



EUROPEAN COMMISSION

*Mr Bodo RAMELOW
President of the Bundesrat
Leipziger Straße 3 - 4
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*Brussels, 13.9.2022
C(2022) 6619 final*

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence {COM(2022) 105 final}.

The Commission welcomes the Bundesrat's shared commitment to achieve the proposal's objective to combat and prevent gender-based violence and achieve the related goals of the Gender Equality Strategy 2020-2025.

The Commission is pleased that the Bundesrat supports combating violence against women and domestic violence comprehensively and that the Bundesrat agrees that this type of violence is rooted in structural discrimination against women. The Commission would also like to thank the Bundesrat for illustrating the national efforts undertaken to strengthen victims' rights in the past years. Indeed, the rise of violence against women, in particular domestic violence during the COVID-19 pandemic, and of cyber violence have accelerated the urgency to take effective action. This necessity, as pointed out by the Bundesrat, is increased due to the fragmented legal framework. This was also highlighted by the extensive report commissioned by the Commission during the preparatory work of the proposal¹. The Commission agrees that the cross-border dimension of cyber violence and the need to protect and defend fundamental rights and values across borders within the European Union further necessitate coordinated action at European Union level.

Furthermore, the Commission appreciates the Bundesrat's detailed and explicit support for a number of Articles of the proposal, in particular those concerning: the suggested harmonisation of offences amounting to violence against women in Chapter 2, including the need for a harmonised definition of the offence of rape; protective measures, such as the specific risk assessment (Articles 18 and 19); the introduction of guidelines for healthcare and social service professionals (Article 27); the proposed preventive

¹ European network of legal experts in gender equality and non-discrimination: Criminalisation of gender-based violence against women in the European States, including ICT-facilitated violence, 2021, [5535-criminalisation-of-gender-based-violence-against-women-in-european-states-including-ict-facilitated-violence-1-97-mb \(equalitylaw.eu\)](#).

measures (Article 36); and the necessity to improve data collection, especially concerning cyber violence (Article 44).

The Commission would like to confirm its commitment to the common goal to further the negotiations on the European Union's accession to the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence². Accession remains one of the Commission's top priorities in the field of gender equality. The Commission would like to thank the Bundesrat for its support on this matter.

In response to the concerns raised in the Opinion and other more technical comments, the Commission would like to refer to the attached annex.

The points covered in this reply are based on the initial proposal presented by the Commission, which is currently in the legislative process involving both the European Parliament and the Council.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

*Helena Dalli
Member of the Commission*

² Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), <https://rm.coe.int/168008482e>.

The Commission has carefully considered each of the issues raised by the Bundesrat in its Opinion and is pleased to offer the following clarifications.

Article 12: With regard to the concerns that proposing specific minimum levels of the maximum penalties heavily interferes with the Member States' criminal legal orders, the Commission would like to point out that setting penalties is crucial to ensure the effectiveness of harmonisation of offences at European Union level. The Commission would also refer to the competences bestowed upon the European Union by the Treaties. In addition to the formulation of the constituent elements of the criminal offences falling within the respective areas of crime, Article 83(1) of the Treaty on the Functioning of the European Union allows for the introduction of minimum rules concerning criminal sanctions. The European Union legislator has made use of this competence, for instance in Directive 2011/93/EU³ (the 'Child Sexual Abuse Directive'), Directive 2011/36/EU⁴ and Directive 2017/541/EU⁵. These pieces of legislation all aim to harmonise the minimum levels of the maximum penalties of the corresponding offences. Therefore, this proposal follows long-standing practice and is in line with the competences provided for by the Treaties. The level of penalties suggested is based on a detailed analysis of the conduct in question as well as a comparative study of the level of existing penalties in the Member States to ensure the consistency of the Member States' sanctioning systems. This approach leaves Member States with the possibility of setting their own minimum penalties while at the same time ensuring that the minimum standards for criminal offences at the Union-level are effectively enforced.

Concerning Article 12(3) on the introduction of mandatory participation in intervention programmes, the Commission would like to underline that this provision is limited to reoffenders and also limited to the offence of rape. At the same time, it follows the same rationale as introducing imprisonment as a criminal penalty, i.e. it pursues the aims of resocialisation of the perpetrators and specific prevention. The issues to be addressed through intervention programmes are the same for perpetrators participating mandatorily and those participating voluntarily in such programmes: perpetrators tend to minimise and deny violence and blame the victim. The programmes will work on guiding persons from being externally motivated to actively participate in the programme to developing an intrinsic motivation, and as such can be highly effective. In addition, the mandatory participation plays a large role in holding perpetrators accountable, to intercept violence by ensuring perpetrators are monitored through

³ 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.

⁴ 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.

⁵ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6.

regular participation in these programmes and lastly to offer social support, thereby triggering substantial behavioural changes⁶.

Article 13: The Commission would like to clarify that it will be up to the discretion of the judicial authorities to consider whether the aggravating circumstances provided for by Article 13 are to be applied, as the provision requires Member States to ensure that these ‘may be regarded’ as aggravating circumstances. Furthermore, as regards the concerns of double jeopardy, the Commission would like to highlight that – as stipulated in Article 13 – the aggravating circumstances are only to be taken into account ‘in so far as [they] do not already form part of the constituent elements of the criminal offences’.

With regard to the content of the circumstances to be regarded as aggravating, these have been carefully modelled on the existing and similar provisions of Article 46 of the Council of Europe’s Convention on Preventing and Combating Violence against Women and Domestic Violence (‘Istanbul Convention’)⁷ and Article 9 of the Child Sexual Abuse Directive. Similarly, the definition of ‘violence against women’ provided for by Article 4(a) is based on Article 3(a) of the Istanbul Convention. The reference to ‘violence’ in Article 13(f) refers to the general notion of ‘violence’, not to violence against women as defined in Article 4(a). The Commission would like to further note that offences of cyber violence not only occur in the context of youth-on-youth violence but are often manifest in situations of intimate partner violence⁸. For example, this is the case of the non-consensual dissemination of intimate images taken consensually during a relationship to exercise revenge against an ex-partner or the installation of spyware on a partner’s mobile phone to exercise control over that person. The preparatory studies and consultations show the particularly vulnerable situation – due to dependency – in which victims of intimate partner violence typically are, which strongly supports considering intimate partner violence as an aggravating circumstance.

Article 15: In introducing limitation periods in the proposal, the Commission addresses specific problems highlighted in the studies and preparations of the proposed Directive. In particular, with regard to children, the Commission would like to point to the fact that children – even adolescents – typically encounter greater barriers to access to justice, in particular with regard to accessing reporting mechanisms, and that they might need more time than adults to overcome the trauma resulting from offences committed. Furthermore, the types of (cyber)offences covered by the proposal typically result in higher levels of shame and attract social stigma, which makes it also harder for adolescents to come forward. In setting minimum standards on limitation periods, the Commission is following established practice at European Union level, for instance the harmonisation of limitation periods provided for by the Directive on the fight against

⁶ See recommendations of Work with Perpetrators European Network, in “How to Start a Perpetrator Programme? Issues and Dilemmas of the ‘Start Up’ Process”, 2015, D. Ajdukovic and A. Pauncz, https://www.work-with-perpetrators.eu/fileadmin/WWP_Network/redakteure/Expert%20Essays/WWP-EN%20Expert%20Essay%20-%20How%20to%20Start.pdf.

⁷ Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), <https://rm.coe.int/168008482e>.

⁸ See GREVIO General Recommendation No. 1 on the digital dimension of violence against women (2021), para. 25, <https://rm.coe.int/grevio-rec-no-on-digital-violence-against-women/1680a49147>.

*fraud to the European Union's financial interests by means of criminal law*⁹. In order to ensure coherence with Member States' internal legal orders, the Commission in its preparatory work also compared the different limitation periods envisaged in the Member States to provide for a balanced proposal.

*Article 22: The prohibition set out in Article 22 is not meant to be absolute. With the words 'without prejudice to the rights of defence' at the beginning of the Article, the provision does not completely rule out the admissibility of evidence relating to the sexual history of the victim but requires that such evidence may be used only when necessary to safeguard the rights of defence of the accused person. This is in line with international standards and the jurisprudence of the European Court of Human Rights*¹⁰. The rationale for this provision is particularly salient: raising questions relating to the victim's past sexual conduct in sexual violence cases, in particular rape cases, may reinforce the perpetuation of damaging stereotypes of victims and lead to secondary victimisation.

Article 35: The Commission – as highlighted in recital 11 of the proposal - agrees that LGBTIQ persons are at a particularly heightened risk of experiencing gender-based violence. As confirmed in recital 5, all victims of offences amounting to violence against women, including LGBTIQ victims, therefore benefit from the protection, support, and access to justice provisions of the proposed directive.

Article 37: The Commission welcomes the Bundesrat's support for Article 37 concerning the training of relevant professionals, in particular with regard to the judiciary and prosecution services. A strengthening of the intersectional aspect and explicit mention of LGBTIQ-sensitivity could indeed be added to the proposal.

⁹ Article 12 of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29.

¹⁰ See e.g. Article 54 of the Istanbul Convention, the Rules of Procedure and Evidence of the International Criminal Court (rule 70 and 71), [Rules-of-Procedure-and-Evidence.pdf \(icc-cpi.int\)](#), and ECtHR CASE OF Y. v. SLOVENIA, Application no. 41107/10, 28 May 2015, [Y. v. SLOVENIA \(coe.int\)](#); see also CEDAW Committee, *Vertido v. Philippines* (2010), <https://juris.ohchr.org/search/details/1700>.