 3 StR 244/09, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=2a8bfba745357f91049dc4e9f03b0780&nr=50476&pos=0&anz=1.

438 Order of the Supreme Court of 12 December 2013, ref. no.: III KK 417/13, LEX no. 1415121 https://sip.lex.pl/#/jurisprudence/521508817/1/iii-kk-417-13-realizacja-znamion-przestepstwa-stalkingu-postanowienie-sadu-najwyzszego?cm=URELATIONS.

439 Act No. 85/2011 (*Lög um nálgunarbann og brottvísun af heimili*) https://www.althingi.is/lagas/nuna/2011085.html The law the took effect on 30 June 2011; amended by Act No. 39/2012; Act No. 1172016; Act No. 12/2019 and 76/ 2019.

It is also relevant to name some specific aggravating circumstances envisaged for this crime, which mainly concern the situation of vulnerability of a person, or the relationship between the victim and the perpetrator. Conditions of vulnerability that increase the penalty might be: age, pregnancy, illness, infirmity, physical or mental disability of the victim/survivor. The use of a weapon might be also an aggravating circumstance. It is important to stress that stalking within the context of domestic violence has been considered as an aggravating circumstance, for example in **Bulgaria** (up to five years' imprisonment), **Slovenia** (up to five years' imprisonment), and **Spain** (specific aggravation of the punishment linked with the definition of victims of domestic violence).[440] An aggravating circumstance is also provided where stalking leads to the death or risk of serious damage to the health of the victim, see for example in **Germany** (up to 5 years, in case of death up to 10 years)[441] and **Poland** (up to 12 years' imprisonment).

The type of prosecution is mainly *ex parte* or a combination of *ex parte* and *ex officio* (the latter for the most serious cases, when there is a special public interest, or for the cases enumerated among the aggravating circumstances).

Table 20 Aggravated factors for stalking

Aggravating factors for stalking	States
Victim is a former or current spouse or partner	Austria, Belgium, Bulgaria, Croatia, Estonia, Hungary, Italy, Liechtenstein, Malta, Norway, Portugal, Slovakia, Spain Sweden
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria, Belgium, Bulgaria, Croatia, Estonia, France, Germany, Hungary, Iceland, Italy, Liechtenstein, Malta, Norway, Netherlands, Slovakia, Spain, Sweden, United Kingdom
The offence, or related offences, were committed repeatedly	Denmark, Estonia, France, Iceland, Liechtenstein, Lithuania, Malta, Norway, Sweden, United Kingdom
Victim was made vulnerable by particular circumstances;	Austria, Belgium, Estonia, France, Italy, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom
Child victim or witness;	Croatia, Czechia, Estonia, France, Italy, Liechtenstein, Lithuania, Malta, Norway, Sweden, United Kingdom
Multiple perpetrators;	France, Iceland, Liechtenstein, Lithuania, Malta, Norway, Sweden, United Kingdom
Extreme levels of violence;	Germany, Italy, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Spain, Sweden, United Kingdom
Use or threat of a weapon;	Czechia, Germany, Italy, Liechtenstein, Lithuania, Malta, Norway, Portugal, United Kingdom
Severe physical or psychological harm for the victim;	Estonia, France, Italy, Liechtenstein, Lithuania, Malta, Norway, Portugal, Sweden, United Kingdom
Previous conviction for similar offences;	Liechtenstein, Malta, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom
Offence has been committed online;	France, Italy, Slovakia, Sweden
Offence committed on the grounds of the victim's gender	France, Lithuania, Malta, Slovakia, Spain, Sweden, United Kingdom

440 Article 173(2) refers to: the spouse or former spouse or person who is or has been linked by an analogous emotional relationship even without cohabitation; descendants, ancestors or siblings by nature, adoption or affinity, own or of the spouse or partner; minors or people with disabilities in need of special protection who live with the perpetrator or who are subject to the power, guardianship, curatorship, foster care or de facto guardianship of the spouse or partner, and persons protected in any other relationship for which they are integrated in the family coexistence of the perpetrator.

441 Federal Court of Justice, judgment of 15 February 2017, 4 StR 375/16, https://lexetius.com/2017,1484.

The problems that have been identified by the experts include the difficulties in proving the elements of the offence in court, the lack of sensitivity and awareness of the phenomenon by public authorities, the increasing number of cases of stalking that are reported to the authorities compared to the low number of cases that end in court, the mild sentences (sometimes only a fine) despite the fact that the maximum penalties provided by the law are significant; what was called 'procedural stalking,' meaning the action of the perpetrator in filing different procedures against the victims, which is not covered by the legislation.[442]

For example, the Finnish Broadcasting Company YLE studied the number of cases in 2018,[443] and demonstrated that since the criminalisation of stalking in 2014, nearly 3 000 cases have been reported to the police, whereas around 300 cases have been brought to court. The perpetrators were typically ex-spouses or partners of the victim, and 80-90 % of them were men.

Some protocols have been adopted. In the **Netherlands**, a specific protocol for the criminal prosecution of stalking has been adopted.[444] In **Norway**, with regard to Guideline 2/2019,[445] the Director of Public Prosecutions and the Regional Public Prosecution Offices has argued that reverse violence alarms (offender tagging) should be used more frequently in stalking cases.

e) ICT-facilitated stalking

National experts were asked whether there is any form of criminalisation of illegal online activities relevant for the prosecution of ICT-facilitated stalking. The answers were not straightforward, because clear provisions are rarely present in the domestic legal system. However, some general trends towards the recognition of the relevance of the ICT dimension of stalking can be observed: in the formulation of the crime; in the list of behaviours that could amount to stalking; as an aggravating circumstance; in domestic jurisprudence; in guidelines; as a current development. Hence, for example, in **Greece**, the reform through Act 4531/2018 amended the criminal law provision on stalking, adding that the 'persistent' behaviour could be performed either by use of a phone or 'electronic media'. According to the Explanatory Report (*travaux préparatoires*) of Act 4531/2018, one of the novelties of the provision is that cyberstalking falls under the scope of this provision. Similarly, in **Slovenia**, Article 134a of the Criminal Code also defines stalking as 'contact through electronic communication media.' In the (exhaustive or non-exhaustive) list of behaviours mentioned above, the general formulation of some expressions might open the possibility to include online stalking in the provision. **Ireland**, for example, has included 'any means' in Section 10 of the Non-Fatal Offences against the Person Act of 1997 as amended by the Harassment, Harmful Communications and Related Offences Act of 2020. In **Malta**, the behaviours listed as amounting to stalking can be carried out 'by any means', and one specific behaviour consists in 'monitoring the use by a person of the internet, email or any other form of electronic communication' (Article 251 AA Criminal Code). In **Norway**, the very general expression 'other comparable acts' is used. In **Slovakia**, 'electronic communication service' is mentioned as a means to establish contact. The national experts from **Italy** and **France** mentioned the online dimension as an aggravating circumstance. The expert from **Estonia** reported that courts have addressed online stalking, and the **Hungarian** expert stressed that online stalking can be punishable under the criminal offence of stalking. In **Bulgaria**, courts have interpreted 'all possible means of communication' in Article 144a of the Criminal Code (new SG16/19) as including online stalking. In the **United Kingdom**, the Code for Crown Prosecution has produced guidance on prosecuting offences of harassment and stalking, where there is an explicit reference to cyberstalking.[446] As for current developments, a draft law on stalking and cyberstalking of

442 This latter action was denounced by NGOs in Hungary.
443 https://yle.fi/uutiset/3-10161760.
444 https://wetten.overheid.nl/jci1.3:c:BWBR0036315&z=2015-03-01&g=2015-03-01.
445 Guideline 2/2019 from the Director of Public Prosecutions and the Regional Public Prosecution Offices; https://www.riksadvokaten.no/document/okt-bruk-av-omvendt-voldsalarm/ (only in Norwegian).
446 https://www.cps.gov.uk/legal-guidance/stalking-and-harassment.

15 February 2021 is pending in **Germany**,[447] covering stalking by use of means of telecommunication, and other behaviours, including the abuse of the victim's personal data to order goods or services on the victim's behalf or to make third persons contact the victim.

The ICT dimension of stalking should also be considered in the violation of protection orders entailing a prohibition of contact.

7.3 Main findings

- √ Stalking has been specifically criminalised by the great majority of countries under analysis (27 out of 31). In Denmark there is an ongoing discussion on the opportunity of criminalising the behaviour, and in Cyprus a legislative proposal has been active since 2017 but has never been approved. It is a trend that cannot be denied or underestimated and has determined an increasing number of reports to the authorities by victims/survivors.
- √ The definitions of stalking are gender neutral.
- √ The increasing number of states criminalising the behaviour has been influenced by the ratification of, or the debate on ratification of, the Istanbul Convention, confirming the results of previous studies.
- √ In terms of elements of the crime, the repetition or the systematic nature of the actions has proved to be fundamental, and jurisprudence has played a pivotal role in interpreting this element. Some national provisions refer to the commission of the behaviour over a long period of time, while one mentions 'at least two occasions,' whereas courts have considered that a series of behaviour in a short period of time is sufficient to demonstrate the character of repetition.
- √ 9 countries out of 27 have defined stalking as a form of harassment (presenting the element of repetition or change of the behaviour of the victim) or as an amendment to a law on harassment already in force.
- √ 19 countries provide a list, exhaustive or non-exhaustive, of behaviours that can fall under the crime of stalking. The types of behaviour mentioned in the lists differ considerably.
- √ The element of fear, as a consequence of an action of stalking, is present in 14 countries out of 27. In other countries, laws refer to interference with the peace, private life or to changing effects on a person's daily habits.
- √ On ICT-facilitated stalking, some general trends towards the recognition of the relevance of the online dimension of stalking can be observed: in the formulation of the crime; in the list of behaviours that could amount to stalking; as aggravating circumstance; in domestic jurisprudence; in guidelines; as a current development. More than an explicit recognition of ICT-facilitated stalking, what emerged is that certain behaviours carried out using ICT fall under the scope of the criminal provision of stalking either through general references to 'any possible means' or 'other comparable acts.'
- √ Penalties vary significantly from one country to another, although the maximum average imprisonment ranges from 1 to 3 years. Restraining orders are commonly issued. Among the aggravating circumstances, the relationship between the perpetrator and the victim and/or the vulnerability of the person are relevant. It is interesting to note that an aggravating circumstance can be the commission of stalking in the context of domestic violence.
- √ The number of reported cases of stalking dramatically increased after criminalisation, according to some national experts.
- √ Enforcement of the law is the key issue for the crime of stalking. The problems that have been identified by the experts include the difficulties of proving in court the elements of the offence, the lack of sensitiveness and awareness of the phenomenon by public authorities, the mild sentences (sometimes only a fine) despite the maximum penalties provided by the law being significant: these elements can be argued to have determined the low number of cases that end in court.
- √ Protocols have been adopted to encourage enforcement and correct implementation.

447 See https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Cyberstalking.pdf. Comment and critique by the German Women Lawyers' Association, Statement of 1 March 2021, https://www.djb.de/fileadmin/user_upload/st21-05_Cyberstalking.pdf.

7.4 Recommendations

Based on the findings of this report, and in line with the Istanbul Convention, the authors suggest that there is a need to:

- √ Prohibit stalking in line with the Istanbul Convention.
- √ Identify behaviours that amount to the offence under the criminal code in an exhaustive or non-exhaustive list, open to interpretation by courts, to take into account the evolution of means and types of conduct amounting to stalking.
- √ Consider as an aggravating circumstance the commission of the behaviour within the context of domestic violence or when carried out with additional psychological or physical violence.
- √ Take into account the ICT dimension of stalking, which has increased and intensified in recent years. The ICT dimension should be emphasised, as a minimum, as an aggravating circumstance, to stress the enormous impact of ICT-facilitated stalking on the victims' lives. The mere addition of 'any possible means' or 'other comparable acts' to the list of behaviours that amount to stalking might not serve the scope of stressing the disproportionate impact of ICT compared to the more common behaviours categorised as stalking.
- √ Address stalking not only through prohibition and criminalisation, but also through the adoption of preventive and protective measures. We recommend the adoption of gender-sensitive protocols for authorities dealing with cases of stalking.

8 Non-consensual dissemination of intimate/private/sexual images

This chapter provides a detailed examination of existing legislation on non-consensual dissemination of intimate/private/sexual images. The crime, which falls under the umbrella definition 'gender-based ICT-facilitated violence against women' was specifically chosen as an example of this dimension of violence: it is relatively new and therefore it was difficult for national experts to appreciate its implementation at domestic level. The emphasis on the ICT dimension does not exclude the possibility that this crime can be committed offline, but the trend towards the prohibition of this behaviour has emerged as a consequence of the widespread use of ICT. The first part of the chapter introduces the main normative framework addressing the issue, describes the definitions used in those guiding documents and explains the different elements that are taken into account in the examination of the domestic jurisdictions under study. The second part of the chapter presents the results from the national questionnaires. The chapter concludes with a summary of main findings and recommendations.

8.1 Introduction and main concepts

The behaviour under analysis in this part of the report consists of the non-consensual dissemination, mostly online, of intimate or private images and images of a sexual nature, obtained with or without consent of the person pictured in the image.[448] The perpetrator of these offences might be an ex-partner who obtains images or videos in the course of a prior relationship, and aims to publicly shame and humiliate the victim, in retaliation for ending a relationship. However, in many cases, images can be obtained by hacking the victim/survivor's computer, social media accounts or phone, and the aim might be to inflict damage on the life of a person.[449] This behaviour, which might or might not amount to an offence, has received different names, the most popular, but also particularly problematic, being 'revenge pornography.' By 2016, 'revenge pornography' had been added to both the Merriam Webster and Oxford English Dictionaries, as meaning 'sexually explicit images of a person posted online without that person's consent especially as a form of revenge or harassment.'[450]

As has been argued, the concept of 'revenge porn' is problematic, because 'not all perpetrators are necessarily motivated by revenge, and not all content may be understood popularly as pornographic.'[451] The term 'pornography' does not emphasise the non-consensual nature of the practices, and 'revenge' only focuses on the presumed motive of the perpetrator and excludes the experience and rights of the victims.[452] Furthermore, the concept does not grasp the complexity of behaviours, which vary from the most typical consensual creation of an intimate image during a relationship and the non-consensual distribution of it usually at the end of the relationship, to the consensual (at least at the beginning) sharing of images between friends; from the sharing of intimate images taken from dating sites and apps for non-malicious reasons to the dissemination of images to humiliate, shame or harm a person.[453] It can also include 'upskirting' (capturing images of private body parts or underwear of unsuspecting persons, usually in public places, when they are shared on public websites for example), but also the manipulation of the image of a person through 'photoshopping' a person's head onto a sexual image of another body (also called as 'sexual deepfake' and 'synthetic media').[454] As has been stressed, with the use of technology – including artificial intelligence – it is possible to create very 'realistic-looking sexual

448 Kirchengast, T. Crofts, T. (2019) 'The Legal and Policy Contexts of "Revenge Porn" Criminalisation: The Need for Multiple Approaches', in *Oxford University Commonwealth Law Journal*, 19:1, p. 4.
449 EIGE (2017), *Cyber Violence against Women and Girls*, p. 2.
450 https://www.merriam-webster.com/dictionary/revenge%20porn.
451 Kirchengast, T. Crofts, T. (2019) 'The Legal and Policy Contexts of "Revenge Porn" Criminalisation: The Need for Multiple Approaches', p. 4.
452 McGlynn, C. Rackley, E. Houghton, R. (2017) 'Beyond "Revenge Porn": The Continuum of Image-based Sexual Abuse,' in *Feminist Legal Studies,* 25, p. 25.
453 McGlynn, C. Rackley, E. Houghton, R. (2017) 'Beyond "Revenge Porn": The Continuum of Image-based Sexual Abuse', p. 25.
454 Dunn, S. (2020), 'Technology-Facilitated Gender-Based Violence. An Overview', Centre for International Governance Innovation, https://www.cigionline.org/sites/default/files/documents/SaferInternet_Paper%20no%201_0.pdf, p. 12.

images of a person without their consent.'[455] The harm caused to the victim is exacerbated owing to the power of the internet and new technologies,[456] and, clearly, the harmfulness of similar behaviour does not depend on any form of initial consent.

The phenomenon is not new, and Liz Kelly, in a pioneer work dating back to 1988, identified it as a form of sexual violence committed through images.[457] She considered non-consensual dissemination of intimate/private/sexual images as another form of gendered, sexualised abuse. In their research, McGlynn, Rackley and Houghton, relying on Kelly's work, used the concept of 'image-based sexual abuse,' which highlights the harm experienced by the victims and the similarities with other forms of sexual abuse.[458] Other authors have used the terms 'image-based sexual exploitation,' deriving it from child exploitation,[459] and 'technology-facilitated sexual violence.'[460]

The use or dissemination of intimate or private images is gendered. Studies and data have shown that women and girls are the main targets of online digital sexualised violence, and, as a projection of offline violence against women, they are disproportionately affected.[461] Furthermore, persistent stereotypes and social norms, along with a historically constructed pattern of power relations, tend to blame the woman victim.[462] As has been found, 'while some quantitative studies have found that both men and women have had their images shared without their consent, research has demonstrated that the impact on women whose images have been shared has been much more severe.'[463]

It has been questioned whether the behaviour described above should be criminalised. It has been argued, for example, that 'the case for criminalisation alone is vexed and contentious. Criminalisation should be considered in light of existing offences and police practices. It should also be considered amongst the alternative remedies available, and the importance of a continued educative campaign that raises individuals' awareness of the risks of smart technologies and the online world.'[464] Criminal law provisions that can be currently invoked in this case are breach of privacy, breach of confidence, intentional infliction of emotional harm, copyright and defamation.[465]

When there is a lack of criminalisation of this practice, this directly impacts on the access to justice of the victims, since their only alternative seems to be to complain to the specific online platform disseminating the images and to request their removal, a decision that remains to a large extent the prerogative of the platform. While some platforms have established procedures to submit such claims, victims often have no recourse to a revision of a negative decision, nor have they any form of compensation. Moreover, the possibility to target the offender (for instance, to cancel their account, etc.) is also dependent on the decision of the platform. Criminalisation of the behaviour would allow for the intervention of the state in guaranteeing victims' access to justice and also the offender's entitlement to due process. Several countries, as the questionnaires have showed, have decided to combat non-consensual dissemination of

455 Dunn, S. (2020), 'Technology-Facilitated Gender-Based Violence. An Overview', p. 12.
456 Henry, N. and Powell, A. (2015) 'Embodied Harms: Gender, Shame and Technology-Facilitated Sexual Violence in Cyberspace' 21 *Violence Against Women* 758, p. 759.
457 Kelly, L. (1988) *Surviving sexual violence*, Polity Press, Cambridge.
458 McGlynn, C. Rackley, E. Houghton, R. (2017) 'Beyond "Revenge Porn": The Continuum of Image-based Sexual Abuse', p. 39.
459 Henry, N. and Powell, A. (2016) 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law', in *Social & Legal Studies*, Vol. 25(4) 397–418.
460 Henry, N. and Powell, A. (2016) 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law'.
461 Dunn, S. (2020), 'Technology-Facilitated Gender-Based Violence'. See, stressing the gendered nature of the behaviour, Uhl, C. and others (2018) 'An examination of nonconsensual pornography websites,' in *Feminism & Psychology,* vol. no. 28 (1), pp. 50-68; Henry, N. and Flynn, A. (2019), 'Image-based sexual abuse: Online distribution channels and illicit communities of support', *Violence Against Women,* vol. no. 25 (16), pp. 1932–55, in which the authors highlight how the majority of comments are mainly made by men; Henry, N. and others (2020), *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (New York, Routledge).
462 Henry, N. and Powell, A. (2016) 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law', p. 399.
463 Dunn, S. (2020), 'Technology-Facilitated Gender-Based Violence', p. 9.
464 Kirchengast, T., Crofts, T. (2019) 'The Legal and Policy Contexts of "Revenge Porn" Criminalisation: The Need for Multiple Approaches', in *Oxford University Commonwealth Law Journal*, 19:1, p. 25. The two authors mainly relied on the Australian experience.
465 These are all private actions crimes.

intimate/private/sexual images through specific criminal law provisions. That said, criminalisation should not be the only action to counter the non-consensual dissemination of intimate/private/sexual images. Preventive measures, ranging from the training of professionals to the raising of awareness of the serious consequences of the behaviour at societal level, along with protective measures for the victims/ survivors should be considered.

This report, however, will focus on the criminalisation of the non-consensual dissemination of private images. It examines the elements of the crime, particularly the objective element (sharing and/or disseminating and/or publishing images, what kind of images), and whether the intention to cause harm must be the subjective element. This latter requirement is challenging in criminal law, because the author of the dissemination might argue that he/she had no intent to harm the victim, but that the behaviour was dictated by amusement or without thinking about all the possible consequences of the action. The intentional infliction of emotional harm (or distress) is a common law tort: it occurs when a person acts with the intent to cause another to suffer severe emotional distress.

8.2 Results from the country questionnaires

The report draws from the questionnaires to establish the areas of law covering the behaviour: the number of countries that have criminalised it and for those countries that have done so, whether there is a common pattern in the identification of the elements of the crime; non-specific criminalisation; penalties; and prosecution.

a) Areas of law addressing the behaviour

From the analysis of the questionnaires, 11 countries have specifically criminalised the behaviour in their criminal codes, illustrated in Table 21. The amendments to the criminal codes of these countries have been recent – in the last five years, with six countries changing their criminal codes in 2019 and 2020 – and reflect the need to respond to the widespread use of ICT in the perpetration of the offence.

Table 21 Non-consensual dissemination of private images – criminalisation

State	Explicit criminalisation	Non-explicit criminalisation
Austria		X
Belgium	X	
Bulgaria		X
Croatia		X
Cyprus		X
Czechia		X
Denmark		X
Estonia		X
Finland		X
France	X	
Germany		X
Greece		X
Hungary		X
Iceland		X
Ireland	X	
Italy	X	
Latvia		X

State	Explicit criminalisation	Non-explicit criminalisation
Liechtenstein		X
Lithuania		X
Luxembourg		X
Malta	X	
Netherlands	X	
Norway		X
Poland	X	
Portugal	X	
Romania		X
Slovakia		X
Slovenia		X
Spain	X	
Sweden	X	
United Kingdom	X	

i) Specific criminalisation

'Revenge porn' has not been used as an expression in any of the 11 countries that have criminalised the behaviour. Other expressions such as non-consensual dissemination/publication have been preferred.

Table 22 Non-consensual dissemination – behaviours and types of images*

State	Type of action			Type of images			
	Dissemination/ Distribution	Publication	Disclosure	Sexual nature/ sexually explicit content	Private	Intimate	Other
Belgium	X			X			
France	X			X			
Ireland	X	X				X	
Italy	X	X		X	X		
Malta			X	X	X		
Netherlands	X			X			
Poland	X			X			
Portugal	X					X	
Sweden	X			X			X
Spain	X		X	X	X		
United Kingdom			X	X	X		

* This table indicates countries that explicitly criminalised the non-consensual dissemination of private images.

b) The issue of consent

Consent is analysed here with regard to two specific aspects of the behaviour: consent (or absence of consent) to the taking of or obtaining the images/recording of or obtaining the videos that are going to be disseminated; and absence of consent to their dissemination. It corresponds to two different temporal moments, given that the taking/obtaining of images/videos precedes their dissemination.

i) Obtaining the images

As anticipated in the introduction to the chapter, the harmfulness of the dissemination of intimate/private/sexual images should be considered irrespective of any initial consent given to the creation of the image. In this report, we explored the issue of how the images have been obtained, before their dissemination without consent, in the jurisdictions that expressly addressed the behaviour. We checked whether this aspect has (or has not) been emphasised in domestic legislation. In some cases, the creation of the image with the consent of the victim is expressly included in the provision on non-consensual dissemination. Hence, **Belgium** has, in the same provision (Article 371/1(2) of the Criminal Code)[466] a reference to the fact that the non-consensual dissemination of an image amounts to an offence 'even if the person has consented to it being taken.' **France** explicitly refers to the fact that the image was 'obtained at the time with the explicit or presumed consent of the person' (Article 226-2-1 of the Criminal Code). If the image was obtained without the consent of the person, other provisions of the Criminal Code might be relevant, such as Article 226-1, which covers the act of using any mechanism to infringe voluntarily the privacy of another '(2) capturing, recording or circulating, without consent, pictures of a person in a private setting.' **Italy** differentiates between situations where images have been made or stolen and those where images are 'received or otherwise acquired', (Article 612*ter* of the Criminal Code),[467] which might include the situation where a person consents to their creation. In the latter case, the non-consensual publication or dissemination amounts to a crime where there is the purpose to harm the victim. Similarly, the new Article 139h of the **Dutch** Criminal Code, enacted in 2020, differentiates between: sexual images that are 'intentionally and unlawfully created' (Article 139h(1)(a)) and are published while he knows or should reasonably suspect that the images have been obtained by or as a result of an act made punishable in Para. (1)(a) (Article 139h(2)(a)); and sexual images – no reference to how they have been obtained – that are disclosed 'knowing that such disclosure may be detrimental to that person' (Article 139h, (2)(b)).[468] **Spain** included in Article 197(7) of the Criminal Code the fact that the image or audiovisual recording might have been obtained with the person's consent. The Spanish Supreme Court decided that both images taken by the perpetrator with the consent of the victim/survivor and those voluntarily sent by the victim to the perpetrator fall under the word 'obtaining.'[469]

In other cases, it is possible to assume, in the absence of an express reference, that the provision on non-consensual dissemination also covers cases in which the image has been obtained with the consent of the person that is depicted in the image. **Ireland** has a specific provision (Section 3 of the Harassment, Harmful Communications and Related Offences Act 2020) which provides a further offence of 'recording, distributing or publishing' when 'he or she records, distributes or publishes an intimate image of another person without that other person's consent'. In this sense, the distribution without consent of images that were taken with the consent of the victim can fall under Section 2 of the same act, which only addresses distribution, publication, or threat to distribute or publish an intimate image.

In **Malta**, Section 208E of the Criminal Code provides that 'whosoever, with an intent to cause distress, emotional harm or harm of any nature, takes or discloses a private photograph or film without the consent of the person or persons displayed or depicted in such photograph or film shall be guilty of an offence.' The word 'or' suggests that the provision covers cases in which the disseminated image was taken with the consent of the pictured person. The same can be said for **Portugal**, where the crime of 'digital intrusion in private life' (Article 193 of the Criminal Code) covers the illicit behaviour of a person who 'creates, keeps *or* uses a digital file of data of an identifiable person that are related to the

466 Act of 4 May 2020 to combat the non-consensual dissemination of images and recordings of a sexual nature, M.8, 18 May 2020, p. 35762.

467 Introduced by Article 10 of Act, No. 69/2019, known as the 'Red Code'.

468 As is stated in an article by M. Berndsen 'The variant under paragraph 2 sub b also prohibits the disclosure of sexual images that have been created voluntarily, but it is then required that the discloser knows that the disclosure may be harmful to the person portrayed.' (Berndsen, M. (2020) 'Een verbod op wraakporno', *Nederlands Tijdschrift voor Strafrecht* 2020-2, pp. 70-76, DOI: https://doi.org/10.5553/NTS/266665532020035002003).

469 ECLI: ES:TS:2020:492.

person's private life' (Article 193(1)).[470] Law No. 44/2018 amended provisions of the Criminal Code on infringement of privacy, by adding the crime of dissemination 'through the internet or other means of generalised public dissemination, personal data, namely image or sound, relating to the privacy of the privacy of one of the victims without his consent.'[471] In **Sweden**, Chapter 4 Section 6c of the Criminal Code[472] covers the non-consensual dissemination of images even if they are obtained with the consent of the victim. The provision criminalises the dissemination of certain types of pictures, if the dissemination is liable to result in serious damage to the person whom the image or information concerns. As reported by the national expert, the question of how the images were obtained is irrelevant for the application of Section 6c.

In **Poland**, the offence (Article 191a as amended in 2020) covers both the recording *and* the dissemination of images of naked persons or persons during sexual activity. The provision is unique because it requires that the perpetrator records the image 'by means of violence, unlawful threat or deception,' hence the non-consensual dissemination of an image taken with the consent of the depicted person does not fall under this provision. Other general criminal law provisions might cover non-consensual dissemination of images obtained with the consent of the person, such as defamation, insult and stalking.

ii) Disseminating and distributing

With regard to the type of actions, national legislation has predominantly used the concepts of 'dissemination' or 'distribution'. For example, in 2020, **Belgium** adopted the Act on non-consensual *dissemination* of sexual images and recordings, which also includes the act of showing and making accessible sexual images.[473] **Poland** also uses the word 'dissemination,' which was interpreted by courts as making an image generally available, making it available to an undefined circle of people, leading to a situation where the image can be considered as generally available.[474] **Portugal** adopted Law No. 44/2018,[475] which reinforced the personal protection of private life on the internet, by addressing the 'dissemination through internet' or through 'general public dissemination' of 'personal data related to the privacy of a person' (related to domestic violence) and the dissemination of personal data through the internet or other means of general public dissemination (related to the crimes from Article 190 to 195 of the Criminal Code). 'Disclosure' has been used by **Maltese** legislation, in Act XVIII of 2016 amended by Act XXIV of 2019, and by the **United Kingdom** in Section 33 of the Criminal Justice and Courts Act of 2015. Both dissemination and disclosure are present in the **Spanish** law enacted in 2015, which specifically addresses the 'dissemination, disclosure or transfer to third parties of any image or audiovisual recording obtained with the person's consent' (Article 197(7) of the Criminal Code).[476]

c) The nature of the material

With regard to the nature of the images, most countries refer to the sexual nature of images and recordings that are disseminated. That is the case in **Belgium** (nude or sexual nature), **France** and the **Netherlands**. The **United Kingdom** and **Malta** contain the expression 'private sexual photographs and films,' Maltese legislation contains the definitions to be attributed to the concepts used in the law: '"private" shall refer to any photograph or film taken without the consent or knowledge of the person or persons depicted therein, or to any photograph or film which was never intended for public consumption;[477]

470 These are rough translations made by the author.
471 Diário da República no. 153/2018, Series I of 2018-08-09. https://dre.pt/web/guest/pesquisa/-/search/115946549/details/normal?q=Lei+44%2F2018.
472 Criminal Code, Chapter 4, Section 6c. Criminal Code 1962:700, as amended by 2018:409.
473 Act of 4 May 2020 to combat the non-consensual dissemination of images and recordings of a sexual nature, M.8, 18 May 2020, p. 35762. In force as of 1 July 2020. In 2016 Belgium adopted a specific law on indecent assault and voyeurism, introducing Article 371/1 to the Criminal Code.
474 Konarska-Wrzosek, V. (2018) 'Commentary to Article 191a of the Penal Code', WKP.
475 Law of 9 of August (*Lei no. 44/2018 de 9 de Agosto*).
476 Organic Law 1/2015, modifying Organic Law 10/1995 on the Criminal Code (*Ley Orgánica 1/2015, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*), 30 March 2015.
477 The definition of 'private', nonetheless, refers to the circumstances of obtaining the material, not its nature *per se*.

"sexual" shall include the depiction of all or part of a person's exposed genitals or pubic area, or, in the case of females, of the breasts, or of any content that, when taken as a whole, a reasonable person would consider to be sexual because of its nature.' **Italy** uses the wording 'sexually explicit content, intended to remain private.' **Ireland** and **Portugal** have introduced the adjective 'intimate'.[478] In **Sweden**, in addition to images of sexual content, it is prohibited to disseminate any images or other information that constitutes an attack on their person, liberty or peace; images of a person in a very vulnerable situation; or images of a person's wholly or partially naked body. **Spain** refers, through interpretation, in the instruction of the Public Prosecutor's office, to images that affect privacy but are also of sexual content.[479] **Poland** criminalises the recording and dissemination of images of a naked person or a person during sexual activity.

d) Intent to harm

With regard to the subjective element, from the analysis of the questionnaires, it appears that the countries that clearly included the intention to harm in the definition are the common law countries of **Ireland** and the **United Kingdom**, along with **Malta**. Section 2 of the **Irish** Harassment, Harmful Communications and Related Offences Act 2020 specifies that a person causes harm to another person when: '(a) he or she, by his or her acts, intentionally or recklessly seriously interferes with the other person's peace and privacy or causes alarm or distress to the other person, and (b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other person's peace and privacy or cause alarm or distress to the other person.' **Italy** has differentiated between making or stealing images that are then distributed without the consent of the pictured person – where no intent to harm is envisaged – and receiving or otherwise acquiring the image, the dissemination of which requires the intention to harm. **Dutch** legislation includes the knowledge of the (potential) harm caused by the disclosure of an image of sexual nature. **Belgian** law considers the 'malicious intent,' to determine an increase in the fine although not in any imprisonment, which is interesting because it emphasises the state of mind of the perpetrator, and the way in which he/she obtains or disseminate the images.

i) Non-specific criminalisation of the non-consensual dissemination and the use of other criminal law provisions

Table 23 Non-consensual dissemination of private images – non explicit criminalisation

State	Non-explicit criminalisation of the behaviour				
	Intrusion into private life/ breaches of privacy/use of personal data and/or identity	Upskirting	Sexual harassment through electronic communication	Insult and defamation	Others
Austria			X		
Bulgaria				X	
Croatia	X				
Cyprus					X
Czechia					X
Denmark	X				
Estonia	X				
Finland	X				

478 Portugal uses the expression 'intimate' in the general provision of the Criminal Code, but the new law of 2018 refers to images related to the privacy of a person.

479 Circular 3/2017, on the reform of the Criminal Code operated by LO 1/2015, in relation to the crimes of discovery and disclosure of secrets and the crimes of computer damage (*Circular 3/2017, sobre la reforma del Código Penal operada por la LO 1/2015, de 30 de marzo, en relación con los delitos de descubrimiento y revelación de secretos y los delitos de daños informáticos*), 21 September 2017, https://www.boe.es/buscar/doc.php?id=FIS-C-2017-00003.

State	Non-explicit criminalisation of the behaviour				
	Intrusion into private life/ breaches of privacy/use of personal data and/or identity	Upskirting	Sexual harassment through electronic communication	Insult and defamation	Others
Germany	X	X			
Greece	X				X
Hungary	X				
Iceland					X
Latvia	X				
Liechtenstein			X		
Lithuania	X				
Luxembourg	X			X	
Norway	X				
Romania	X				
Slovenia	X				

In the absence of a specific crime of the non-consensual dissemination of images of a sexual/intimate/private nature, it is worth checking which other criminal provisions have been applied to prosecute offences that fall under this category. The reports finds that the criminal provisions that are commonly applied refer to the interference in the private life of an individual, although a reference to the sexual or intimate nature of the images is commonly lacking. A particular case is **Germany**, which, beyond the provision on violation of intimate privacy in a photograph or other images without her consent (Section 201a(1) of the Criminal Code), has a specific provision on *'upskirting'* (Section 184k as amended on 9 October 2020): 'a custodial sentence not exceeding two years or a monetary penalty shall be imposed on anyone who 1. Intentionally or knowingly makes or transmits an unauthorised image recording of the genitals, the buttocks, the female breast or the underwear covering these parts of the body of another person, insofar as these areas are protected from view, 2. Uses or makes accessible to a third person a picture taken as a result of an offence under number 1, or 3. Knowingly makes an authorised image recording of the kind described in number 1 accessible to a third person without authorisation.'

With regard to general provisions of criminal law on the breach of privacy, in some cases the emphasis is on images regarding private life along with other communications related to the person, such as in **Denmark**,[480] **Finland**.[481] As the Finnish national expert has highlighted, this offence does not really tackle issues such as revenge porn or other typically gendered forms of online violence. In other cases, it concerns the illegal use of personal data, such as in **Croatia**.[482] **Cyprus** has a law (112(I)/2004) on telecommunication and postal services, which could be used in non-consensual dissemination of intimate/private images cases. Article 149(6) of the law provides that it is an offence to send via a telecommunication network an offensive, a grossly offensive and/or indecent, obscene and/or threatening message, or to knowingly send a false message via a telecommunications network with the purpose of causing disturbance, inconvenience or needless anxiety to another person. The criminal provisions on protection of personal data, extortion (Article 385, Criminal Code) and fraud (Article 386, Criminal Code) were mentioned by the **Greek** expert. Two recent judgments applied those provisions in cases of non-consensual dissemination of intimate/private/sexual images.[483] **Norway** can rely on provisions in both the Criminal Code and civil law. In the Criminal Code, for example, Article 266 applies to all forms of reckless conduct, does not require that the action is public and is not limited to messages or images. However, it is required that the perpetrator's intent includes that the offended person should be aware

480 Criminal Code, Article 264d.
481 Criminal Code, Chapter 24, Section 8.
482 Criminal Code, Article 146, along with unauthorised visual recording (Article 144, Criminal Code).
483 No. 505/2020, Supreme Penal Code, and Court of Appeal of Piraeus (civil court), judgment 12/2021. In the latter case, compensation of EUR 12 500 for moral damages was awarded to a woman victim of revenge porn.

of the violation. In civil law, the Copyright Act, Article 104, is relevant, stating 'the right to images.' In a case, the district court acknowledged that sharing other people's private and intimate photos constitutes a strong intrusion into a person's private life.[484]

Other general criminal law provisions – unrelated to privacy – were mentioned by the experts: for example, in **Czechia**, the crime that is commonly referred to is 'damage of another's rights' (Article 181, Criminal Code). In **Hungary**, sexual coercion (Article 196, Criminal Code) concerns the case in which the offender coerces the victim into sexual activity by threatening the victim of disclosing intimate images/recordings (Article 196, Criminal Code).

In **Iceland**, there is no explicit provision, and the only legal reference consists in the prohibition of pornography. Quite peculiarly, in **Liechtenstein** the offence is 'continued harassment via electronic communication or computer system' (Article 107c of the Criminal Code as amended in 2019): it refers to an offence committed in a long period of time by means of electronic communication or using a computer system, likely to unreasonably impair the conduct of a person and can consist in making facts or images of the highly personal area of life perceivable by a large number of people without the consent of the person.

e) Prosecution and sanctions

Penalties range from three months (minimum) to up to seven years (maximum). The average maximum is one to two years' imprisonment and/or a fine (in some cases the amount of any fine is clearly stated in the piece of legislation). It is relevant to note that in **Portugal**, which amended in 2018 the criminal provisions on infringement of privacy by adding the non-consensual dissemination of personal data, including images, the penalties traditionally envisaged for the infringement of privacy have been increased by one third in the minimum and maximum limits.

Aggravating circumstances can increase the sentence. **Italy** introduced among the aggravating circumstances the fact that the crime has been committed through ICT, which seems unnecessary – as the national expert has highlighted – and distorts the nature of the offence, given that in practice it is committed using this kind of technology. **Dutch** legislation contemplates as an aggravating circumstance the fact that the victim suffers severe physical injury or there is a danger to his/her life, and a higher one in case of death of the victim, as a consequence of the non-consensual dissemination. The intimate relation between the victim and the perpetrator can be also considered among the aggravating circumstances, as is the case where the offence is committed against a minor.

A new article in the **Belgian** Judicial Code (Article 584, 7°, amended in 2020) provides that the President of the court can order to 'use all appropriate means to immediately remove [images] or make them inaccessible by the broadcaster or any intermediary service provider' within six hours of the order at the latest. The provision further states that the absolute necessity for such action is presumed and that the dissemination is non-consensual 'until proven otherwise'. The provision requires the alleged perpetrator to demonstrate that the victim did not object to the dissemination of the images (reversal of the burden of proof). Given the very recent adoption of the provision, no case has been decided yet, although one is reported as being under investigation.

In terms of prosecution, *ex officio* or a combination of *ex parte* and *ex officio* has been introduced in countries that have specifically criminalised the behaviour. In **Italy**, for example, *ex officio* prosecution is envisaged where the crime has been committed against a person in a condition of physical and mental inferiority or to the detriment of a pregnant woman or is linked to another crime prosecuted *ex officio*, and the withdrawal of the complaint can only occur during a proceeding. Prosecution is *ex officio* in **Spain**

484 Vestfold District Court, Judgment of 2020-03-03, TVEFO-2019-169430.

when the victim is underage, a person with disability, or in need of special protection. **Belgium**[485] and **France** kept the *ex parte* prosecution, which is common for crimes related to the violation of privacy.

Table 24 Factors aggravating non-consensual dissemination of images

Aggravating factors for non-consensual dissemination of private images	States
Victim is a former or current spouse or partner	Austria, France, Italy, Liechtenstein, Norway, Spain
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria, Estonia, Italy, Liechtenstein, Norway, Portugal, Spain, United Kingdom
The offence, or related offences, were committed repeatedly	Denmark, Liechtenstein, Lithuania, Netherlands, Norway, United Kingdom
Victim was made vulnerable by particular circumstances;	Austria, Denmark, France, Italy, Liechtenstein, Lithuania, Netherlands, Norway, Portugal, Spain, United Kingdom
Child victim or witness;	Austria, Belgium, Croatia, Denmark, Estonia, France, Iceland, Italy, Liechtenstein, Lithuania, Netherlands, Norway, Spain, United Kingdom
Multiple perpetrators;	Denmark, Iceland, Liechtenstein, Lithuania, Netherlands, Norway, United Kingdom
Extreme levels of violence;	Austria, Denmark, Italy, Liechtenstein, Netherlands, Norway, Spain
Use or threat of a weapon;	Austria, Denmark, Liechtenstein, Norway, United Kingdom
Severe physical or psychological harm for the victim;	Austria, Denmark, Italy, Liechtenstein, Lithuania, Norway, United Kingdom
Previous conviction for similar offences;	Denmark, Liechtenstein, Norway, Portugal, Spain
Offence has been committed online;	France, Italy, Poland, Spain
Offence committed on the grounds of the victim's gender	France, Lithuania, Malta, Norway, Spain

With regard to protocols and guidelines, **France** has specific guidelines on sexist cybercrimes (also on sexist cyber insults), the **Netherlands** has produced guidelines for criminal prosecution of abuse of sexual images, and the **Spanish** General Public Prosecutor's Office has issued an instruction regarding the prosecution of offences under the amended Article 197 of the Criminal Code,[486] following the jurisprudence of the Supreme Court. **Denmark** produced guidelines on digital sex violations, encompassing a violation of Article 264d Criminal Code.[487] The guidelines explain that a victim filing a report of a violation of Article 264d must be interpreted as a request to initiate public prosecution unless otherwise stipulated in the report by the victim. **Estonia**, although lacking specific legislation on the non-consensual dissemination of intimate/private/sexual images, has tackled online violence through preventive measures and the appointment of web-constables, who are police officers working in the internet. On the absence of

485 In Belgium, the decision to prosecute criminally lies in principle with the Public Prosecutor's Office (indeed, there are cases where the victim can cite directly before the Criminal Judge – Article 64(2) of the Criminal Investigation Code). Nevertheless, the criminal offence must be brought to his or her attention (e.g. a complaint, a report of a risk of forced marriage, etc.). The victim, or any party who feels aggrieved by a crime or misdemeanour, may bring a civil action. In this case, an examining magistrate must investigate the case. Once the investigation is completed, the Chamber of Counsel decides on the follow-up to be given to the case. It may remand the accused for trial, order the case to be dismissed when it considers that there are insufficient charges or prescribe additional duties for the investigating judge. The civil party may appeal against this decision.

486 Circular 3/2017, on the reform of the Criminal Code operated by LO 1/2015, in relation to the crimes of discovery and disclosure of secrets and the crimes of computer damage (*Circular 3/2017, sobre la reforma del Código Penal operada por la LO 1/2015, de 30 de marzo, en relación con los delitos de descubrimiento y revelación de secretos y los delitos de daños informáticos*), 21 September 2017, https://www.boe.es/buscar/doc.php?id=FIS-C-2017-00003.

487 Rigsadvokatmeddelelsen 'Digitale sexkrænkelser' issued on the 1 of July 2020 is available here in Danish: https://vidensbasen.anklagemyndigheden.dk/h/6dfa19d8-18cc-47d6-b4c4-3bd07bc15ec0/VB/870f993d-5cd4-4043-9d1d-30f4200d3132?showExact=true#37bb3a605b.

protocols, the **Italian** national expert stressed how the law on non-consensual dissemination of images of sexual nature has been approved in the 'dark' without any procedural and extra-criminal support measures and detailed consideration of aggravating circumstances and completely lacking prevention policies.

f) Emerging trends

There is an increasing trend towards criminalisation. On the one hand, criminalisation pushes the problem, which sometimes goes unnoticed by the media or the public, to the fore and allows the victims to have a legal provision on which to rely to punish the perpetrators. In **Croatia**, for example, sharing someone's sick leave report contrary to the data protection rules, and non-consensual dissemination of sexual images fall under the same category, even though there are clearly specific concerns and a gender-violence dimension in relation to the latter. On the other hand, the report takes due account of the concerns expressed by some national experts, according to which criminalisation alone cannot adequately address the behaviour. With regard to the new trends towards criminalisation, the national expert for **Iceland** noted that a 2020 Government steering committee report suggested the adoption of a new provision protecting sexual privacy in response to the frequent violations that occur in the digital world. In **Norway**, the Ministry of Justice and Public Security submitted proposals for penalties to deal with the non-consensual sharing of private images.[488] The Parliament asked the Government to prepare a law explicitly criminalising the dissemination or publication of images having a revealing, degrading or offensive character, and which explicitly prohibits revenge porn.[489] A further development is awaited in **Romania**. Pending legislation moves in the direction of prohibiting the dissemination of intimate private images, by adding two paragraphs to Article 226 of the Criminal Code. The legislative proposal aims to prohibit disclosing, disseminating, presenting or transmitting in any way an intimate image of a person identified or identifiable by the information provided, without the consent of the person depicted, likely to cause him mental suffering or harm his image. The bill is also proposing a definition of the notion of 'intimate image,' understood as any reproduction, regardless of the medium, of the image of a naked person who totally or partially exposes her genitals, anus or pubic area or (in the case of women) breasts, or who is involved in sexual intercourse or sexual act. A proposed amendment to the bill adopted by the Legal Committee and the Committee for Equal Opportunities of the Chamber of Representatives replaces the word 'reproduction' in the definition of intimate image with 'recording' of the physical appearance of a person. On 16 February 2021, the bill was adopted and referred to a vote in the Chamber of Deputies. In **Slovakia**, the introduction of the crime of 'serious harassment' (Article 360 b) is under discussion in the Parliament. It will include the offence committed by any person who 'intentionally significantly degrades quality of life of another person via an electronic communication service, a computer system or a computer network' by 'unauthorisedly publishing or making available to another person a video, audio or video-audio recording of his/her expression of a personal nature obtained with his/her consent, capable of endangering his/her seriousness or causing him/her other serious harm.'

Civil society has also expressed increasing concern about the phenomenon. In **Greece**, for example, in December 2020, a movement was formed to stop a specific web page, named 'chatpic.org', from publishing photos of naked women, often underage, without their consent, in some cases with reference to their names, social media profiles or addresses. On this occasion, hundreds of citizens sent posts with the hashtag #cancelchatpicorg and made complaints to the relevant Department of the Greek Police. More than 30 000 people signed a petition organised by the website Change.org.[490] The issue was

488 See the proposal from The Ministry of Justice and Public Security; https://www.regjeringen.no/contentassets/31f4d50fa83942cc83f6aab8642ff0a6/horingsnotat---endringer-i-straffeloven-mv---nytt-straffebud-om-deling-av-bilder.pdf (only in Norwegian).

489 Parliament request decision of 8 March 2018 (Decision 532 (2017-2018)).

490 https://www.change.org/p/investigation-deletion-ban-of-chatpic-org/u/28332524.

given wide publicity in the media.[491] When the Department of Electronic Fraud of the Greek Police took over, the managers of the site in question, based in the USA, removed the web page. However, some months later the site was restored. Recently, a female victim has brought the first criminal proceedings against the platform. Her lawyer criticised the fact that the relevant police authorities refused to trace the perpetrator unless criminal legal proceedings were instigated.[492] In December 2020, a question for written answer was submitted by MEP Maria Spyraki to the Commission on the issue.[493]

8.3 Main findings

√ Eleven states (**Belgium**, **France**, **Ireland**, **Italy**, **Malta**, **Netherlands**, **Poland**, **Portugal**, **Spain**, **Sweden**, **United Kingdom**) have specifically criminalised the non-consensual dissemination/ publication/disclosure of intimate/private/sexual images. It is not expressly stated in all criminal provisions that the images can be obtained with or without the consent of the victims. Some national definitions include the element of intent to harm in the dissemination. However, it is possible to argue that the crime is inherently harmful, irrespective of whether there was such intention on the part of the perpetrator. Criminalisation of non-consensual dissemination of intimate/private/sexual images has increased in recent years in the states under analysis. In two states (**Greece**, **Romania**) where non-specific criminalisation exists, case law has clearly addressed the non-consensual dissemination/ publication of intimate/ private/sexual images by using the legislation in force. Reforms are ongoing in **Iceland**, **Norway**, **Romania** and **Slovakia** to explicitly address the behaviour.

√ The crime is quite 'new,' hence its application in courts has yet to be fully appreciated. Furthermore, in line with developments in technology, the acts that this crime covers also develop quickly. Civil law measures can also be applied, including the removal of non-consensual dissemination of images or recordings by order of a court, as proposed in Belgium. There has been no practical application of this provision yet, but it has potential: a court can order the immediate removal of images or that they should be made inaccessible by the broadcaster or any intermediary service provider within a specific time frame.

√ Compared to crimes related to the infringement of a person's privacy, the prosecution of the non-consensual dissemination/publication/disclosure of intimate/private/sexual images has been reported to be mainly *ex officio.*

8.4 Recommendations

Based on the findings of the report, the impact of the non-consensual dissemination of private images on the lives and human rights of women, and the difficulties they face in remedying the situation, the authors consider it essential to:

491 https://www.protothema.gr/greece/article/1071307/cancelchatpicorg-thuella-sto-twitter-me-site-pou-dimosieuei-fotografies-gunaikon-horis-sugatathesi/; https://www.news247.gr/koinonia/revenge-porn-stin-ellada-ena-sait-epese-o-efialtis-paramenei.9070592.html; https://mykonosticker.com/en/revenge-porn-skaei-i-vomva-ton-sexoualikon-ekviasmon-stin-ellada-pos-to-revenge-porn-kai-to-bullying-anilikon-saronoun-sto-diadiktyo/; https://www.athensvoice.gr/greece/698753_ekdikitiki-pornografia-ena-fainomeno-me-ayxitikes-taseis; https://www.greeceit.gr/niki-ton-politon-katevike-to-site-me-to-revenge-porn/; https://www.flash.gr/greece/1731439/cancelchatpicorg-orgi-gia-to-site-ekdikitikis-pornografias-diakinoyn-yliko-akomi-kai-ton-egkyon-syzigon-toys.

492 https://www.efsyn.gr/ellada/koinonia/294051_anexelegkti-kai-atimoriti-i-diadiktyaki-sexoyaliki-kakopoiisi; https://www.koutipandoras.gr/article/chatpicorg-kataggelies-thymaton-gia-tin-epistrofi-toy-skoteinoy-site-ekdikitikis.

493 Question No E-006622/2020, available at: https://www.europarl.europa.eu/doceo/document/E-9-2020-006622_EN.html referred that: 'Numerous complaints have been registered over the last few days regarding chatpic.org, an anonymous chat site that illegally shares pornographic material and photographs of women and girls illegally acquired without their knowledge. In many cases, the perpetrators also release personal details (such as their names, addresses, social media user names, schools attended), thereby even endangering the life and physical safety of victims. Access to the website is unrestricted and free of charge for all users, regardless of age. Furthermore the material is classified by place of residence of the victims, indicating neighbourhoods in Greek and other European cities (e.g. Evosmos in Thessaloniki)'.

- √ Criminalise the non-consensual dissemination of intimate/sexual images, stressing the impact of the use of ICT, which has exacerbated the phenomenon. This outcome might also be achieved by amending provisions prohibiting the infringement of privacy.
- √ Consider that the original consent to the taking/obtaining of the image should not be relevant in the determination of the offence.
- √ Take into account that the intention to harm should not be considered as an element of the offence, because the behaviour can be argued to be inherently harmful.
- √ Broaden the scope of non-consensual dissemination of intimate/sexual images in order to include the dissemination of deepfake images.
- √ Ensure that criminalisation does not preclude remedies in civil law, such as compensation or removal of the contested image by order of the court.
- √ In terms of jurisdiction, consider that any state in which the image is made available through the internet or ICT should retain jurisdiction, even if the act has been committed abroad.
- √ Adopt preventive and protective measures to address the phenomenon, including restorative justice mechanisms. For example, centres for victims of violence should take care of victims of the non-consensual dissemination of intimate/private/sexual images, and protocols should be adopted in order for the authorities to be capable of addressing the phenomenon. Tackling the issue early on, for instance, by incorporating information in school curricula is recommended.
- √ Consider the creation of a body such as a commissioner or an observatory that deals with violations committed on the internet, and is connected to equality bodies.

9 Hate Speech on the basis of gender/sex ('sexist hate speech')

The purpose of this chapter is to assess whether hate speech on the basis of gender/sex has been addressed in domestic legislation, and to reflect on the criminalisation of hate speech (or, in the best case, incitement to hatred or violence) on such a basis. The first part of the chapter introduces the main normative framework addressing hate speech in general and the tensions that emerge in relation to other human rights, discusses the scope of the various definitions used and explains the different possible responses (criminal and non-criminal) to each case. It then focuses on hate speech on the basis of gender/sex in particular. In order to provide a complete picture of how hate speech on the basis of sex/gender is addressed at national level in a way that appreciates the complexity of the concept of 'gender', it also includes the grounds of sexual orientation/gender identity/sex reassignment in the analysis. Finally, the chapter outlines the elements that are taken into account in the examination of the domestic jurisdictions. The second part of the chapter presents the results from the national questionnaires, outlining the current state of the regulation on hate speech based on gender/sex in the jurisdictions covered by the study. The chapter concludes with a summary of main findings and recommendations.

9.1 Introduction and main concepts

The prohibition of hate speech in international human rights law, the Council of Europe and the EU legal systems

Freedom of expression constitutes one of the essential foundations of a democratic society and its progress, as well as being a basic condition of personal development.[494] That said, freedom of speech can also be used to incite violence, spread hatred and violate individual privacy and safety. From a human rights law perspective, the limitation of hateful speech requires a balance between the protection of freedom of expression and the obligation to prevent attacks on vulnerable communities. Finding that balance has proved challenging for states, and the situation has gained greater complexity with the use of the internet.

According to human rights law, freedom of speech can be limited if the conditions of legality, legitimacy, necessity and proportionality are met. In particular circumstances, human rights law actually calls for the prohibition of hate speech. Article 20 of the International Covenant on Civil and Political Rights (ICCPR)[495] requires states to prohibit by law hate speech that amounts to war propaganda or that advocates national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Article 4 of the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD) calls on states to

> 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including their financing.'[496]

In 2013, the Committee on the Elimination of Racial Discrimination (CERD) explained that the Convention requires the prohibition of insults, ridicule or slander of persons or groups or justification of hatred,

494 European Court of Human Rights, *Handyside v The United Kingdom*, Application No. 5493/72, 4 November 1976, available at: https://www.refworld.org/cases,ECHR,3ae6b6fb8.html.

495 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html.

496 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: https://www.refworld.org/docid/3ae6b3940.html, Article 4(a).

contempt or discrimination if these amount *to incitement to hatred or discrimination*.[497] Thus, it established a threshold constraining such prohibitions to the most serious category of hate speech.

At the Council of Europe level, the European Court of Human Rights (ECtHR) has adopted two approaches when dealing with cases concerning incitement to hatred and freedom of expression. First, the limitation of hate speech is possible if the legality, legitimacy and necessity test of Article 10 is met, and secondly, hate speech negating the fundamental values of the European Convention of Human Rights (ECHR) is prohibited since it constitutes abuse of rights under Article 17 ECHR. Speech that entails holocaust denial, or antisemitism more generally, or that amounts to Islamophobia – all current concerns in Europe given their widespread expression – may not constitute protected speech, and thus, restrictions can be imposed without interfering with freedom of expression.[498] Hate speech against sexual minorities has also become a pressing issue in Europe.[499] In this regard, and specifically in relation to expressions that amount to homophobic hate speech, the ECtHR seems to follow the view that such expression falls outside the scope of protection of Article 10, and can therefore be limited.[500]

In 2008, prior to the entry into force of the Lisbon treaty, the EU adopted a Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law,[501] noting the different approaches adopted by the Member States and recognising the need for harmonisation of their laws and regulations in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons.[502] As the title indicates, this Framework Decision addresses some phenomena falling under hate speech.[503] Besides the adoption of criminal sanctions, the Framework Decision highlights that combating racism and xenophobia requires various kinds of measures in a comprehensive framework.[504] The Framework Decision defines punishable conduct in Article 1, which basically consists of two types of behaviour: publicly inciting to violence or hatred against a group or a person based on their race, colour, religion, descent or national or ethnic origin, and condoning, denying or trivialising international crimes against such groups or persons. It also explicitly includes incitement to violence or hatred carried out by the public dissemination or distribution of tracts, pictures or other material. Member States may choose to punish only conduct that is either carried out in a manner likely to disturb public order or that is threatening, abusive or insulting, thus adding an additional element to the crimes.

The Code of conduct on countering illegal hate speech online, adopted on 31 May 2016 is an additional EU soft law measures which addresses the need for online intermediaries to take action against hate speech posted by users on their services. The Code of conduct guides ICT companies in taking action against 'illegal hate speech' – according to relevant national laws transposing Council Framework Decision 2008/913/JHA – and to facilitate the elimination of flagged harmful comments from their

497 Committee on the Elimination of Racial Discrimination, General recommendation No. 35 (2013) on combating racist hate speech, para 13.

498 On Holocaust denial see: *Faurisson v France,* CCPR/C/58/D/550/1993I (8 November 1996); *Garaudy v France* (decision), No. 65831/01, Reports 2003-IX, *Honsik v Austria*, No. 25062/94, decision of 18 October 1995, D; *Marais v France*, No. 31159/96, decision of 24 June 1996, DR86. On antisemitism, see *Jewish Community of Oslo and irs v Norway*, UN Doc CERD/C/67/D/30/2003; On Islamophobia, see: *Norwood v the United Kingdom*, No. 23131/03, 16 November 2004, Reports 2004-XI.

499 According to the last FRA report on the situation of LGBTI rights in Europe, 38 % of the respondents experienced one or more forms of harassment because they are LGBTI. In 14 % of the cases, harassment took place online, including on social media. These results were particularly worrying regarding youth. See: FRA (2020) *A long way to go for LGBTI equality*, p. 42. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf.

500 See: *Vejdeland and Others v Sweden*, Application no. 1813/07, 9 February 2012; *Beizaras and Levickas v Lithuania*; *Lilliendahl v Iceland*; *Mladina D.D. Ljubljana v Slovenia*, Application no. 20981/10, 17 April 2014.

501 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, OJ L 328, 6.12.2008, pp. 55-58.

502 Council Framework Decision 2008/913/JHA, preamble, Recital 5.

503 On the process of regulation of hate speech at EU level, see: Alkiviadou, N. (2017) 'Regulating Hate Speech in the EU,' in Assimakopoulos, S., Baider, F. H. and Millar, S. (eds) *Online hate speech in the European Union: a discourse-analytic perspective*, Springer.

504 Council Framework Decision 2008/913/JHA, preamble, at 6.

platforms.[505] The European Commission has highlighted the complementarity of this instrument with the effective enforcement of existing legislation.

Hate speech based on gender/sex

Hate speech based on gender/sex is not specifically addressed in any EU instrument. As noted above, the Framework Decision calls for the criminalisation of some forms of hate speech on the basis of race, ethnicity, colour, religion, national origin or descent, at national level.[506]

Hate speech based on sex/gender has been addressed to some extent by the Council of Europe. In the definition of hate speech provided by the European Commission Against Racism and Intolerance (ECRI)[507] there is an acknowledgement of the disproportionate and intersectional impact on women:

> 'Conscious of the particular problem and gravity of hate speech targeting women both on account of their sex, gender and/or gender identity and when this is coupled with one or more of their other characteristics.'[508]

The Council of Europe Gender Equality Strategy has defined sexist hate speech as the '*expressions which spread, incite, promote or justify hatred based on sex*', recognising that it both reproduces and exacerbates gender inequality.[509] Moreover, the Recommendation of the Council of Europe for preventing and combating sexism of 2019 notes that 'women and girls can be subject to multiple and intersecting forms of discrimination.' The Recommendation emphasises that sexist hate speech 'may escalate to or incite overtly offensive and threatening acts, including sexual abuse or violence, rape or potentially lethal action.'[510] It adopts a combined approach, recommending criminal and non-criminal measures by encouraging Member States to adopt measures that will 'induce behavioural and cultural change at individual, institutional and structural levels,' while also inviting states to define and criminalise hate speech. In terms of criminalisation, it encourages states to ensure that the same rules apply to sexist hate speech as those developed for racist hate speech. That said, the specific behaviours that constitute sexist hate speech are not sufficiently defined in the Recommendation.

The digital dimension

Undoubtedly, digital technologies have transformed individuals' lives and ways of interacting with each other, making the internet one of the main channels through which people express themselves

505 Code of conduct on countering illegal hate speech online, 30 June 2016, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

506 See the Additional Protocol to the Cybercrime Convention, adopted in 2003, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Under the Protocol, 'racist and xenophobic material' means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.' See also 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.

507 ECRI General Policy Recommendation No. 15 on Combating Hate Speech, 8 December 2015, p. 16: 'Hate speech for the purpose of the Recommendation entails the use of one or more particular forms of expression – namely, the advocacy, promotion or incitement of the denigration, hatred or vilification of a person or group of persons, as well any harassment, insult, negative stereotyping, stigmatization or threat of such person or persons and any justification of all these forms of expression – that is based on a non-exhaustive list of personal characteristics or status that includes "race", colour, language, religion or belief, nationality or national or ethnic origin, as well as descent, age, disability, sex, gender, gender identity and sexual orientation.' https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01.

508 ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015.

509 Council of Europe Gender Equality Strategy, 'Combating sexist hate speech' (2016).

510 Recommendation CM/Rec(2019)1 adopted by the Committee of Ministers of the Council of Europe 27 March 2019.

today. Studies show the positive impact of access to digital technologies for women,[511] and the United Nations has recognised that digital technologies have the potential to 'advance gender equality and the empowerment of all women and girls'.[512] As Soraya Chemaly points out:

> 'This "virtual" world opens doors to information, education, markets, jobs and communities that, in the past, would have been completely inaccessible to most people, particularly girls and women. Social media, information and communication technologies are vital tools for women. Being able to tap into the web gives women unparalleled opportunities to express themselves and engage in civic and public life.'[513]

Indeed, online media and social platforms have opened the possibilities to express personal opinions, but also to convey hateful messages and expressions. Insults, defamation, threats and hate speech are now facilitated by the internet. (Online) hate speech against women and other sexual minorities has emerged as new form of gender based violence against women.[514] Hate speech is often directed against public figures, which, according to the EU Fundamental Rights Agency, affects women, people of colour and members of the LGBTI community disproportionately, all of whom are attacked for their personal characteristics (gender, ethnicity, sexual orientation), while abuse directed at men from the dominant group is more often based on their opinions or status in society. Other studies show that women face a backlash when exercising freedom of expression, including women politicians,[515] journalists and bloggers.[516] These attacks result in some women pulling out from public life or engaging in self-censorship. Yet hate speech is also directed against 'private' persons. According to the European Institute for Gender Equality (EIGE): 'Women who have ideas that are considered radical, women challenging traditional gender roles, journalists and otherwise politically outspoken women face gendered threats and violence through Twitter and other social online forums. Being present in online spaces alone often means being present in a hostile, sexist environment.'[517] Countering hate speech based on sex/gender that takes place online or through digital technologies can enable women to fully participate in political, economic and public life.

The report analyses the following elements on the basis of the national questionnaires: the number of countries that have criminalised hate speech on the grounds of sex, gender, sexual orientation, gender identity or sex reassignment. It also explores whether there is a common pattern in the identification of the elements of the crime, sanctions and types of prosecution. The report will also highlight other measures that have been adopted to respond to the crime (such as protocols and preventive measures), and which general offences have been applied in countries that have not criminalised the behaviour.

511 See: Buskens, I. (2014), 'ICT and Gender', in Mansell R. and Ang P. H. (eds), *The International Encyclopedia of Digital Communication and Society*, Oxford, Wiley Blackwell; Huyer, S., Hafkin, N. Ertl, H. and Dryburgh, H. (2005) 'Women in the information society', in Sciadas, G. (ed.), *From the Digital Divide to Digital Opportunities: Measuring Infostates for Development*, Québec: Claude-Yves Charron, pp. 135–96; Bonder, G. (2011) *Why is it Important that Women Fully Participate in the Construction of the Information/ Knowledge Society?* Buenos Aires: FLASCO. This has gained particular attention in the field of ICT for Development ('ICT4D'), see: Buskens, I. (2014), 'ICT and Gender'. It has also been highlighted at UN level, see: United Nations (2005) 'Gender equality and empowerment of women through ICT', in *Women2000 and Beyond*, September 2005, www.un.org/womenwatch/daw/public/w2000-09.05-ict-e.pdf.

512 Resolution adopted by the Human Rights Council on 11 July 2019 'New and emerging digital technologies and human rights', A/HRC/RES/41/11, available at: https://undocs.org/A/HRC/RES/41/11.

513 Ging, D. and Siapera, E. (eds) (2019) *Gender Hate Online*. Cham: Springer International Publishing. Doi: 10.1007/978-3-319-96226-9; Foreword.

514 For detailed discussions of the phenomenon see: Ging, D. and Siapera, E. (eds) (2019) *Gender Hate Online*; Citron, D. K. (2014) *Hate Crimes in Cyberspace*. Harvard University Press; Nussbaum, M. C. (2011) 'Objectification and Internet Misogyny', in *The Offensive Internet: Speech, privacy and reputation*, Harvard University Press, pp. 68-88.

515 European Institute for Gender Equality (EIGE) (2017), 'Cyber violence against women and girls', available at: https://eige.europa.eu/publications/cyber-violence-against-women-and-girls; Council of Europe Gender Equality Strategy (2016) 'Combating sexist hate speech', available at: https://edoc.coe.int/en/gender-equality/6995-combating-sexist-hate-speech.html; Inter-Parlamentarian Union (2016) 'Sexism, harassment and violence against women parliamentarians', available at: http://archive.ipu.org/pdf/publications/issuesbrief-e.pdf.

516 See: FRA (2016), *Violence, threats and pressures against journalists and other media actors in the European Union*, available at: https://fra.europa.eu/en/publication/2016/violence-threats-and-pressures-against-journalists-and-other-media-actors-european.

517 EIGE (2017), 'Cyber violence against women and girls', p. 9.

9.2 Results from the country questionnaires

a) Areas of law addressing the issue

i) Specific criminalisation of hate speech on the basis of gender/sex

Only 14 states have explicitly recognised sex or gender as a ground for hate speech, while an increasing number of countries include sexual orientation and/or gender identity and/or sex reassignment among the prohibited grounds. The authors of this study considered the express criminalisation of hate speech based on gender, and/or sex, and/or sexual orientation, and/or gender identity or expressions, and/or sex reassignment, only, leaving out countries where the criminalisation of hate speech based on gender, and/or sex, and/or sexual orientation, and/or gender identity or expressions, and/or sex reassignment is completely absent, or it might derive from the application of (or the combination of) other criminal provisions, or it might stem from the interpretation of the provision on hate speech on the basis of a very general ground (see Table 25, third column).

Table 25 Hate speech – grounds

State	Gender and / or sex	Sexual orientation/gender identity or expression/sex reassignment	No express criminalisation of hate speech on the basis of the previous grounds
Austria	X	X	
Belgium	X	X	
Bulgaria			X
Croatia	X	X	
Cyprus		X	
Czechia			X
Denmark		X	
Estonia	X	X	
Finland		X	
France	X	X	
Germany			X*
Greece		X	
Hungary		X	
Iceland			X
Ireland		X	
Italy			X*
Latvia	X		
Liechtenstein	X	X	
Lithuania	X	X	
Luxembourg	X	X	
Malta	X	X	
Netherlands	X	X	
Norway		X	
Poland			X
Portugal	X	X	
Romania			X
Slovakia		X	
Slovenia	X	X	

State	Gender and / or sex	Sexual orientation/gender identity or expression/sex reassignment	No express criminalisation of hate speech on the basis of the previous grounds
Spain	X	X	
Sweden		X	
United Kingdom		X	

*see below on the current debate in Italy, and the interpretation in court of a very general ground in Germany

We find two main approaches among the states that have incorporated sex or gender in their criminal prohibitions: explicit incorporation in the enumeration of the grounds included in the definition of the offence; incorporation of sex/gender under the broader notion of 'other group' or similar, through case law or other policy documents.

Among the first group, the **Croatian** prohibition of hate speech (Article 325 of the Criminal Code) is very comprehensive: it covers 'gender, sexual orientation, gender identity, disability or any other characteristics' among the grounds of discrimination, and all possible ways of communication, including through a computer system or network. The **Portuguese** Criminal Code has punished discrimination and incitement to hate and violence, including on the basis of gender/sex since 2017, in addition to a long list of grounds of discrimination, including sexual orientation, and gender identity. In **Spain**, following the reform of 2015, Article 510 of the Criminal Code[518] includes among the grounds of hatred, sex, sexual orientation or identity, and 'for reasons of gender'. A new amendment to the Criminal Code was recently adopted in the **Netherlands**, where incitement to hatred or discrimination against people is criminalised when it is perpetrated also because of their their gender, their heterosexual or homosexual orientation or their physical, psychological or mental disability, and is committed publicly, orally or by writing or image (Article 137d).[519] In 2017, **Greece** expanded the grounds of hate speech to include gender identity, sexual orientation and gender characteristics.[520] **Luxembourg** criminalises in Article 457-1 of the Criminal Code 'anyone who, either by speeches, shouts or threats uttered in public places or meetings, or by writing, prints, drawings, engravings, paintings, emblems, images or any other written, spoken or image medium sold or distributed, offered for sale or displayed in public places or meetings, either by placards or posters exposed to the public, or by any means of audiovisual communication, incites to discrimination, hatred or violence against a person, natural or legal, a group or a community based on, one of the elements referred to in Article 454.' According to Article 454 of the Criminal Code 'Discrimination constitutes any distinction between natural persons due to their origin, skin colour, gender, sexual orientation, gender change, gender identity, family situation, age, health status, disability, customs, political or philosophical opinions, trade union activities, belonging or lack thereof (true or supposed) to an ethnicity, nation, race, or specific religion. […]' **Liechtenstein** amended its Criminal Code in 2019 by adding a provision (Article 283) providing for the punishment of someone who 'on the grounds of sex and gender incites publicly hate or discrimination against a person or a group of persons, or who publicly disseminates ideologies aiming at the systematic depreciation and defamation of persons on the grounds of sex and gender. All these actions are also penalised if they are committed on the grounds of race, disability, language, nationality, ethnicity, religion or conviction, age or sexual orientation.' It is interesting to note that this is the only provision examined in this report on hate speech that starts with discrimination on the grounds of sex and gender, and then extends to the other grounds of discrimination ('also penalised'). Article 170(2) of the Criminal Code in **Lithuania** states: '2. A person who publicly ridicules, expresses contempt for, urges hatred of or incites discrimination against a group of persons or a person belonging thereto on grounds of age, sex, sexual orientation, disability, race, nationality, language, descent, social status, religion, convictions or views shall be punished by a fine or by restriction of liberty or by arrest or by a custodial sentence for a term of up to two years'. In **Belgium**, Article 27 of the Sex Discrimination

518 https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444#a510.
519 https://wetten.overheid.nl/jci1.3:c:BWBR0001854&boek=Tweede&titeldeel=V&artikel=137d&z=2020-07-25&g=2020-07-25.
520 Article 1(1) Act 927/1979, OJ A 139/28.6.1979, as amended by: 1) Article 1 Act 4285/2014 (OJ A 191/10.9.2014) in line with 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 and 2) Article 7(2) Act 4491/2017, OJ A 152/13.10.2017.

Act[521] criminalises incitement to discrimination on the basis of sex (1), incitement to hatred or violence on the basis of sex (2), incitement to discrimination or segregation towards a group, a community or their members on the basis of sex (3), and incitement to hatred or violence towards a group, a community or their members on the basis of sex (4).

The 'indirect' incorporation of sex/gender is found in **Germany**: while Article 130 of the Criminal Code punishes incitement to hatred against national, religious, ethnic or racial groups, and 'other segment of the population,' recent case law has included women under the latter category.[522]

The majority of the countries analysed have not included a reference to the online dimension in their criminalisation of hate speech. The provision in **Greece** mentions 'internet' or 'any other way or by any other means,'[523] the provision in **Croatia** refers to 'computer system or network',[524] and the one in **Liechtenstein** refers to 'ICT'.[525] Section 150(2) of the **Latvian** Criminal Code refers to the crime committed 'using an automated data processing system' as aggravating circumstance. An aggravating circumstance in **Spain** is that the crime has been committed through the internet or ICT (Article 510(3) Criminal Code). The national expert of **Luxembourg** reported that the concept of 'public spaces' (Article 454 and 457-1 of the Criminal Code) was interpreted in case law as including social media. Similarly, in the **Netherlands**, case law has confirmed that the crime can happen online as well as offline.[526]

Other legislation uses 'any kind of support,' 'broadcast,' or information or 'computer systems', which might be extensively open to other forms of communication beyond the traditional means. In **Germany**, the Network Enforcement Act – regarding telemedia service providers – explicitly addresses online hate speech.

ii) Non-specific criminalisation of hate speech based on sex/gender

In **Iceland**, the relevant chapter of the Criminal Code is the one devoted to defamation and violation of private life, as amended by Law No. 13/2014, Article 233a: 'Anyone who publicly mocks, defames, denigrates or threatens a person or group of persons by comments or expressions of another nature, for example by means of pictures or symbols, for their nationality, colour, race, religion, sexual orientation or gender identity, or disseminates such materials, shall be fined or imprisoned for up to 2 years'. An amendment was proposed in February 2019, to add that the conduct must be likely to provoke or incite hatred, violence or discrimination. However, this amendment has never been adopted, which is why this report has included Iceland among the countries that do not provide for a specific criminalisation of incitement to hatred or violence. That said, Article 233a offers protection to women and other sexual minorities from what are considered to be milder forms of hate speech, which are not criminalised in most states. Moreover, Article 27 of the Media Act No. 38/2011 contains a provision prohibiting hate propaganda and incitement to punishable acts: 'Media service providers may not incite people to criminal behaviour. They shall be forbidden to encourage hatred in the media on grounds of race, gender, sexual orientation, religious belief, nationality, opinion or cultural, economic, social or other standing in society.' It can be argued that even in the absence of the traditional 'incitement to hatred, violence and

521 Sex Discrimination Act, Act of 10 May 2007 aimed at combating discrimination between women and men, Article 2,7 available at: https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2007051036&table_name=loi.
522 See: Cologne's OLG Higher Regional Court May 2020.
523 Article 1(1) Act 927/1979 (OJ A 139/28.6.1979 as amended in 2014 in line with the Council Framework Decision 2008/913/JHA and in 2017.
524 Article 325, Criminal Code.
525 Article 283(2), StGB.
526 The Hague Appeal Court, 1 December 2020: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2020:2246; Rotterdam District Court, 9 July 2018: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2018:5472; Supreme Court, 26 June 2012, NJ 2012/415: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2012:BW9189.

discrimination', milder forms of (sexist) hate speech are included. In fact, the proposed amendment would raise the threshold of criminalisation.

In **Cyprus**, Article 99 of the Criminal Code criminalises incitement of violence or hatred on the basis of sexual orientation or gender identity. A reference to the ground of sex is in Article 47(1)(b) of the Criminal Code, which, however, criminalises the promotion of hostility – and not incitement to hatred or violence – 'between communities, religious groups, on the basis of race, religion, colour or sex.'

In **Poland**, a combination of criminal provisions might be used in court to prosecute hate speech on the ground of sex. Article 126a on hate crime, in combination with Article 118a of the Criminal Code can be used to criminalise a particular case of hate speech on the ground of sex. However, it should be underlined that **Poland** did not criminalise hate speech on the ground of sex generally, i.e. covering all forms of 'incitement to violence and hatred' on the ground of sex/gender.[527]

Norway has taken a different judicial route. The offence of hate speech already included 'homosexual orientation' as a protected ground, and in 2020 this concept was changed to the more inclusive 'sexual orientation', in addition to 'gender identity and gender expression'. The concept of 'sex/gender' was deliberately excluded.[528] The explicit inclusion of the grounds of 'sexual orientation' and 'gender identity or expression' improve the protection for gay, lesbian, and trans people. Excluding sex/gender from the protected grounds, however, makes the prohibition of sexist hate speech difficult, unless the expression can be considered as transphobic or homophobic as well. The limitations arising from the selection of grounds is perhaps better illustrated with the example of **Denmark**, which criminalises hate speech on the basis, among other things, of sexual orientation (Article 266b Criminal Code), where an amendment has been proposed to include *inter alia* the terms gender identity, gender expression and gender characteristics with the purpose of making the protection of trans and intergender persons clear.[529] From this perspective, the incorporation of the ground of sex/gender would thus make the amendment more effective and complete.

b) Prosecution and sanctions

Penalties range from a minimum of one month (for those that have a minimum sentence) to up to seven years maximum.[530] Imprisonment can be also replaced by or be supplemented by a fine. **Norway** reported that fines are much more commonly used to respond to hate speech.

Prosecution is generally *ex officio*. Indeed, Article 8 of the Framework Decision 2008/913 expressly states that: 'Each Member State shall take the necessary measures to ensure that investigations into or prosecution of the conduct referred to in Articles 1 and 2 shall not be dependent on a report or an accusation made by a victim of the conduct, at least in the most serious cases where the conduct has been committed in its territory.' This rule was extended to forms of incitement to hatred and violence that were committed on the basis of other grounds, including gender and sexual orientation where addressed by the legislation. In **Germany**, the expert highlights that despite *ex officio* prosecution,

527 'Whoever publicly incites to the commission of the act specified in Articles 118, 118a, 119(1), Articles 120 to 125 or publicly praises the commission of the act defined in these provisions, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.' Article 118a of the Criminal Code reads as follows: 'Anyone who takes part in a mass attack, or in one of repeated attacks against a group of people in order to implement or support the policy of a state or an organisation: 1) in violation of international law compelling such people to change their lawful place of residence, 2) severely persecuting a group of people/ for reasons recognised as inadmissible under international laws, in particular for reasons of political, racial, ethnic, cultural, religious belief or lack of religious belief, worldview or sex thereby depriving them of their fundamental rights, is liable to a imprisonment for a period of not less than three years.'

528 See discussion and decision from the Parliament; https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=79718 (only in Norwegian).

529 Legislation programme for the parliamentary year 2020-2021, available here in Danish: https://www.stm.dk/statsministeriet/publikationer/lovprogram-for-folketingsaaret-2020-2021/.

530 The Framework Decision requires EU Member States to establish criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.

the main problem is access to justice for victims, the mobilisation of these existing provisions by civil society and the application of the law by the judiciary.[531] It has also been reported that prosecuting state authorities as well as specialised media law courts usually do not apply the appropriate laws due to a misconception of digital violence as a private matter or by examining freedom of speech in sole favour of the perpetrator and not the victim and, thus, ignoring the victim's fundamental rights. Furthermore, there is a considerable lack of legal knowledge concerning the potential and advantages of a criminal law approach.[532]

Measures that have been adopted by states to prevent hate speech and protect the victims/survivors are worth mentioning. Protocols, guidelines and awareness measures might play a key role in the prevention of the offence, because, as the questionnaires have shown, the number of cases of hate speech that reach the courts is quite low. In **Croatia**, for example, the Protocol on the procedure in cases of hate crimes has been in force since 2011.[533] Hate speech is within the scope of the Protocol, which aims to ensure efficient and comprehensive cooperation among various authorities (police, justice system) engaged in detection, prosecution and monitoring of such offences.[534] In **Lithuania**, in 2019, the Ministry of Internal Affairs approved the Guidelines on the application of criminal liability for hate crimes and hate speech,[535] and in March 2020, the General Prosecutor of the Republic of Lithuania adopted guidelines for pre-trial investigations in cases related to hate crimes and hate speech.[536]

c) Emerging trends

The need to prohibit hate speech based on sex and gender has been highlighted by public bodies in some states.

Several developments at national level demonstrate an increasing interest, both in legislation and case law, in the inclusion of gender as a ground in the crime of hate speech. In **Ireland**, the Minister for Justice, Helen McEntee TD, secured Government approval to publish the General Scheme of the Criminal Justice (Hate Crime) Bill 2021 on 16 April 2021, which includes gender, including gender expression and identity, as a protected characteristic under the crime of hate speech.[537] In **Italy**, the 'Zan Law' (Bill No. 2005 of 4 November 2020) was buried during a – very controversial – vote in the Senate in October 2021. It was supposed to amend Article 604*bis* of the Criminal Code by including the grounds of sex/gender, sexual orientation, gender identity and disability. The same was meant for Article 604*ter* of the Criminal Code in relation to the aggravation therein provided. Moreover, the bill was aimed at extending to hate speech on the basis of sex/gender, sexual orientation, gender identity and disability and to all crimes aggravated by hate speech on the basis of sex/gender, sexual orientation, gender identity and disability all the accessories to the penalty provided by Article 1 of Act No. 205/1993 for discrimination/hatred/violence for racial, ethnic, national or religious reasons. In **Greece**, a proposal was made in 2017 to adopt provisions to fight sexist hate speech. In **Denmark**, an amendment has been proposed to include *inter alia* the terms gender identity, gender expression and gender characteristics with the purpose of making

531 For the question of collective action within the German legal framework, see Lembke, U. (2017), 'Kollektive Rechtsmobilisierung gegen digitale Gewalt' (Collective legal action against digital violence), E-Paper available at: https://www.gwi-boell.de/de/2018/01/09/kollektive-rechtsmobilisierung-gegen-digitale-gewalt.

532 See Lembke, U. (2016), 'Ein antidiskriminierungsrechtlicher Ansatz für Maßnahmen gegen Cyber Harassment' (An anti-discrimination law approach for measures against cyber harassment) *Kritische Justiz*, vol. 49, No. 3, pp. 385-406.

533 *Protokol o postupanju u slučaju zločina iz mržnje* (2011) (Protocol on the procedure in cases of hate crimes), available at: https://pravamanjina.gov.hr/UserDocsImages/arhiva/protokoli/Protokol%20o%20postupanju%20u%20slučaju%20zločina%20iz%20mržnje.pdf.

534 In January 2021, the new Protocol on the procedure in cases of hate crimes was released for public consultation. The draft text of the new Protocol on procedure in cases of hate crimes is available at: https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=15756.

535 https://vrm.lrv.lt/uploads/vrm/documents/files/Rekomendacijos%20dėl%20baudžiamosios%20atsakomybės%20taikymo(1).pdf.

536 https://www.prokuraturos.lt/data/public/uploads/2020/04/neapykantos_nusikaltimu_tyrimo_metodines_rekomendacijos.pdf.

537 Department of Justice (2021) 'Tough sentences for hate crimes under new Bill from Minister McEntee' press release, 21 April 2021, https://www.gov.ie/en/press-release/48cb5-tough-sentences-for-hate-crimes-under-new-bill-from-minister-mcentee/.

the protection of trans- and intergender persons clear.[538] As mentioned earlier, in **Lithuania**, in January 2021, the Ministry of Justice published a proposal to introduce administrative liability for hate speech, because courts apply criminal liability in extreme cases only.

With regard to hate speech on the basis of gender/sex, two important judgments should be mentioned here. In **Spain**, the Supreme Court decided in 2018, in the first case of hate speech on the basis of sex, that the core element of the criminal act consists of the expression of epithets, qualifiers, or expressions, which contain a hateful message that is transmitted in a generic way. The subjective element of the offence – the wilfulness – does not need to be related to any specific consequence of the content of the message. Rather, it is enough to verify the voluntariness of the act and that it is not an uncontrolled situation or a momentary reaction – even an emotional one – to a circumstance that the subject has not been able to control. In the **Netherlands**, last year, a person was found guilty of incitement to violence against women, because he was encouraging female genital mutilations.[539] The court said that the crime of 'incitement to violence' can include any form of discrimination, exclusion, limitation or preference, which has the object or the effect of nullifying the recognition, enjoyment or exercise on an equal basis of human rights and fundamental freedoms or affected. The court was of the opinion that it followed from the wording used by the accused that the statement was unmistakably aimed at women.[540]

9.3 Main findings

- √ Studies and documents indicate the significant impact of hate speech on women and girls' human rights, particularly on their freedom of expression and their right to participation in public life. This is particularly the case for ICT-facilitated hate speech. Access to digital technologies and the internet contributes to the achievement of gender equality and women's empowerment, but ICT can also be used (and misused) to convey hateful messages and expressions.
- √ As explained in Section 9.1 the criminalisation of severe forms of hate speech, such as incitement to hatred or discrimination based on protected grounds does not constitute a violation of freedom of expression, according to human rights law. Harmful expressions based on protected grounds that do not amount to incitement to hatred or discrimination, can be prohibited if they amount to an abuse of rights or jeopardise the enjoyment of rights of individuals or groups.
- √ Examining national legislation on the crime of hate speech, only 14 states included gender or sex as prohibited grounds, whereas sexual orientation and gender identity and/or gender expression, and/or sex reassignment, are included in the legislation of 23 states.
- √ The average maximum penalty for hate crime based on sex and gender is between one and three years (although some countries have higher thresholds).
- √ Very few states appear to have laws regulating the online dimension of the crime as an element of the offence or aggravating circumstance, by references to the internet, media or ICT communications.
- √ There is insufficient information about the procedures available at national level to request the removal of hateful content from the platforms.
- √ Prosecution is *ex officio*, but the national experts report a very low number of judicial cases of hate speech in general, and specifically in regard to sexist hate speech. They also highlight a lack of awareness among public authorities of what constitutes hate speech, and how to identify it, and a lack of gender sensitiveness in detecting this form of violence against women.[541]

538 Legislation programme for the parliamentary year 2020-2021, available here in Danish: https://www.stm.dk/statsministeriet/publikationer/lovprogram-for-folketingsaaret-2020-2021/.

539 The Hague District Court, 19 June 2020, Para. 3.4. https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:5469.

540 The Hague District Court, 19 June 2020, Para. 3.4.

541 The German expert's response to the questionnaire mentioned the judgment by the Regional Court of Berlin, judgment of 21 January 2020, 27 AR 17/19, https://gesetze.berlin.de/bsbe/document/KORE534882020, which was slightly changed (crime of insult) by Higher Regional Court of Berlin, judgment of 11 March 2020, 10 W 13/20, https://gesetze.berlin.de/bsbe/document/KORE221452020.

√ In states where hate speech based on sex or gender is not criminalised, there is scarce information about other forms of prohibition or determination of liability.

9.4 Recommendations

Based on the findings of the report, the authors suggest that there is a need to:

√ Consider the impact of hate speech based on sex/gender on gender equality and women and girls' human rights.
√ Include sex/gender, sexual orientation and gender identity as protected grounds against hate speech.
√ In the adoption of measures prohibiting hate speech on the basis of sex/gender, sexual orientation and gender identity, consider the online dimension of the crime which disproportionately affects women and girls.
√ Provide for preventive and protective measures to ensure the effectiveness of criminalisation of hate speech based on gender/sex.
√ Consider adopting comprehensive measures aiming at the elimination of prejudice and bias based on sex, gender, sexual orientation and gender identity.

10 Femicide/gender-related killing of women

The aim of this chapter is to provide a detailed examination of existing legislation on femicide. The first part of the chapter introduces the main normative framework addressing the issue, describes the definitions used and explains the different elements that are taken into account in the examination of the domestic jurisdictions. The second part of the chapter presents the results from the national questionnaires. The chapter concludes with a summary of main findings and recommendations.

10.1 Introduction and main concepts

Across international institutions and domestic jurisdictions, we find references to the concepts of 'femicide', 'feminicide', 'intimate partner homicide' and 'gender-related killing of women and girls' to address the crime of *murdering women because of their gender.*[542] Among these different terms, the most salient is that of 'femicide.' The specific trajectory of the concept of femicide starts in feminist legal theory, and has slowly been adopted by international human rights bodies, until its recent incorporation in several domestic jurisdictions. The theoretical concept of femicide seeks to make visible the systematic murder of women. Defined in the 1970s as 'the murders carried out by men motivated by a sense of having a right to it or superiority over women, by pleasure or sadistic desires towards women, or by the assumption of ownership over women,'[543] the concept was revived in the early 2000s as 'feminicide', underlining the structural and political nature of the murders, their connection with gender and the inaction of the state. More recently, it has been emphasised that while femicide highlights the murder of women, it also attempts to highlight the progression of violent acts that range from emotional and psychological abuse, beatings, insults, torture, rape, prostitution, sexual harassment, child abuse, infanticide of girls, genital mutilation, domestic violence to institutional violence, which ends in femicide.[544]

The visibility of the systematic gender-related killings of women and insistence on naming it as femicide is related to a historical and social process of recognition of the human rights of women and their right to a life free of violence. These claims have slowly reached several human rights mechanisms. The Inter-American system of human rights has encouraged the adoption of legislation on femicide in the recommendations of the Committee of Experts monitoring the implementation of the Belém do Pará Convention,[545] and in the case law of the Inter-American Court.[546] In 2013, the United Nations General Assembly adopted a resolution on 'Taking action against gender-related killing of women and girls' where it expressed concern 'about violent gender-related killing of women and girls, while recognising efforts made to address that form of violence in different regions, including in countries where the concept of femicide or feminicide has been incorporated into national legislation', and drew attention to 'the alarming proportions reached by this phenomenon in all its different manifestations'.[547] The issue of femicide, or gender-related killings of women, has been a thematic priority for the United Nations Special Rapporteur on violence against women (UN SRVAW). She defined it as 'the killing of women because of their sex and/or gender.' In her 2012 thematic report, the UN SRVAW drew attention to the fact that the gender-related killing of women is not a new form of violence or an isolated phenomenon that has arisen suddenly and unexpectedly but is instead the ultimate act of violence that is experienced in a continuum

542 See: European Institute for Gender Equality (EIGE) (2017) 'Terminology and indicators for data collection: Rape, femicide and intimate partner violence', available at: https://eige.europa.eu/sites/default/files/documents/ti_pubpdf_mh0116141enn_pdfweb_20171204114037_0.pdf, p. 33.

543 Radford, J. and Russell, D. (1992) *Femicide: The Politics of Woman Killing*, New York: Twayne Publishers. doi: 10.1177/000486589402700212.

544 Monárrez, J. (2002) 'Feminicidio Sexual Serial en Ciudad Juárez: 1993–2001' (Serial sexual feminicide in Ciudad Juárez: 1993–2001), *Debate Feminista*, vol. 25. 279-305.

545 OEA/Ser.L/II.7.10 MESECVI/CEVI/DEC. 1/08 15 August 2008, available at: https://www.oas.org/es/mesecvi/docs/DeclaracionFemicidio-EN.pdf.

546 Inter-American Court of Human Rights, *González et al ('Cotton Field') v Mexico*, Series C 205 (16 November 2009); *Veliz Franco et al v Guatemala*, IACtHR Series C 277 (19 May 2014); *Velásquez Paiz et al v Guatemala*, IACtHR Series C 307 (19 November 2015).

547 United Nations General Assembly Resolution 68/191.

of violence. In the report, it is noted that the prevalence of such killings is increasing globally, and thus, in 2016, the UN SRVAW proposed the establishment of a 'femicide watch' at the global, national and regional levels, and observatories on violence against women.[548] Since then, she has been collecting information on femicides annually.

In Europe, despite the lack of explicit reference to femicide in the Istanbul Convention, GREVIO makes reference to legislation and statistical data relating to femicide in its baseline reports.[549] In addition, the European Court of Human Rights has recognised the intentional killing of women as a form of gender discrimination for the first time in *Opuz v. Turkey*,[550] and recent case law incorporates the terminology of femicide, yet without providing a definition.[551] Femicide is also slowly getting more attention from scholars and institutions. In connection to an EU-funded European cooperation in science and technology action (COST action), several publications on femicide explored the issue at European level.[552] The GREVIO Committee, monitoring the implementation of the Istanbul Convention, makes reference to femicide in its reports, and has commended Member States reporting on femicide.[553] The European Institute for Gender Equality (EIGE) encourages and supports Member States in the collection of data regarding femicide.[554]

Looking at femicide from a criminal perspective, the main characteristics of the crime are clarified by the Latin American model protocol for the investigation of gender-related killings of women (femicide/feminicide) developed by UN Women and UNODC, which recognises two categories of femicide. An 'active or direct' category of femicide that includes intentional killing, armed conflict-related killings, female infanticide, and killings based on the sexual orientation and gender identity of women, and 'passive or indirect' forms of femicide, which include maternal mortality and other forms of deaths resulting from neglect disproportionally affecting women or as the result of harmful practices.[555] There are, thus, different types of femicide, ranging from 'intimate femicide', that is, when the killing is carried out by a partner or ex-partner or someone with a personal relationship, and those which do not entail such connection. Racist, transphobic and lesbophobic femicide are also explicitly mentioned. While there are different views regarding which concept is more adequate to better capture the experiences of trans women ('femicide', 'transfemicide' or 'hate crimes' based on gender identity/expression),[556] their explicit inclusion under the scope of femicide seems a positive development given the very high prevalence of violence and discrimination against lesbian and trans women.[557]

In essence, definitions of femicide highlight the structural and systemic character resulting from the discrimination suffered by women, including trans women, and the inaction or insufficient response of the

548 Special Rapporteur on violence against women, its causes and consequences (2016) 'Report on femicide or the gender-related killing of women', 23 September 2016. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/71/398&Submit=Search&Lang=E.

549 See, for instance: GREVIO's Baseline Report on Turkey (2018); Portugal (2019); Italy (2019); France (2019); Belgium (2020) and Spain (2020).

550 *Opuz v Turkey*, Application no. 33401/02, Council of Europe: European Court of Human Rights, 9 June 2009.

551 See: *Talpis v Italy* (2017) para 147; *Kurt v Austria* GC (2021) and *Tkhelidze v Georgia* (2021).

552 Ṿail Shalṿah, Corradi, C. and Naudi, M. (eds) (2018) *Femicide across europe: theory, research and prevention*, Bristol: Policy Press; Corradi, Marcuello, Boira and Weil, eds. (2016) 'Special Issue on Femicide', *Current Sociology* 64:7.

553 See GREVIO Baseline Report on Italy (2019) p. 30.

554 See, for instance, EIGE (2017) 'Glossary on working definitions for the collection of data on gender-based violence', available at: https://eige.europa.eu/publications/glossary-definitions-rape-femicide-and-intimate-partner-violence; and EIGE (2017) 'Terminology and indicators for data collection: Rape, femicide and intimate partner violence', available at: https://eige.europa.eu/publications/terminology-and-indicators-data-collection-rape-femicide-and-intimate-partner-violence-report.

555 Latin American Model Protocol for the investigation of gender-related killings of women (femicide/feminicide), available at: https://lac.unwomen.org/en/digiteca/publicaciones/2014/10/modelo-de-protocolo.

556 In Europe, the preferred notion to cover these cases is that of hate crime based on gender identity/expression (as discussed in Chapter 10) For a discussion on how these different concepts play out in practice in criminal prosecution, see: Sosa, L. (2020) 'Now you see me? The visibility of trans and travesti experiences in criminal procedures', *Politics and Governance*, 8(3), pp. 266-277. doi: 10.17645/pag.v8i3.2804.

557 See: FRA (2020), *A long way to go for LGBTI equality*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf. According to the report, the highest rates of physical or sexual attacks motivated by the victim being LGBTI are observed in Poland (15 % of the respondents), Romania (15 %), Belgium (14 %) and France (14 %). The lowest rates are found in Portugal (5 %) and Malta (6 %).

state to prevent it. They include intimate and not intimate killings of women, including 'passive' death as the result of acts other than killings that affect women disproportionally.

10.2 Results from the country questionnaires

a) Areas of law addressing the issue

None of the jurisdictions under review has introduced a specific offence of femicide to their domestic systems. Nevertheless, in seven states it is possible to aggravate murder offences 'based on gender' (**Belgium**, **Croatia**, **France**, **Malta**, **Portugal**, **Slovenia**, **Spain**). Legislation in four of these countries follows an approach connected or resembling the framing of hate crimes, that is, requiring aversion or prejudice against the person because of their characteristics or (perceived) belonging to a group. In **Belgium**, committing the crimes of murder or injuries motivated by hatred against a person because of their sex, constitutes an aggravating circumstance.[558] In **Croatia**, *any* criminal offence committed because of race, colour, religion, national or ethnical origin, language, disability, sex, sexual orientation, or gender identity of another person is deemed as hate crime and taken into account as an aggravating circumstance for sentencing purposes, unless it already forms a constituent element of the criminal offence (Article 87(21) of the Criminal Code). **Malta** has also incorporated gender as an aggravated circumstance to the offence of grievous bodily harm followed by death – when there is no intentional killing – motivated on the grounds of gender. The gender-based motivation can be proved if at the time of committing the offence, or immediately before or after the commission of the offence, the offender demonstrates hostility, aversion or contempt based on the membership (or presumed membership) of the victim to a particular gender. **Portugal** considers a murder as a 'qualified homicide' when the crime is determined by hate 'on the grounds of sex, sexual orientation and identity of gender of the victim', which entails a more severe penalty.[559] All of these aggravations allow for the criminalisation of the intentional killing of both cisgender and transgender women. Interestingly, in the case of **Sweden**, the aggravation based on gender refers exclusively to 'transgender identity and expression, and gender reassignment', protecting *transgender* women only.

The aggravation of a crime based on 'hate' could thus be used as a vehicle to criminalise gender-related killing. This approach calls, however, for amendments to the criminal law, as the situation in **Denmark** suggests. According to the Danish expert, Section 81(6) of the Criminal Code introduces an aggravating circumstance when 'the act was based on the ethnic origin, religious faith or sexuality of others or similar issues.' Although the expression 'similar issues' could indicate that other suspect grounds for discrimination, such as gender as a motive for the offence, could also constitute an aggravating circumstance, the preparatory works of the amendment act adopting the provision establish the meaning and scope of these words. This will be the prevalent approach in most states, since analogy is prohibited in criminal law more generally, as it affects the principle of legality.

In the **United Kingdom**, despite the absence of a specific aggravation based on gender, Sections 145 and 146 of the Criminal Justice Act 2003 require sentencing courts to take into account hostility based on race, religion, disability, sexual orientation, and transgender identity in sentencing for any offence. In addition, the Law Commission has recently produced a report and consultation on hate crime, which includes consideration of the current omission of sex and gender from the list of protected characteristics which give rise to enhanced sentencing.[560] In 2018, Lord Bracadale completed a review into hate crime laws in Scotland that likewise recommended the inclusion of gender among the characteristics protected.[561]

558 Article 405*quater* of the Criminal Code.
559 Article 132(2)(b), (c) and (f) of the Criminal Code.
560 The Law Commission (2020) *Hate crime laws: A consultation paper* (Law Commission, Consultation 250, 23 September 2020) available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/10/Hate-crime-final-report.pdf.
561 Lord Bracadale (2018), *Independent review of hate crime legislation in Scotland: final report* (May 2018), available at https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/.

In **Spain**, the chosen approach to establish the aggravation establishes a lower probatory threshold than 'hate-based' ones. The reform of the Criminal Code of 2015[562] to comply with obligations under the Istanbul Convention, introduced an aggravating circumstance for the commission of a crime 'for racist, antisemitic or other types of discrimination regarding the ideology, religion or beliefs of the victim, the ethnic group, race or nation to which they belong, their sex, orientation or sexual identity, gender reasons, illness or disability'.[563] The national expert explains that the Spanish Supreme Court has consistently argued that the foundation for the aggravating circumstance of gender rests on the greater criminal reproach that the perpetrator merits for committing the offence motivated by a feeling of superiority over the victim, or as a means to demonstrate that he considers her a being that must be dominated.[564] This aggravating factor will be applied when the behaviour of the man tries to establish or maintain a situation of domination over the woman, placing her in a role of inferiority and subordination in the relationship, with a serious breach of her right to equality, freedom and due respect as a human being.[565] Moreover, jurisprudence clearly establishes that the aggravating circumstance of gender is distinct and compatible with the aggravating circumstance of kinship, which is used to aggravate the murder of spouses, ex-spouses, partners and ex-partners.[566] There are two more states, where the aggravation based on gender or sex does not require 'hate' or 'aversion' explicitly. In **Slovenia**, when the taking of someone's life involves a violation of equality, this is considered an aggravation and gives rise to a higher penalty.[567] In **France**, homicides are aggravated if they are committed because of the sex, sexual orientation or gender identity of the victim.[568]

There is a general consensus among national experts that the general offences of murder, manslaughter and killing applies to the killing of women, in some cases under aggravating circumstances. Table 27 lists all possible aggravations for murder. For instance, several states consider murder committed by a spouse, ex-spouse, partner or ex-partner as an aggravating factor (**Bulgaria**, **Croatia**, **France**, **Italy**, **Netherlands**, **Norway**, **Portugal**, **Slovakia**, **Spain**). **Norwegian** authorities use the gender-neutral description 'partner homicide', and have appointed a special committee (*Partnerdrapsutvalget* – 'The partner homicide committee')[569] to review homicide cases where the perpetrator is a partner or former partner, and to make recommendations that can help prevent such homicides in the future. An initial review of 19 criminal cases showed that there are several challenges regarding the police response and the adoption of preventative measures. One of the committee's recommendations is to ensure that the police and emergency services use existing protocols (such as the current risk assessment systems).[570] Applying aggravating circumstances that only take account of the partnership between victim and perpetrator, however, will reduce the scope of 'femicide' to intimate forms of femicide (by a partner or ex-partner). The same consideration applies to the aggravation of murder occurring in the context of a situation of violence (**Bulgaria**, **Croatia**, **Italy**).

There are a few other aggravations that could be applied to murder with the intention to capture the gender-based nature of the murder, yet these also seem inadequate to fully capture the gendered dimension of the killings, and even reinforce gender stereotyping. An example of this is the aggravation

562 Organic Law 1/2015, modifying Organic Law 10/1995 of Criminal Law (*Ley Orgánica 1/2015, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*), 30 March 2015, https://www.boe.es/buscar/doc.php?id=BOE-A-2015-3439.
563 Spanish Criminal Code, Article 22(4).
564 Spanish Supreme Court, judgment 565/2018 of 19 November 2018, ECLI:ES:TS:2018:3757.
565 Spanish Supreme Court, judgment 444/2020 of 14 September 2020, ECLI:ES:TS:2020:2904.
566 Spanish Supreme Court, judgment 650/2020 of 2 December 2020, ECLI: ES:TS:2020:4047.
567 Slovenian Criminal Code, Article 116(3).
568 Article 132-77 Criminal Code, introduced by Article 171 of the Law on equality and citizenship (*Loi relative à l'égalité et à la citoyenneté du 27 janvier 2017*,) https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033934948/, see Leray E. and Monsalve, E. (2017) 'Un crime de féminicide en France? À propos de l'article 171 de la loi relative à l'égalité et à la citoyenneté', *La Revue des droits de l'homme*, Actualités Droits-Libertés, 10 February 2017.
569 The committee is led by a Professor in public law at the University of Oslo; Ragnhild Hennum; See the Government's website: https://www.regjeringen.no/no/dep/jd/org/styre-rad-og-utval/innstillinger/innstillinger-fra-utvalg/innstillinger-levert-i-2020/partnerdrapsutvalg/id2615621/.
570 See the conclusions in the report of Partner Homicide Committee (2020) 'Varslede drap- Partnerdrapsutvalgets utredning', 15. December 2020; https://www.regjeringen.no/no/dokumenter/nou-2020-17/id2791522/ (only in Norwegian).

based on the pregnancy of the victims of murder, currently available at least in six states (**Belgium**, **Croatia**, **Czechia**, **France**, **Latvia**, **Lithuania**). This aggravation is not only not based on the additional reproach to killing women but rather relates to the killing of the unborn children, and even if that were not the case, it would reduce the gender dimension to 'motherhood'. Similarly, some national questionnaires suggest that the aggravating factor of 'taking advantage of someone's vulnerability' found in seven states (**Bulgaria**, **Croatia**, **Germany**, **Italy**, **Netherlands**, **Norway**, **Spain**) could be applied to such an end. This approach, however, could reinforce both gender and victim stereotyping, which seems confirmed by relevant **Croatian** jurisprudence.[571]

Although the experts did not mention it as a possibility to address femicide, the aggravation of death following unsafe abortions, currently considered as a separate offence in at least 12 states (**Austria**, **Belgium**, **Croatia**, **Germany**, **Greece**, **Latvia**, **Lithuania**, **Luxembourg**, **Romania**, **Slovakia**, **Slovenia**, **Sweden**) and as an aggravation in 6 states (**Bulgaria**, **Croatia**, **Czechia**, **Hungary**, **Italy**, **Poland**), seems to be the only possibility to address 'indirect femicides', in this case possibly resulting from deficient state policies on sexual and reproductive rights. That said, the responsibility of the states in that regard would remain unengaged considering that it only allows for the individual criminal responsibility of the perpetrators, usually the person performing the (illegal) abortion.

Table 27 Aggravations applicable to the crime of murder

Aggravations	Murder
Victim is a former or current spouse or partner	Austria, Bulgaria, Croatia, Estonia, France, Italy, Netherlands, Norway, Portugal, Slovakia, Spain, Sweden
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria, Croatia, Estonia, France, Italy, Netherlands, Norway, Portugal, Slovakia, Spain, Sweden
The offence, or related offences, were committed repeatedly	Bulgaria, Czechia, Estonia, Hungary, Norway, Portugal, Slovakia, Sweden
Victim was made vulnerable by particular circumstances	Austria, Bulgaria, Croatia, Estonia, Germany, Hungary, Iceland, Italy, Netherlands, Norway, Slovakia, Spain, Sweden
Child victim or witness	Austria, Bulgaria, Czechia, Estonia, Hungary, Italy, Norway, Spain, Sweden
Multiple perpetrators	Bulgaria, Norway, Portugal, Slovakia, Slovenia, Sweden
Extreme levels of violence	Austria, Bulgaria, Croatia, Czechia, Estonia, Hungary, Finland, France, Germany, Italy, Norway, Poland, Portugal, Slovakia, Spain, Sweden
Use or threat of a weapon	Austria, Iceland, Norway, Sweden
Severe physical or psychological harm for the victim	Austria, Italy, Netherlands, Norway, Sweden
Previous conviction for similar offences	Bulgaria, Estonia, Hungary, Norway, Poland, Portugal, Slovakia, Spain, Sweden
Offence committed on the grounds of the victim's gender	Belgium, Croatia, France, Malta, Portugal, Slovenia, Spain

571 For cases in which a history of violent behaviour was recognised and led to conviction for aggravated murder see: County Court in Zagreb, 8 K-23/15, County Court in Karlovac, 12 K-11/15, County Court in Dubrovnik, K-6/15. For cases in which this has not led to qualification and conviction for aggravated murder, but only for murder, see: County Court in Varaždin, 2 K-30/13, County Court in Karlovac, 12 K-21/13.

Aggravations	Murder
Other	Pregnant victim (Belgium, Croatia, Czechia, France, Latvia, Lithuania) Poisonous substance or insidious means (Italy, Lithuania) Perpetrator was under the influence (Lithuania) Following sexual offence (Spain) Against more than one victims (Hungary) Endangering the life of more than one victims (Hungary) Against a person incapable to defend himself/herself (Hungary) Against elderly persons or persons living with disability (Hungary) For a base reason or purpose (Hungary)

b) Sanctions

Two main and worrying aspects regarding the punishment of gender-based murder of women emerge from the country questionnaires. On the one hand, mitigation of the sentence is still possible in some states when the crime was committed 'in the heat of passion'. In **Hungary**, when a person kills another 'in the heat of passion caused by a legitimate reason', imprisonment will range between two and eight years. A similar situation is found in **Poland** regarding 'whoever kills a person under the influence of severe agitation justified by circumstances.' Another issue is the effect of femicide on the parental rights of the perpetrator. In **Sweden**, a person convicted of killing a woman is not automatically deprived of custody of their joint children. Instead, the issue of custody is decided by the court on the initiative of the social services. This issue resonates with the findings in the section of domestic violence. Conversely, a positive example on how to establish concrete standards for sanctioning appears in **Ireland**, where the decision in *People (DPP) v Mahon* provides a clear indication of the correct approach to sentencing for manslaughter. Offences were divided into categories of lower culpability, medium culpability, high culpability and the worst cases.[572]

c) Prosecution

Since the offence entails murder, *ex officio* prosecution is applied in all states. However, prosecutorial guidelines explicitly addressing the murder of women are not available in any of these states, except for **Spain**. The Spanish Circular 6/2011 of the Public Prosecution Office[573] contains indications as to the application of the aggravating circumstance of gender of Article 22(4º) of the Criminal Code that are relevant to the prosecution of this offence. That said, **Swedish** Prosecution Services provide specific handbooks for prosecutors to guide the prosecution process in a number of cases, out of which some address situations of relevance for violence against women, yet these seem to focus mostly on the handling of cases on domestic violence, honour-related violence, sexual crimes, crimes against children, and cases of gross violation of integrity or gross violation of a woman's integrity.

As mentioned in the introduction, in 2015, the UN Special Rapporteur issued an ongoing call to establish a 'femicide watch' and/or observatories to promote evidence-based policies and strategies for the prevention of femicide, through the collection of comparable data on femicide rates at the national, regional and global level. EIGE has also encouraged states to collect data by adopting a definition of femicide for statistical purposes. Regardless of these developments, observatories of femicides or gender-related killing of women were not reported by the national experts.

572 *People (DPP) v Mahon* [2019] IESC 24 https://www.courts.ie/acc/alfresco/07649d84-a5aa-4931-b5f5-f43e315ddff6/2019_IESC_24_1.pdf/pdf#view=fitH.

573 Public Prosecutor's Office, Circular 6/2011 on common criteria for the specialized action of the Public Prosecutor's Office in relation to violence against women (*Circular 6/2011, sobre criterios para la unidad de actuación especializada del Ministerio Fiscal en relación a la violencia sobre la mujer*), 2 November 2011, https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-C-2011-00006.pdf.

d) Relevant case law

The use of the term 'femicide' has appeared in case law, even when the aggravation was not labelled in that way or when no specific aggravation based on gender has been adopted. In **France**, the Court of Assizes of Creteil explicitly referred to the term femicide in a recent case, when repeated harassment, torture and violence preceded the murder.[574] In **Greece**, the landmark judgment of 15 May 2020 in the case of the murder of Eleni Topaloudi by the Jury Court of Appeal of Athens, charged the perpetrators with a life sentence for murder of joint purpose (Article 229(1) PC) plus 15 years for the rape committed by two perpetrators acting jointly (Article 336(2-1)PC).[575] The first annual Report on Violence against Women of the General Secretariat for Family Policy and Gender Equality was dedicated to the memory of Eleni Topaloudi, acknowledging the case as femicide.[576]

e) Emerging trends

According to the 2018 report, *Gender-related killing of women and girls*, by the United Nations Office on Drugs and Crime (UNODC), issued as part of the Global Study on Homicide,[577] a total of 87 000 women were intentionally killed in 2017, with 58 % of them killed by intimate partners or family members, meaning that 137 women across the world are killed by a member of their own family every day. More than a third of the women intentionally killed in 2017 were killed by their current or former intimate partner. International and European organisations have warned that these numbers have increased during lockdown measures.[578] In fact, several country questionnaires highlight the increase of domestic violence cases during the COVID-19 pandemic. In some cases data distinguishes murder at the hand of partners and/or family members. In **France**, a sharp rise in complaints of domestic violence during the lockdown in 2020 has also caused public concern, and measures were adopted to help victims logistically and financially during the judicial process.[579] In **Iceland**, domestic violence appears to have increased by 10 % during the COVID-19 period according to new statistics from the Police Commissioner. Notifications to child protection services, where children themselves are calling to complain about the situation are also more frequent. According to the national questionnaire, two women have been murdered in their homes since the lockdown started in March 2020.[580] In **Denmark**, the lockdown has resulted in an increased number of reports of domestic violence, where the Ministry of Social Affairs asked the women's rights organisation Danner to lead a temporary emergency crisis centre for abused women and children at a secret address in Copenhagen.[581] These are all factors that seem to stimulate new debates.

574 This trial opened up the possibility of using the term femicide, Ballet, V. (2020) 'Meurtre d'Aïssatou Sow: "Ce procès a permis que le terme "féminicide" soit prononcé dans un tribunal"' 3 November 2020: https://www.liberation.fr/france/2020/11/03/meurtre-d-aissatou-sow-ce-proces-a-permis-que-le-terme-feminicide-soit-prononce-dans-un-tribunal_1804381/.

575 https://www.isotita.gr/1%CE%B7-%CE%B5%CF%84%CE%AE%CF%83%CE%B9%CE%B1-%CE%AD%CE%BA%CE%B8%CE%B5%CF%83%CE%B7-%CE%B3%CE%B9%CE%B1-%CF%84%CE%B7-%CE%B2%CE%AF%CE%B1-%CE%BA%CE-%B1%CF%84%CE%AC-%CF%84%CF%89%CE%BD-%CE%B3%CF%85%CE%BD/.

576 https://www.isotita.gr/1%CE%B7-%CE%B5%CF%84%CE%AE%CF%83%CE%B9%CE%B1-%CE%AD%CE%BA%CE%B8%CE%B5%CF%83%CE%B7-%CE%B3%CE%B9%CE%B1-%CF%84%CE%B7-%CE%B2%CE%AF%CE%B1-%CE%BA%CE-%B1%CF%84%CE%AC-%CF%84%CF%89%CE%BD-%CE%B3%CF%85%CE%BD/.

577 UNODC (2018) *Global Study on Homicide: Gender-related killing of women and girls*, available at: https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf. The data in the study was based on homicide statistics produced by national statistical systems in which the relationship between the victim and perpetrator or the motive was reported.

578 EIGE (2021) *The Covid-19 pandemic and intimate partner violence against women in the EU*, available at: https://op.europa.eu/en/publication-detail/-/publication/6af1ff62-82e8-11eb-9ac9-01aa75ed71a1; EU agency for Law Enforcement Training (CEPOL) (2020) *Report on the Impact of COVID-19 on domestic violence law enforcement operations and training needs*, available at: https://www.cepol.europa.eu/sites/default/files/CEPOL_TNA_Domestic_Violence_Covid19.pdf.

579 Decrees to limit financial constraints linked to procedural rights: *décret n° 2020-683 du 4 juin 2020 qui autorise déblocage anticipé de l'épargne salariale en cas de violences conjugales; décret n° 2020-841 du 3 juillet 2020 qui modifie les articles 1136-3 du code de procédure civile et R. 93 du code de procédure pénale pour mettre fin au délai imposé par le décret n° 2020-636 du 27 mai 2020 à peine de caducité et mettre à la charge de l'État les frais et dépens de l'acte de signification de l'ordonnance de fixation de la date d'audience; arrêté du 21 juillet 2020 qui fixe à 42 € le coût de la signification de l'ordonnance de fixation de ladite date d'audience puis à 41,66 € à compter du 1er janvier 2021*.

580 https://www.ruv.is/kveikur/heimilisofbeldi-i-skugga-koronuveirufaraldurs/.

581 According to the homepage of Danner, which is available here in Danish: https://danner.dk/nyt/coronatiltag-nyt-ndkrisecenter-oprettes-i-k-benhavn.

While discussions at the legal and judicial level are scarce, the increase in the visibility of femicide cases appear to have triggered debates about the need to adopt specific measures addressing the gender-based nature of the murders of women in several states. These take place in the media,[582] and are in most cases encouraged by women's NGOs (**Belgium**, **Bulgaria**, **Croatia**, **Czechia**, **Hungary**).[583] In **Greece**, the rape and brutal murder of a female student, Eleni Topaloudi in November 2018, put the concept of 'femicide' at the centre of the debate for the first time, introducing the social dimensions of violence against women to the public discourse. Her case gave space to women's organisations to establish the term and demand the legal recognition of femicide, namely the recognition of sexist and misogynist motives in crimes.[584] A similar situation of one case triggering media attention was reported in the **Dutch** national questionnaire.[585]

In some states, public agencies are highlighting the gender-based nature of the murders. According to the expert, some public institutions in **Bulgaria** such as the Ombudsperson, the Ministry of Justice, and the Ministry of the Interior have started disseminating information and show concern about the rate of femicides. In **Croatia**, the Ombudsperson for Gender Equality currently dedicates a large part of her work to gender violence and femicide. The **Netherlands** Institute for Human Rights has also been campaigning for more recognition for violence against women and femicide.[586] In **Ireland**, the Minister for Justice announced in May 2019 the initiation of an independent review of domestic homicides and cases of familicide in Ireland.[587] The minister indicated in December 2019 that the report was expected to be published in March 2020,[588] yet it has still not been published, and it is unclear whether the issue continues to be a focus of attention under the current Government.

Debates about femicide are also entering national parliaments. In the **Netherlands** this has been rather sporadic with one of the members of the House of Representatives asking the Minister of Justice and Safety about the issues around female murder and manslaughter victims.[589] In **Denmark**, however, discussions on how to address the issue of femicide are ongoing, acknowledging the overrepresentation of women in the category of partner homicides. However, according to the expert, the discussions do not seek to establish a new category of homicides, and rather than approaching the topic more systemically,

582 For instance, in December 2020, a Czech online media site released a series of articles called 'Call it femicide!' aiming to introduce and explain this crime as a large part of the society is not familiar with the concept. Seznam Zprávy (2020), 'Říkej tomu femicida', available at: https://www.seznamzpravy.cz/clanek/rikej-tomu-femicida-co-to-vlastne-je-a-proc-je-potreba-o-ni-mluvit-133227.

583 In Belgium, see the Conseil des Femmes Francophone published a memorandum in 2018; Bulgaria: Alliance for Protection from GBV and the report *Homicides of women based on their sex* – author Elena Krasteva, 2019, and the Bulgarian Helsinki Committee which has an internet sites for monitoring the murders of women; Czechia: 'Rosa' provides help to victims of domestic and sexual violence and is the only entity keeping a record of femicide victims – Rosa (2020), 'List of femicides 2000-2020' – Facebook post, available at: https://www.facebook.com/rosacentrum.cz/posts/2074590249344909; Hungary: NANE Women's Rights Association collects the cases of women – and lately, of children as well – who have been killed in the context of domestic violence in the past 12 months. They also organise the 'Silent Witness March' yearly, https://nane.hu/our-services/silent-witnesses-exhibition/?lang=en; Ireland: Women's Aid, *Femicide Watch 2019 A Legacy of Loss for Women, Family and Community* femicide_watch_2019_republic_of_ireland.pdf (womensaid.ie); Poland: the Centre for Women's Rights has launched a social campaign to draw attention to femicide and prepared a petition to the Polish authorities, containing recommendations: https://publicystyka.ngo.pl/stop-kobietobojstwu-nowa-kampania-centrum-praw-kobiet.

584 Krithari, E. (2020), 'Greece: justice for a femicide', https://www.balcanicaucaso.org/eng/Areas/Greece/Greece-justice-for-a-femicide-202400.

585 For examples see: https://www.nu.nl/binnenland/6090223/zorgen-over-geweld-jegens-vrouwen-het-is-een-gigantisch-probleem.html; https://www.parool.nl/nieuws/aangiftes-tegen-partnergeweld-blijven-uit-door-schaamte-en-angst~b69ecbe5/?referrer=https%3A%2F%2Fwww.google.com%2F; https://www.volkskrant.nl/columns-opinie/femicide-is-niet-iets-wat-pechvogels-nu-eenmaal-overkomt~b3537d14/?referrer=https%3A%2F%2Fwww.google.com%2F; https://www.oneworld.nl/lezen/seks-gender/feminisme/nederland-heeft-een-femicide-probleem/.

586 For the article see: https://mensenrechten.nl/nl/toegelicht/meer-dan-40-vrouwen-jaar-gedood-door-ex-partner.

587 Minister Flanagan announces independent specialist in-depth research study on familicide and domestic homicide reviews – MerrionStreet https://merrionstreet.ie/en/news-room/releases/minister_flanagan_announces_independent_specialist_in-depth_research_study_on_familicide_and_domestic_homicide_reviews.html.

588 Ceisteanna ar Reachtaíocht a Gealladh – Questions on Promised Legislation – Dáil Éireann (32nd Dáil) – Wednesday, 18 Dec 2019 – Houses of the Oireachtas.

589 Ministerie van Justitie en Veiligheid (27 October 2020). *Antwoorden Kamervragen over ex-partnergeweld. Kamerstuk | Rijksoverheid.nl.* Available at: https://www.rijksoverheid.nl/documenten/kamerstukken/2020/10/27/antwoorden-kamervragen-over-ex-partnergeweld.

they are focused on preventive measures against these offences. The Danish Parliament had a lengthy debate on partner homicides, which led to a parliamentary decision with the following wording:

> 'The Parliament condemns partner killings and emphasizes the importance of reducing the number of killings in close relationships, as it is noted that killings in close relationships constitute the largest number of killings in Denmark. The Parliament also emphasizes the importance of preventive work, including in relation to physical and psychological violence in close relationships. The Parliament calls on the government to work continuously to ensure that the police are equipped to combat and prevent violence and killings in close relationships, including in connection with the initiated work with initiatives against stalking. The Parliament emphasizes the importance of the work of preventing and combating violence in close relationships taking place across ministries and authorities. The Folketing finds that the topic must be addressed in the negotiations on a new multi-year agreement for the police and the prosecution.'[590]

The **German** national questionnaire also highlights that there is a lot of political discussion about recognising the killing of women as femicide, especially the killing of women as a consequence or manifestation of partnership violence.[591] According to the national expert, an analysis of the Federal Court of Justice case law on killings in close social relationships between 2006 and 2012 suggested that decisions on so-called honour murders by men with Turkish, Kurdish or Arabic migration background were shaped by culturalist prejudice, while the decisions upon intimate partner killings following separation in which perpetrators had no migrant background showed persistent victim blaming and a considerable understanding for the reasons for separation-related homicide and the pains of the abandoned husband, leading to considerable differences in sentencing.[592] A public hearing on femicides was held on 1 March 2021 before the Parliamentary Commission for Family, Senior Citizens, Women and Youth, where the views on the topic differed considerably.[593]

In **Italy**, a Parliamentary Commission was set up in 2017 in order to investigate the scale and causes of femicide and violence against women. The commission recommended: the improvement of statistical data collection; better criminal legislation in relation to child witnesses, the issuing of emergency orders for preventing violence, identity injuries and feminicide; the promotion of a socio-cultural change through education, professional training of police, social services and physicians, guidelines to the media on how to report on gender violence; the adoption of specific norms on online violence and online harassment; and the improvement of psychological assistance for male perpetrators of violence.[594]

Resistance to the concept of femicide is also present in some states. In **Spain**, despite the existence of aggravating circumstances in cases of gender-related killing of women and the fact that the Supreme Court has ratified its own doctrine several times in the recent years,[595] discussion is emerging at the political level. A new far right political party in Spain (VOX) has often questioned the idea of gender-related violence, including gender-related killings. Although in some Autonomous Communities this party has acquired enough strength to impose financial cuts on gender equality programmes (including programmes for the protection of victims of gender-based violence), its attempts to have the law against gender-based violence repealed have failed in Parliament.[596]

590 The decision and the debate is available here in Danish: https://www.ft.dk/samling/20191/vedtagelse/V95/index.htm.
591 For the actual judiciary and public discourse see Lembke, *Nennt sie Femizide!*, 26 February 2021, https://www.zeit.de/kultur/2021-02/mord-frauen-femizid-ehrenmord-justiz-rassismus-10nach8.
592 Foljanty, L. and Lembke, U. (2014) 'Die Konstruktion des Anderen in der "Ehrenmord"-Rechtsprechung', in: *Kritische Justiz* 2014, pp. 298-315, https://www.kj.nomos.de/fileadmin/kj/doc/2014/2014_3/8._Lena_Foljanty__Ulrike_Lembke_-_Die_Konstruktion_des_Anderen_in_der__Ehrenmord_-Rechtsprechung.pdf.
593 See https://www.bundestag.de/ausschuesse/a13/Anhoerungen/822308-822308.
594 http://www.senato.it/documenti/repository/commissioni/femminicidio/DocXXII-bis_9.pdf.
595 ECLI: ES:TS:2021:457; ECLI: ES:TS:2020:4373; ECLI: ES:TS:2020:4439; ECLI: ES:TS:2020:3111; ECLI: ES:TS:2020:4047; ECLI:ES:TS:2018:3757; ECLI:ES:TS:2018:3757.
596 https://www.eldiario.es/sociedad/respuesta-organizada-partidos-ley-vox-ley-violencia-genero-pp-ciudadanos-responden-leyendo-nombres-1-081-asesinadas_1_7245553.html.

Unlike the resistance and hesitation shown by some states, there is currently a legislative proposal pending at the House of Representatives in **Cyprus**, submitted on 30 October 2020, that seeks to amend the Criminal Code and introduce the offence of feminicide. In the proposal, the offence of feminicide is defined as:

> 'Whoever causes the death of a woman or girl with an illegal act or omission and
> a) has, had or attempted to have a personal relation with the victim, whether they lived together or not, or
> b) is a member of the victim's family
> c) Whose motivation for the act or omission is attributed to reasons of honour or protection of the family's reputation or religious beliefs or
> d) The act or omission took place in the context of female genital mutilation is guilty of felony, punishable with imprisonment for life.'

Similarly, while there is no specific bill pending in **France**, during discussions on the recent law on domestic violence in the French Parliament, a report adding the term femicide to the law was presented,[597] although unsuccessfully.[598]

10.3 Main findings

- √ No state has introduced a specific offence addressing the gender-based killing of women, although seven provide for aggravating circumstances in cases of gender-motivated killing of women.
- √ In fact, most states would rely on the aggravations applicable to the killing by a partner or spouse, or death in the context of intimate partner violence. This, however, would reduce the scope of femicide to the sphere of intimate relationships, ignoring other kinds of gender-motivated killing of women.
- √ Similarly, the use of aggravations based on the pregnancy or the vulnerability of the victim can reinforce stereotypes about women and victims.
- √ However, the result of death following unsafe abortions could be one aggravating factor that allows for the punishment of indirect or passive femicide, yet this was not considered by the national experts as possible aggravation, suggesting there is a limited scope attributed to the definition of femicide and it is largely considered as solely connected to intimate partner violence.
- √ In the complete opposite sense, not only is the gender-related killing of women seldom recognised, but punishment of gender-based killing of women can still give room for mitigating circumstances based on the emotional state of the perpetrator.
- √ Similar to the findings concerning domestic violence, the involvement of children and the adoption of measures for their protection seems to be deficient. Intimate femicide, that is, femicide committed by the partner or ex-partner of the victims, does not automatically result in the restriction of parental rights in relation to the children.
- √ The different legal definitions and aggravations used in Member States can prevent data collection and comparison across countries. Facilitating the collection of comparable data at the EU level is a crucial step towards complying with the call to form femicide observatories.
- √ Debates seem to be emerging at social and political level, as well as entering parliamentary discussions and a concrete proposal for explicit criminalising femicide exists in Cyprus.

10.4 Recommendations

597 https://www.assemblee-nationale.fr/dyn/15/rapports/ega/l15b2695_rapport-information.
598 The law on domestic violence of 2020 did not include it as a separate and autonomous offence, see Lucas E. (2020) 'La terme "feminicide" n'entre pas loi', *La Croix*, 17 July 2020 https://www.la-croix.com/Famille/Le-terme-feminicide-nentre-pas-loi-2020-07-17-1201105301.

Considering the complete absence of a specific offence of gender-based murder and the very low number of states that have introduced an aggravation of the crime based on the sex or gender of the victim, the authors of the report suggest:

- √ The introduction of a *working definition* of femicide for the purposes of collection of comparative data. This would contribute to ascertaining the prevalence of gender-based killings of women in Europe and take possible future steps into consideration.
- √ Such a definition should specify that women and girls are killed because of their gender and cover situations of intimate and non-intimate violence.
- √ The establishment of national observatories for femicide and a European femicide observatory.
- √ Consider the possibility of strengthening the deterring effect of criminalising the gender-related killing of women, either by introducing a specific offence where the gender of the victim is an element of the crime, or by including the gender of the victim as an aggravated circumstance for killings of women.
- √ Eliminate any mitigating factors based on the emotion, passion or similar state of the perpetrator.
- √ Include the restriction of parental rights in the sanctions applicable to intimate femicide.
- √ Adopt prosecutorial guidelines specifically addressing the gender-related killings of women, even in the absence of a specific offence.

11 General approach to enforcement and sanctioning

The purpose of chapter is to focus in on some of the specific obligations of states in relation to gender-based violence against women that emerge from the international and European normative framework. As explained in the introduction to this report, CEDAW General Recommendation 19 establishes that states must adopt, among other things,

> 1. Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence;
> 2. Protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence.[599]

Similar measures are required by the Istanbul Convention, while protection and reparation for victims are the main concern of Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. While the previous chapters have examined specific types of violence, their definitions, sanctions and related aspects, this chapter explores the legal measures that facilitate prosecution, such as the applicable statute of limitations, the existence of non-judicial and alternative mechanisms, the provision of protection and compensatory measures, and factors related to sanctioning. This information is drawn from the country questionnaires, with the additional support of previous mapping studies financed by the European Commission. The findings discussed below provide a more comprehensive overview of the existing regulation of gender-based violence against women in the 31 jurisdictions of study.

11.1 Aspects facilitating prosecution

This section describes two aspects that preclude the possibility of prosecution: statute of limitations and the territorial scope of criminal jurisdiction.

a) Statute of limitations

The applicable statute of limitations in each jurisdiction depends on the applicable sanction for each type of crime, which results in a broad range as shown in Table 28. In addition to the diversity among states, it is notable that gender-based violence offences require some special considerations regarding the 'ordinary' principles that statutes of limitations follow. The period of statute of limitations normally starts counting the very moment when the offence is committed, or in relation to continuous crimes, the moment when the violent act stops or the effects of the offence have ceased. This, of course, has implications for crimes such as domestic violence or stalking, which entail a certain repetition of behaviours. Online offences can also be considered as continuous crimes or having long-lasting effects, thus, any starting point for statute of limitations should be postponed as long as the damaging information or images remain accessible online. This approach has been taken in **France**.

We found some positive developments in relation to some forms of gender-based violence. For example, sexual violence crimes are not subject to statute of limitations in **Norway** since Article 91 of the Penal Code of 2005 entered into force, and a similar situation is found in **Sweden** (when the victim is under 18 years old) and the **United Kingdom**. There is also no statute of limitations for murder in **Germany**, the **Netherlands**, **Norway** or **Sweden**. No statutory time limit for prosecution exists in respect of indictable offences in **Ireland** either.[600]

599 General Recommendation No 19, para 24.t.i-iii.
600 Walsh, D. (2016) *Walsh on Criminal Procedure* (Dublin, Roundhall) at p. 921.

In most states, the starting moment of crimes is delayed in relation to (*ex parte*) crimes against minors, most frequently in relation to sexual violence. The starting period then varies between the age of majority (**Greece**, **Hungary**, **Iceland**, **Italy**, **Luxembourg**, **Norway**, **Slovakia**, **Spain**, **Sweden**) and longer periods, such as when the victims turns 25 (**Lithuania**), 28 (**Liechtenstein**) and 30 (**Germany**, **Poland**). In **Denmark**, the statute of limitation for the crime of female genital mutilation starts when the victim turns 21. The national expert reports that since mid-January 2021, the **Greek** Government is considering extending the suspension of the limitation of crimes against minors following revelations in the context of the #MeToo movement, which revealed serious sexual abuse in sports and the theatre, including, *inter alia,* rape and sexual abuse against minors.[601]

Table 28 Range of statute of limitations per type of violence

Offence	Period (in years)
Domestic violence	1-20
Sexual violence, including rape	5-30
Sexual harassment and harassment based on sex	1-10
Sexual exploitation	2-25
Female genital mutilation, and other non-consensual forms of genital mutilation	5-25
Forced abortion and forced sterilisation	5-25
Forced marriage	5-15
Stalking	2-10
Non-consensual use of intimate / private images	2-12
Hate speech based on gender and/or sex	2-10
Femicide	20-35

b) Extraterritoriality

The most common principles guiding the determination of jurisdiction over criminal offences in comparative criminal law establish that a state can adjudicate any offence that is committed within its territory or area of effective control, or on board a ship or an aircraft registered under the laws of the state; or the offence was committed by a national or a person who has habitual residence in its territory. Jurisdiction is determined based on these principles (and some modifications) for all states under review.[602] Some states require a 'double criminality', that is, subordinating jurisdiction to the condition that the acts are also criminalised in the territory where they were committed. Double criminality is required by **Iceland** and **Ireland**, while **Finland** requires that the offence is sanctioned with a minimum sentence of six months.

The Istanbul Convention requires the elimination of the requirement of double criminality in relation to sexual violence and rape, forced marriages, female genital mutilation (FGM), forced abortion and forces sterilisation. Based on the country questionnaires, only **Spain** seems to fully meet these criteria. The jurisdiction of the Spanish Courts to hear acts committed outside the national territory was extended by the 2014 reform of the judicial power relative to universal jurisdiction. Article 23(4)(l) establishes that the Spanish courts will be competent to hear the acts committed by Spaniards or foreigners outside the national territory that may be classified, according to Spanish law, as crimes regulated in the Istanbul Convention, provided that the procedure is directed against a Spaniard or against a foreigner who habitually resides in Spain; or, the crime had been committed against a victim who, at the time of

601 https://www.dikastiko.gr/eidhsh/oi-allages-ston-poiniko-kodika-mesa-apo-tis-fraseis-toy-k-mitsotaki-poies-ypotheseis-the-ekdikazontai-kata-proteraiotita/.

602 Bulgaria, Czechia, Hungary, Latvia and Malta require only these elements, with no exceptions or additional requirements.

commission of the facts, had Spanish nationality or habitual residence in Spain, provided that the person charged with the commission of the criminal act is in Spain.

Other states recognise exceptions to double criminality, yet pose some additional restrictions. While **Germany** excludes sexual violence and rape, forced marriages, FGM, forced abortion and forces sterilisation from the requirement of double criminality, it requires that the victim is a German national, leaving residents outside of the protection. **Croatia**, the **Netherlands** and **Sweden** established that double criminality is exempted only in relation to sexual violence, forced marriages, female genital mutilation (in addition to forced abortion in **Croatia**, and trafficking in human beings in **Sweden**), excluding forced abortion and forced sterilisation. **Denmark** excludes double criminality in cases of aggravated violence, aggravated assault and female genital mutilation.

In some cases, states have derived their jurisdiction from the realisation or continuation of the offence in the territory of the state. **Norway** has found in a case on domestic violence where the violence had begun in Norway and had continued during the family's residence in Nigeria and then in Norway again that, although the acts were not punishable in Nigeria, Norwegian criminal law applied to the acts committed in Nigeria, and that the collective crime in its entirety should be considered to have been committed in Norway.[603] Similarly, in **Belgium**, FGM and forced marriage or forced legal cohabitation committed abroad would not require double criminality, if elements of violence or threats have taken place on Belgian territory.

Only a few states pose stricter requirements on the extraterritoriality of the criminal jurisdiction. In **France**, jurisdiction on crimes committed abroad is only possible in relation to asylum seekers who are victims of GBVAW abroad before entry. In **Luxembourg**, extraterritoriality is only possible if the victim is unable to bring a complaint in the EU Member State where the offence was committed. According to the experts, the **United Kingdom** and **Greece** do not allow for the extraterritoriality of criminal law adjudication in any circumstances.

11.2 General approach to sanctioning and aggravating factors

The approach in relation to sanctioning and aggravating sanctions varies among the states under examination. In some states, there are specific aggravations included in each type of crime, in combination with extra, general aggravations that apply to every single crime equally and that serve the judge when determining the sentence. In some states, there is a distinction between the basic offence and more serious offences, often called 'qualified' offences, in addition to aggravating factors applying to each of them. In the context of this report, 'aggravating factors' refer to any circumstances that the legislator or judge takes into account to the decide on the seriousness of the offence and the severity of the sanction, regardless of whether this is considered as a qualification of the offence, an element of a more serious offence or an aggravating factor. In Table 29 we see the most common circumstances reported by the national experts as aggravating either the specific or general offences connected to each type of violence against women in their jurisdictions. In some cases, these aggravating factors, are constitutive elements of the offence. For instance, the repetitive behaviour is constitutive to the crime of stalking. In other cases, some definitions include the aggravating factors as constitutive elements. For instance, the use of force may be a constitutive element of rape. Aggravating factors are discussed in greater detail in the chapters focusing on each form of violence.

A few aspects merit discussion here. In addition to the specific aggravating factors, **Spain** has adopted an interesting approach that contributes to overcoming the limitations resulting from the gender-based violence definition restricted to heterosexual intimate partner violence. According to Supreme Court doctrine, the gender of the victim qualifies the behaviour of the perpetrator with an 'added unlawfulness

603 Norwegian Supreme Court, judgment of 19-10-2018 in HR-2018-2043-A.

that entails that it is a manifestation of the serious and entrenched inequality that perpetuates the roles traditionally assigned to men and women, based on the dominance and superiority of the former and the subordination of the latter'.[604] Therefore, if the circumstances of the case show relevant elements of discriminatory conduct, this aggravating circumstance can qualify all those offences that are gender neutral. The aggravating circumstance of gender has been recognised in 67 % of the cases in which it was claimed.[605] In a recent judgement the Supreme Court has established that whereas 'not every crime against sexual freedom perpetrated by a man on a woman will be subject to the aggravation', the aggravating circumstance is to be imposed when 'the circumstances surrounding the events reveal that it is an act of male domination'.[606] It is important to notice that, in the doctrine of the Supreme Court, this provision must be framed within a corrective objective of inequality or discrimination. Therefore, the aggravating circumstance does not require a subjective element consisting of a seriously discriminatory intent.[607] It is enough for the perpetrator to know that in carrying out the behaviour, he places the woman in that subordinate, humiliated or dominated position.[608] This is a very different approach than the one resulting from the use of hate-related aggravations based on sex or gender (discussed in Chapter 10), since the focus lies on the animus of the perpetrator rather than on the existence of a context of gender inequality and subordination. As argued elsewhere,[609] it should be noted that aspects connected to the subjective element of the crimes may, in practice, jeopardise the prosecution and punishment of the violence. Most definitions of hate crime focus on the perpetrator's bias ('hate') against the victim. This means that, in addition to the intent to commit the crime, hate crimes require a specific motivation behind their commission, putting an additional burden on prosecutors and the police who need to prove it.[610]

604 Spanish Supreme Court, judgment 444/2020 of 14 September 2020, ECLI: ES:TS:2020:2904.

605 Expert Group on Domestic and Gender Violence of the General Council of the Judiciary (2018) *Análisis aplicación de la agravante por razón de género en sentencias dictadas entre 2016 y mayo de 2018* (Analysis of the Application of the Aggravating Circumstance of Gender in Judgments between 2016 and May 2018), October 2018, https://www.poderjudicial.es/cgpj/es/Temas/Violencia-domestica-y-de-genero/Actividad-del-Observatorio/Informes-de-violencia-domestica-y-de-genero/Analisis-aplicacion-de-la-agravante-por-razon-de-genero-en-sentencias-dictadas-entre-2016-y-mayo-de-2018.

606 Spanish Supreme Court, judgment 444/2020 of 14 September 2020, ECLI: ES:TS:2020:2904.

607 Spanish Supreme Court, judgment 99/2019 of 26 February 2019, ECLI: ES:TS:2019:591.

608 Spanish Supreme Court, judgment 667/2018, of 19 December 2018, ECLI:ES:TS:2018:4554.

609 Sosa, L. (2020) 'Now you see me? The visibility of trans and travesti experiences in criminal procedures', *Politics and Governance*, 8(3), pp. 266–277. doi: 10.17645/pag.v8i3.2804.

610 See: Hall, N. (2013) *Hate Crime*, second edition, Routledge, New York; Jacobs, J. and Potter, K. (1998) *Hate Crimes: Criminal law and identity politics*. New York: Oxford University Press.

Table 29 Aggravations applied in cases of GBVAW

	DV	Sexual violence & rape	Sexual harassment & harassment based on sex	Female genital mutilation	Forced arriage	Stalking	Non-consensual use of intimate/ private images	Murder
Victim is a former or current spouse or partner	Austria, Belgium, Bulgaria, Denmark, Estonia, France, Greece, Ireland, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Romania, Slovakia, Spain, Sweden	Austria, Belgium, Croatia, Estonia, France, Hungary, Ireland, Liechtenstein, Luxembourg, Malta, Norway, Portugal, Slovakia, Spain, Sweden	Austria, Belgium, Estonia, Iceland, Liechtenstein, Malta, Norway, Spain, Sweden	Austria, Belgium, Croatia, France, Ireland, Liechtenstein, Lithuania, Malta, Norway, Slovakia Spain	Austria, Iceland, Liechtenstein, Malta, Norway, Spain	Austria, Belgium, Bulgaria, Croatia, Estonia, Hungary, Italy, Liechtenstein, Malta, Norway, Portugal, Slovakia, Spain, Sweden	Austria, France, Italy, Liechtenstein, Norway, Spain	Austria, Bulgaria, Croatia, Estonia, France, Italy, Netherlands, Norway, Portugal, Slovakia, Spain, Sweden
Perpetrator is a family member, a person cohabiting with the victim or a person having abused her or his authority	Austria, Belgium, Bulgaria, Denmark, Estonia, France, Greece, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Slovenia, Slovakia, Spain, Sweden, United Kingdom	Austria, Belgium, Croatia, Estonia, France, Germany, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Romania, Slovakia, Spain, Sweden, United Kingdom	Austria, Belgium, Croatia, Estonia, Italy, Liechtenstein, Malta, Netherlands, Norway, Poland, Spain, Sweden, United Kingdom	Austria, Belgium, Croatia, France, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom	Austria, Bulgaria, Italy, Liechtenstein, Lithuania, Malta, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom	Austria, Belgium, Bulgaria, Croatia, Estonia, France, Germany, Hungary, Iceland, Italy, Liechtenstein, Malta, Norway, Netherlands, Slovakia, Spain, Sweden, United Kingdom	Austria, Estonia, Italy, Liechtenstein, Norway, Portugal, Spain, United Kingdom	Austria, Estonia, Croatia, France, Italy, Netherlands, Norway, Portugal, Slovakia, Spain, Sweden

	DV	Sexual violence & rape	Sexual harassment & harassment based on sex	Female genital mutilation	Forced arriage	Stalking	Non-consensual use of intimate/ private images	Murder
The offence, or related offences, were committed repeatedly	Croatia, Czechia, Denmark, Estonia, Iceland, Liechtenstein, Lithuania, Norway, Portugal, Slovakia, Sweden, United Kingdom	Denmark, Estonia, Liechtenstein, Lithuania, Malta, Norway, Sweden, United Kingdom	Denmark, Estonia, France, Liechtenstein, Lithuania, Malta, Norway, Portugal, Sweden, United Kingdom	Bulgaria, Czechia, Denmark, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Sweden	Denmark, Liechtenstein, Malta, Norway, Sweden	Denmark, Estonia, France, Iceland, Liechtenstein, Lithuania, Malta, Norway, Sweden, United Kingdom	Denmark, Liechtenstein, Lithuania, Netherlands, Norway, United Kingdom	Bulgaria, Czechia, Estonia, Hungary, Norway, Portugal, Slovakia, Sweden
Victim was made vulnerable by particular circumstances	Denmark, Estonia, France, Germany, Italy, Liechtenstein, Lithuania, Luxembourg, Norway, Poland, Portugal, Slovakia, Sweden, United Kingdom	Austria, Belgium, Croatia, Denmark, Estonia, France, Germany, Greece, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom	Austria, Belgium, Estonia, Croatia, Denmark, France, Greece, Italy, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Spain, Sweden, United Kingdom	Austria, Belgium, Bulgaria, Denmark, France, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom	Austria, Denmark, Italy, Liechtenstein, Lithuania, Malta, Norway, Portugal, Slovakia, Slovenia, Sweden, United Kingdom	Austria, Belgium, Estonia, France, Italy, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom	Austria, Denmark, France, Italy, Liechtenstein, Lithuania, Netherlands, Norway, Spain, Portugal, United Kingdom	Austria, Bulgaria, Croatia, Estonia, Germany, Hungary, Iceland, Italy, Netherlands, Norway, Slovakia, Spain, Sweden

	DV	Sexual violence & rape	Sexual harassment & harassment based on sex	Female genital mutilation	Forced arriage	Stalking	Non-consensual use of intimate/ private images	Murder
Child victim or witness	Austria, Croatia, Denmark, Estonia, France, Greece, Italy, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Sweden, United Kingdom	Austria, Denmark, Estonia, France, Greece, Italy, Liechtenstein, Malta, Netherlands, Norway, Poland, Sweden, United Kingdom	Belgium, Bulgaria, Croatia, Czechia, Denmark, France, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom	Austria, Bulgaria, Denmark, Greece, Italy, Iceland, Liechtenstein, Lithuania, Malta, Norway, Spain, Sweden, United Kingdom	Croatia, Czechia, Estonia, France, Italy, Liechtenstein, Lithuania, Malta, Norway, Sweden, United Kingdom	Austria, Belgium, Croatia, Denmark, Estonia, France, Iceland, Italy, Liechtenstein, Lithuania, Netherlands, Norway, Spain, United Kingdom	Austria, Bulgaria, Czechia, Estonia, Hungary, Italy, Norway, Spain, Sweden
Multiple perpetrators	Denmark, Estonia, France, Germany, Liechtenstein, Lithuania, Norway, Slovakia, Sweden, United Kingdom	Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom	Austria, Denmark, Estonia, France, Germany, Iceland, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Slovenia, Sweden, United Kingdom	Bulgaria, Denmark, France, Iceland, Liechtenstein, Lithuania, Malta, Norway, Slovakia, Sweden, United Kingdom	Czechia, Denmark, Iceland, Liechtenstein, Lithuania, Malta, Norway, Slovakia, Sweden, United Kingdom	France, Iceland, Liechtenstein, Lithuania, Malta, Norway, Sweden, United Kingdom	Denmark, Iceland, Liechtenstein, Lithuania, Netherlands, Norway, United Kingdom	Bulgaria, Norway, Portugal, Slovakia, Slovenia, Sweden

	DV	Sexual violence & rape	Sexual harassment & harassment based on sex	Female genital mutilation	Forced arriage	Stalking	Non-consensual use of intimate/ private images	Murder
Extreme levels of violence	Austria, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Norway, Poland, Portugal, Slovakia, Spain	Austria, Belgium, Croatia, Denmark, Estonia, France, Germany, Iceland, Italy, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Spain, Sweden, United Kingdom	Austria, Denmark, Estonia, Italy, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Spain, Sweden, United Kingdom	Bulgaria, Denmark, Finland, Germany, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Portugal, Slovakia, Spain, Sweden	Austria, Denmark, Italy, Liechtenstein, Lithuania, Malta, Norway, Spain, Sweden	Germany, Italy, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Spain, Sweden, United Kingdom	Austria, Denmark, Italy, Liechtenstein, Netherlands, Norway, Spain	Austria, Bulgaria, Estonia, Hungary, Croatia, Czechia, Finland, France, Germany, Italy, Norway, Poland, Portugal, Slovakia, Spain, Sweden
Use or threat of a weapon	Austria, Denmark, Finland, France, Germany, Italy, Liechtenstein, Lithuania, Norway, Slovakia, Spain, Sweden, United Kingdom	Austria, Croatia, Czechia, Denmark, Estonia, France, Germany, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Portugal, Spain, Sweden, United Kingdom	Austria, Denmark, Liechtenstein, Malta, Norway, Sweden, United Kingdom	Denmark, Finland, France, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Portugal, Sweden, United Kingdom	Austria, Denmark, Liechtenstein, Malta, Norway, United Kingdom	Czechia, Germany, Italy, Liechtenstein, Lithuania, Malta, Norway, Portugal, United Kingdom	Austria, Denmark, Liechtenstein, Norway, United Kingdom	Austria, Iceland, Norway, Sweden

	DV	Sexual violence & rape	Sexual harassment & harassment based on sex	Female genital mutilation	Forced arriage	Stalking	Non-consensual use of intimate/ private images	Murder
Severe physical or psychological harm for the victim	Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Portugal, Slovakia, Sweden, United Kingdom	Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Portugal, Romania, Sweden, United Kingdom	Austria, Denmark, France, Italy, Liechtenstein, Malta, Netherlands, Norway, Portugal, Sweden, United Kingdom	Belgium, Denmark, Finland, Hungary, Iceland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Norway, Portugal, Slovakia, Slovenia, Sweden, United Kingdom	Austria, Czechia, Denmark, Greece, Italy, Liechtenstein, Malta, Norway, Sweden	Estonia, France, Italy, Liechtenstein, Lithuania, Malta, Norway, Portugal, Sweden, United Kingdom	Austria, Denmark, Italy, Liechtenstein, Lithuania, Norway, United Kingdom	Austria, Italy, Netherlands, Norway, Sweden
Previous conviction for similar offences	Denmark, Liechtenstein, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom	Denmark, Estonia, Germany, Liechtenstein, Malta, Norway, Portugal, Spain, Sweden, United Kingdom	Denmark, Liechtenstein, Malta, Norway, Portugal, Spain, Sweden, United Kingdom	Bulgaria, Czechia, Denmark, Germany, Liechtenstein, Malta, Norway, Portugal, Spain, Sweden, United Kingdom	Denmark, Liechtenstein, Malta, Norway, Spain, Sweden United Kingdom	Liechtenstein, Malta, Norway, Portugal, Slovakia, Spain, Sweden, United Kingdom	Denmark, Liechtenstein, Norway, Portugal, Spain	Bulgaria, Estonia, Hungary, Norway, Poland, Portugal, Slovakia, Spain, Sweden
Offence has been committed online	-	-	France, Greece	-	-	France, Italy, Slovakia, Sweden	France, Italy, Spain, Poland	-
Offence committed on the grounds of the victim's gender	France, Lithuania, Malta, Spain,	France, Lithuania, Malta, Slovakia, Spain,	France, Lithuania, Malta, Norway, Spain, Sweden, United Kingdom	France, Lithuania, Malta, Spain,	Lithuania, Malta, Slovakia, Spain,	France, Lithuania, Malta, Slovakia, Spain, Sweden, United Kingdom	France, Lithuania, Malta, Norway, Spain	Belgium, Croatia, France, Malta, Portugal, Slovenia, Spain

11.3 Non-criminal mechanisms of accountability

a) Alternative dispute resolution processes

The Victims' Rights Directive 2012/29/EU states that 'victim-offender mediation, family group conferencing and sentencing circles, can be of great benefit to the victim'. The mechanism has been largely used in relation to juvenile offenders.[611] The Directive also highlights, however, that factors such as the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of a victim's physical, sexual, or psychological integrity, power imbalances, and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim's ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting a restorative justice process.[612] The Istanbul Convention takes a step further and calls on states to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention (Article 48(1)).

A good example of a domestic system complying with the requirements of both instruments is the **Spanish** one. Until 2015, in Spain, victim-offender mediation was only provided for in Organic Law 5/2000, regulating the criminal responsibility of minors,[613] allowing the file to be dismissed due to conciliation between the minor and the victim. The possibility of criminal mediation was introduced with the reform of the Criminal Code of 2015, allowing the judge to condition the suspension of the execution of the sentence to compliance with the agreement reached by the parties by virtue of mediation.[614] The requirements of mediation are set by Article 15 (Restorative justice services) of Law 4/2015 on the Statute of Victims of Crime,[615] which transposes Directive 2012/29/EU. One requirement is that mediation 'is not prohibited by law for the crime committed.' Article 44 of Organic Law 1/2004 against gender violence[616] prohibits mediation in the crimes included in the titles of the Criminal Code relating to homicide, abortion, injuries, injuries to the foetus, crimes against freedom, crimes against moral integrity, against sexual freedom and indemnity or any other crime committed with violence or intimidation, provided they have been committed against the spouse, ex-spouse, or a person who is or has been linked to the author by analogous affective relationship, even without cohabitation, as well as those committed on the descendants, their own or the spouse's or partner's, or on the minors or incapacitated living with the author, when there has also been an act of gender violence. In other words, criminal mediation is prohibited only in crimes of intimate partner violence, or in crimes of domestic violence when they occur together with an act of intimate partner violence, but it is thus not prohibited in all those forms of gender violence that exceed the definition of the Organic Law 1/2004.

Several of the states under review offer mediation as a mechanism for alternative dispute resolution, yet this is a voluntary rather than mandatory procedure (**Belgium**, **Denmark**, **Finland**, **Netherlands**, **Norway**, **Poland**, **Slovakia**, **Slovenia**). In some states, mediation is obligatory in case of divorce, although excluded if the cause of the divorce is related to GBV (**Lithuania**, **Malta**). In **Hungary**, however, the national expert points out that, although mediation is not mandatory in any case, women's rights NGOs report that victims are pressured to participate even in cases when it is not mandatory. Similarly,

611 See: Kratcoski P.C. (2017) 'Treatment of Juvenile Offenders: Diversion and Formal Processing' in: *Correctional Counseling and Treatment*, Springer; Decker, S. H., and Marteache, N., (eds) (2017) *International Handbook of Juvenile Justice*, Springer; Elliott, E. and Gordon, R. (eds) (2005) *New Directions in Restorative Justice: Issues, Practice, Evaluation,* Willan Publishing; Walgrave, L. (2003) *Repositioning Restorative Justice: Restorative Justice, Criminal Justice and Social Context,* Willan Publishing.

612 Victims' Rights Directive, Para. 46.

613 Organic Law 5/2000, regulating the criminal responsibility of minors (*Ley Orgánica 5/2000, reguladora de la responsabilidad penal de los menores*), 12 January 2000, https://www.boe.es/buscar/act.php?id=BOE-A-2000-641.

614 Criminal Code, Article 84(1)(1º), https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444#a84.

615 Law 4/2015 of the Statute of Victims of Crime (*Ley 4/2015, del Estatuto de la víctima del delito*), 27 April 2015, https://www.boe.es/buscar/act.php?id=BOE-A-2015-4606.

616 Organic Law 1/2004, on integrated protection measures against gender violence (*Ley Orgánica 1/2004, de medidas de protección integral contra la violencia de género*), 28 December 2004, https://www.boe.es/buscar/act.php?id=BOE-A-2004-21760.

in **Germany**, although mediation is not possible, the national expert reports that courts seem willing to accommodate perpetrators who show considerable efforts towards reconciliation. According to the country questionnaires, no mediation is possible in eight states (**France**, **Germany**, **Greece**, **Iceland**, **Ireland**, **Latvia**, **Liechtenstein**, **Portugal**).

Alternative dispute resolution mechanisms are usually available for cases of sexual harassment or harassment based on sex (**Sweden**, **United Kingdom**), yet it is also reported to be available in cases of *ex parte* criminal offences (**Romania**).[617] In some cases, mediation is available at the discretion of the prosecutor if they find that this measure is likely to ensure the reparation of the victim or to put an end to the trouble resulting from the offence or to contribute to the rehabilitation of the perpetrator. This is possible in **Luxembourg**, yet mediation is not possible when the perpetrator and the victim are living together.[618] In **Estonia**, however, mediation is generally available.

b) Equality bodies

Equality Bodies play a large role in the jurisdictions under review. Previous reports have identified three core functions of equality bodies: promotion and prevention, support and litigation, and decision making.[619] The EU equal treatment directives require a range of competences regarding the support and litigation function (provision of independent assistance to those experiencing discrimination). That said, the Commissioner for Human Rights of the Council of Europe has recommended assisting those experiencing discrimination by 'receiving and handling individual or collective complaints; providing legal advice to victims, including in pursuing their complaints; engaging in activities of mediation and conciliation; representing complainants in court; and acting as amicus curiae'.[620] Previous research indicated that 25 equality bodies have the capacity to receive, examine, hear and make decisions on cases of discrimination[621] Following the transposition of Directives 2006/54/EC and 2010/41/EU, 22 states report that national equality bodies can receive claims of sexual harassment and harassment based on sex (**Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Denmark**, **Estonia**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Latvia**, **Liechtenstein**, **Malta**, **Netherlands**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Sweden**).

There are several limitations of equality bodies in relation to handling criminal offences, particularly considering their limited monitoring and enforcement capacity. Hence, in relation to *ex officio* offences, judicial procedures will be the inevitable avenue. In the case of **Norway**, the Equality and Anti-Discrimination Tribunal can no longer address a case if the police are investigating it.[622] However, a few national experts report that equality bodies can address other cases of gender-based violence, besides sexual harassment or harassment based on sex, although in some cases it appears that the capacity to do so is limited to providing advice and help through the adequate procedures (**Poland**, **Portugal**, **United Kingdom**).. Table 30 shows the equality bodies available under all jurisdictions of study, and indicates with an X which of them can receive sexual harassment complaints, and which can also receive other GBVAW complaints.

617 Article 67 of Law 192/2006 on mediation (*Legea 192/2006 privind medierea şi organizarea profesiei de mediator*).
618 CPC, Article 24, Para. 5.
619 Crowley, N. (2018) *Equality bodies making a difference*, European network of legal experts in gender equality and non-discrimination (EELN), p. 7. Available at: https://www.equalitylaw.eu/downloads/4763-equality-bodies-making-a-difference-pdf-707-kb.
620 Council of Europe, Commissioner for Human Rights (2011), *Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality*, Strasbourg, Council of Europe, 21 March 2011.
621 Crowley, N. (2018) *Equality bodies making a difference*.
622 Act of 2017-06-16-50, Article 10c. Entry into force 01.01.2018; https://lovdata.no/dokument/NLE/lov/2017-06-16-50#KAPITTEL_3 (English).

Table 30 Equality bodies and complaints

State	Capacity to receive sexual harassment complaints	Capacity to receive GBV complaints	Body
Austria	X	X	Ombudsperson for Gender Equality
Belgium	X	X	Institute for gender equality
Bulgaria	X	-	Commission for protection against discrimination
Croatia	X	-	Ombudsperson for Gender Equality
Cyprus	X	-	Committee on Gender Equality in Employment and Vocational Training, the Equality Body (Office of the Ombudsman) and Labour Inspectorates
Czechia	-	-	Public Defender of Rights
Denmark	X	-	Danish Board of Equal Treatment
Estonia	X	X	Gender equality and equal treatment commissioner,
Finland	-	-	Equality Ombudsperson
France	X	-	Defender of Rights
Germany	X	-*	Equal Opportunity Commissioner
Greece	X	-	The Ombudsperson and Deputy Ombudsman for Gender Equality
Hungary	X	-	Commissioner for Fundamental Rights
Iceland		-	
Ireland	X	-	Human Rights and Equality Commission
Italy	X	-	Equal opportunities National Advisor
Latvia	X	-	Ombudsperson
Liechtenstein		-	
Lithuania	X	-	
Luxembourg	-	-	Centre for Equal Treatment
Malta	X	-	National Commission for the Promotion of Equality
Netherlands	X	-	National Commission for the Promotion of Equality
Norway	X	-*	Equality Tribunal
Poland	X	-	Commissioner for Human Rights
Portugal	X	X	Public Agency for Citizenship and Gender Equality'
Romania	X	-	National Council for Combating Discrimination
Slovakia	X	-	National Centre for Human Rights
Slovenia	X	X	Advocate
Spain	-	-	Institute of Women and for Equal Opportunities
Sweden	X	-	Equality Ombudsperson
United Kingdom	?	-	Equality and Human Rights Commission

* this information is not available at the time this report is written.

11.4 Protection orders

Several European instruments establish the obligation of states to provide protection measures for victims of violence or those at risk of suffering violence. The Victims' Rights Directive 2012/29/EU establishes that,

> 'Measures should be available to protect the safety and dignity of victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, such as interim injunctions or protection or restraining orders.'[623]

Similarly, the Istanbul Convention explicitly incorporates the obligation to include protection orders (POs) to the norms, identifying different 'moments' of protection, such as immediate and longer-term protection, and requiring states to offer victims of violence both emergency barring orders in situations of immediate danger[624] and longer-term protection orders.[625]

In this report, protection orders are understood as any decision, provisional or final, adopted as part of a civil, criminal, administrative or other procedure, imposing rules of conduct (prohibitions, obligations or limitations) on an adult person with the aim of protecting another person against an act that may endanger his/her life, physical or psychological integrity, dignity, personal liberty or sexual integrity.[626] Hence, protection orders can be issued by a court, prosecutor, police, or administrative body.[627] At the EU level, protection orders issued in one Member State have to be recognised and enforced in another Member State based on the principle of mutual recognition. When adopted as part of criminal proceedings, protection orders are covered by Directive 2011/99/EU on the European Protection Order (EPO), whereas protection orders adopted as part of civil and administrative procedures are covered by Regulation 606/2013 on Mutual Recognition of Protection Measures in Civil Matters.[628]

In recent years, there have been several studies exploring the benefits and limitations of protection orders and their availability in European States.[629] For this reason, this section provides only a brief mapping of the availability of these measures in the jurisdictions under review, illustrated with an X in Table 31.

623 Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012, p. 52.
624 Istanbul Convention, Article 52.
625 Istanbul Convention, Article 53.
626 See: van der Aa S., Niemi J., Sosa L., Ferreira A., Baldry A., (2015) *Mapping the legislation and assessing the impact of protection orders in the European Member States, Final report of the POEMS Project funded by the DAPHNE Programme of the EU*, p. 36.
627 For a detailed yet brief discussion of the differences between civil law, criminal law and administrative law protection orders, see Sosa, L. et al (2019) 'Protection against violence: the challenges of incorporating human rights' standards to procedural law', *Human Rights Quarterly* 41.
628 For a detailed discussion of the implementation of these directives, see the 2018 implementation report: https://www.europarl.europa.eu/doceo/document/A-8-2018-0065_EN.pdf.
629 For a full comparative mapping of protection orders in Europe, see: van der Aa S., Niemi J., Sosa L., Ferreira A., Baldry A. (2015) 'Mapping the legislation and assessing the impact of protection orders in the European Member States'; For an analysis on emergency barring orders in particular, see: Römkens, R. and Sosa, L. (2011) 'Protection, Prevention and Empowerment: Emergency Barring Intervention for Victims of Intimate Partner Violence', in Kelly, Hagemann-White, Meysen and Römkens (eds), *Realising Rights. Case studies on state responses to violence against women and children in Europe,* DAPHNE Project European Commission, (London), and Niemi, J. and Logar, R. (2017) 'Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention'. On the implementation of the EPO, see: Cerrato, E. and others, 'European Protection Order' (2017). For a general discussion of the different aspects of protection order: Sosa, Niemi and van der Aa, S. (2019); Protection against violence: the challenges of incorporating human rights' standards to procedural law', *Human Rights Quarterly* 41, No. 4: 939-961.

Table 31 Protection orders in all jurisdictions

State	Medium to long-termprotection order	Emergency protection order
Austria	X	X
Belgium	X	X
Bulgaria	X	X
Croatia	X	X
Cyprus	X	-
Czechia	X	X
Denmark	X	X
Estonia	X	X
Finland	X	X
France	X	-
Germany	X	X
Greece	X	-
Hungary	X	X
Iceland	X	-
Ireland	X	X
Italy	X	X
Latvia	X	X
Liechtenstein	-	X
Lithuania	X	-
Luxembourg	X	X
Malta	X	X
Netherlands	X	X
Norway	X	X
Poland	X	X
Portugal	X	-
Romania	X	X
Slovakia	X	
Slovenia	X	X
Spain	X	-
Sweden	X	-
United Kingdom	X	X

a) Medium and long-term protection orders

Medium and long-term protection orders are available in all the jurisdictions under review except for in **Liechtenstein**. These include *civil law* interim measures or restriction orders (**Bulgaria**, **Czechia**, **France**, **Ireland**, **Italy**, **Luxembourg**, **Romania**, **Slovakia**, **United Kingdom**), and *criminal law* protection orders (**Belgium**, **Croatia**, **Estonia**, **Greece**, **Latvia**, **Lithuania**, **Netherlands**, **Norway**, **Poland**, **Sweden**). In **Denmark**, however, restraining orders are provided under *administrative law* if there is reasonable suspicion of risk for the victims. The measure is valid for one year and it can be extended upon request. The breach of the protection order is sanctioned with a fine or prison up to two years. While the breach of a criminal protection order results in a sanction in all cases, in the majority of cases, civil or family law protection orders are also enforced by criminal law.

Civil protection orders can generally be imposed as (preliminary) injunction via interlocutory proceedings. In general terms, criminal law POs can be adopted as (pre-trial) coercive measures or as restraining orders to prevent the suspect from harassing certain persons. These measures can also be imposed as conditions to probation, as conditions to a conditional/ suspended sentence or as conditions to a conditional leave from prison. One example of protection orders available under criminal law is found in **Norway**. According to the national expert, long-term protection orders are normally issued by the criminal courts together with the final judgment in a domestic violence case. In recent years protection orders supplemented by electronic monitoring (issued by a court as part of a sentencing judgment) have also come into focus. According to Article 57 of the Penal Code the protection orders can last for up to five years, and in special cases they may be indefinite. Violations of restraining orders should be followed-up quickly and firmly, and in severe cases, violations may result in arrest and detention. However, some particularities are found in relation to POs regulated in criminal law. According to country questionnaires, in **Denmark**, **Finland** and **Sweden**, protection orders can be issued by the public prosecutor, the police or a district court, but they are not necessarily criminal protection orders. In fact, the procedure by which these orders can be imposed is separate from criminal prosecution and can even be initiated without suspension or prosecution of a crime.

A similar situation is found in **Spain** where the Code of Criminal Procedure[630] regulates precautionary measures in offences of homicide, abortion, injuries, against freedom, torture and against moral integrity, trafficking in human beings, against sexual freedom and indemnity, privacy, the right to self-image and the inviolability of home, honour, heritage and socioeconomic order. Yet, precautionary measures are decided by the judge or the court, or special courts on gender based violence, at the request of the prosecutor, the victim, the victim's relatives or the court *ex officio*, via a simple and quick judicial procedure (a maximum of 72 hours after application) when an offence is being investigated, and they are necessary for the protection of the victim.[631] The protection order may include both criminal and civil measures and the rules of a criminal procedure apply. This is also the case in **Portugal**, where victims of gender-based violence and domestic violence are protected by criminal, administrative and civil measures intended to grant them long-term protection against their aggressors.

b) Emergency protection orders

The adoption of emergency barring orders (EBOs) in European national jurisdictions as a response to the need for immediate protection against domestic violence has been encouraged by the Istanbul Convention,[632] yet this normative recognition is first and foremost an achievement of national women's movements. EBOs were first introduced in **Austria** in 1997,[633] and since then, the 'Austrian model' has been adopted in several states across Europe. The main advantage of 'emergency barring orders' is that they can provide victims with *immediate* protection in crisis situations. They can be issued as the result of a risk assessment, even before an offence is actually committed and even if there is no need to arrest the abuser, and given their preventative nature and short duration, they do not pose strict evidentiary requirements. In comparison to medium and long-term protection orders, EBOs do not usually require the victim to file a civil lawsuit. These are the elements that are taken into account to evaluate the extent to which EBOs are available in the jurisdictions under examination.

Emergency protection orders meeting the requirements described above were found in 21 states (**Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Czechia**, **Denmark**, **Finland**, **Germany**, **Hungary**, **Ireland**, **Italy**, **Latvia**,

630 Royal Decree enacting the Law on Criminal Procedure (*Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal*), 14 September 1882, https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036. Articles 544bis, ter and quinquies commented on here were introduced in 1999, 2003 and 2015, respectively.

631 Article 544bis Law on Criminal Procedure https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036#a544bis.

632 See Istanbul Convention, Articles 52 and 53. On approaches to protection orders, Sosa, L. et al (2019) 'Protection against violence: the challenges of incorporating human rights' standards to procedural law', *Human Rights Quarterly* 41, 956.

633 Logar, R. (2007) 'Introduction: National and International Measures to Prevent Domestic Violence Against Women and Children', in Krenn, M. Weiss, K. & Logar, R. (eds) *Ten Years of Austrian Anti-Violence Legislation: International Conference in the Context of the Council of Europe Campaign to Combat Violence Against Women, Including Domestic Violence*, 10.

Liechtenstein, **Luxembourg**, **Netherlands**, **Norway**, **Poland**, **Romania**, **Slovakia**, **Slovenia**, **United Kingdom**). In all cases, new regulations were adopted. The requirements for issuing EBOs vary, however, in many cases they refer to 'immediate danger', 'threat to life', 'threat to physical integrity', 'flagrancy' or 'serious risk' of the victim. The extent of the protection ranges from 24 hours to 20 days, in most cases requiring that the victim apply for an interim protection order. Among the many different approaches, also discussed in previous studies, the **Austrian** and **German** systems show many advantages in relation to the provision of emergency protection, and have been analysed in detail elsewhere.[634] These relate to the powers attributed to the police and administrative officers to issue the orders, and also to the proactive provision of support services allowing victims to request the extension of the measures or the provision of medium or long-term precautionary measures.

In the rest of the states under review, the laws suggest that protection orders could be applicable in emergency situations, yet there are many difficulties in accessing protection in practice. These relate to the average time limits for the adoption of the measures or who can request such an order and which authority is entrusted with the capacity to make the decision. For instance, while in **France** medium/long-term protection orders should be available within six days of the request, legal practice indicates that the procedure may exceed one or even two months, making them unsuitable for immediate protection in situations of emergency.[635] Moreover, according to the national expert, the request for protection is notified to the abuser after 24 hours, putting the victim at serious risk of retaliation. In **Estonia** restraining orders can be established in urgent cases. This is decided by the prosecutor for a maximum of two days, and then extended by the court or by the issuing of restraining orders in civil proceedings. Following a recent amendment, the prosecutor can issue the order and inform the court, which will decide on an extension later on. Similarly, in **Portugal**, there are two types of barring orders that can be issued in cases of violence against women. Both depend on the initiation of criminal proceedings and are ordered by courts. The criminal judge can issue restriction orders against the suspect during the proceedings, including a prohibition of contact with the victim and eviction from the family home.[636] The GREVIO Committee has considered, however, that the delays involved in issuing these measures make them unfit to qualify as emergency barring orders designed to protect the victim in situations of immediate danger, since they require an application either by the public prosecutor or by law enforcement agencies to the investigating judge, followed by a hearing with the applicant and the perpetrator to decide whether or not to grant the order.[637]

In 2014, an EU funded project carried out a mapping study on protection order legislation in 27 EU Member States (POEMS).[638] Since the completion of the POEMS report in 2014, new states have adopted EBOs in their legislation. In **Ireland**, EBOs can be issued when there is an immediate risk to the applicant or a dependent person, and the request for a protection order would not be sufficient to address this risk.[639] Where an interim barring order is granted following an *ex parte* application by the applicant for such an order, the order can only be granted for a maximum of eight working days pending the determination of the matter notice to the respondent.[640] In some states, EBOs can now be issued by the police. For instance, in **Latvia**, according to Cabinet of Ministers Regulation No. 161, victims can make a claim for an emergency protection order to be issued by the police[641] or a court under the Civil Procedure

634 See: Römkens, R. and Sosa, L. (2011) 'Protection, Prevention and Empowerment: Emergency Barring Intervention for Victims of Intimate Partner Violence', in Kelly, Hagemann-White, Meysen and Römkens (eds), *Realising Rights. Case studies on state responses to violence against women and children in Europe*.
635 GREVIO Baseline Report on France (2019), Para. 242.
636 Law No. 112/2009, of 16 September 2009, Article 31(1)(c) and (d).
637 GREVIO Baseline Report on Portugal, 2019, Para. 242.
638 See: http://poems-project.com/.
639 Domestic Violence Act 2018, Section 8(1).
640 Domestic Violence Act 2018, Section 8(14).
641 Cabinet of Ministers Regulation No.161 (adopted on 25 March 2014) 'Procedure which prevents threat and provides provisional protection against the violence' (*Kārtība, kādā novērš vardarbības draudus un nodrošina pagaidu aizsardzību pret vardarbību*), Official Gazette No. 64, 31 March 2014, available in Latvian at: https://likumi.lv/ta/id/265314-kartiba-kada-novers-vardarbibas-draudus-un-nodrosina-pagaidu-aizsardzibu-pret-vardarbibu.

Law.[642] Since 2020, **Polish** legislation allows police officers to issue emergency protection orders against a person that poses a threat to the life or health of a person. The order can include the obligation to immediately leave the shared premises and its immediate surroundings or a prohibition on approaching the premises and its immediate surroundings.[643] The order or prohibition expires after 14 days from the date of their issuance, unless the court has granted security.[644] In **Romania**, emergency protection orders can now be imposed by an administrative order of the police.[645] Even when police officers lack decision-making capacity, enhancing the capacity to act of police officers arriving at the scene of the violence can accelerate the issuing of the emergency protection measure. For instance, in **Lithuania**, police officers have the right to initiate a pre-trial investigation and detain the perpetrator for up to 48 hours upon arrival at the scene of domestic violence.

Sweden, however, appears to provide emergency protection in the absence of particular emergency protection orders. According to the national expert, applications for restraining orders must be processed without delay.[646] An official report on practices regarding restraining orders based on statistics from a number of local public prosecution offices, indicates that looking at the applications submitted to the prosecution office that resulted a restraining order, the restraining order was issued: the day of submission or the day after (80.3 %); three days after submission (8.5 %), and five days after submission (0.7 %).[647]

Over the years, the **Norwegian** Director of Public Prosecutions has given substantial attention to the use of interim restraining orders.[648] While the decision to impose emergency restraining orders lies with the Prosecutor,[649] the Norwegian police make use of the risk assessment tools SARA and Patriarch[650] to assess the risk and immediately inform the prosecution. An interim restraining order covering the suspect's home can remain in effect for no more than three months at a time, but it can also be extended. An interim restraining order can be upheld until a restraining order against contact can be imposed as part of a penal sanction before the courts. Violation of emergency restraining orders has a sentencing framework of a fine or imprisonment for a maximum of one year, according to Article 168 of the General Civil Penal Code.

Similarly, the **Spanish** approach has long been discussed in relation to its effectiveness in providing emergency protection in the absence of specific emergency measures or enhanced functions of the

642 Civil Procedure Law (*Civilprocesa likums*), Official Gazette No.326/330, 3 November 1998, available in English at: https://likumi.lv/ta/en/en/id/50500.
643 Police Act of 6 April 1990, Article 15aa(1), (JoL of 2020, item 360).
644 Police Act, Article 15ak(1).
645 Domestic Violence Law, Article 30 ff.
646 Section 6(a), Act (1988:688) on Restraining Orders.
647 The Swedish Prosecution Authority and the Swedish Police Authority (2020), *Restraining orders. A survey of the application including comments to the observations* (*Kontaktförbud. En kartläggning av tillämpningen med synpunkter på iakttagelserna*), Monitoring report 2020:1, available (in Swedish only) at: https://www.aklagare.se/globalassets/dokument/rapporter/tillsynsrapporter/tillsynsrapport-2020-1---kontaktforbud.pdf?_t_tags=language%3Asv%2Csiteid%3A764c28f6-3ce5-48e7-a8ec-b8f5f22e4245&_t_hit.id=Aklagare_Web_Models_Media_DocumentFile/_9840005f-2c2f-4e19-8dcc-f4e42ebf7543&_t_hit.pos=9.
648 See website https://www.riksadvokaten.no/english/.
649 Act 1981-05-22-25 https://lovdata.no/dokument/NL/lov/1981-05-22-25?q=straffeprosessloven (only in Norwegian).
650 SARA (Spousal Assault Risk Assessment) is a risk assessment tool that is used by the police in the preventive track in all cases of domestic violence in couple relationships. The aim is to provide the police with decision support for the assessment of protective measures to prevent any new incidences of violence from occurring. The tool can be used in all the police districts to assess the level of risk for future violence and for the severity of the violence. All police districts have a dedicated SARA coordinator and SARA employees who follow up on such cases. Patriarch (Assessment of Risk for Honour-Based Violence – PATRIARCH) – is a checklist or a guide that can be used as an aid for assessment of the risk for honour-related violence.

police.[651] Precautionary measures can be requested directly from the judiciary, public prosecutor's office, law enforcement forces, offices of attention to victims, or social services and social assistance institutions of the public administration, and can be decided both by the civil and the criminal jurisdictions. The audience to decide precautionary measures has to take place in a maximum of 72 hours after the request was submitted. In this situation, there are two elements which help mitigate the expected delays in the adoption of the order. First, precautionary protection orders can be requested by filling out a simple standard form that is widely available to the public and may be requested by the victim, by family members or by others who maintain emotional ties with the victim. In addition, a private or public body or organisation providing social services that comes across facts that may warrant a protection order, must apply to an examining magistrate on duty at a police court or a public prosecutor to start up the procedure to issue a protection order. Secondly, Spain established a system of specialised courts, in addition to specialised police units, which contributes to accelerating the process. That said, in practice, the availability is largely dependent on location, and the provision of services is dependent on local resources.

Considering the gaps in long-term protection, there is a promising state policy worth mentioning here. According to the national questionnaire, in **Norway**, victims may bring a civil case against the State to court if the State has not acted sufficiently to protect them against long-term violence and abuse. In 2013, Norway was found responsible by the Norwegian Supreme Court for not having protected a woman sufficiently after she had been stalked and harassed by a man with whom she had had a short relationship.[652] The man, convicted in 1998 of aggravated assault, after serving his sentence breached the ban prohibiting him from visiting and contacting her, on a number of occasions, and subjected the woman to a long-term, threatening and frightening persecution, which was considered as psychological harassment and terrorism. The police follow-up of the constant violations of the restraining order was very deficient, and two potentially very serious threats were not investigated further. As a result of his acts, the woman's quality of life deteriorated significantly. The Supreme Court concluded that the State had not fulfilled its obligation under Article 8 of the ECHR to protect her from the violence exerted by the perpetrator.

In conclusion, it should be pointed out that a human rights perspective on GBVAW entails prevention and protection from violence, in combination with an integrated set of measures to support and empower victims. The varying levels of protection afforded to victims of GBVAW across Europe is apparent from this brief overview of the availability of protection orders, suggesting that not much has changed since the previous extensive mappings and studies. As we argued elsewhere, in addition to urgent protection, emergency barring orders could prove a real bonus on top of traditional protection orders if they were incorporated into the domestic system together with support services for both the victim and offender. In doing so, states should consider two issues: whether the emergency intervention is provided in a comprehensive and integrated way, and how the two elements of the intervention – barring to protect and support to empower – relate to each other.[653]

651 See: van der Aa S., Niemi J., Sosa L., Ferreira A., Baldry A., (2015) *Mapping the legislation and assessing the impact of protection orders in the European Member States, Final report of the POEMS Project*, DAPHNE Project European Commission; For an analysis on Emergency Barring orders in particular, see: Römkens, R. and Sosa, L. (2011), 'Protection, Prevention and Empowerment: Emergency Barring Intervention for Victims of Intimate Partner Violence', in Kelly, Hagemann-White, Meysen and Römkens (eds), *Realising Rights. Case studies on state responses to violence against women and children in Europe,* DAPHNE Project European Commission, (London 2011), and Niemi, J. and Logar, R. (2017) 'Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention'.

652 Case from the Norwegian Supreme Court of Rt-2013-588.

653 Römkens, R. and Sosa, L. (2011), 'Protection, Prevention and Empowerment: Emergency Barring Intervention for Victims of Intimate Partner Violence', p. 56.

11.5 Reparation measures

There are five general principles guiding the provision of reparations in international law, which are commonly referred to as the 'Van Boven/Bassiouni Principles'.[654] In general terms, reparation entails the restitution to the original situation, compensation for any economically assessable damage, rehabilitation (including medical and psychological care and social services), satisfaction (including the cessation of violations, investigation of the facts and disclosure of the truth, public apology and sanctions), and guarantees of non-repetition. The duty to provide reparation has been incorporated in most international instruments addressing VAW, including the Istanbul Convention, which calls on States to take the necessary legislative and other measures to provide reparation for acts of violence perpetrated by non-State actors.[655] The Explanatory Report to the Convention clarifies that reparation is to be understood in line with these principles of restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition.[656] In addition, Article 30(2) of the Convention establishes that 'adequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming regress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.'

At the EU level, Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims recognises a right to access national compensation schemes for victims of violent intentional crime, independently of where in the European Union the crime took place, and facilitates access to state compensation in cross-border cases.[657] However, the way that national authorities develop, implement and understand the right to compensation is left at the discretion of the Member States.[658] In addition, the Victims' Rights Directive 2012/29/EU seeks to ensure that victims of crime receive appropriate information, support and protection and can participate in criminal proceedings. Articles 4 and 16 of the Directive set out the obligations on comensation from the perpetrator in detail.

a) Access to reparation for victims of violence

Unlike other aspects discussed in previous sections, the mapping of the 31 jurisdictions under review reveals an even ground when it comes to reparations for victims of crime. Victims of crime[659] can claim compensation from the perpetrator in all states under study. Victims can file this request in a civil suit in criminal proceedings or civil proceedings in all states, except for **Iceland**, where victims in their status as injured party can claim compensation from the perpetrator in the criminal procedure. In **Germany**, **Romania** and **Sweden**, victims can claim restitution in addition to compensation.

As a rule, healthcare costs and other quantifiable damages can always be included in the compensation claim. In addition, in several states, rehabilitation is regularly provided through public services (**Czechia**,

654 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution adopted by the General Assembly, 21 March 2006, A/RES/60/147 (Van Boven/Bassiouni Principles), Articles 20–23.
655 Istanbul Convention, Article 5(2).
656 Explanatory Report, Para. 60.
657 For a recent evaluation of the current state of affairs in relation to compensation for victims of crime, see the Report of the Special Adviser, J. Milquet, to the President of the European Commission, Jean-Claude Juncker 'Strengthening victims rights: from compensation to reparation', March 2019. Available at: https://ec.europa.eu/info/sites/default/files/strengthening_victims_rights_-_from_compensation_to_reparation_rev.pdf. For a relevant case on the access to compensation for victims, see: Judgment of the Court (Grand Chamber) of 16 July 2020 (request for a preliminary ruling from the Corte suprema di cassazione – Italy) – *Presidenza del Consiglio dei Ministri* v *BV*. Available at: https://curia.europa.eu/juris/document/document.jsf?docid=228681&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=85136.
658 For a detailed discussion of the implementation of these directives, see the 2018 implementation report: https://www.europarl.europa.eu/doceo/document/A-8-2018-0065_EN.pdf.
659 In principle, primary victims and secondary victims (such as children or other family members affected by the violence directed towards the primary victim) can claim compensation, and if the crime resulted in the death of the victim, their next of kin.

Estonia, **Finland**, **Germany**, **Greece**, **Liechtenstein**, **Lithuania**, **Norway**, **Spain**). In **Czechia**, these services are free of charge for 'vulnerable victims.' In some states, there is a provision of specialised services for victims of GBV. In **Spain**, Organic Law 1/2004 establishes the right to comprehensive social support for women victims of gender violence. This includes medical attention, emergency, support and shelter and comprehensive rehabilitation. Multidisciplinary attention includes information, psychological attention, social support, follow-up of rights claims, training and support in work. Similarly, in **Norway**, victims are entitled to immediate assistance and the necessary health and care services from the municipality, including psychological support and physiotherapy. Municipalities have a statutory duty to provide crisis centres for women, men and children who are subjected to domestic violence or threats of domestic violence (the Crisis Centre Act). In addition, victims of specific serious offences, including forced marriage, domestic abuse, female genital mutilation and sexual assault, are entitled to have a legal representative for victims who shall safeguard their interests and may assist, among other things, with filing a claim for compensation.[660]

Regardless of the formal possibility of victims to claim compensation, several limitations appear in each system. For instance, in **Belgium**, victims need to provide evidence of the harm and the causal link with the violence themselves, a common requirement in civil claims. That said, criminal prosecution is not always initiated by the public prosecutors, or preferred by the victims in cases where the violence constitutes an *ex parte* offence and judicial practice leads to secondary victimisation.

b) Provision of state compensation to victims of GBVAW

State compensation is provided in 24 states (**Belgium**, **Bulgaria**, **Croatia**, **Czechia**, **Denmark**, **Estonia**, **Finland**, **Greece**, **Iceland**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, **Luxembourg**, **Malta**, **Netherlands**, **Norway**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia**, **Sweden**, **United Kingdom**). In line with Council Directive 2004/80/EC of 29 April 2004, in most cases, state compensation is provided only to victims of violent, intentional crimes, and in at least 12 states, this option is only available if victims have sustained serious bodily injury or impairment of health (**Belgium**, **Czechia**, **Germany**, **Hungary**, **Luxembourg**, **Malta**, **Netherlands**, **Norway**, **Poland**, **Portugal**, **Romania**, **Spain**). In a few cases, state funding is restricted to specific crimes (**Croatia**, **Iceland**, **Netherlands**, **Spain**). For instance, in the **Netherlands**, victims of sexual or violent crimes which have caused severe bodily harm can also request a fixed amount of reparation at the Violent Offences Compensation Fund (*schadefonds geweldsmisdrijven*) without having to go through a court procedure.[661] Similarly, the **Spanish** Law 35/1995 on aid to victims of violent crimes and against sexual freedom[662] establishes a system of public aid to direct or indirect victims of malicious and violent offences with result of death, serious injury, or serious damage to physical or mental health, and in favour of direct victims of offences against sexual freedom, even when they are perpetrated without violence.

In the majority of states, state-funded compensation is available subsidiarily, thus only when the victim cannot procure payment from the perpetrator, either because they have not been identified, cannot afford the compensation or compensation was denied in the criminal or civil proceedings. An exception is **Latvia**, where victims of violent crimes can request compensation under the Law on state compensation to victims, which does not require the victim to first claim compensation from a perpetrator under criminal or civil procedure.[663] In **Greece**, however, the fact that victims must have reported the crime within three months, without any additional requirement is mentioned in the national questionnaire.[664]

660 See Criminal Procedure Act, Article 107a.

661 European Parliamentary Research Service (2017) *The Victims' Rights Directive 2012/29/EU – European Implementation Assessment*, Brussels: European Union, p. 119.

662 Law 35/1995 on aid and support to victims of violent offences and offences against sexual freedom (*Ley 35/1995, de 11 de diciembre, de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual*), 11 December 1995, https://www.boe.es/buscar/act.php?id=BOE-A-1995-26714.

663 Criminal Procedure Law (*Kriminālprocesa likums*), Official Gazette No.74, 11 May 2005, available in English at: https://likumi.lv/ta/en/en/id/107820.

664 Act 3811/2009, transposing Directive 2004/80/EC of the Council of the European Union of 29 April 2004, OJ A 231/18.12.2009.

Similarly, in **Sweden** the Crime Victim Compensation and Support Authority (Brottsoffermyndigheten) will grant compensation provided that a preliminary investigation of the police confirms that the victim has been subjected to a criminal act.

This brief overview confirms other studies indicating that state-funded compensation is not widely available or accessible across Europe. In **Germany**, however, there are state foundations which provide financial support to victims of violent crimes who are in need when no reparation by the perpetrator can be achieved, and if the compensation is not covered by the Victims' Compensation Act.

c) Engendering reparations

There is one more limitation of current reparation schemes that merits discussion. In cases of violence resulting from discrimination, such as gender-based violence against women, there are additional elements that require attention when establishing a framework of reparations. Rubio-Marín and de Greiff consider that there is 'a growing sense of the necessity of "engendering" reparations', since this represents a singular opportunity for 'transformation' rather than mere restitution to the original situation.[665] This transformation also relates to economic realities beyond material harm, as pointed out by Bernstein, who notes that in many regimes, the patriarchal character of the systems limited women's access to property and capital, so expanding the scope of traditional economic compensation to create further economic and social empowerment of women is needed.[666]

The proposition of a gendered approach to reparations often relies on the idea that women's experiences of violence are inherently different from those of men, but also on the idea that violence against women is the result of 'unequal relations of power' and structural gendered discrimination. In this sense, reparations need to make use of their transformative potential. The goal should never be limited to simply provide material payments or to compensate for loss but also to disrupt the conditions of targeted violence. This approach has been supported by the Inter-American Court in the *Campo Algodonero* case[667] in which the socio-structural context in relation to gender discrimination influenced the determination of the obligation for integral reparation of the victims:

> 'bearing in mind the context of structural discrimination in which the facts of this case occurred [...] the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification.'[668]

This transformative take is yet to be reflected in the European normative framework.

d) National transposition of the Victims' Rights Directive with regard to GBVAW

Throughout the report, reference has been made to Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. As previously explained, the Directive provides a definition of gender-based violence and violence in close relationships in its preamble, and calls on states to adopt all necessary measures to meet those standards, including by adapting their judicial procedures, providing protection and establishing compensatory mechanisms. Based on the country questionnaires, the Victims' Rights Directive has been transposed in all EU Member States under review. The transposition in national legal systems with regard to victims of GBVAW, however, has been

665 Rubio-Marín, R. (2009) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, Cambridge University Press; Rubio-Marín, R. and de Greiff, P. (2007) 'Women and Reparations', *International Journal of Transitional Justice*, 1; Rubio-Marín, R. and Sandoval, C. (2011) 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment', *Human Rights Quarterly*, 33(4), pp. 1062-1091.

666 Bernstein, A. (2009) 'Pecuniary Reparations Following National Crisis: A Convergence Of Tort Theory, Microfinance, And Gender Equality,' *U. Pa. J. Int'l L.* 31:1.

667 Inter-American Court of Human Rights (IACrtHR), *González et al.* ("*Cotton Field*") *v Mexico*, judgment of November 16, 2009 (Preliminary Objection, Merits, Reparations, and Costs).

668 IACrtHR, *González et al. ("Cotton Field") v Mexico*, Inter-American Court of Human Rights, 16 November 2009, Para. 450.

done in different ways. In most cases, transposition led to *amendment* of criminal procedure laws, and in some cases, in combination with new legislation focusing on victims. For instance, In **Malta**, the Victims' Rights Directive was transposed by means of a Victims of Crime Act.[669] In **Portugal**, it has been formally transposed into national legislation by a law that changed the Criminal Procedure Code by including a wide notion of victim,[670] and approved the '*Estatuto da Vítima*' ('Victim's Statute'). In **Romania**, the Directive has been transposed by adopting legislation on measures to ensure information, support and protection for the victims of crimes.[671] In the **United Kingdom**, transposition resulted in amendments to the Code of Practice for Victims of Crime.[672] According to the country questionnaires, in two cases, the transposition of the Directive triggered the adoption of legislation specifically addressing victims of domestic violence. In **Lithuania** this was done through the amendment of the Code of Criminal Procedure and the adoption of the Law on Protection from Domestic Violence. In **Slovenia**, the Victims' Rights Directive has been transposed by the Domestic Violence Prevention Act in civil law, and by the Criminal Procedure Act in criminal law.[673]

In some cases, transposition was achieved by the *adoption of several mechanisms*. In the **Netherlands**, the directive is implemented in the Dutch Code of Criminal Procedure,[674] the Victims of Criminal Offences Act,[675] the Regulation on information services for victims[676] and the Regulation on sharing case information with victims.[677] Similarly, the Directive has been transposed in **Poland** by four legal acts, amending the Code of Criminal Procedure;[678] recognising the rights and obligations of the victim in criminal proceedings;[679] and granting protection and assistance for victims and witnesses.[680] The Directive was transposed in **Spain** by a law adopting a Statute of Victims of Crime[681] and **Sweden** amended the Swedish Code of Judicial Procedure and the Social Services Act.

Several national experts, however, acknowledge that the Directive has not been fully or effectively transposed or accurately applied in their states with regard to victims of GBVAW (**Bulgaria**, **Finland**, **Germany**, **Latvia**). According to the national expert, in **Germany**, the Victims' Rights Directive has been transposed, however with some limitations in relation to victims of 'less severe crimes'. In practice, there are a series of limitations imposed on victims of sexual violence, and in the case of domestic violence, compensation will not be granted if the victim did not separate from the perpetrator. Similarly, while the Victims' Rights Directive has also been transposed in **Hungary**, research on the application of the Directive shows that victims of domestic violence still face problems and difficulties in the fields/themes regulated by the Directive. In **Latvia**, the national questionnaire indicates a limited implementation of the Directive, done primarily through the Criminal Procedure Law.[682]

While this short overview does not provide any indication of the effective implementation of the Directive, for instance, whether victims have indeed increased their participation in proceedings, or whether protection and compensation is more easily accessible, the formal commitment seems to be met. This

669 Victims of Crime Act, https://legislation.mt/eli/cap/539/eng/pdf.
670 Law No. 130/2015, of 4 September 2015, Statute of the Victim, Article 67ºA of this Code.
671 Law No. 211/2004 on some measures to ensure information, support and protection of victims of crime (*Legea nr.211/2004 privind unele măsuri pentru asigurarea informării, sprijinirii şi protecţiei victimelor infracţiunilor*).
672 Code of Practice for Victims of Crime in England and Wales, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF.
673 Criminal Procedure Act, Official Gazette of the Republic of Slovenia, Nos št. 32/12 – uradno prečiščeno besedilo, 47/13, 87/14, 8/16 – odl. US, 64/16 – odl. US, 65/16 – odl. US, 66/17 – ORZKP153,154, 22/19, 55/20 – odl. US, 89/20 – odl. US, 191/20 – odl. US in 200/20, http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO362.
674 Code of Criminal Procedure, (DCCP), Section IIIA, Articles 51a – 51h https://wetten.overheid.nl/BWBR0001903/2021-01-01.
675 https://wetten.overheid.nl/BWBR0038468/2017-04-01.
676 https://wetten.overheid.nl/BWBR0039405/2017-04-01.
677 https://wetten.overheid.nl/BWBR0039404/2017-04-01.
678 Act of 16 December 2020, JoL 2021.155.
679 Ordinance of 14 September 2020 JoL 2020.1619.
680 Act of 28 November 2014, JoL 2015.21.
681 Law 4/2015 of the Statute of Victims of Crime (*Ley 4/2015, del Estatuto de la víctima del delito*), 27 April 2015, https://www.boe.es/buscar/act.php?id=BOE-A-2015-4606.
682 Criminal Procedure Law (*Kriminālprocesa likums*), Official Gazette No.74, 11 May 2005, available in English at: https://likumi.lv/ta/en/en/id/107820.

information is encouraging if new directives proposing minimum standards are adopted with the aim of strengthening the process initiated by Directive 2012/29.

Conclusions

This report has provided an overview of the ways in which the various forms of gender-based violence against women (GBVAW) and domestic violence have been criminalised in 31 European countries. While we make specific recommendations to the Member States and the European Union in each of the chapters, the purpose of this concluding chapter is to bring together and reflect on the three core themes that have emerged from the analysis.

The first crosscutting theme relates to the great diversity of approaches found across the Member States in the way they criminalise GBVAW. Drawing on the country questionnaires, the report shows that some states have opted for specific offences, while others rely on general offences, sometimes in combination with aggravations. It is notable that many states adopted specific offences regarding FGM and forced marriage. On the contrary, very few states have criminalised domestic violence as a specific offence. In relation to rape, contrary to the case law of the European Court of Human Rights and the Istanbul Convention, most states still define this form of violence as requiring the use of force or threats. Regarding stalking, although it is widely criminalised, the online dimension is rarely considered, and new forms of online violence, such as the non-consensual dissemination of intimate/private/sexual images, have only recently entered the debate at national level. Conversely, incitement to hatred and violence has been widely criminalised, even in regard to grounds of discrimination that are not addressed in Framework Decision 2008/913, such as gender, sexual orientation and gender identity and expression. This proves the positive impact of EU legislation and the acceleration it provokes at domestic level. That said, with regard to sexual harassment and harassment related to sex, we notice that, while the EU directives on gender equality have been transposed at national level, there are still many shortcomings and protection is uneven among Member States, which seems to stem from the limited material scope and general approach of the directives.

The second emerging theme relates to the implications of adopting specific offences in comparison with relying on general offences. It must be stressed that relying on general offences for the criminalisation of GBVAW, particularly when no gender-sensitive guidelines have been adopted, results in divergent judicial interpretations across and even within countries and varying degrees of protection for victims. The application of generalised offences has proved ineffective in relation to 'traditional' forms of GBVAW, such as domestic violence and rape, and is potentially a difficulty for emerging forms of online gender-based violence as well. In fact, the importance of guidelines in consideration of the risk of divergent interpretations, is a third core theme emerging from this report.

A third and certainly crucial theme emerging from the analysis is the extent to which GBVAW is approached as a form of discrimination and/or an equality issue. This is one of the main limitations found in this study. It is not so much an issue arising from the predominant gender-neutral definitions used in domestic jurisdictions, but from the scarcity of gender-sensitive guidelines in prosecution, the lack of a gender perspective in adjudication, and also in the restricted imposition of protection measures beyond imprisonment, particularly in favour of children witnessing violence. Despite formal recognitions that gender-based violence impacts women disproportionally, particularly violence in close relationships, it has not been translated into the introduction, for instance, of an aggravating factor based on gender.

In light of these core findings, we can conclude that GBVAW, including ICT-facilitated violence, needs to be urgently tackled at the European level. The questionnaires of the national experts have unequivocally confirmed this necessity. Women in Europe are facing one or several forms of GBVAW without the possibility to obtain justice, owing either to a lack of adequate legislation or inappropriate gender-sensitive implementation. The phenomenon was well known already before the COVID-19 pandemic, but the worldwide health emergency has exacerbated existing patterns of discrimination and increased the number of episodes of GBVAW. Consequently, this report highlights the need to adopt overarching definitions of specific prohibitions or aggravations. With regard to criminal definitions, the report has made

some specific recommendations for each illicit behaviour, stressing its main elements, and highlighted where more action would be welcome at European level.

Besides making specific suggestions regarding the definitions of the offences addressing different forms of violence, this report also stresses that criminalisation alone cannot fully address a *gender-discrimination* issue such as GBVAW. To do so, the adoption of a comprehensive approach, as suggested in the Istanbul Convention and international human rights norms, is needed. The report shows that currently there are varying levels of protection afforded to victims of GBV across Europe. In this regard, it is advisable to ensure not only measures that enable the possibility of criminalisation, but also urgent protection through emergency orders, with the potential to request medium and longer-term protection orders in combination with the provision of support services for victim and offender. In sum, we have encountered an uneven field with diverse strategies adopted at national level, resulting in unequal levels of criminalisation, protection and prevention of gender-based violence. Coordinated action in upcoming years can help to overcome the current shortcomings.

Questionnaire on gender-based violence against women and domestic violence

Part I: General approach to gender-based violence against women

In this first part, the questionnaire explores whether the States have incorporated in their legislation – a specific law or through amendments to the legal instruments already in force – a definition of VAW or GBVAW, or both. Absent a specific definition in the legislation, we are also interested in whether domestic jurisprudence has made attempts to define VAW and/or GBVAW. Violence against women might be defined as a violation of the principle of non-discrimination,[1] or as a violation of the principle of equality, enshrined in Articles 2 and 3 TEU,[2] Articles 8, 153 (i) and 157 (4) TFEU,[3] Article 23 of the Charter of Fundamental Rights of the EU.[4]

1) Is there a **definition** of VAW or GBVAW, or both, in the national legal system (a specific law, a definition included in the criminal code, others) or emerging from national jurisprudence? Please include the name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available. In case of national jurisprudence, name the relevant cases and provide a full reference, as well as a link if available.
    i. If yes, how is VAW and/or GBVAW defined? If GBV is defined, is the definition gender-neutral or gender-specific?
2) Is VAW/GBVAW defined as a **form of discrimination or as a violation of the principle of equality**?
    i. In the legislation?
    ii. In the jurisprudence?
3) What is the consequence of categorising VAW/GBVAW as a form of discrimination? Is there any case-law to support the previous answer?
4) Is VAW/GBVAW linked in any way to any form of intersectional discrimination?
    i. In the legislation?
    ii. In the jurisprudence?
5) Are there **equality bodies** competent to receive complaints from victims/survivors of VAW/GBVAW?
6) Is there **a definition of gender-based online violence** in the legal system (specific law, criminal code, etc.) or emerging from national jurisprudence?
    a) If the definition is present, is it gender-neutral or gender-specific?
    b) Are there illicit behaviours that are commonly referred to as online violence against women? Which ones are they?
    c) Please provide the relevant definition of gender-based online violence (on gender-based hate speech and non-consensual use of private images, see below).
    d) Do any of the online forms of violence (online stalking, online harassment, gender-based hate speech and non-consensual use of private images, or others if included in the national legal system) covered in this study include in the national legislation elements of crimes which concern the use of ICT systems (cybercrime) as defined in EU law, which is in line with the Budapest Convention of the Council of Europe?[5]

1 Being violence against women acknowledged as a form of discrimination against women, see General recommendation No. 19 -- eleventh session, 1992 violence against women available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3731&Lang=en.
2 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT.
3 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.
4 https://www.europarl.europa.eu/charter/pdf/text_en.pdf.
5 Cybercrime consists of 'criminal acts that are committed online by using electronic communications networks and information systems. It is a borderless problem that can be classified in three broad definitions: Crimes specific to the Internet, such as attacks against information systems or phishing (e.g. fake bank websites to solicit passwords enabling access to victims' bank accounts); Online fraud and forgery. Large-scale fraud can be committed online through instruments such as identity theft, phishing, spam and malicious code; Illegal online content, including child sexual abuse material, incitement to racial hatred, incitement to terrorist acts and glorification of violence, terrorism, racism and xenophobia' https://ec.europa.eu/home-affairs/what-we-do/policies/cybercrime_en. EU legislation on cybercrime corresponds to the rules set out in the Council of Europe Convention on Cybercrime (Budapest Convention), ETS No. 185, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561.

7) Are provisions on **aiding and abetting** applicable to this type of violence? Please tick what is appropriate.

	Yes	No
Domestic violence		
Sexual Violence, including Rape		
Sexual harassment and Harassment based on Sex		
Sexual Exploitation		
Female genital mutilation, and other non-consensual forms of genital mutilation		
Forced abortion and forced sterilisation		
Forced Marriage		
Stalking		
Non-consensual use of intimate / private images		
Hate speech on the basis of gender and/or sex		
Femicide		

8) In line with the Istanbul Convention article 46 (i-x), are any of the following considered as **aggravating factors** of GBVAW violence? Please indicate in the table below, which of the following circumstances aggravate which types of violence by noting down the corresponding letters.

a) The offence was committed against a former or current spouse or partner;
b) The perpetrator is a member of the family, a person cohabiting with the victim or a person having abused her or his authority;
c) The offence, or related offences, were committed repeatedly;
d) The offence was committed against a person made vulnerable by particular circumstances;
e) The offence was committed against or in the presence of a child;
f) The offence was committed by two or more people acting together;
g) The offence was preceded or accompanied by extreme levels of violence;
h) The offence was committed with the use or threat of a weapon;
i) The offence resulted in severe physical or psychological harm for the victim;
j) The perpetrator had previously been convicted of offences of a similar nature;
k) The offence has been committed online;
l) The offence has been committed on the grounds of the victim's gender (if so, how is the gender bias defined);
m) Other aggravations (please specify).

	Aggravating circumstances
Domestic violence	
Sexual Violence, including Rape	
Sexual harassment and Harassment based on Sex	
Sexual Exploitation	
Female genital mutilation, and other non-consensual forms of genital mutilation	
Forced abortion and forced sterilisation	
Forced Marriage	
Stalking	
Non-consensual use of intimate / private images	
Hate speech on the basis of gender and/or sex	
Femicide	

9) Please indicate the **statute of limitations** applicable to GBVAW (period and starting date). Since these very often offence-specific, we ask you to fill in the table below.

	Period	Starting point
Domestic violence		
Sexual Violence, including Rape		
Sexual harassment and Harassment based on Sex		
Sexual Exploitation		
Female genital mutilation, and other non-consensual forms of genital mutilation		
Forced abortion and forced sterilisation		
Forced Marriage		
Stalking		
Non-consensual use of intimate / private images		
Hate speech on the basis of gender and/or sex		
Femicide		

10) Can victims of GBVAW make a complaint if the offence was committed in the **territory** of a Party other than the one where they reside?
11) **Mandatory alternative dispute** resolution processes, including mediation and conciliation, are prohibited by the Istanbul Convention. Are any of these processes still applied in your country to GBVAW?
12) Are there any forms of **retaliation** against victims reporting VAW/GBVAW (counter demands, media backlash, physical aggression, etc) or any police or judicial **practice deterring** women from reporting VAW/GBVAW? If so, are there any reports of policy evaluations indicating this? If this occurs more often in relation to specific types of violence, please indicate it so.
13) Protection from violence: We would like to know about the regulation of **protection orders** in your country.[6]
    a) Are there **long-term protection** orders available in your country for women victims of gender-based/ domestic violence? Please indicate through which areas of law (criminal, civil, administrative, other) can protection orders be imposed and what sort of measures do they consist of (prohibition to contact the victim, eviction from the home, etc.)
    b) Are there **emergency protection orders** in your country for women victims of gender-based/ domestic violence? Please indicate through which areas of law (criminal, civil, administrative, other) can protection orders be imposed and what sort of measures do they consist of (prohibition to contact the victim, eviction from the home, etc.)
    c) Which authorities have the **power to issue** a restraining or protection order in your country? Please distinguish between long-term and emergency protection.
    d) When it comes to criminal law: can protection orders be imposed in all **stages** of the criminal procedure?
14) Are victims of VAW/GBVAW entitled to **reparation**?
    a) If yes, what types of reparation are granted in your legal system to them?
        i. Restitution (reinstatement);
        ii. Compensation (money, goods or services);

6 By 'protection orders' we refer to all legal measures by which rules of conduct can be imposed upon a person with the aim of protecting another person, regardless of the type of procedure by which the decision came about. We are not only covering protection orders issued by judges, but also decisions issued by magistrates, public prosecutors or other public servants. We distinguish between protection orders that have a longer and more permanent duration in time (long-term protection orders), or and protection orders that may be used with immediate effect in emergency situations (emergency protection orders).

iii. Rehabilitation (medical and psychological care and other social services)
iv. Other

b) If yes, **who can claim** reparation?
   i. The victim / survivor only
   ii. The child witnessing violence
   iii. Others

c) **Who is responsible** for providing reparation?
   i. The perpetrator
   ii. The state
   iii. Both
   iv. Others (a specific body or fund)

d) Through which **procedure** can reparation, in particular compensation, be granted? (criminal procedure – usually the one launched for the prosecution of the alleged crime committed against the woman; civil procedure – separate and/or independent from the previous one; other procedure?)

e) Has the **EU Victims' Rights Directive (No. 2012/29)** been transposed in your legal system? If yes, can you mention which legal act (name/number, date enacted and area of law (civil, criminal, etc. Provide a link if available) has been adopted to transpose it and which provisions are relevant for countering VAW/GBVAW?

f) Is there a mechanism of State compensation awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions? (implementing Article 30 the Istanbul Convention)?

Part II: Specific Forms of Violence

Domestic violence

According to article 3 (b) of the Istanbul Convention, domestic violence refers to 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.'

While some EU member states have developed specific laws and policies on domestic violence, in many others it is only addressed by general provisions in criminal law. In some states, domestic violence is only prosecuted when physical violence takes place, yet civil protection orders may be more broadly available. In this section, please provide details about your national legislation in relation to the acts defined above.

1) Definition and scope
   Is there any national legislation prohibiting domestic violence specifically?
   If yes, please indicate:
   a) Name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available.
   b) Please provide the definition/description of domestic violence.
      i. What forms of violence fall under the scope of the prohibition of DV?
      ii. Is the legal definition gender specific [referring to the gender of the victim and/or perpetrator] or gender neutral?
      iii. How is the family and/or domestic unit defined in the legislation or case law? In other words, who may qualify as victim and who may qualify as a perpetrator of domestic violence?
      iv. Who qualifies as a partner? (please highlight all applicable)
      Marital spouse
      Ex-marital spouse

Co-habiting person
Former cohabitation partner
Any intimate partner, regardless of co-habitation or sex
Same sex partners
Heterosexual partners
Other category, [please specify]

2) If your national law does not contain a specific provision prohibiting domestic violence, what **other (general) offences** are applied to cases of domestic violence (e.g. murder, physical abuse, maltreatment, threat; etc).
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
4) Please include relevant **case law** that indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence. If this type of violence is not covered by a specific offence, please mention relevant case law which contributes to the definition of the illicit behaviour or how it is addressed by criminal, civil, administrative or other courts.
5) Please indicate the **types of prosecution** applicable to this type of violence (eg *ex officio*, *ex parte*, private prosecution?).[7] If available, please include a link to protocols that guide the prosecution of domestic violence.
   a) Are there any prosecutorial guidelines regarding this type of violence?
   b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?
6) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
7) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

Sexual Violence, including Rape

In this section we enquire after the prohibition of sexual violence, understood in line with article 36 (1) of the Istanbul Convention as 'non-consensual acts of a sexual nature with a person or causing another person to engage in non-consensual acts of a sexual nature with a third person (including forms of sexual assault or intimidation which do not entail penetration), and the prohibition of rape, understood as the non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object.'[8] The Istanbul Convention establishes in article 36 (2) that 'consent' must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances. Despite the persistent recommendations to incorporate definitions of sexual violence based on the lack of consent, in many jurisdictions sexual violence and rape continue to be defined in relation to the use of force. In this section, we enquire after the definitions used in your domestic system. *When domestic legislation differs in relation to rape (with penetration) and sexual violence (without penetration) in your jurisdiction, please indicate this.*

7 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

8 Please note that sexual harassment and sexual exploitation are addressed in specific sections below.

1) Definition and scope
   Is/are there a specific offence(s) of sexual violence and/or rape? If yes, please indicate:
   a) Law name/number introducing the offence(s), date enacted and provide a link if available.
   b) Is sexual violence, including rape, considered to be:
      i. A crime against sexual integrity/autonomy
      ii. A crime against morality
      iii. A sexual offence
      iv. Other type of offence (specify)
   c) Please include the definitions of rape and sexual violence.
      i. What behaviours fall under the scope of the prohibition of sexual violence?
      ii. Are the legal definitions of these offences gender specific [referring to the gender of the victim and/or perpetrator] or gender neutral?
      iii. Are the criminal offence of sexual violence and/or rape defined in terms of lack of consent or use of force/threats?
      iv. If applicable, how is sexual consent defined?
      v. What is the minimum age of sexual consent?
2) If your national law does not contain a specific provision prohibiting this type of violence, what **other (general) offences** are applied to cases of sexual violence (including rape)? (serious bodily injury, psychological violence, etc).
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
4) Please include relevant **case law** that indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence. If this type of violence is not criminalised, please mention relevant case law which contributes to the definition of the illicit behaviour or how it is addressed by civil, administrative or other courts.
5) Please indicate the **types of prosecution** applicable to this type of violence (eg *ex officio*, *ex parte*, private prosecution?).[9] If available, please include a link to protocols that guide the prosecution of sexual violence.
   a) Are there any protocols guiding the prosecution of these types of violence?
   b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?
6) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
7) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

Sexual harassment and Harassment based on Sex

Sexual harassment consists in 'any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment' (Article 40 of the Istanbul Convention). The Istanbul Convention does not establish the obligation of criminalisation, other legal

9 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

sanctions being also possible. The behaviour must be unwanted and of a sexual nature, and it also must be aimed at violating the dignity of the victim and creating an intimidating environment. With specific regard to violence at the workplace, Article 1 of the 2019 ILO Convention defines this as follows:

> the term 'violence and harassment' in the world of work refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment; the term 'gender-based violence and harassment' means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment.[10]

In EU law, harassment based on sex and sexual harassment are defined as a form of discrimination and defined as follows (see Gender Equality Recast Directive 2006/54, Article 2 (c) and (d)):[11]

> 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose, or effect, of violating the dignity of that person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
> 'sexual harassment': where any form of unwanted verbal, non-verbal, or physical, conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

N.B. To answer this question, you can also take inspiration from this report https://www.equalitylaw.eu/downloads/4541-harassment-related-to-sex-and-sexual-harassment-law-in-33-european-countries

1) Definition and scope
   Is there any national legislation addressing harassment based on sex and sexual harassment specifically? If yes, please indicate:
   a) Name/number, date enacted and area of law (civil, criminal, labour, etc.). Provide a link if available.
   b) Please include the definition of sexual harassment and /or harassment based on sex:
      i. Is sex-based and sexual harassment conceived in the legislation also when occurring beyond the workplace? If so, where?
      ii. Is the legal definition gender specific [referring to the gender of the victim and/or perpetrator] or gender neutral?
      iii. If not gender-specific, are there aggravating circumstances related to the gender of the victims/survivors? N.B. This applies when harassment is criminalised only.
      iv. Is there a reference in the legislation to sexual harassment and/or harassment based on sex committed online?
      v. Has the national legislation been adopted in compliance with Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services;[12] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast);[13] Directive 2010/41/EU

10 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190.

11 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36. See also Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, p. 37–43; and Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, *OJ L 180, 15.7.2010, p. 1–6, Article 3 (letters c) and d))*.

12 *OJ L 373, 21.12.2004, p. 37–43*, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0113.

13 *OJ L 204, 26.7.2006, p. 23–36,* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0054.

of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC?[14]

vi. Are harassment based on sex and/or sexual harassment considered as a psychological occupational safety and health risk within the meaning of the Framework Directive on Occupational Safety and Health as transposed at national level?[15] If so, which measures are employers obliged to adopt?

vii. Who can be held liable for acts of sexual harassment and harassment based on sex (e.g. the employees and/or companies)? Do employees have obligations to prevent and address harassment?

2) If your national law does not contain a specific provision prohibiting this type of violence, what **other (general) offences** are applied to cases of sexual harassment or harassment based on sex? (intimidation, psychological violence, etc.).
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
4) Please include relevant **case law** that which indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/act, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime if harassment is criminalised, cases which have cause upheaval in media or society, cases that have triggered legislative change, labour law cases that might have contributed to the fight against harassment, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.
5) Please indicate the **types of prosecution** applicable to this type of violence (*ex officio*, *ex parte*, private prosecution?). If available, please include a link to protocols that guide the prosecution of domestic violence.
   a) Are there any protocols guiding the prosecution of this type of violence?
   b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?
6) **Mandatory alternative dispute** resolution processes, including mediation and conciliation, are prohibited by the Istanbul Convention. Are any of these processes still applied in your country to this type of violence? For example, are labour inspectorates and other relevant authorities, empowered to deal with violence and harassment in the world of work, including by issuing orders requiring measures with immediate executory force, and orders to stop work in cases of an imminent danger to life, health or safety, subject to any right of appeal to a judicial or administrative authority which may be provided by law?[16] Are dispute resolution mechanisms provided at the workplace level or external to it?[17] (Article 10(b)(i) and (ii) ILO Convention No. 190).
7) Are there any forms of **retaliation** against victims reporting this type of violence (counter demands, media backlash, physical aggression, etc) or any police or judicial **practice deterring** women from reporting this type of violence? If so, are there any reports of policy evaluations indicating this?
8) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
9) Please indicate any **gaps in the criminalisation** (or other legal prohibitions) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) or in ILO Violence and Harassment Convention No. 190/2019, and make any **recommendations** on how these gaps can be tackled.

14 *OJ L 180, 15.7.2010, p. 1–6,* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010L0041.
15 *Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29/06/1989 P. 0001 – 0008, Article 1(2). See also, specifically on EU Member States legislation, this report of 2016* https://op.europa.eu/en/publication-detail/-/publication/09cef40c-0954-11e7-8a35-01aa75ed71a1/language-en.
16 Article 10(h) ILO Convention No. 190.
17 Article 10 (b)(i) and (ii) ILO Convention No. 190.

Sexual Exploitation

There is no established definition of sexual exploitation at the international and regional level, except in some soft law documents. The UN Secretary General introduced an operative definition of sexual exploitation in 2003, aimed at reducing violence committed by UN officials, as 'any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.'[18] In the Model law prepared by the UNODC, even though it is mentioned that the concept of sexual exploitation has been voluntarily left undefined in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, the following definition of sexual exploitation has been provided: 'sexual exploitation shall mean the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials.'[19]

Despite the lack of a definition in a binding legal instrument, 'sexual exploitation of women and children' is an area of particularly serious 'EU-crime' under Article 83(1) TFEU and constituted the legal basis for Directive No. 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA,[20] and for Directive No. 2011/93 on the fight against sexual exploitation of children and child pornography, which replaces Framework Decision 2004/68.[21] In elaborating the latter, the European Commission mainly referred to the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse,[22] which is not ratified by the EU.[23] In this section, we want to explore how sexual exploitation has been defined at national level, whether there is a general definition, or if it is related to human trafficking and/or sexual exploitation of children only.

1) Definition and scope
   Is there any national legislation prohibiting sexual exploitation specifically? If yes, please indicate:
   a) Name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available.
   b) Please include the definition of sexual exploitation where available.
      i. Is the definition related to human trafficking only?
      ii. Is the definition related to the abuse of children (e.g. child pornography, child sex tourism) only?
      iii. Is there a reference/references to sexual exploitation of women not related to human trafficking?
2) If your national law does not contain a specific provision prohibiting this type of violence, what **other (general) offences** are applied to cases of sexual exploitation? (for example, are there provisions on pornography or prostitution)?
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
4) Please include relevant **case law** that which indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/, the

18 Secretary-General's Bulletin Special measures for protection from sexual exploitation and sexual abuse, UN Doc. ST/SGB/2003/13, available at https://undocs.org/en/ST/SGB/2003/13. See also https://conduct.unmissions.org/glossary.
19 Trafficking in Human Beings and Peace Support Operations: Trainers' Guide, United Nations Interregional Crime and Justice Research Institute, 2006, p. 153.
20 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ L 101, 15.4.2011, p. 1–11.*
21 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. 1–14.
22 CETS No. 201 https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201.
23 Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHACOM(2010)94 final, 2010/0064 (COD), p. 2.

circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.

5) Please indicate the **types of prosecution** applicable to this type of violence (*ex officio*, *ex parte*, private prosecution?).[24]
   a) Are there any protocols guiding the prosecution of this type of violence?
   b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?
6) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
7) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

Female genital mutilation, and other non-consensual forms of genital interventions of women and girls

In line with article 38 of the Istanbul Convention, this questionnaire considers Female Genital Mutilation (FGM) as the intentional excising, infibulating or any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; the coercing or procuring a woman to undergo any of these acts; the inciting, coercing or procuring of a girl to undergo any of these acts. The Istanbul Convention is the first treaty to recognise that FGM exists in Europe and that it needs to be systematically addressed. It requires states parties to make FGM a criminal offence, and to ensure that criminal investigations are effective and child-sensitive.[25]

More recently, non-consensual forms of genital interventions have started to gain visibility, particularly those affecting intersex children. By 'Intersex children' we refer to children whose sex characteristics are atypical or at variance with commonly accepted norms. There are a large number of forms of intersex variation and there is no consensus as to what variations of sex development should be regarded as intersex. That said, the number of children born with a gender that cannot be considered male or female account for only a small share of intersex children, since the majority are recognized as either boy or girl. The UN Special Rapporteur on torture pointed out that intersex children, including intersex girls, are often subject to non-consensual surgical interventions in the form of genital-normalising surgery, performed without their informed consent or that of their parents "in an attempt to fix their sex" as they fail to conform to socially constructed gender expectations.[26] This leaves them with permanent, irreversible infertility and causes severe mental suffering.

In this section, please provide details on how FGM and other non-consensual genital interventions affecting intersex girls and women are addressed in domestic legislation.

1) Definition and scope
   Is there any national legislation prohibiting female genital mutilation specifically? If yes, please indicate:

24 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

25 For a detail analysis of the obligations arising from the Istanbul Convention in relation to FGM, see: https://www.endfgm.eu/content/documents/studies/Istanbul-Convention-FGM-guide.pdf See also: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52013DC0833.

26 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.

a) Name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available.
b) Please include the definitions of female genital mutilation.
    i. Is it an offence to take the child to a different jurisdiction with the intention to perform FGM there?
    ii. If your national law does not contain a specific provision prohibiting this type of violence, what other (general) offences are applied to cases of FGM? (serious bodily injury, for example)?

2) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
3) Please include relevant **case law** that which indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.
4) Please indicate the **types of prosecution** applicable to this type of violence (*ex officio*, *ex parte*, private prosecution?).[27]
    a) Are there any **protocols guiding the prosecution** of this type of violence?
    b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?
5) Can victims of this type of violence make a complaint if the offence was committed in **the territory** of a Party other than the one where they reside?
6) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.

Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

Forced abortion and forced sterilisation

Article 39 (a) of the Istanbul Convention defines forced abortion as the intentional provocation or execution of an abortion on a person without their prior and informed consent. In addition, article 39 (b) refers to the intentional termination of a person's capacity to naturally reproduce without their prior and informed consent or understanding of the procedure (forced sterilisation). According to the European Court of Human Rights, sterilisation procedures concern one of the essential bodily functions of human beings and impact on the individual's personal integrity, including his or her physical and mental wellbeing and emotional, spiritual and family life.[28] The Court has determined that States have a positive obligation in relation to article 8 of the European Convention of Human Rights to ensure effective legal safeguards to protect women from non-consensual sterilisation.[29] The Court's jurisprudence also applies to inadvertent sterilisation, when the doctor fails to perform adequate checks or obtain informed consent during an abortion procedure.[30]

27 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

28 *V.C. v. Slovakia*, Application no. 18968/07, Council of Europe: European Court of Human Rights, 16 June 2009, available at: https://www.refworld.org/cases,ECHR,4a648cb42.html, § 106.

29 *V.C. v. Slovakia; I.G. and others v. Slovakia,* Application no. 15966/04, Council of Europe: European Court of Human Rights, 13 November 2012, available at: https://www.refworld.org/cases,ECHR,50a289e22.html.

30 *Csoma v. Romania* Application no. 8759/05, Council of Europe: European Court of Human Rights, 15 January 2013, available at: https://hudoc.echr.coe.int/eng#{"itemid":["001-115862"]}.

Forced abortion and forced sterilisation are often imposed on minority women and women with disabilities. In addition, forced sterilisation often targets transgender persons and intersex persons. As pointed out in the 2018 EELN report on Trans and Intersex Equality Rights in Europe, to be formally recognised in their preferred gender in several EU member states, trans and intersex persons must show evidence that they have undertaken a process of sterilisation or are otherwise incapable of reproducing.[31] Similarly, in 2014, the WHO and other UN institutions issued an interagency statement addressing the fact that "in some countries, people belonging to certain population groups, including intersex persons, continue to be sterilized without their full, free and informed consent".[32] The UN Special Rapporteur on torture has also pointed out that intersex children are often subject to involuntary sterilisation, performed without their informed consent or that of their parents.[33]

In this section, please provide details about the prohibition of forced abortion and forced sterilisation in the domestic jurisdiction. Please make sure to distinguish between these two practices.

1) Definition and scope
   Is there any national legislation prohibiting forced abortion and/or forced sterilisation specifically? If yes, please indicate:
   a) Name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available.
   b) Please include the definitions of forced abortion and/or forced sterilisation.
      i. Is the legal definition gender specific [referring to the gender of the victim and/or perpetrator] or gender neutral?
2) If your national law does not contain a specific provision prohibiting this type of violence, what **other (general) offences** are applied to cases of forced abortion/forced sterilisation? (e.g. serious bodily injury).
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
4) Please include relevant **case law** that which indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.
5) Please indicate the **types of prosecution** applicable to this type of violence (*ex officio*, *ex parte*, private prosecution?).[34] If available, please include a link to protocols that guide the prosecution of domestic violence.
   a) Are there any **protocols guiding the prosecution** of these types of violence?
   b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?
7) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
8) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

31 Available at: https://ec.europa.eu/info/sites/info/files/trans_and_intersex_equality_rights.pdf.
32 OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO (2014), Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement.
33 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.
34 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

Forced Marriage

By forced marriage (FM) we refer to the intentional conduct of forcing an adult or a child to enter into a marriage. In this section, we ask for legislative or other domestic measures that prohibit the intentional conduct of luring or forcing an adult or a child into a marriage (Istanbul Convention, Article 37). In that respect, according to the resolution adopted on 28 June 2018 by the Parliamentary assembly of the Council of Europe, Member States of the Council of Europe were encouraged to 'criminalise, as a specific offence, intentional conduct forcing an adult or a child to enter into a marriage, as well as luring an adult or a child abroad for the purpose of forcing him or her to enter into a marriage, and provide for effective sanctions against the perpetrators and those who aid, abet, or attempt to commit such offences.'[35]

At the EU level, the Committee on women's rights and gender equality for the Committee on Foreign Affairs took steps toward an EU external strategy against early and forced marriages when it condemned child, early and forced marriages and other harmful coercive practices imposed on women and girls, recognising that child and forced marriages are a 'real problem' within the EU.[36] On 4 July 2018, the European Parliament adopted a resolution which acknowledged that child, early and forced marriages constitute a 'serious violation of human rights and, in particular, women's rights' and asked Member States to include a complete ban on child, early and forced marriages.[37] This section wants to investigate which provisions your country has introduced with regard to child, early and/or forced marriages, whether they are specifically prohibited or not, and whether those marriages can be declared voidable, annulled or dissolved.

1) Definition and scope
   Is there any national legislation prohibiting child, early and/or forced marriages specifically? If yes, please indicate:
   a) Name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available.
   b) Please include the definition of child, early and/or forced marriage
      i. Is the legal definition only referring to marriages below age?
      ii. Can marriages concluded under force be declared voidable, annulled or dissolved?
2) If your national law does not contain a specific provision prohibiting this type of violence, **can other (general) offences** be applied to cases of forced marriages (abduction, deprivation of liberty, sexual violence, forced pregnancy, etc)?
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
4) Please include relevant **case law** that which indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.
5) Please indicate the **types of prosecution** applicable to this type of violence (*ex officio*, *ex parte*, private prosecution?).[38] If available, please include a link to protocols that guide the prosecution of domestic violence.
   a) Are there any protocols guiding the prosecution of this type of violence?

35 Resolution 2233 (2018) Forced Marriage in Europe, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25016&lang=en.

36 2017/2275(INI) Rapporteur Daniela Aiuto, 18 April 2018, available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0187_EN.html.

37 European Parliament resolution of 4 July 2018 Towards an EU external strategy against early and forced marriages – next steps (2017/2275(INI), https://www.europarl.europa.eu/doceo/document/TA-8-2018-0292_EN.html.

38 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?

6) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
7) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

Stalking

By 'stalking' we refer to the intentional conduct of repeatedly engaging in threatening conducts directed at another person, causing her or him to fear for her or his safety (Article 34, Istanbul Convention). What characterises stalking is 'the repetitive or systematic nature of the behaviour, aimed at a specific person, which is unwanted by the targeted person.'[39] Some definitions require that the behaviour causes the targeted person to fear for her or his safety. The element of fear in the crime of stalking, however, has been reported to be quite problematic. The Istanbul Convention specifically requires the criminalisation of stalking under Article 34, and in the explanatory note to the Convention the online dimension is emphasised as follows: 'Engaging in unwanted communication entails the pursuit of any active contact with the victim through any available means of communication, including modern communication tools and ICTs.'[40] In this section we want to know how the prohibition of stalking, committed both online and offline, is regulated in your country.

1) Definition and scope
   Is there any national legislation prohibiting stalking specifically? If yes, please indicate:
   a) Name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available.
   b) Please include the definition of stalking.
      i. Does the legal definition refer to the element of fear?
      ii. Is the legal definition gender specific [referring to the gender of the victim and/or perpetrator] or gender neutral?
      iii. If not gender-specific, are there aggravating circumstances related to the gender of the victims/survivors?
2) If your national law does not contain a specific provision prohibiting this type of violence, what **other (general) offences** are applied to cases of stalking? (intimidation, defamation, psychological violence, illegal threats etc). Is there any form of criminalisation of illegal online activities which is relevant for the prosecution of online stalking?
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc)?
4) Please include relevant **case law** (especially on online stalking) which indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.
5) Please indicate the **types of prosecution** applicable to this type of violence (*ex officio*, *ex parte*, private prosecution?).[41] If available, please include a link to protocols that guide the prosecution of domestic violence.

39 S. van der Aa, 'New Trends in the Criminalization of Stalking in the EU Member States', *Eur J Crim Policy Res* 24 (2018) 315–333.
40 Explanatory report to the Istanbul Convention, para. 182.
41 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

a) Are there any **protocols guiding the prosecution** of this type of violence?
b) If yes, do they explicitly cover online stalking?
c) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?

6) Please indicate the **statute of limitations** applicable to this type of violence (period and starting date).
7) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
8) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

Non-consensual use of intimate/private images

This act consists of the non-consensual mostly online dissemination of intimate/private images and images of a sexual nature, obtained with or without consent.[42] The legislation might include in the definition the purpose of shaming, stigmatising, humiliating or harming the victim (so-called revenge porn). We have selected as forms of online violence the non-consensual use of intimate/private images and gender-based hate speech, which seem to correspond to state practice. If you feel that in your country another relevant illicit gender-based online behaviour has been addressed in legislation or case-law, please report it in the general part above.

In this section we want to know whether a law addressing this specific behaviour exists, or whether a debate has started in that respect.

1) Definition and scope
Is there any national legislation prohibiting the non-consensual use of intimate/private images specifically? If yes, please indicate:
a) Name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available.
b) Provide the definition of non-consensual use of intimate/private images.
i. Is the legal definition gender specific [referring to the gender of the victim and/or perpetrator] or gender neutral?
ii. If not gender-specific, are there aggravating circumstances related to the gender of the victims/survivors?

2) If your national law does not contain a specific provision prohibiting this type of violence, what **other (general) offences** are applied to cases of non-consensual use of intimate/private images? (defamation, data interference, cyber-crime,[43] etc.)?
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
4) Please include relevant **case law** that which indicates if and how your state is (not) **countering** this type of violence (for instance, cases that explain the scope of the elements of the crime/, the

42 T. Kirchengast and T. Crofts, The legal and policy contexts of 'revenge porn' criminalisation: the need for multiple approaches, in *Oxford University Commonwealth Law Journal*, vol. 19:1, 2019, p. 4. https://doi.org/10.1080/14729342.2019.1580518.

43 Cybercrime consists of 'criminal acts that are committed online by using electronic communications networks and information systems. It is a borderless problem that can be classified in three broad definitions: Crimes specific to the Internet, such as attacks against information systems or phishing (e.g. fake bank websites to solicit passwords enabling access to victims' bank accounts); Online fraud and forgery. Large-scale fraud can be committed online through instruments such as identity theft, phishing, spam and malicious code; Illegal online content, including child sexual abuse material, incitement to racial hatred, incitement to terrorist acts and glorification of violence, terrorism, racism and xenophobia' https://ec.europa.eu/home-affairs/what-we-do/policies/cybercrime_en. EU legislation on cybercrime corresponds to the rules set out in the Council of Europe Convention on Cybercrime (Budapest Convention), ETS No. 185, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561.

circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.

5) Please indicate the **types of prosecution** applicable to this type of violence (ex officio, ex parte, private prosecution?).[44]
   a) Are there any **protocols** guiding the prosecution of this type of violence?
   b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?
6) Can victims of this type of violence make a complaint if the offence was committed **in the territory** of a Party other than the one where they reside? How jurisdictional issues have been addressed in the legislation regarding this type of violence?
7) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
8) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

Hate Speech on the basis of gender and/or sex

In 2019, the UN Secretary General Guterres defined hate speech as follows:

> 'any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their (perceived) religion, ethnicity, nationality, race, colour, descent, gender or other identity factor. This is often rooted in, and generates intolerance and hatred and, in certain contexts, can be demeaning and divisive.'[45]

Moving to the regional level, in the definition of hate speech provided by the European Commission Against Racism and Intolerance (ECRI), the discrimination against women on the basis of gender is included using these words: 'Conscious of the particular problem and gravity of hate speech targeting women both on account of their sex, gender and/or gender identity and when this is coupled with one or more of their other characteristics.'[46]

Whereas hate speech on the basis of race and ethnicity is commonly criminalised,[47] hate speech on the basis of gender and/or sex is often not. The Recommendation of the Council of Europe for preventing and combating sexism of 2019, which has defined sexism in very general terms, stressed how the Internet has provided a new dimension for the expression of sexist hate speech, which 'may escalate to or incite overtly offensive and threatening acts, including sexual abuse or violence, rape or potentially

44 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

45 UN Strategy and Plan of Action on Hate Speech, 2019, available at https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf.

46 ECRI General Policy Recommendation No. 15 on Combating Hate Speech, adopted on 8 December 2015, available at https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01.

47 See the Additional Protocol to the Cybercrime Convention, adopted in 2003, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Under the Protocol, 'racist and xenophobic material' means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.' See also 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.

lethal action.' The recommendation encouraged member states of the Council of Europe to 'implement legislative measures that define and criminalise incidents of sexist hate speech and are applicable to all media, as well as reporting procedures and appropriate sanctions.'

At EU level, the Commission has paved the way for an extension to the list of euro-crimes to include all forms (hence also based on gender and/or sex) of hate crime and hate speech.[48] Furthermore, the new Digital Services Act proposal would, when accepted, apply to all illegal online content, including to illegal hate speech on all grounds.[49]

In this section, we are interested in legal instruments already adopted or under discussion on the criminalisation of hate speech on the basis of gender and/or sex, and in relevant jurisprudence.[50]

1) Definition and scope
   Is there any national legislation prohibiting hate speech? If yes, please indicate:
   a) Name/number, date enacted and area of law (civil, criminal, etc.). Provide a link if available.
   b) Please provide the definition of hate speech.
   c) Which are the grounds of discrimination at the basis of hate speech whether criminalised at national level? Is gender included?
      i. If gender is included, is the legal definition gender specific [referring to the gender of the victim and/or perpetrator] or gender neutral? Is there a specific reference to women as victims of hate speech? How is the gender bias defined?
      ii. If not gender-specific, are there aggravating circumstances related to the gender of the victims/survivors?
      iii. Does national legislation include a specific criminalisation of gender-based hate crime? How is 'hate' defined?
2) If your national law does not contain a specific provision prohibiting this type of violence, what **other (general) offences** are applied to cases of sexist hate speech? (defamation, data interference, intimidation etc).
3) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, prohibition to assume public office, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
4) Please include relevant **case law** that which indicates if and how your state is (not) countering this type of violence (for instance, cases that explain the scope of the elements of the crime/, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). In particular, how have courts defined 'hate' and the prejudice based on gender in their case law, if all? Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.
5) Please indicate the types of prosecution applicable to this type of violence (ex officio, ex parte, private prosecution?).[51]

48 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission Work Programme 2021 A Union of vitality in a world of fragility, COM(2020) 690 final, 19 October 2020, p. 7.

49 Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final, recital No. 12 and 57. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020PC0825.

50 Preventing and Combating Sexism, Recommendation CM/Rec(2019)1, adopted by the Committee of Ministers of the Council of Europe, 27 March 2019, available at https://rm.coe.int/prems-055519-gbr-2573-cmrec-2019-1-web-a5/168093e08c.

51 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

a) Are there any **protocols guiding the prosecution** of this type of violence?
b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?

6) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
7) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence, particularly in relation to the requirements established in the Istanbul Convention (refer to Grevio reports or other studies suggesting this) or by EU law (in case of sex-based harassment or sexual harassment) and make any **recommendations** on how these gaps can be tackled.

Femicide

Femicide refers to the killings of women based on gender, whether it occurs within the family, a domestic partnership, or any other interpersonal relationship; in the community, by any person, or when it is perpetrated or tolerated by the state or its agents, by action or omission. The notion of femicide has been incorporated into different jurisdictions. At Inter-American level the adoption of legislation on femicide has been recommended by the Committee of Experts monitoring the implementation of the Belém do Pará Convention,[52] and adopted in the case law of the Inter-American Court.[53] In 2016, the United Nations Special Rapporteur on violence against women issued a report on femicide and gender-related killings of women, proposing the establishment of a "femicide watch" at the global, national and regional levels, and observatories on violence against women.[54] Since then, she annually collects information on femicides. Nevertheless, while many states have followed these recommendations, the incorporation of femicide as a specific crime has been resisted in other domestic jurisdictions. In this section, please provide details about the current situation in your country.

1) Definition and scope
Is there a specific offence of **femicide or gender-related killing of women**? If yes, please indicate:
a) Law name/number introducing the offence, date enacted and provide a link if available.
b) Please provide the definition of femicide.
2) If there is no **specific offence** of femicide/gender-related killing of women, is the fact that the victim was killed because of her gender considered as an **aggravation**? Please specify.
3) Are there any **current discussions**, and if so, resistance, in your state towards labelling or recognising the killing of women as femicide or gender-related (counter demands, media backlash, physical aggression, etc)? If so, by whom, and please indicate if there are any reports of policy evaluations indicating this?
4) Please indicate the range of **sanctions and penalties** (including accessory to the penalty, such as restriction orders, restrictions on parental rights, etc.) applicable to this type of violence (min/max time, fines, community service etc?)
5) Please include **relevant case law** that indicates if and how your state is (not) countering this type of violence (for instance, cases that explain the scope of the elements of the crime/, the circumstances that remove culpability or, on the contrary, circumstance that aggravate the crime, cases which have cause upheaval in media or society, cases that have triggered legislative change, etc.). Our intention here is to find out whether and how judicial practice supports or differs from the formal criminalisation of the violence.
6) Please indicate the **types of prosecution** applicable to this type of violence (e.g. ex officio, ex parte,

52 OEA/Ser.L/II.7.10 MESECVI/CEVI/DEC. 1/08 15 August 2008, available at: https://www.oas.org/es/mesecvi/docs/DeclaracionFemicidio-EN.pdf.
53 Inter-American Court of Human Rights, *González et al ('Cotton Field') v Mexico*, Series C 205 (16 November 2009); *Veliz Franco et al v. Guatemala*, IACtHR Series C 277 (19 May 2014); *Velásquez Paiz et al v. Guatemala*, IACtHR Series C 307 (19 November 2015).
54 Report of the Special Rapporteur on violence against women, its causes and consequences, Report on femicide or the gender-related killing of women, 23 September 2016. Available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/71/398&Submit=Search&Lang=E.

private prosecution?).[55] If available, please include a link to protocols that guide the prosecution of domestic violence.

a) Are there any prosecutorial guidelines regarding this type of violence?
b) Are these guidelines gender-sensitive? In other words, do such guidelines take into account that gender may have played a role in the experience of violence and subsequent needs?

7) If applicable, please mention any **pending** legislative changes or draft laws currently under discussion.
8) Please indicate any **gaps in the criminalisation** (or non-criminalisation) of this type of violence and make any **recommendations** on how these gaps can be tackled.

55 Ex officio prosecution does not require the formal complaint of the victim to initiate the proceedings since it can be purely triggered by the decision of the prosecutor or state official. On the contrary, ex parte prosecution necessitates the impulse of the victim or other persons with a legitimate interest for the prosecutor to initiate the proceedings. Private prosecution depends solely on the initiation by the victim through private counsel (no public prosecutor involved).

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