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The new EU Directive on combating violence against women and domestic violence

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I. Introduction

The European Union (EU) has adopted its first Directive addressing violence against women and domestic violence (Directive [EU] 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence; hereinafter: Directive 2024/1385 or the Directive). The text was published in the Official Journal of the EU on 24 May and entered into force twenty days later. Member States will have until 14 June 2027 to transpose the new act into their national law.

According to Recital no. 1, the Directive aims to “provide a comprehensive framework to effectively prevent and combat violence against women and domestic violence throughout the Union”. To this end, it sets out an extensive set of measures that are divided into seven chapters and can be grouped into three main categories (Art. 1). The first one contains minimum rules to harmonise the definitions of and penalties for several offences in the area of violence against women and domestic violence (Arts. 3–13); the second one sets norms aimed at strengthening the protection of victims and their rights before, during, and after criminal proceedings (Arts. 14–33); the third one stipulates provisions for the prevention of and early intervention against violence (Arts. 34–37).

Within this broad scope, the present paper will focus on substantive criminal law, seeking to illustrate key provisions and limitations of Directive 2024/1385. In fact, despite its claim to “provide a comprehensive framework”, the Directive only covers the criminalisation of a limited number of offences (female genital mutilation; forced marriage; non-consensual sharing of intimate or manipulated material; cyber stalking; cyber harassment; cyber incitement to violence or hatred), excluding the most severe forms of gender-based violence, such as rape. There is thus a dis-

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crepancy between the objectives proclaimed by the Directive and its actual contents. As will be explained later, this gap stems from the fact that the legislative process was tainted by strong political disagreements. The final text effectively differs from that proposed by the European Commission (Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence tabled on 8 March 2022, hereinafter: the Proposal).

Given this premise, the paper will start by framing the Directive within EU legislation and policy, devoting special attention to the original Proposal and the reasons for its amendment (Section II). The article will then describe the key features of the criminal offences covered by the final text, explaining their rationale and their main technical problems (Section III). The analysis will conclude with a brief assessment of the virtues and shortcomings of the Directive (Section IV).

II. The background

1. The EU's commitment to counteracting gender-based violence and the legal basis of the Directive

a) The EU's commitment to counteracting gender-based violence

As mentioned above, Directive 2024/1385 is the first legislative EU Act that specifically targets violence against women and domestic violence. The issue had been previously spread across several acts, especially in the field of criminal justice (for example, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and Directive 2011/99/EU on the European Protection Order). Some of these acts had also included harmonisation measures to counteract specific forms of gender-based violence (for example, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, recently amended by Directive (EU) 2024/1712). However, neither had any of them adopted a comprehensive approach nor had they tried to define criminal offences in the area of domestic violence¹.

¹ According to the Council of Europe Convention on preventing and combating violence against women and domestic violence, the expression “domestic violence” designates “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” (Art. 3(b)); a similar definition is now provided by Art. 2(b) of the Directive.

Hence, the European Parliament had called for the EU to assume a more proactive role in the fight against gender-based violence on several occasions²; in the same vein, the Gender Equality Strategy announced by the European Commission in March 2020 had planned to propose several measures to combat this form of violence³. More precisely, President *von der Leyen* had identified three main actions: the completion of the EU's accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: the Istanbul Convention); the adoption of a Directive including additional measures to prevent and combat gender-based violence; adding specific forms of violence to the "Eurocrimes" list (Art. 83(1) of the Treaty on the Functioning of the European Union (TFEU))⁴. While the first two measures were implemented⁵, the last one has yet to materialise.

All these actions were based on the assumption that Member States' national legislation on violence against women still differs too substantially, and that such broad variation undermines the protection of women's fundamental rights⁶ and hampers the mutual recognition of judicial remedies such as protection orders⁷. Indeed, evidence confirms that violence against women remains a widespread phe-

2 See e.g. European Parliament resolution of 25 February 2014 with recommendations to the Commission on combating Violence Against Women, 2013/2004 (INL). For more details on the EU policy on violence against women, *Roggeband*, Violence against women and gender-based violence, in: Abels et al. (eds.), *The Routledge Handbook of Gender and EU Politics*, Routledge 2021, pp. 352–359.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions of 5 March 2020. A Union of Equality: Gender-Equality Strategy 2020–2025, COM (2020) 152 final.

4 The EU Commission statement was followed by some initiatives: in this regard, see Communication from the Commission to the European Parliament and the Council of 9 December 2021. A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime, COM (2021) 777 final, and, for an assessment, *Peršak*, "Criminalising hate crime and hate speech at EU level: extending the list of Eurocrimes under article 83(1) TFEU", *Criminal Law Forum* 33 (2022), 85, 92–119. Alternatively, in support of an extension of the EU's competences to include gender-based violence, see European Parliament Resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU, 2021/2035 (INL).

5 The EU accession to the Istanbul Convention was completed on 1 June 2023; on the meaning of this act, *De Vido*, "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 (2017), 69, 86–102.

6 *De Vido/Sosa*, Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence, Publications Office of the European Union 2021, pp. 193–194.

7 On this point, *Merino*, The concept of gender violence in the legal systems of the Member States, in: Freixas/Román (eds.), *The European Protection Order. Its application to the victims of gender violence*, Tecnos 2015, pp. 55–56.

nomenon in Europe⁸. It is also true that existing legal instruments are insufficient to counteract this type of violence effectively. Even if we discount the fact that not all Member States have ratified or enforced the Istanbul Convention⁹, we must remember that this treaty fails to address several forms of gender-based violence, such as those committed using information and communication technologies (ICTs).

b) The legal basis of the Directive

Having identified several reasons for strengthening harmonisation of national law in this field, we need to acknowledge that the EU's efforts to combat violence against women and domestic violence face structural limits. Primarily, gender-based violence does not actually fall within the EU's remit, with Art. 83(1) TFEU only recognising a limited competence. It establishes that harmonisation measures can be adopted in specific areas of "particularly serious crime with a cross-border dimension"; in any case, an EU intervention must also satisfy the principles of subsidiarity and proportionality¹⁰. Yet problems arise from the fact that, to date, the list of Euro-crimes does not include any explicit reference to domestic violence or gender-based violence¹¹. As seen, the EU Commission had envisaged extending the EU's competence in the Gender Equality Strategy 2020–2025 to overcome this obstacle; however, this has yet to be finalised.

Given the above, it is easy to understand why the Directive only addresses limited forms of violence. Notably, the EU Commission Proposal placed two offences in the area of "sexual exploitation of women and children" (female genital mutilation and forced marriage) in terms of their legal basis, whereas the other four can be categorised as "computer crime" (non-consensual sharing of intimate or manipulated material; cyber stalking; cyber harassment; cyber incitement to violence or hatred). Regarding the last point, it is noteworthy that, for the first time, the Directive sets minimum standards for the definition of offences that are not necessarily

⁸ On the prevalence of gender-based violence in the EU, and the reasons behind the proposal to broaden the EU competence, *Navarra et al.*, Gender-based violence as a new area of crime listed in Article 83(1) TFEU: European added value assessment, European Parliament Research Service 2021, pp. 7–14.

⁹ To date, the EU Member States that have not ratified the Istanbul Convention are Bulgaria, the Czech Republic, Hungary, Lithuania, and the Slovak Republic.

¹⁰ On the meaning of these principles, *Kettunen*, Legitimizing European Criminal Law. Justification and Restrictions, Springer 2020, pp. 169–173.

¹¹ For an overview on the EU's remit in substantive criminal law, *Bogensberger*, Area of freedom, security and justice, in: Kellerbauer et al. (eds.), *The EU Treaty and the Charter of Fundamental Rights. A commentary*, Oxford University Press 2019, pp. 896–908.

committed with an ICT tool. Indeed, acts previously adopted in the domain of “computer crime” (see Directive (EU) 2019/713 on combating fraud and counterfeiting of non-cash means of payment, and Directive 2013/40/EU on attacks against information systems) had covered “computer-dependant crimes”, *i.e.*, offences that can only be committed using ICT. Newly recognised, the Directive encompasses offences that can be committed outside the cyber sphere and that are only facilitated by technology (“cyber-enabled crimes”) under “computer crime”¹². Crucial for the adoption of such a broad interpretation of the concept of “computer crime” was the will to support the implementation of Regulation (EU) 2022/2065 on a Single Market for Digital Services, the so-called Digital Services Act (hereinafter: the DSA), that is referred to several times in the Recitals and Articles of the Directive. This act requires online platforms to adopt notice and take-down procedures to remove “illegal contents”; given the lack of a common definition of the last concept, it was deemed necessary to introduce additional harmonisation measures aimed at enforcing the Internet Service Provider (ISP)’s duties.

In the following section, we will examine the new criminal provisions, starting with “sexual exploitation of women and children” offences, and then moving to “computer crime”. Before examining the new criminal provisions in more detail, however, it seems useful to briefly reflect on the text proposed by the European Commission and on the reasons for its amendment to better understand the features of Directive 2024/1385.

2. The EU Commission Proposal

First presented on 8 March 2022, the EU Commission Proposal sparked a heated debate that ultimately led to its amendment. At its centre was the harmonisation of rape law. Specifically, Art. 5 of the original draft asked Member States, *inter alia*, to punish the intentional conduct of “engaging with a woman in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object”; it clarified that the expression “non-consensual act” should be understood as referring to “an act which is performed without the woman’s consent given voluntarily or where the woman is unable to form a free will due to her physical or mental condition, thereby exploiting her incapacity to form a free will, such as in a state of unconsciousness, intoxication, sleep, illness, bodily injury or disability”¹³.

¹² On these concepts, *Cross et al.*, National Cybercrime Strategy Guidebook, Interpol 2021, p. 10.

¹³ For the complete text, see Art. 5 of the Proposal, COM (2022) 105 final. For an overview of the whole Proposal and a critical analysis, *Picchi*, “Violence against Women and Domestic Violence: The European Commission’s Directive Proposal”, *Athens Journal of Law* 8, 4 (2022), 395, 395–408.

The Proposal intended to prompt States that had not yet aligned their rape law with a consent-based model to update their regulation: according to the draft, force and coercion were to be considered as aggravating circumstances and not as essential elements of the definition of rape. More precisely, the Proposal seemed to target an affirmative model (the so-called *only yes means yes* model)¹⁴, which establishes that sexual intercourse is unlawful unless there is an explicit expression of free and voluntary consent.

There was strong opposition to this Article from some States contesting this definition of rape and the gender perspective embedded therein, and some others claiming that the Directive would have overreached EU legal competences¹⁵. It would go beyond the scope of this article to analyse such criticism in detail; however, remarking briefly on the issue, we must first highlight that the criminalisation of rape is a very controversial issue. The legislative landscape in Europe is still fragmented in this regard, and there are also differences between the States that have embraced a consent-based model¹⁶; for this reason, to date, the harmonisation of rape law still appears difficult to achieve¹⁷. Secondly, as the EU Commission's project to add specific forms of violence to the Eurocrimes list had failed, the Proposal was based on the EU's competence in the area of "sexual exploitation of women and children". The underlying assumption was that rape is a form of objectification of a woman's body; it is also a "particularly serious crime with a cross-border dimension" in that, by affecting women disproportionately, it infringes the EU's fundamental values of gender equality and human dignity and thus causes harm beyond

¹⁴ On the key features of this model, and the other consent-based models currently adopted in Europe, Hörnle, "The Challenges of Designing Sexual Assault Law", *Current Legal Problems* 77, 1 (2024), 49, 55–63. On the Proposal, Rigotti, "A long way to end rape in the European Union: Assessing the commission's proposal to harmonise rape law, through a feminist lens", *New Journal of European Criminal Law* 13, 2 (2022), 153, 177, according to whom Art. 5 is "the middle way between the 'no means no' and 'yes means yes' approaches".

¹⁵ The inclusion of rape in the Directive was opposed by Bulgaria, the Czech Republic, Estonia, France, Hungary, Malta, the Netherlands, Poland, Slovakia, and Germany; for more details, *Bauer-Babef*, France, Germany, Netherlands side with conservative EU countries in split over rape definition, Euractiv, 16.01.2024, <https://www.euractiv.com/section/health-consumers/news/france-germany-netherlands-side-with-conservative-eu-countries-in-split-over-rape-definition/>.

¹⁶ For an overview, *Zamfir et al.*, Definitions of rape in the legislation of EU Member States, European Parliamentary Research Service 2024, pp. 7–23.

¹⁷ Indeed, moral and technical issues converge in the definition of rape: in this regard, Hörnle, *The Challenges of Designing Sexual Assault Law* (fn. 14), 51–72, who concludes that "modern sexual assault laws need to be complex" (63).

the borders of each single State¹⁸. However, it would seem that, to expand the EU's remit, the Proposal ultimately adopted an overbroad interpretation of the term “sexual exploitation”; moreover, anchoring the legal basis in the area of “sexual exploitation of women and children” limited the definition of rape to conduct committed against women, thus leaving men and transgender persons unprotected.

On 9 June 2023, to overcome this impasse, the Council adopted a political agreement (“general approach”) on a less ambitious text and abandoned the goal of harmonising rape law. The final version of the Directive does contain norms that refer to rape; for instance, it makes clear that investigations into or the prosecution of rapes shall not be dependent on a victim reporting the act (Art. 15(5)); it establishes that States must provide specialised assistance to rape victims (Art. 26) and promote awareness to prevent violence and highlight the role of consent in sexual relationships (Art. 35). However, it does not include any definition of rape.

III. The EU Directive's substantive criminal law innovations

1. The harmonisation of criminal offences in the area of “sexual exploitation of women and children”

Directive 2024/1385 devotes Chapter 2, entitled “offences concerning sexual exploitation of women and children and computer crime”, to substantive criminal law. In short, Arts. 3–8 include the definition of offences, whereas Art. 9 provides for the sanctioning of inciting, aiding and abetting, and attempt. Arts. 10 and 11 harmonise sanctions, providing indications on the maximum term for penalties and on aggravating circumstances. Art. 12 governs jurisdiction, whereas Art. 13 completes the chapter by regulating the limitation periods.

This being the background, we will start by focusing on female genital mutilation (Art. 3) and forced marriage (Art. 4), and then turn to the area of ‘computer crimes’ in the next paragraph.

¹⁸ For more details on the EU Commission and Parliament positions, see *Zamfir*, Definitions of rape in the legislation of EU Member States (fn. 16), pp. 6–7; on the social cost of violence, see the report European Institute for Gender Equality EIGE, 28.10.2021, “The costs of gender-based violence in the European Union”, <https://eige.europa.eu/publications-resources/publications/costs-gender-based-violence-european-union>. In scientific literature, for an in-depth analysis of the issues posed by EU competence in the area of rape, *Rigotti*, A long way to end rape in the European Union (fn. 14), 165–171.

According to some literature, female genital mutilation and forced marriage are both forms of honour-based violence that have recently become more prevalent in Europe because of increased migration¹⁹. For a long time, female genital mutilation and forced marriage received little attention from the EU States, partly due to a limited number of reported cases. Over the last two decades, however, prompted by alerts from international human rights organisations and by an increase in incidents, many countries have introduced *ad hoc* offences²⁰. The European Parliament has also warned about the spread of such practices and, together with the European Council, has stressed the need to build a common policy framework on several occasions, calling for the criminalisation of female genital mutilation and forced marriage²¹. On one hand, the appropriateness of a criminal law-centred approach is discussed in the academic literature, with some scholars arguing that, in cases of honour-based violence, the threat of punishment may be of limited deterrent value and could even discourage victims from asking for help²². On the other hand, there is a strongly prevailing view in Europe that criminal sanctions are the most effective means of upholding the right to dignity of women and girls, and of preventing future acts of violence.

Given these premises, the Directive took the – for Europe – innovative approach to regulate female genital mutilation and forced marriage by law. It asks Member States to criminalise these forms of violence and provide for effective, proportionate, and dissuasive criminal penalties. It defines these offences in conformity with Arts. 37 and 38 of the Istanbul Convention, thereby remedying the fact that some EU countries have not yet ratified this Convention²³. In addition to defin-

¹⁹ On the key features of honour-based violence and its main forms, *Rigoni*, Honor-based violence and forced marriages. Community and restorative practices in Europe, Routledge 2024, pp. 17–37. Without going into detail, it should be pointed out that, according to the author, female genital mutilation and forced marriage are currently most prevalent in North Africa, the Middle East, and in South Asia.

²⁰ According to *De Vido/Sosa*, Criminalisation of gender-based violence against women in European States (fn. 6), pp. 104 and 115, to date eighteen countries in Europe have introduced specific criminal offences to punish female genital mutilation and forced marriage.

²¹ For one of the oldest documents on female genital mutilation, see European Parliament resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, 2010/2209 (INI); on forced marriage, European Parliament Resolution of 4 July 2018, Towards an EU external strategy against early and forced marriages – next steps, 2017/2275 (INI).

²² For an overview of the debate on this topic and a stance in favour of the enhancement of alternative programmes, *Rigoni*, Honor-based violence and forced marriages (fn. 19), pp. 61–64 and 257–261.

²³ For more details on the provisions contained in the Istanbul Convention, *Ragni*, Art. 37, and *Mestre I Mestre*, Art. 38, in: De Vido/Frulli (eds.), Preventing and Combating Violence Against Women and Domestic Violence. A commentary on the Istanbul Convention, Elgar Commentaries in Human Rights Series 2023, pp. 448–458 and 459–470.

ing offences, the Directive lays down special rules for the limitation period (Art. 13)²⁴ and urges States to provide for specialist support (Art. 25), including healthcare, for victims of female genital mutilation (Art. 27). Acknowledging that migrant women may suffer more severe harm in cases of violence (Recital no. 6), the Directive prompts States to ensure that the enforcement of return procedures does not hinder victims' access to justice, including their right to be heard by the judicial authority (Recital no. 35) and to receive specific protection and support (Recital no. 71).

2. The harmonisation of criminal offences in the area of “computer crime”

We should start by underlining that the most significant innovations of the Directive relate to “computer crime”. Hitherto, some international documents had recognised the seriousness and prevalence of computer violence²⁵, while at EU level, the European Institute for Gender Equality (EIGE) had stressed the emergence of this form of violence and the need for a stronger response²⁶. Nevertheless, a binding definition of online violence against women was still lacking at the time the Proposal was drawn up, as was any effort towards its criminalisation.

Against this backdrop, the Directive sets out the first minimum standards for the definition of several forms of online violence against women, calling on Member States to criminalise both acts committed online and using ICTs. The offences addressed are deemed particularly concerning because of an exacerbation of the typical consequences associated with the use of ICTs. Moreover, given their gender-based nature, these forms of violence are regarded as a special form of wrongdoing, consisting of an individual as well as a social dimension²⁷. At the same time, it is worth observing that the Directive has adopted a comprehensive approach. On

24 Notably, Art. 13(2) states that, where the victim is a child, the limitation period is to commence at the earliest once the victim has reached 18 years of age.

25 See for instance GREVIO, General Recommendation No. 1 on the digital dimension of violence against women, 20 October 2021, pp. 13–16; UNHR, 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, 18 June 2018, pp. 18–21.

26 EIGE, 25.11.2022, “Combating Cyber Violence against Women and Girls”, <https://eige.europa.eu/publications-resources/publications/combating-cyber-violence-against-women-and-girls>, p. 10. On the prevalence of gender-based cyber violence and the relevant international sources, *Sjöholm*, International Human Rights Law and Protection Against Gender-Based Harm on the Internet, Springer 2022, pp. 45–54.

27 See Recital no. 17 of the Directive; for an overview of the characteristics of online and technology-facilitated violence against women, *van der Wilk*, Smart-looking up women: internet of things (IOT)

the one hand, for all cases, it limits the application of criminal law to “conduct which is likely to cause serious harm or serious psychological harm to the victim or to conduct which is likely to cause the victim to seriously fear for his or her own safety or that of dependants” (Recital no. 18). On the other hand, it combines the harmonisation of offences with other, non-criminal measures. Notably, to provide for effective access to justice, the Directive establishes that States must ensure that victims have the option of reporting violence online (Art. 14 (1)); it also includes provisions aimed at guaranteeing the prompt removal of illegal content by the ISP (Art. 23), in line with the duties established by the DSA.

Given the complexity of the measures outlined, the following sub-sections will focus on a detailed examination of computer crime offences in the Directive, analysing their definitions individually²⁸.

a) Non-consensual sharing of intimate or manipulated material

The first computer crime defined by the Directive is the “non-consensual sharing of intimate or manipulated material”. More specifically, Art. 5(1) asks Member States to criminalise three different types of conduct, all ascribable to the broader phenomenon of image-based sexual abuse. The first one consists of “making accessible to the public, by means of information and communication technologies (‘ICT’), images, videos or similar material depicting sexually explicit activities or the intimate parts of a person, without that person’s consent” (a). The second offence is centred on the non-consensual production or manipulation and subsequent dissemination of “material making it appear as though a person is engaged in sexually explicit activities” (b). Lastly, the third offence addresses the threatening to engage in the unlawful conduct previously described, “in order to coerce a person to do, acquiesce to or refrain from a certain act” (c). The types of conduct penalised in points (a) and (b) must meet the threshold of being “likely to cause serious harm” to the victim; Art. 5(2) clarifies that their punishment must be carried out without prejudice to the principles set out by the Charter of Fundamental Rights of the European Union, such as freedom of expression and information.

According to empirical data, the non-consensual sharing of intimate images, sometimes improperly referred to as “revenge pornography” or “non-consensual pornography”, is a form of violence that is widespread in Europe and is more likely

perpetration in domestic violence, in: De Vido/Frulli (eds.), *Preventing and Combating Violence Against Women and Domestic Violence* (fn. 23), pp. 865–868.

²⁸ With reference to all offences, see Arts. 9–12 for a complete overview of the relevant regulations.

to affect women²⁹. It constitutes a violation of the rights to privacy and sexual autonomy and is closely linked to other types of image-based sexual abuse, like the non-consensual creation of intimate images. Considering its detrimental effects, over time almost all European States have introduced offences aimed at punishing the most severe expressions of image-based violence, although with different perspectives and technical solutions. In accordance with Art. 83(1) TFEU, which limits EU intervention to crimes with a cross-border dimension, the Directive focuses only on the dissemination to the public of intimate materials and does not envision punishment solely for their production. In doing so, Art. 5 expressly rejects the victim-blaming approach adopted by some Member States, which consider the victim's consent to the creation of the material when defining the offence; moreover, it avoids limiting punishment to cases where the offender acts with the intention of harming the victim³⁰. Instead, Art. 5 defines the scope of the offence broadly to encompass both sexual and intimate materials³¹, and extends criminalisation to the sharing of images produced with ICTs (for instance, deepfakes), albeit limited to those of a sexual nature. This decision is noteworthy as, despite their growing prevalence, only a few countries have so far introduced provisions aimed at suppressing the dissemination of pornographic deepfakes³². Last but not least, point (c) targets blackmailing that includes threats to share intimate images (so-called “sextor-

29 On the nature and extent of image-based sexual abuse, *Rigotti/McGlynn*, “Towards an EU criminal law on violence against women: The ambitions and limitations of the Commission's proposal to criminalise image-based sexual abuse”, *New Journal of European Criminal Law* 13, 4 (2022), 452, 4565–459; on women's victimisation rates, EIGE, *Combating Cyber Violence against Women and Girls* (fn. 26), p. 55; on the different terms adopted to label the phenomenon and their appropriateness, *De Vido/Sosa*, *Criminalisation of gender-based violence against women in European States* (fn. 6), pp. 135–137. Finally, on the lack of a uniform approach in Europe, and more details on the solutions adopted in Germany, Italy, and Spain, *Cancio Meliá*, *Patterns of criminalization of Intimate Image Abuse*, in: Caletti/Summerer (eds.), *Criminalizing intimate image abuse*, Oxford University Press 2024, pp. 194 and 203–212.

30 See, for instance, Article 612-ter of the Italian Criminal Code, which distinguishes between situations where images have been produced or stolen by the creator and situations where images have been received, including cases of consensual creation. For an overview of the technical solutions adopted in Europe, *De Vido/Sosa*, *Criminalisation of gender-based violence against women in European States* (fn. 6), pp. 139–140.

31 Art. 5 therefore penalises the so-called “upskirting” if material is shared on websites. In all cases, however, the offence is limited to visual content. For more details on the scope of the provision, *Rigotti/McGlynn*, *Towards an EU criminal law on violence against women* (fn. 29), 472.

32 According to *Rigotti/McGlynn*, *Towards an EU criminal law on violence against women* (fn. 29), 463–464 and 466, a few countries specifically cover the dissemination of deepfakes, whereas only one punishes the creation of such images. The need to broaden the scope of criminal law to the dissemination of deepfakes had already been outlined by *De Vido/Sosa*, *Criminalisation of gender-based violence against women in European States* (fn. 6), p. 147.

tion"). In this regard, it is essential to distinguish this form of violence from image-based sexual abuse, despite their empirical connections, as it constitutes a distinct type of wrongdoing that, while not immediately compromising the victim's sexual sphere, nonetheless represents a violation of their psychological integrity and autonomy³³.

Before moving to Arts. 6 and 7, it is worth underlining that the choice to include the non-consensual sharing of intimate images in the Directive is well-founded, as image-based sexual abuse constitutes a serious crime that is not always properly addressed by national legislation. Notwithstanding the Directive's provisions, the limitations imposed by its legal basis result in some shortcomings. For instance, we have seen that Art. 5 focuses on online abuse only; however, it thus disregards the fact that, although usually perpetrated on the Internet, intimate abuse can also take place offline³⁴. Moreover, since the Directive only covers the public dissemination of images, it does not take into account that the right to privacy and/or sexual autonomy can also be violated through the non-consensual creation of the intimate image as such, or its sharing with a restricted group of people.

b) Cyber stalking and cyber harassment

Arts. 6 and 7 of the Directive target two types of conduct that fall under psychological violence. Given that they partially overlap, we will start by outlining the two Articles before analysing the offences separately. Art. 6 addresses cyber stalking, defined as "the intentional conduct of repeatedly or continuously placing a person under surveillance, without that person's consent or a legal authorisation to do so, by means of ICT, to track or monitor that person's movements and activities". States are called on to resort to criminal law every time such conduct is "likely to cause serious harm". Art. 7, entitled "cyber harassment", covers four different forms of abuse. The first one (a) is the intentional conduct of "repeatedly or continuously engaging in threatening conduct directed at a person [...] by means of ICT"; the second (b) refers to "engaging, together with other persons, by means of ICT, in publicly accessible threatening or insulting conduct directed at a person"; the third (c) is the "unsolicited sending, by means of ICT, of an image, video or other similar material depicting genitals to a person". In all of the above-mentioned cases, a criminal sanction must be applied if the conduct meets a threshold of seriousness. The provision

³³ Critical on this point are *Rigotti/McGlynn*, Towards an EU criminal law on violence against women (fn. 29), 475, who argue that the Directive should also have covered threats committed with the aim of causing distress.

³⁴ In this regard, see EIGE, Combating Cyber Violence against Women and Girls (fn. 26), p. 55.

is completed by a fourth conduct (d), that of “making accessible to the public, be means of ICT, material containing the personal data of a person, without that person’s consent, for the purpose of inciting other persons to cause physical or serious psychological harm to that person”.

Clearly, both Articles address forms of violence that can be committed in a cyber environment as well as in real life. With regard to Art. 6 for example, in the physical sphere stalking is commonly defined as “persistent harassment” that consists of the imposition of unwanted communications or contacts. While the unwanted behaviour can take different forms, repetition is considered a defining element of stalking³⁵. This phenomenon, which emerged in the 1980s, has gained increasing attention in the last twenty years. Partially due to the widespread adoption of the Istanbul Convention, which devotes a specific norm to it (Art. 34), anti-stalking legislation is now commonplace in Europe. While the spectrum of normative solutions is diverse, offences are typically framed to cover a wide range of behaviours, from repeated threats and communications to monitoring and spying; they also commonly address conduct committed through ICTs³⁶.

Moving to Art. 7, harassment is equally a common form of violence that takes place online as well as offline. Here, the scenario is less clear, as harassment is an umbrella term that can include very different types of conduct, some of which overlap with stalking or hate speech³⁷. To make things worse, international human rights treaties neither provide a precise definition of harassment nor call for the punishment of specific kinds of conduct. Moreover, the Istanbul Convention requires adhering States to counteract the typical form of harassment inflicted on women, *i.e.*, sexual harassment, yet without specifying what acts must be addressed or setting out an obligation to criminalise them (Art. 36)³⁸. Some jurisdictions define harassment as the intentional infliction of distress committed by a persistent course

35 For all, *Van der Aa*, “New Trends in the Criminalization of Stalking in the EU Member States”, *European Journal of Criminal Policy and Research* 24 (2018), 315, 315.

36 EIGE, *Combating Cyber Violence against Women and Girls* (fn. 26), p. 42.

37 On the concept of “online harassment” and its overlap with stalking and hate speech, *Sjöholm*, *International Human Rights Law* (fn. 26), pp. 234–236; for more details on national legislation, EIGE, *Combating Cyber Violence against Women and Girls* (fn. 26), p. 46.

38 Indeed, Art. 36 of the Istanbul Convention only asks States to “sanction” sexual harassment and defines it as “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”; on the meaning of this broad definition and the reason why the Istanbul Convention does not provide for any obligation to criminalise such behaviour, *Tevere*, Art. 36, in: *De Vido/Frulli* (eds.), *Preventing and Combating Violence Against Women and Domestic Violence* (fn. 23), pp. 484–486.

of conduct, whereas others include isolated incidents³⁹. In many cases, harassment is criminalised only when it takes place in a specific context (for instance, in educational institutions or the workplace) or in a way that causes an appreciable suffering to the victim; *ad hoc* offences for conduct committed online are quite rare⁴⁰.

This being the background, we can affirm that the Directive covers only specific forms of stalking and harassment; it targets acts that may often be part of a broader pattern of behaviour, and which can occur online as well as offline. As regards stalking, we have seen that Art. 6 only penalises monitoring and controlling behaviours that are characteristic of intimate partner violence (IPV)⁴¹; that said, other forms of stalking may be captured by Art. 7(a), which criminalises the persistent issuance of threats against a person.

For harassment, different observations may be made concerning the different types of conduct addressed by the Directive in this regard. As previously noted, the first one consists of repeated threats made by one person against another, often overlapping with stalking. By contrast, the second type of conduct (Art. 7(b)) involves threats or insults perpetrated by multiple individuals in a publicly accessible way. Here, the focus shifts from IPV to violence committed in the public sphere and frequently against women who hold a prominent position⁴². Whether such an act is classified as wrongdoing hinges on it being perpetrated as part of a larger attack involving several individuals. It is only when considered in this broader context that these acts are likely to compromise the victim's psychological and/or physical integrity.

Art. 7(c) penalises cyber flashing, which can be defined as the “unsolicited sending of an image, video, or other similar material depicting genitals to a person” (Recital no. 24). This phenomenon has only recently emerged; evidence shows that it is particularly common among younger generations and affects women and girls in a disproportionate way⁴³. Most European States address cyber flashing through general harassment offences; in very few cases, *ad hoc* provisions have been en-

³⁹ For instance, France only punishes sexual harassment, defined as the repetition of verbal or physical conduct of a sexual nature that, *inter alia*, demeans or humiliates the victim, while Italy criminalises any act of harassment, regardless of whether or not it is sexual in nature. For an overview of the different solutions adopted in Europe, *De Vido/Sosa*, Criminalisation of gender-based violence against women in European States (fn. 6), pp. 92–95.

⁴⁰ EIGE, Combating Cyber Violence against Women and Girls (fn. 26), pp. 45–46.

⁴¹ On this point, see Recital no. 21; the prevalence of cybersurveillance in cases of domestic violence has also been recognised by the ECtHR (*Buturugă v. Romania*, 11 June 2020, Appl. no. 56867/15, § 74).

⁴² See Recital no. 24; from an empirical point of view, this kind of harassment partially overlaps with hate speech.

⁴³ *McGlynn*, “Cyberflashing: Consent, Reform and the Criminal Law”, *The Journal of Criminal Law*, 86 (2022), 336, 340–341.

acted to tackle such conduct more effectively and emphasise the denial of a victim's dignity that is embedded therein⁴⁴. Admittedly, the idea of introducing dedicated cyber flashing offences has raised some concerns, especially regarding the risk of violating the harm principle; additionally, there are ongoing debates about how to define this criminal offence, with questions arising about whether to take into account the offender's malicious intent or the victim's lack of consent⁴⁵. So, while the Directive does consider cyber flashing a serious crime worthy of punishment, it pays heed to the above-mentioned objections by specifying that such conduct must be "likely to cause serious psychological harm".

Lastly, as already mentioned, Art. 7(d) targets the disclosure of personal information, an act that may overlap with other offences, such as defamation, non-consensual sharing of intimate images, and hate speech⁴⁶. Again, while the seriousness of the conduct addressed may appear debatable, depending on the type of information revealed and the extent of the person's exposure, the Directive nonetheless opts for criminal law, emphasising the perpetrator's malicious intent to define the scope of the offence.

c) Cyber incitement to violence or hatred

The last offence covered by the Directive is "cyber incitement to violence or hatred". Art. 8(1) calls on States to punish intentional incitement to violence or hatred "directed against a group of persons or a member of such a group, defined by reference to gender, by publicly disseminating, by means of ICT, material containing such incitement"; Art. 8(2) specifies that States can limit punishment to "conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting".

This provision addresses hate speech on the grounds of gender. In general, hate speech is a global phenomenon that is not new. Indeed, since the 1960s, several documents have dealt with racial hate speech, recognising the legitimacy and necessity of restrictions to the freedom of expression, aimed at upholding the principle of non-discrimination and the right to equal dignity. The EU has also long been com-

⁴⁴ McGlynn, *Cyberflashing: Consent, Reform and the Criminal Law* (fn. 43), 341.

⁴⁵ For some critical points on the idea of introducing a specific criminal offence, Wang, "A Critical Analysis of the Law Commission's Proposed Cyberflashing Offence", *The Journal of Criminal Law* 87 (2023), 39, 47–52; on the main models being considered to criminalise cyberflashing, McGlynn, *Cyberflashing: Consent, Reform and the Criminal Law* (fn. 43), 339.

⁴⁶ On this conduct and its relationship with other forms of violence, Sjöholm, *International Human Rights Law* (fn. 26), pp. 271–273.

mitted to tackling hate speech, with the first harmonisation measures dating back to Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law⁴⁷. Despite this long-lasting commitment, and evidence showing the prevalence of gender-based violence⁴⁸, little attention has traditionally been devoted to sexist hate speech. Only in recent years have human rights organisations and the EU been calling for more action, highlighting the negative effects of this phenomenon on women's participation in social and political life. The Directive finally fills this gap by harmonising the criminal provisions that address online hate speech based on gender.

Two aspects of Art. 8 merit closer inspection. Firstly, the norm targets only online hate speech. While this narrow scope is a consequence of the limited legal basis of the Directive, the choice to focus on online hate speech may be seen as justified by the unique risks posed by the Internet. It is known that the architecture of the web can facilitate the rapid dissemination of hate speech and exacerbate its seriousness; above all, the permanence of online materials compounds the harm inflicted on individuals, leading them to re-experience the suffering caused by the crime. Moreover, online hate speech based on gender seems to undermine the participation of women in the public debate, thus weakening democracy, especially when the victims are politicians or journalists. For these reasons, the EU had previously undertaken action specifically aimed at counteracting aggressions committed online, such as the EU Code of conduct on countering illegal hate speech online (2018) and the DSA, which, as seen earlier, establishes notice and take-down duties to ensure a prompt removal of illegal contents.

Secondly, Art. 8 also raises questions as to what conduct it covers. We have seen that the Directive is innovative in that it expands the grounds for discriminatory hate speech to include gender; however, there may be uncertainties in delineating the scope of criminal conduct. For one, the concept of gender is broad, as it usually refers to the social role of a person in relation to sex; given the absence of a precise

⁴⁷ The first document of this kind is the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), dated 21 December 1965; for a complete overview of the measures enacted at international level, *Sjöholm*, *International Human Rights Law* (fn. 26), pp. 288–299.

⁴⁸ A report carried out in 2018 by Amnesty International revealed that 23% of women surveyed had experienced online abuse or harassment at least once; 32% had stopped posting after experiencing hate speech (Amnesty International, 21.03.2018, “Toxic Twitter”, <https://www.amnesty.org/en/>). Within this general framework, threats and insults committed against female journalists are of particular concern (on their prevalence, see European Union Agency for Fundamental Rights (FRA), 11.11.2016, “Violence, threats and pressures against journalists and other media actors in the EU”, <https://data.europa.eu/doi/10.2811/344046>); in order to combat them more effectively, Art. 11(n) provides for an aggravating circumstance whenever “the offence was committed against a person because that person was a public representative, a journalist or a human rights defender”.

definition, it appears unclear whether this includes incitement to hatred based on sexual orientation⁴⁹. Doubts may also be linked to the identification of unlawful expressions. As Recital no. 25 underlines, language “does not always directly refer to the gender of the targeted person” and “the biased motivation can be inferred from the overall content”; therefore, Art. 8 might theoretically also cover sexualised threats or body shaming comments. In this regard, however, it is worth underlining that conduct must meet the threshold of seriousness that is usually required to criminalise hate speech: in fact, the Directive uses the same wording as adopted by Framework Decision 2008/913/JHA and allows States to restrict the application of criminal law to conduct that is dangerous for the public⁵⁰.

IV. Conclusions

Before concluding, the preceding analysis prompts some reflections. In brief, we can say that Directive 2024/1385 contains several notable innovations, both in terms of EU criminal law and the broader fight against gender-based violence.

Concerning the first point, although the original draft failed to harmonise rape law, the Directive testifies to a shift in EU criminal policy. Significantly, the harmonisation measures are based on a broad interpretation of EU competence: the concept of computer crime is expanded to encompass computer-enabled crimes; and some offences, such as cyber flashing, do not easily fit the categorisation as “serious crime” in the sense of Art. 83(1) TFEU. As discussed, it can be argued that a crucial factor in this evolution has been the necessity to enforce the ISP’s duties for notice and take-down; on a more general level, the contemporary relevance of human rights law as a driving force in penal matters, along with the EU’s desire to affirm its core values, must also be considered⁵¹. In any case, there is no doubt that the

⁴⁹ According to the organisations monitoring the implementation of the EU Code of Conduct on countering illegal hate speech online, hate speech on the ground of sexual orientation was the third most reported in 2022, and the most reported in 2021 (see European Commission, 30.06.2016, “The EU Code of conduct on countering illegal hate speech online”, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#monitoringgrounds). In this regard, it must be pointed out that on 16 June 2023, Bulgaria declared that the term “gender” would be interpreted as referring exclusively to the male and female sexes in biological terms.

⁵⁰ On the definitional issues surrounding sexist hate speech, *Sjöholm*, International Human Rights Law (fn. 26), pp. 303–306.

⁵¹ On the ways in which human rights law is influencing criminal policy, *Pinto*, Rights-driven global penalty, in: Mazzacuva et al. (eds.), *Criminal Justice in the Prism of Human Rights*, Maklu 2023, pp. 23–31; on the growing resort to criminal law to affirm EU values rather than to satisfy enforcement needs,

Directive will impact the national criminal justice systems in a significant way; thus, we can conclude that EU criminal law is progressively extending the boundaries established by the Treaty of Lisbon.

Moving to the second point, we must first recognise that the Directive has considerable symbolic value. Despite their limited scope, the new offences demonstrate how deeply the EU is committed to fighting gender-based violence. In addition, the Directive seems to hold the potential of enhancing the protection of women's rights. As regards female genital mutilation and forced marriage, for instance, it offers a remedy for the non-ratification of the Istanbul Convention by some member States. Moreover, with respect to serious cyber crimes like the non-consensual sharing of intimate images, the Directive will necessitate updates to legislations that still have gaps or employ a victim-blaming approach. Yet despite these merits, it must be noted that the Directive also invites criticism, mainly due to its limited legal basis. It does not encompass the most severe forms of violence, such as rape; therefore its implementation may result in a scope of criminal law that inadequately represents the seriousness of the harm caused to victims⁵². Furthermore, given that the Directive mainly addresses cyber-enabled crimes, it might paradoxically fall short in enabling the punishment of equally wrongful acts committed offline. However, as regards the latter consideration, the new act will likely have a cascading effect that promotes the harmonisation of criminal law beyond the realm of cyber crimes. This supports previous observations about the growing impact of EU law.

Wieczorek, The principle of Subsidiarity in EU Criminal Law, in: Brière/Weyembergh (eds.), *The needed balances in EU Criminal Law: past present and future*, Hart Publishing 2017, pp. 76–106; *Turner*, “The Expressive Dimension of EU Criminal Law”, *The American Journal of Comparative Law*, 60, 2 (2012), 555, 574.

⁵² *Rigotti/McGlynn*, *Towards an EU criminal law on violence against women* (fn. 29), 453–454.