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STATEMENT

Deutscher Juristinnenbund e.V.
Vereinigung der Juristinnen,
Volkswirtinnen und Betriebswirtinnen
Geschäftsstelle / Office:
Kronenstraße 73 ● D-10117 Berlin
fon: +49 30 4432700 ● fax: +49 30 44327022
geschaeftsstelle@djb.de ● https://www.djb.de

On the draft "Directive of the European Parliament and of the Council on combating violence against women and domestic violence" of 08.03.2022 (working translation from the German original)

Executive Summary

Against the background of some EU Member States' obstructive attitude to the EU's accession to the Istanbul Convention (IC)[1] proposed by the European Commission or to ratify the IC itself, the Commission already announced in 2020 that it would "propose measures within the EU's competence to achieve the same objectives as the Istanbul Convention."[2] The Commission has now followed up on this announcement by presenting the comprehensive draft directive (RL-E) on "combating violence against women and domestic violence".[3]

The German Women Lawyers Association (djb) welcomes the EU legislative project in principle. In particular, it is positive that the draft directive explicitly places the phenomenon of violence against women in the context of human rights violations and structural discrimination and recognizes that violence against women arises from historically grown unequal power relations between women and men and is rooted in socially shaped role attributions for the sexes.[4] The draft directive ensures that central requirements of the IC in the area of criminal law and criminal procedure are implemented ambitiously throughout the Union.

The djb continues to call emphatically for the accession of the EU to the Istanbul Convention.[5] Only such an accession can lead to a fully comprehensive level of protection in all member

1 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, adopted 11.05.2011; entered into force 01.08.2014, ETS 201. Instructive: Lembke/Steinl, djbZ 2018, 203; monographic: McQuigg, The Istanbul Convention, 2017. In the meantime, the ECJ has stated in an opinion that the EU itself can also accede to the IC: Opinion No. 1/19 v. 06.10.2021.

2 European Commission, A Union of Equality: Strategy for Gender Equality 2020-2025, COM(2020)152 final, 05.03.2020, 4; see also: Melchior/Schönfeldt, djbZ 2020, 114.

3 European Commission, Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, v. 08.03.2022, COM(2022)105 final.

4 Recital 7.

5 Proposal of the European Commission for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, COM(2016)109 final, 04.03.2016, https://eur-lex.europa.eu/legal-content/EN-DE/TXT/?from=EN&uri=CELEX:52016PC0109, last accessed 08.02.2023.

states. The present draft directive cannot replace this accession, as the EU legislator cannot adopt an equally comprehensive set of regulations for combating violence against women due to a lack of regulatory competence for certain areas. The Convention, which was created over a decade ago by the 47 member states of the Council of Europe in multi-year deliberations, provides a comprehensive legal framework that commits member states to interlocking coordinated measures and strategies to protect women from gender-based violence and hold perpetrators accountable. In doing so, it covers all aspects of preventing and combating gender-based violence against women. In contrast, the draft directive, for all its ambition, leaves the area of migration and asylum as well as aspects to be considered in family court decisions on custody and visitation rights in cases of suspected domestic violence unregulated. The draft directive also addresses the role of civil society only in general terms. It is therefore to be welcomed that discussions on the Commission's proposals for the EU's accession to the IC have resumed in the first half of 2023 under the Swedish Council Presidency.

Nevertheless, it should be emphasised that to strongly and effectively protect women against violence in the EU, both instruments are necessary and complement each other. The Directive partly goes beyond the requirements of the IC, especially in the areas of cyber violence, criminal sanctions and the statute of limitations. In addition, the adoption of the Directive enables a legal review of the correct implementation of the Directive in the Member States by the Commission and the European Court of Justice (including infringement proceedings).

The djb therefore calls on the European Parliament and the Council to swiftly continue and conclude the negotiations on the draft directive on the one hand and on EU accession to the Istanbul Convention on the other, while ensuring a high level of protection.

This appeal is also addressed to the German Federal Government. Despite the ratification of the IC in 2018, there is also in Germany still a considerable need for action in the area of the protection of women against violence.[6] So far, neither a policy document nor a national strategy has been developed at the federal level that establishes generally applicable definitions of violence against women and domestic violence and sets nationwide targets for the implementation of the Convention, focusing on the rights of victims and giving due importance to the gender-specific nature of the various forms of violence against women.[7]

The djb particularly welcomes the holistic approach of the draft directive. The rights of those affected by gender-specific and domestic violence are to be safeguarded with the help of an comprehensive legal act that brings together the various aspects of the protection against violence. It would not do justice to this urgent and important issue to make only isolated corrections or to tighten existing guidelines. Further, the topicality of the draft directive should be emphasised regarding the issue of digital violence. A not inconsiderable share of misogynistic violence now takes place on the internet. Particularly in social networks, women become victims of gender-specific hatred and incitement or are exposed to the uncontrollable dissemination of intimate images.

The djb expressly shares the Commission's view that the draft directive in its entirety falls under the competence of EU legislation. While the provisions on victim protection and procedural issues (Chapters 3 - 6 of the Draft Directive) can indisputably be based on Article

6 Cf. GREVIO, Evaluation Report, v. 07.10.2022, p. 3.

7 Laxton C. and Women's Aid (2014), "Virtual World, Real Fear – Women's Aid report into online abuse, harassment and stalking", https://www.womensaid.org.uk/wp-content/uploads/2015/11/Women_s_Aid_Virtual_World_Real_Fear_Feb_2014-3.pdf, last accessed 08.02.2023.

82 (2) TFEU, the title of competence on the harmonisation of substantive criminal law in Article 83 (1) TFEU also correctly provides a legal basis for the proposed harmonisation of sexual offences and cybercrime offences (Chapter 2 of the Draft Directive). Considering the regulatory purpose of Art. 83 (1) TFEU as well as the now generally established understanding of sexual abuse and sexual exploitation as inextricably interwoven categories, the provision on "sexual exploitation of women and children" in Art. 83 (1) subpara. 2 TFEU covers the provisions of Art. 5 and 6 Draft Directive.

The djb welcomes in particular

- the harmonisation of the offences of rape (Art. 5) and FGM_C (Art. 6) at EU level, including far-reaching penal sanctions;
- the commitment to the "yes-means-yes" model (Art. 5);
- the introduction of comprehensive criminal offences on cyber violence as well as protective measures for victims, such as in particular the removal of illegal online material (Art. 7-10 and 25);
- the characterisation of an intimate relationship to the perpetrator as an aggravating circumstance (Art. 13);
- simplified reporting and notification possibilities, including for children (Art. 16);
- measures for effective and speedy investigation of evidence and prosecution (Art. 17);
- the imposition of (emergency) protection orders even without an application by the victim (Art. 21);
- the comprehensive obligations to provide further training for all persons involved in the protection against violence - especially public prosecutors and judges (Art. 37).

The djb sees a need for improvement in certain provisions of the draft directive. In particular:

- The criminal offence of rape should cover all non-consensual sexual acts (and not only sexual penetration) - in accordance with the requirements of the IC (Art. 5);
- in the offence of FGM_C, acting against or without the will of the person concerned should also be included as a criterion (Art. 6);
- Adjustments to the cyber offences in order to strengthen and better calibrate protection (Art. 7-9 and 25);
- Need for readjustment of Art. 16 para. 3 with regard to the too far-reaching release of medical staff from their duty of confidentiality;
- Clarification of how, in application of Art. 22, the right to ask questions in the trial can be designed in a victim-friendly manner without restricting defence rights more than necessary;
- a more comprehensive inclusion of intersectional aspects of the protection against violence.

Finally, the djb emphatically points out the clear deficits in the German translation of the draft directive, especially regarding legal terminology and terms established in criminal law. This leads to a distortion of the content of individual provisions in comparison with the other

language versions, including Art. 5 of the Draft Directive, which does not provide for a "yes-means-yes" model in the German version. The djb appeals to the Federal Government to support the services of the linguistic lawyers of the European Parliament and the Council in the translation of the final version of the Directive to ensure an error-free translation. In the following in-depth discussion of individual provisions of the draft directive, this statement therefore refers to the wording of the original English version throughout.

In detail, the djb comments as follows:

I. European legal framework

1. Legal basis

The djb shares the Commission's view that the draft directive in its entirety falls under the competence of EU legislation. While the provisions on victim protection and procedural issues (chapters 3, 4, 5 and 6 of the Draft Directive) can undoubtedly be based on Article 82 (2) TFEU, the title of competence on the harmonisation of substantive criminal law in Article 83 (1) TFEU also correctly provides a legal basis for the proposed harmonisation of sexual offences and cybercrime offences (chapter 2 of the Draft Directive).

Article 82 (1) and (2) TFEU regulate the EU's competence to issue directives on harmonisation projects concerning criminal procedure in the broader sense in the enumerated areas. The provisions in Chapters 3-6 of the Draft Directive can all be subsumed under these areas, in particular "admissibility of evidence", "rights of the individual in criminal proceedings", "rights of victims of crime" and " training of the judiciary and judicial staff". Especially in the area of victim protection, the EU has already issued several directives on the basis of Article 82 (2) TFEU without this being challenged.[8] The provisions in Chap. 3 et seq. of the Draft Directive supplement the existing directives and close gaps that exist in particular with regard to gender-sensitive criminal proceedings.

Like the Commission, the djb is of the opinion that the harmonisation of sexual, in particular the crimes of rape (Art. 5 Draft Directive) and mutilation of female genital organs (Art. 6 Draft Directive) is covered by the provision on "sexual exploitation of women and children" in Art. 83 para. 1 subpara. 2 TFEU.

A (legal) definition of the term sexual exploitation cannot be found in EU primary law. The term must therefore be interpreted, in particular in consideration of the acts of harmonisation under international and European law in the respective areas of crime.[9]

Taking into account the use of the concept of sexual exploitation in international and European law, a generally broad understanding of the concept of sexual exploitation has been established that goes beyond the aspects of economic exploitation.[10] The concept of sexual exploitation is to be understood as an overarching category under which large parts of sexual criminal law are gathered as offences of "sexual abuse and sexual exploitation".[11] The 2011 Directive on combating the sexual abuse and sexual exploitation of children and child

8 Most recently RL 2012/29/EU.

9 Schwarze/Becker/Hatje/Schoo/Böse, EU-Kommentar, 4. Auflage 2019, Art. 83 AEUV Rn. 9.

10 A broad understanding of the term also emerges from legal history. In the 2003 Constitutional Convention, it was accepted that the area of sexual exploitation of women and children should be included as a separate area of crime and not merely as a sub-category of trafficking in human beings, cf. first of all formulation No. 48 of the Tampere European Council Conclusion „Menschenhandel, insbesondere die Ausbeutung von Frauen, sexuelle Ausbeutung von Kindern“, https://www.europarl.europa.eu/summits/tam_en.htm#c, last accessed 08.02.2023, and then the version of the Constitutional Convention „Menschenhandel und die sexuelle Ausbeutung von Frauen und Kindern“: Analysis, CONV 821/03, p. 90, which was incorporated into the Lisbon Treaty, https://european-convention.europa.eu/pdf/reg/de/03/cv00/cv00821.de03.pdf, last accessed 08.02.2023.

11 Thus Grabitz/Hilf/Nettesheim/Vogel/Eisele, 76. EL Mai 2022, AEUV Art. 83 Rn. 56; a.A. Streinz/Satzger AEUV Art. 83 Rn. 16 u. Frankfurter Kommentar EUV/GRC/AEUV/Hochmayr AEUV Art. 83 Rn. 20.

pornography[12] was also adopted on the basis of "sexual exploitation" in Art. 83 para. 1 subpara. 2 TFEU. This directive comprehensively harmonises a range of offences in connection with the performance of sexual acts against children and not only offences which focus on the economic purpose, such as forced prostitution. At the level of international law, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse in particular expresses the understanding of this area of crime as a fixed common category.[13] Sexual abuse and sexual exploitation are treated in combination with each other in all these conventions, as the transitions between offences involving sexual abuse and sexual exploitation are fluid.

The fact that the criminal area of "sexual exploitation" in a broad understanding of the term comprehensively covers sexual offences results not least from the meaning and purpose and structure of Article 83 (1) TFEU. The very wording and telos of the explicit and conclusive enumeration of the areas of crime suggest that the individual areas each cover a group of punishable acts and not only individual offences – such as forced prostitution in this case. The provision on competences is to be interpreted in particular in the light of the fundamental values of the Union as laid down in Article 2 TEU. In this context, respect for human dignity and human rights as well as equality between women and men are particularly relevant. According to Art. 3 para. 3 subpara. 2 TEU, the EU legislators are obliged in particular to combat discrimination and to promote equality between women and men. This mandate can only be fulfilled if the scope of "sexual exploitation of women and children" is interpreted broadly. The offences of rape (Art. 5 Draft Directive) and female genital mutilation (Art. 6 Draft Directive) are genuinely exploitative and an expression of a structural and gender-discriminatory power imbalance. The draft directive focuses on the sexual self-determination of victims of sexualised violence, against whose will sexual acts may not be carried out.

It is sufficient for the affirmation of the legal basis that the draft directive can be assigned to one of the areas of crime. The elements of Article 83 para. 1 subpara. 1 TFEU, in particular the cross-border dimension, do not additionally have to be present with regard to each individual offence.[14] In any case, the existence of a cross-border dimension is indicated for offences that fall into one of the areas of crime.[15]

With regard to Art. 5 and 6 of the Draft Directive, also the presumption of a cross-border dimension is not refuted. A cross-border dimension should not only be understood in the narrower geographical sense, meaning that a border is crossed when individual offences are committed. In particular, the cross-border dimension according to Article 83 para. 1 subpara. 1 TFEU is present when there is a "special need" to combat the offences "on a common basis". The mandate of the EU to effectively combat offences against the sexual self-determination and sexual integrity of women throughout Europe derives directly from the fundamental values of the Union and runs through the entirety of primary law. Thus, the Union law provisions of Art. 2 and 3 para. 3 subpara. 2 TEU, as well as Art. 8, 10 and 19 TFEU and Art. 23 of the Charter of Fundamental Rights, oblige the Union to effectively combat

12 RL 2011/93/EU.

13 Convention adopted 25.10.2007, entered into force 01.03.2016; cf. also the common category used by the United Nations Sexual Exploitation and Abuse (SEA), as used in: https://www.unhcr.org/what-is-sexual-exploitation-abuse-and-harassment.html, last accessed 08.02.2023.

14 Thus, among others, Schwarze/Becker/Hatje/Schoo/Böse, EU-Kommentar, 4. Auflage 2019, Art. 83 AEUV Rn. 8; eher restriktiv Vedder/Heintschel von Heinegg, Europäisches Unionsrecht, 2. Auflage 2018, Art. 83 AEUV Rn. 1 u. Streinz/Satzger AEUV Art. 83 Rn. 11 f.

15 Thus Streinz/Satzger AEUV Art. 83 Rn. 12.

(gender) discrimination and to promote equality between women and men. This value orientation and the accompanying basic consensus also coincide with that of the Istanbul Convention, the provisions of which are to be partially implemented by the draft directive. This understanding of the cross-border dimension is also not contradicted by the restrictive interpretation of Article 83 TFEU by the Federal Constitutional Court (BVerfG) in the so-called Lisbon ruling.[16] Here, the BVerfG assumed that the "special need to combat [criminal offences] on a common basis" cannot already result from the corresponding political will of the Union institutions alone. However, a legislative project is not only guided by political will if it is intended to cover criminal offences whose nature and effect affect the Union in its essence as a community of law and values.[17] The offences in Art. 5 and 6 of the Draft Directive are directed against the Union's values as such. It is therefore necessary that all Member States combat them on the basis of a common legal foundation.[18]

The djb shares the Commission's view that the offences in the area of cyber violence (Art. 7 et seq. Draft Directive) fall under the criminal area of "computer crime". This area of crime covers not only offences against the confidentiality and security of information systems, such as "hacking", but also offences committed with the help of a computer or information systems.[19] Thus, the scope of crime also includes content-related offences, such as the dissemination of misogynistic content, in which computer systems and data are used as a means of attack.[20] In all offences regulated in Art. 7 - 10 of the Draft Directive, the use of computer systems and data is a central element of the offence and typical for the commission of the offence. All proposed cybercrimes also have in common that they are (or can be) regularly committed across national borders.

2. Subsidiarity and Proportionality

The djb welcomes the Commission's[21] detailed analysis of compliance with the principles of subsidiarity and proportionality under Article 5 para. 3 and para. 4 TEU[22] and supports its conclusions. Since the adoption of legal acts under Articles 82 and 83 para. 1 TFEU does not fall within the scope of the Union's exclusive competence, action by the Union must be justified separately. The Commission has fulfilled its obligation to pay particular attention to the principles of subsidiarity and proportionality through its detailed analysis of the gaps in the legal acts currently in force at EU level and the gaps at Member State level.

The Commission has convincingly justified the need for Union action on the grounds that the existing level of criminal law protection against domestic and digital violence in the Member

16 But differently: Heger, Sexualverbrechen sind nicht grenzüberschreitend, Blogbeitrag v. 07.04.2022, https://verfassungsblog.de/sexualverbrechen-sind-nicht-grenzuberschreitend/, last accessed 08.02.2023.

17 BVerfG, Urteil vom 10.06.2009 - 1 BvR 814/08, Rn. 359.

18 So also explicitly Grabitz/Hilf/Nettesheim/Vogel/Eisele AEUV Art. 83 Rn. 43.

19 Schwarze/Becker/Hatje/Schoo/Böse, EU-Kommentar, 4. Auflage 2019, Art. 83 AEUV Rn. 13.

20 Cf. also Grabitz/Hilf/Nettesheim/Vogel/Eisele AEUV Art. 83 Rn. 62

21 Cf.: Commission Staff Working Document, v. 08.03.2022, SWD(2022) 61 final, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2022:61:FIN, last accessed 08.02.2023.

22 Art. 5 para. 3 states that "…die Union in den Bereichen, die nicht in ihre ausschließliche Zuständigkeit fallen, nur tätig [wird], sofern und soweit die Ziele der in Betracht gezogenen Maßnahmen von den Mitgliedstaaten weder auf zentraler noch auf regionaler oder lokaler Ebene ausreichend verwirklicht werden können, sondern vielmehr wegen ihres Umfangs oder ihrer Wirkungen auf Unionsebene besser zu verwirklichen sind."

States has gaps and falls short of the requirements proposed in the draft Directive.[23] Also, the current EU provisions, in particular regarding victim protection and access to justice for women and victims of domestic violence, do not sufficiently ensure prevention and coordination between Member States.[24] The Commission has also shown that the benefits of closing the gaps are likely to exceed the costs of implementation.

The principle of proportionality is respected. The proposal for a directive correctly concerns only those offences where the legal systems of the Member States have been found to fall short of the intended common minimum standard of the Istanbul Convention. [25] Proportionality is also maintained by the insertion of the non-regression clause in Art. 49 of the Draft Directive to the extent that an existing higher level of protection remains untouched. The Member States also have considerable flexibility in implementation, as the Directive sets targets and minimum standards (cf. Art. 46 Draft Directive).

3. Intersectionality

The djb welcomes the consideration of an intersectional discrimination analysis in the drafting of the Directive. In the 11th recital, the Commission correctly emphasises that violence against women and domestic violence intensify when they are accompanied by discrimination on the basis of sex and other grounds of discrimination prohibited under Union law. Member States should therefore pay particular attention to the situation of victims affected by such intersectional discrimination. In the proposed directive itself, the principle of intersectionality is explicitly included in Art. 35 of the Draft Directive and discrimination is also mentioned in other provisions such as Art. 18, 23 and 27 of the Draft.

With this approach, the Commission complies with the gender mainstreaming requirements in Art. 8 TFEU and the obligations under Art. 10 TFEU to combat multiple discrimination as a cross-cutting issue.

However, the djb criticises that the Draft Directive does not address intersectional issues consistently enough. In particular, multiple discrimination and the special concerns of LGBTIQ persons are not consistently taken into account. The djb calls for LGBTIQ persons to be explicitly included as a "vulnerable group" in Article 35 of the Draft Directive. It is positively emphasised that the draft directive endeavours to clarify that every person, regardless of their sex or gender, should be covered by the protection of the directive as a victim (Art. 4 lit. c) Draft Directive). In the definition of gender-based violence, however, it remains open whether this also sufficiently covers violence against trans* persons who are particularly often attacked because of their gender identity (cf. Art. 4 lit. a) Draft Directive).

The djb calls on the Commission to improve the relevant provisions, in particular Art. 5 and Art. 6, so that the consideration of multiple discrimination in the enactment and implementation of the Directive does not remain a mere appeal.

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23 Commission Staff Working Document, v. 08.03.2022, SWD(2022) 61 final, Abschn. 5, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2022:61:FIN, last accessed 08.02.2023.

24 Commission Staff Working Document, v. 08.03.2022, SWD(2022) 61 final, Abschn. 4 und Annex 1 (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2022:61:FIN, last accessed 08.02.2023).

25 See the detailed examination of the gaps: Commission Staff Working Document, v. 08.03.2022, SWD(2022) 61 final, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2022:61:FIN, last accessed 08.02.2023, Abschn. 7.1.7.1., p. 62 ff.

II. Commentary on selected provisions

1. Article 5 – Rape

The djb welcomes the effort to harmonise the punishability of rape in the Member States through EU law. With regard to the concrete formulation of Article 5 of the draft directive, the djb sees a need for some readjustments in order to ensure a sufficiently concrete formulation of the offence.

The German translation of the draft directive requires a thorough revision, as the original English text explicitly does not speak of an act "against the woman's apparent will", but rather of an act performed without the woman's consent ("without the woman's consent given voluntarily").[26] The djb welcomes this commitment to the "yes-means-yes model", which corresponds to the standard of the IC. The introduction of the "yes-means-yes" model is an expression of the comprehensive protection of the right to sexual self-determination.

The regulation of rape in German criminal law in § 177 (1) and (6) StGB does not meet these requirements of Art. 5 RL-E; in this respect, action by the legislator will be necessary.

In detail:

- The djb welcomes the emphasis on the requirement of consensus in the performance of sexual acts, which the draft directive focuses on with the formulation "non-consensual act". It is particularly positive that rape as defined in Article 5 does not require the use of force or threat. This is still a prerequisite for the offence in several member states.[27] A harmonisation of rape according to Art. 5 of the Draft Directive would counteract this and close important gaps in criminal liability.
- The djb criticises that only sexual penetration is covered. Instead, all non-consensual sexual acts should be covered in order not to fall short of the requirements of the IC.[28]
- The djb supports a broad interpretation of the definition of "woman". Assaults on trans* and non-binary persons must also be covered by the protection of Article 5 of the Draft Directive. Trans* women are particularly affected by sexualised violence and in need of protection.[29] A clarification in the directive to the effect that trans* and non-binary persons are also covered is desirable. Should the Directive stick to a gender-specific formulation of Art. 5 of the Draft Directive, the Member States - especially Germany - should be explicitly reminded that the Directive only stipulates minimum standards, and that rape offences against victims of any gender should be

26 Cf. https://www.djb.de/presse/stellungnahmen/detail/st16-03, last accessed 08.02.2023, und https://www.djb.de/presse/stellungnahmen/detail/ st14-14_RefE-177-StGB.pdf, last accessed 08.02.2023.

27 Cf. Commission Staff Working Document, v. 08.03.2022, SWD (2022) 61 final, Abschnitt 5 (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2022:61:FIN, last accessed 08.02.2023).

28 Cf. the wording proposal in the DRAFT REPORT of the European Parliament On the proposal for a directive of the European Parliament and of the Council Combating violence against women and domestic violence (COM(2022)0105 – C9-0058/2022 – 2022/0066(COD)), https://www.europarl.europa.eu/doceo/document/CJ01-PR-739730_EN.pdf, p. 11, last accessed 08.02.2023.

29 Being Trans in the EU – Comparative analysis of the EU LGBT survey data – Summary - p. 6 ff. (https://fra.europa.eu/sites/default/files/fra-2015-being-trans-eu-comparative-summary_en.pdf, last accessed 08.02.2023); such a broad interpretation is also not precluded by the wording of Art. 83 TFEU, which must be interpreted broadly with regard to the Union values and should also include non-binary persons, see above.

punishable when implemented domestically. In this context, the non-regression clause in Art. 49 should also be recalled, according to which a higher existing level of protection under the law of a Member State may not be reduced due to the requirements of the Directive.

2. Art. 6 – Genital mutilation

The djb welcomes the provision in Art. 6 of the Draft Directive to make genital mutilation a punishable offence throughout Europe.

However, the draft directive does not explicitly refer to consent as the relevant criterion. With regard to gender reassignment or cosmetic surgery[30] - not mentioned in Art. 6 of the Draft Directive - it is not decisive, for example, whether these are covered by the scope of application. The only suitable criterion for delimitation is whether action is taken against or without the will of the person concerned. The criterion of consent should therefore be added to Article 6 of the Draft Directive. In this regard, the djb proposes to clarify in recital 16 that consent can only be given if the person has given his or her free, prior and informed consent.[31]

The djb points out that the use of the term "mutilate" in the German version is problematic, as it is concretised as a negative change.[32] The djb therefore suggests replacing the term "mutilation" in Art. 6 lit. a) of the Draft Directive with "injury".

The djb calls on the EU legislators to clarify that particularly vulnerable persons are also explicitly included in the scope of personal protection. Both Art. 6 lit. b) of the Draft Directive and Section 226a of the German Criminal Code explicitly protect only female persons. Intersexual or trans* persons are not explicitly covered. The Draft Directive only refers to the fundamental vulnerability of these groups of persons in recital 11.

3. Art. 7 – Non-consensual sharing of intimate or manipulated material

The djb expressly welcomes the fact that Article 7 of the Draft Directive adapts the regulation of image-based sexual violence to the realities of digitalisation and that the non-consensual sharing of intimate or manipulated material by means of information and communication technologies is to be introduced as a criminal offence throughout the EU. This is to be welcomed also with regard to the German legal situation, since the relevant Art Copyright Act (Kunsturhebergesetz, KUG), which dates back to 1907, only meets the requirements for protection against gender-based image-based violence on the internet to a limited extent. Similarly, image-based sexual violence is regulated only incompletely and unsystematically in §§184k and 201a of the German Criminal Code.

- In the light of a comprehensive and effective protection of the victim, it is positive that Art. 7 lit c) Draft Directive also criminalises the threat of non-consensual

30 The assessment of when something is considered aesthetic or at least aesthetically justifiable - such as intimate piercings or cosmetic surgery - is linked to the prevailing ideal of beauty. However, such an ideal of beauty is based on the one hand on cultural, partly also oppressive views and on the other hand does not do justice to the protective purpose of Art. 5 of the Draft Directive.

31 Cf. the principle of "free, prior and informed consent" in international law.

32 Draft law of the parliamentary groups of the CDU/CSU and FDP, Bundestags-Drs. 17/13707, p. 6; Bundestags-Drs. 17/1217, p. 7 https://dserver.bundestag.de/btd/17/012/1701217.pdf, last accessed 08.02.2023; from the literature: e.g. „nicht nur unerhebliche nachteilige Veränderung des natürlichen Erscheinungsbildes der gesunden äußeren Genitalien", BeckOK StGB/Eschelbach, 55. Ed. 01.11.2022, StGB § 226a Rn. 8.

disclosure of intimate or manipulated material according to Art. 7 lit a) and b) Draft Directive. This would close a gap in criminal liability for Germany.

- It is also to be welcomed that the materials covered by Art. 7 are to be broadly defined according to EC 19 and are to include so-called "deep fakes".
- In order to achieve a higher level of protection (also for Art. 8 and 9), the proposal in the draft report of the European Parliament that non-consensual disclosure does not have to be made to "a multitude of end-users", but that disclosure to "other end-users" is sufficient, is to be supported.[33]
- The phrases "intimate images, videos or other materials depicting sexual conduct by another person" (paragraph 1) or "images, videos or other materials that give the appearance that another person is engaged in sexual conduct" (paragraph 2) suggest that only images depicting sexual conduct are covered. However, image-based sexual violence also includes nude images, especially images of naked genitalia, and images of covered genitalia that are protected from view, e.g. upskirting.[34] It should therefore be clarified that intimate images include not only the showing of sexual acts but also other images, such as nude images, images of covered genitals, of going to the toilet and the like.
- The draft directive does not provide for the criminalisation of the mere production of intimate images, videos or other materials depicting sexual acts of another person of legal age without that person's consent. The same applies to uses other than sharing the content. This should be urgently reconsidered, because the production and any form of use of intimate images without the consent of the person depicted also violates their right to sexual self-determination.

4. Art. 8 – Cyberstalking

The djb welcomes in principle Art. 8 of the Draft Directive, which corresponds to the requirements of the IC and in particular also makes stalking by means of modern communication channels a punishable offence. However, the djb recommends that individual components of Art. 8 of the Draft Directive be tightened up.

- The djb suggests replacing the requirement of a "persistent" threat in Art. 8 lit. a) Draft Directive with the requirement of a "repeated" threat. The temporal element of persistence could set the threshold of punishability too high and is also likely to be too vague. A narrow interpretation of the term could require a continuously ongoing threat situation, which does not necessarily exist in many cases of cyber stalking. The somewhat lower criterion of "repeated" threats would also do justice to the temporal component of the offence of stalking.
- The djb expresses concerns regarding the requirement of intimidating conduct provided for in Art. 8 lit. a) Draft Directive. It remains unclear which cases should fall under the alternative of intimidation in comparison to threats. German criminal law

33 Cf. the drafting proposal in the DRAFT REPORT of the European Parliament On the proposal for a directive of the European Parliament and of the Council Combating violence against women and domestic violence (COM(2022)0105 - C9-0058/2022 - 2022/0066(COD)), see e.g. amendment 68, https://www.europarl.europa.eu/doceo/document/CJ01-PR-739730_EN.pdf, last accessed 08.02.2023.

34 Cf. Henry/McGlynn/Flynn/Johnson/Powell/Scott, Image-based sexual abuse, Routledge, London / New York 2021, p. 4

does not provide for an act of intimidation in addition to an act of threat. Measured against the constitutional requirements of certainty under Article 103 (2) of the German Constitution, the concept of intimidation raises concerns, since it cannot be conceptually defined and could also include mere socially harmful behaviour such as behaviour that is aggressive but can otherwise only be described as anti-social and is thus below a threat threshold.

- The djb is of the opinion that the protected group of persons is too narrowly defined as "dependants" (cf. Art. 4 lit. j) Draft Directive). In accordance with the regulations in German (criminal) law, cyber stalking according to Art. 8 of the Draft Directive should also include threats to "relatives" and "persons close to them".[35] The djb therefore proposes to broaden the legal definition in Art. 4 lit. j) Draft Directive and to include "relatives of the victim or other persons close to the victim" in the scope of protection instead of "dependants".[36]

5. Art. 9 – Cyber Harassment

The djb strongly welcomes the inclusion of cyber harassment as conduct punishable under criminal law in the proposed Directive. So far, cyber harassment - as in many Member States - is not a separate criminal offence in Germany. Under German law[37], the punishability of cyber harassment is distributed among a multitude of offences, and different offences may be considered depending on the individual case. Because of this, considerable gaps in punishability are revealed here regarding the individual acts. The specific wrongful content of cyber harassment is therefore not currently covered either symbolically or in terms of punishment. The Istanbul Convention also does not explicitly mention the concept of cyber harassment. In this respect, Article 9 of the Draft Directive is necessary both for clarification and for practical reasons to deal with the increasingly widespread phenomenon covered by cyber harassment.[38]

In detail, the djb recommends the following improvements:

- The concept of cyber harassment is defined too narrowly in the proposed Directive because it only refers to threatening or insulting material, but not to other forms of public harassment, such as the dissemination of image recordings that are damaging to the victim's reputation or the creation of fake profiles in social networks. The djb therefore calls for such reputation-damaging attacks to also be included as cyber harassment if they are specifically used against a person concerned to disparage that person in public.[39]
- In principle, the recognition of psychological harm is to be welcomed. However, it will be decisive in the implementation how the procedural determination of this psychological harm is structured in the individual Member States. The djb points out

35 Cf. §§ 238 Abs. 1 Nr. 4 und 8, 241 StGB sowie § 4 GewSchG i.V.m. § 1 Abs. 2 Satz 1 Nr. 1 und Nr. 2 lit. b) GewSchG.

36 See also commentary on Art. 21.

37 § 185 ff. StGB, §§ 201 ff. StGB oder § 33 KUG und §§ 131, 240, 241 or § 253 StGB.

38 This also applies to analogue bullying. The djb suggests that this should also be taken into account in the implementation of the directive by the member states.

39 This also applies to Bundesrats-Drs. 131/1/22, p. 8, https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2022/0101-0200/0131-22.html, last accessed 08.02.2023.

that the procedural determination of this characteristic should be as gentle as possible for the person concerned.

- The djb has concerns that the psychological harm suffered by the victim must be "significant". It is understandable that so-called "petty offences" are to be excluded. However, attempts to limit the scope should be made in relation to the conduct, as every victim reacts differently to such an attack. Therefore, the threshold should not be set too high; in particular, precautions should also be taken against victim-blaming and retraumatisation. Non-physical forms of violence (as well as physical violence) can have very different effects on the victims, and the consequences can manifest themselves later. For the basic offence, the quality of the assault should be decisive, as well as the fact that it leads to psychological harm for the assaulted person.
- In addition, the criterion of significance could be taken into account as an aggravating circumstance, as is the case in Germany with property offences (cf. section 263, paragraph 3, sentence 2, no. 2 of the Criminal Code, " major financial loss").[40]

Article 9 lit. b) of the Draft Directive, according to which "participation with third parties" in the cyber harassment of others should also be punishable, is to be welcomed, since the specific unlawful content of cyber harassment arises and is intensified precisely through the participation of many. In the implementation into the law of the Member States, it is still to be discussed how "participating with third parties" is meant or how this is to be determined.[41]

The djb calls for effective data collection concerning the occurrence of cyber harassment in order to effectively supplement the protection demanded in Art. 9 of the Draft Directive. According to official statistics, cyber harassment affects men and women to roughly the same extent.[42] However, the number of unreported cases is likely to be significantly higher among women. It must be pointed out (as the djb has already done frequently and in other parts of this statement) that the statistical data situation has to be improved.[43] Criminal statistics are likely to become more precise with the introduction of the offence of cyber harassment, as this will also create more social awareness of this form of punishable behaviour and make it possible for those affected to clearly name the violation they suffered.

6. Art. 10 – Cyber incitement to violence or hatred

The djb welcomes the proposal in Art. 10 of the Draft Directive as it closes existing gaps in legal protection with regard to the German legal situation.

Article 10 of the Draft Directive helps to establish comprehensive "criminal anti-discrimination provisions"[44] in the national legal systems. Section 130 of the German Criminal Code (StGB) (incitement of masses) would have to be adapted accordingly or at least interpreted in the

40 See also Art. 13 lit. i) of the proposal: „Sofern die nachstehenden Umstände nicht bereits ein Tatbestandsmerkmal der in den Artikeln 5 bis 10 genannten Straftaten sind, stellen die Mitgliedstaaten sicher, dass sie im Zusammenhang mit diesen Straftaten als erschwerende Umstände gelten: […] Die Straftat führte zum Tod oder Selbstmord des Opfers oder zu schweren körperlichen oder psychischen Schäden bei dem Opfer."

41 As also in Bundesrats-Drs. 131/1/22, p. 7,https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2022/0101-0200/0131-22.html, last accessed 08.02.2023.

42 Cf. https://de.statista.com/statistik/daten/studie/917129/umfrage/betroffene-von-cybermobbing-nach-geschlecht-in-deutschland/, last accessed 08.02.2023; however, only 2,000 people were interviewed in an online survey.

43 This also applies to Bundesrats-Drs. 131/1/22, p. 5 (Fn. 41).

44 Cf. on this understanding of § 130 StGB: OLG Cologne III-1 RVs 77/20, BeckRS 2020, 13032, para. 80.

light of the Directive in such a way that it covers violence or hatred against a group of persons defined according to sex or gender or against a member of such a group. So far, this has only been addressed sporadically in German case law, but it is not (yet) widely accepted.[45]

The djb points out that beyond the obligation of Art. 10 of the Draft Directive, the introduction of nationwide specialised public prosecution offices for offences in connection with digital violence is necessary to combat (digital) hate speech (cf. in this context also Art. 17 para. 1 of the Draft Directive) and that these must be adequately staffed. At the same time, mandatory trainings for the judiciary, public prosecutors and police officers is indispensable. In particular, the gender-specific dimension of digital violence must be taken into account. Raising awareness of this issue among those applying the law is essential to ensure that hate crimes on the Internet are recognised as such and prosecuted accordingly, cf. also Art. 37 of the Draft Directive.

7. Art. 12 – Penalties

The djb welcomes the holistic approach of the draft directive, which in Art. 12 supplements the offences listed in Chapter 2 with concrete sentencing guidelines. However, the djb suggests that the penal provisions be sufficiently flexible to allow sufficient room for the legal doctrinal peculiarities of the criminal law systems of the member states.[46]

The djb welcomes in principle the inclusion of intervention programmes (cf. Art. 38). The further expansion of preventive measures and therapy offers in prisons is necessary. However, with regard to Article 12 (3) of the Draft Directive ("intervention programme"), the djb points out that the draft Directive does not clarify which format is intended for the programme. The djb suggests that a clarification be included in the recitals that corresponds to the explanatory report on the IC, par. 104.[47]

8. Art. 13 – Aggravating circumstances

The djb welcomes the inclusion of aggravating circumstances, which primarily affect women and are thus an expression of violence against women. It specifically welcomes the clarification that offences within close relationships are particularly reproachable and should have an aggravating effect on the punishment. Nevertheless, there is a need to clarify some of the characteristics used in Article 13 of the Draft Directive and their applicability to cybercrime. In particular, the concept of violence, the use of weapons and an offence in the presence of children, especially in relation to cybercrime, must be explained in more detail. Moreover, it must be ensured that the courts retain sufficient discretion to take the individual case into account when sentencing.

In detail:

- The djb is in favour of recognising the seriousness of criminal offences against persons who are particularly in need of protection. With regard to these grounds for

45 Cf. ibid. (fn. 44).

46 In German criminal law, in order to maintain an appropriate range of punishments, the formulation of Section 177 (6) of the Criminal Code as a qualification should be considered. However, the provision must continue to be amenable to assessment as a less serious case in order to be able to arrive at balanced punishments in individual cases.

47 'Programmes should encourage perpetrators to take responsibility for their actions and examine their attitudes and beliefs towards women.'

aggravation, which are for the most part identical to Art. 46 lit. c) and Art. 46 lit. d) IC, there are no reservations on the merits.[48]

- It is particularly welcome that according to Art. 13 lit. k) and lit. l) Draft Directive, a close relationship to the offender is considered an aggravating circumstance. Art. 13 of the Draft Directive thus prescribes what was already demanded by Art. 46 lit. a) of the IC: the recognition of the seriousness of offences in close relationships. Contrary to the view sometimes expressed in case law, a close relationship must not have a mitigating effect on punishment, but must be regularly taken into account as an aggravating factor.[49] In particular, the inclusion of relationships beyond traditional and institutionalised relationships as grounds for aggravation in Art. 13 lit. l) Draft Directive deserves support. Close ties and a relationship of trust can also arise in relationships that cannot be categorised in the prevailing traditional forms. However, the djb notes that "cohabiting" alone is not a suitable characteristic to capture this circumstance. Rather, the concrete relationship to each other and the breach of trust resulting from the offence in relationships that are neither familial nor romantic must be taken into account. The draft directive should therefore be amended to include the characteristic of "personal relationship" as an additional alternative to the cohabitation mentioned in Art. 13 lit. l) Draft Directive.

9. Art. 14 – Jurisdiction

The djb welcomes the fact that Art. 14 of the Draft Directive ensures the punishability of the offences of Chapter 2 of the Draft Directive beyond the territoriality principle. However, there is a need for improvements in some areas, especially in order to achieve the same level of protection as the Istanbul Convention.

- The djb welcomes in principle that according to Article 14 para. 4 of the Draft Directive, the active personality principle is to apply absolutely. It should not depend on whether the offence is also punishable at the place where it is committed. This could close gaps in punishability and in particular make it impossible to deliberately circumvent criminal provisions by travelling abroad (for example, genital mutilations during the holidays under Article 6 of the Draft Directive). However, the djb points out that with regard to cybercrime, which are likely not punishable worldwide, there could be tensions with the non-intervention principle under international law if the sovereign decision of the state where the offence was committed not to punish a certain conduct is ignored.
- The draft directive partly falls short of the IC. The djb therefore calls for the corresponding provisions to be harmonised. The flag principle enshrined in Art. 44 para. 1 lit. b) and c) IC (relevant when committing the offence on a ship or aircraft) should also be adopted in the Directive. The obligation to introduce the active

48 The above-mentioned circumstances are already partially taken into account in German law by making the punishment more severe; in the case of sexual offences, for example, by introducing separate criminal offences that cover sexual acts against minors and children (sections 174 ff. StGB). § Section 177, paragraph 4 of the Criminal Code takes into account the fact that the exploitation of an incapacity to form a will or to express oneself, which is based on an illness or disability, is particularly reproachable.

49 Cf. in detail the report of the German Women Lawyers' Association (djb) on the implementation of the Istanbul Convention in Germany, 25 November 2020, p. 50 et seq. https://www.djb.de/fileadmin/user_upload/st20-31-IK-Bericht-201125.pdf, last accessed 08.02.2023.

domicile principle (Art. 44 para. 1 lit. e) IC) and suggestion to introduce the passive domicile principle (Art. 44 para. 2 IC) should also be included in the Directive.

10. Art. 15 – Limitation periods

The djb welcomes the fact that Art. 15 of the Draft Directive provides for limitation periods that allow for investigations, prosecution measures, court proceedings and judicial decisions for a sufficiently long period of time after the commission of the offences according to Chapter 2 of the Draft Directive. In the negotiations of the draft directive in the Council and EP, special features of national law, such as generous suspension and interruption provisions, should be taken into account with regard to the proposed limitation periods.

- The djb welcomes the strict provision in Art. 15 para. 2 of the Draft Directive, which calls for a minimum limitation period of 20 years for the offence of rape. A long limitation period is necessary in cases of rape because victims have a particularly high interest in reporting a crime even after several years. Rape often takes place in close relationships such as partnerships. In this context, the step to report the crime often happens only after the partnership has ended or the relationship has been dissolved. In addition, rape is associated with considerable psychological harm[50] and enormous social stigmatisation[51]. Moreover, the interest of the prosecution in investigating the crime and achieving material justice is separate from potential evidentiary difficulties that may arise with the passage of time.
- In order to meet the requirements of the Directive, the German legislature would have to reform the character of the offence rape in Section 177 (6) of the Criminal Code from an aggravated case example to a qualified offence. Currently, rape is considered as a particularly serious case of sexual assault and thus not included in the assessment of the statute of limitations. Whether it is a sexual assault in the form of a forced kiss or rape is irrelevant in German law for the limitation period - in both cases the period is 5 years. This is inappropriate, especially in view of the considerably more serious harm caused by rape, and it falls well short of the requirements in Art. 15 para. 2 of the Draft Directive.

11. Art. 16 – Reporting of violence against women or domestic violence

The djb welcomes the fact that Article 16 of the Draft Directive provides for simplified (digital) reporting options for violence against women and domestic violence. In particular, it is positive that it will be easier for children to report crimes (Article 16 para. 4 of the Draft Directive) and that the transfer of personal data to the migration authorities will be prohibited for the time being (Article 16 para. 5 of the Draft Directive)[52]. The djb sees a need for readjustment with regard to the too far-reaching release from the duty of confidentiality, which Art. 16 para. 3 Draft Directive provides for.

50 A number of studies (meta-analyses) show that the risk of suffering from PTSD, anxiety disorders, depression and suicidality is significantly increased among victims of sexual assault. See Campbell/Dworkin/Cabral, Trauma, Violence, & Abuse 10 (2009), 225; Dworkin et. al, Clinical Psychology Review 56 (2017), 65; Dworkin, Trauma, Violence & Abuse 21 (2020), 1011.

51 Bhuptani/Messman-Moore, in: O´Donohue/Schewe (Hrsg.), Sexual Assault and Sexual Assault Prevention, 309 (314).

52 Cf. also https://www.djb.de/presse/pressemitteilungen/detail/st19-25, last accessed 08.02.2023.

- The djb points out that the obligations proposed in Article 16 para. 3 lead to a complete release from the duty of confidentiality in some cases if healthcare professionals become aware that there is an imminent risk that a criminal offence within the meaning of the draft directive will be committed against their patients. This does not sufficiently take into account that the persons concerned often turn to doctors precisely because they trust in their duty of confidentiality.
  The right to informational self-determination requires that persons may decide for themselves when and within what limits personal facts of life may be disclosed by a third party.[53] This is particularly true because healthcare professionals are often placed in a position of special trust.[54] If victims can no longer trust that doctors are bound by their duty of confidentiality in cases of violence against women or domestic violence, this can lead to victims no longer seeking medical help. Under the proposed regulation, it would no longer be up to the victims to decide whether they want to file a criminal complaint and go through (stressful) criminal proceedings.[55]
  It is essential that those affected can turn to doctors in confidence, also in order to be able to secure evidence for later criminal charges. The basis for trust is the duty of confidentiality to which the persons providing treatment are subject. According to current German law, a person can be released from the duty of confidentiality in narrowly defined cases of necessity as justification according to section 34 of the Criminal Code. A legal provision as envisaged in the draft directive would circumvent the underlying idea of Section 34 of the Criminal Code that the legally protected interests are to be weighed against each other and instead unilaterally dissolve it to the detriment of the protection of legitimate expectations.
- The simplification of reporting by children according to Article 16 para. 4 of the Draft Directive must be accompanied by mandatory training of police officers in dealing with violence against women and domestic violence. The training of professionals provided for in Article 37 of the Draft Directive should also include a child-friendly approach to domestic violence. It should be mandatory that the training of professionals also covers cases in which children or particularly vulnerable persons file complaints. Dealing with these cases appropriately ensures that the reporting procedures are confidential and accessible in a child-friendly manner and language, taking into account age and maturity level, and that any particular vulnerability of the victim can be taken into account at an early stage.

12. Art. 17 – Investigation and prosecution

The djb welcomes the demands of Art. 17 of the Draft Directive for an effective and prompt investigation of evidence and prosecution as well as the obligation to refer victims to support services according to Art. 27 et seq. Draft Directive. In many EU Member States and also in

53 This is also based, for example, on the work of the ProBeweis network, which enables the preservation of evidence for possible later criminal charges: https://www.probeweis.de/de/, last accessed 08.02.2023.

54 Schönke/Schröder/Eisele, § 203 Rn. 3.

55 In Germany, the criminal prosecution authorities would be obliged to investigate if the doctors reported the offence, section 152 (2) of the Code of Criminal Procedure. This can lead to a considerable burden for those affected, who often still live with the perpetrators in the household.

Germany, criminal proceedings in cases of violence against women are too long.[56] Especially in proceedings involving sexual offences, a long duration of proceedings has a harmful effect on the victim, who has to live with the experience permanently and for whom the trial can be a way of coping or at least dealing with it, but at the same time can also lead to re-traumatisation over and over again. The length of the criminal proceedings means a danger of secondary victimisation as well as the risk of triggering a feeling of powerlessness in the long proceedings without any possibility of influence[57], e.g. because every trial date - also through the higher courts - means a meeting with the perpetrator.

The approach of the draft directive is to be welcomed that the authorities are to be equipped with the necessary expertise and investigative tools in cases of cyber violence. In the area of cyber violence, rapid evidence gathering is particularly important, as tweets and chats etc. can be deleted. However, there is still much need for action in the area of cyber violence. So far, there is a lack of precise figures on those affected, but initial data surveys suggest that women are particularly and predominantly affected.[58] An increased exchange between the Member States as well as cyber capacity building in less financially strong Member States would be welcome.

Regarding the requirement in Article 17 para. 3 of the Draft Directive to ensure that an "official" complaint is made in all cases after an offence[59], the djb assumes that "competent authorities" means (only) the competent investigation and prosecution authorities mentioned in paragraph 2 and not other authorities or bodies. Criminal proceedings are a stressful situation for the victim. Victims are not always sure whether they want to press charges and should have the opportunity to seek appropriate legal or psychosocial advice from competent bodies beforehand. For such cases, the possibilities for the court-proof, confidential preservation of evidence should be expanded and financially secured.[60]

13. Art. 21 – Emergency barring, restraining and protection orders

The djb welcomes the fact that Art. 21, as well as Art. 18 para. 4, Art. 53 IC, allow for protective orders even without an application by the - possibly still threatened – victim. However, it must be ensured that Art. 21 does not allow for paternalistic orders against the will of the victims, i.e. contact bans despite a reconciliation of spouses.

- Going further than the Istanbul Convention, "dependants" (cf. Art. 4 lit. j) of the Draft Directive) are to be included in the scope of protection. Accordingly, the endangerment of one's own children can be a reason for an order in favour of the mother and the children. However, "dependants" in the sense of Art. 4 lit. j) Draft Directive are usually only spouses and minor children, more rarely also adult children

56 FRA, Women as victims of partner violence – Justice for victims of violent crime Part IV, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-justice-for-victims-of-violent-crime-part-4-women_en.pdf, p. 65 f., last accessed 08.02.2023.

57 FRA, Women as victims of partner violence – Justice for victims of violent crime Part IV, p. 66.

58 Laxton C. and Women's Aid (2014), "Virtual World, Real Fear – Women's Aid report into online abuse, harassment and stalking", https://www.womensaid.org.uk/wp-content/uploads/2015/11/Women_s_Aid_Virtual_World_Real_Fear_Feb_2014-3.pdf, last accessed 08.02.2023.

59 In English, this is clearer than in German.

60 Report of the German Women Lawyers' Association (djb) on the implementation of the Instanbul Convention in Germany, p. 53, https://www.djb.de/fileadmin/user_upload/st20-31-IK-Bericht-201125.pdf, last accessed 08.02.2023; 27 Abs. 1 p. 6, § 132k SGB V.

and parents. Violence or threats can also affect the victim's partner, siblings or stepchildren who do not live in the same household as the victim and are cared for or supported by the victim. The djb therefore proposes to broaden the legal definition in Art. 4 lit. j) Draft Directive and to include "relatives of the victim or other persons close to the victim" in the scope of protection instead of "dependants".

- The djb welcomes the fact that the Member States - in this respect more extensively than in Art. 53 IC - are encouraged to also guarantee long-term protection of victims. This is particularly necessary if contact is unavoidable for years after separation due to the assertion of rights of access to joint children.
- The djb welcomes the obligation of the Member States to provide comprehensive information to victims. Women must receive low-threshold information in their own language on where they can get help if they become victims of (domestic) violence.
- The sanction of violations of protection orders according to Art. 21 para. 4 ensures - as does Art. 53 para. 3 IC - that the protection brought about by the orders is efficiently flanked by civil or criminal sanctions. From a German point of view, it should be pointed out that the criminalisation of a violation of the protection order under section 4 of the Protection against Violence Act (GewSchG) enables a particularly flexible and effective protection against violence (in addition to the possibility of enforcement under civil law through the imposition of coercive fines). This is because behaviour that would normally not be punishable (e.g. visiting the cinema where the victim works that is covered by the protection order) is classified as a crime. The duality of criminal and civil sanctions has proven very successful in Germany, because the offender can only invoke the principle of "in dubio pro reo" in the case of criminal sanctions, while he is already threatened with a civil sanction in case of an overwhelming probability. Civil sanctions are also easier for the victim to control, because it is not the criminal justice system that is in charge of the proceedings, but an application by the victim that has to be processed.
- The efficiency of the protection against violence is strongly dependent on whether it is classified under civil law or criminal law, whether victims have to make a conclusive submission in civil law proceedings or whether the principle of official investigation applies. It must therefore not be concluded from Article 21 para. 5 of the Draft Directive that it is irrelevant for the efficiency of the protection against violence whether the states provide criminal, civil or administrative legal measures. From preventive perspective, procedures with an official investigation principle and extensive powers of the deciding authorities (in Germany: police authorities, criminal courts, family courts) are preferable to those in which procedural law assumes a dispute on an equal footing. This overburdens victims of violence who are seeking help and are often traumatised.

14. Art. 22 – Protection of the victim's private life

The djb welcomes the approach of designing the right to ask questions during legal proceedings in a way that protects the victim. In practice, victim witnesses in cases of sexualised violence are sometimes forced to disclose their sexual history or preferences comprehensively to the trial participants and to have this intimate information commented

on, even though the victim's past life is usually of no significance for assessing the truthfulness of the incriminating statement.[61]

At the same time, criminal investigations and court proceedings represent a massive encroachment on the fundamental rights of the accused. The protection of the rights of the defence must therefore not be disregarded.

Against this background, the current regulation in Art. 22 of the Draft Directive seems to be too narrow.[62] It provides that, without prejudice to the rights of the defence, all questions concerning the victim's past sexual conduct or other aspects of the victim's private life are not permitted. In the current version of the draft directive, however, it remains unclear how the rights of defence are to be safeguarded. In the view of the djb, this needs to be clarified. It would be preferable to have an explanatory formulation, e.g. in the recitals, which ensures that the named questions are considered inadmissible as a rule and that their admissibility is subject to a special justification requirement.

Such a duty to justify the question would also contribute to transparency and the defence would be required to check the indispensability of its question itself. This would also reduce the risk of revisable judgments and the associated delays in proceedings.[63]

15. Art. 25 – Measures to remove certain online material

The djb welcomes in principle Art. 25 of the Draft Directive, which supplements the corresponding provisions of the EU Digital Services Act (DSA). It is not sufficient to create cyber violence offences according to Art. 7 et seq. of the Draft Directive; in order to effectively strengthen the rights of victims of digital violence, it is rather imperative that the removal of illegal content on the net is also ensured by means of quick and effective measures, especially by way of interim proceedings.

- However, there are concerns that, as in the DSA, the initiative for interim relief must still come from the victims themselves ("upon application by the victim") and that they must also make advance payments. In this respect, the proposal by the

61 Fundamental to this: djb, Stellungnahme: Opferrechte in Strafverfahren wegen geschlechtsbezogener Gewalt, 22.11.2018, https://www.djb.de/presse/stellungnahmen/detail/st18-18/, last accessed 08.02.2023; the commentary in MüKo-StPO/Maier, 2014, section 68a marginal no. 9, for example, is also problematic.: *„Besondere Bedeutung gewinnt die Vorschrift in Verfahren wegen Sexualstraftaten. Der Gesetzgeber wollte verhindern, dass sich die Opfer von Sexualdelikten Befragungen über ihr Sexualleben aussetzen müssen, die keinen Zusammenhang mit dem Anklagevorwurf erkennen lassen. [Fn.] Dieses Ziel muss allerdings vor dem Hintergrund und den Erfordernissen der Aufklärungspflicht gesehen werden; es kann deshalb erhebliche Einschränkungen erfahren. So kann es im Rahmen der Beweiswürdigung, aber auch für die Rechtsfolgenbestimmung, etwa bei der Klärung der Voraussetzungen eines minder schweren Falles […] oder der Frage, ob an Stelle des Strafrahmens des besonders schweren Falls […] heranzuziehen ist, durchaus entscheidungserheblich und damit unvermeidlich sein, festzustellen, wie sich das Opfer gegenüber dem Angeklagten oder Dritten in sexueller Hinsicht vor und nach der Tat verhalten hat. Dem Verhalten des Opfers vor und nach der Tat sowie allgemein in früheren Partnerschaften kann Indizwert zukommen und dann der Aufklärung bedürfen; entsprechend liegt es nicht selten dann, wenn der Angeklagte geltend macht, es habe sich um einen einvernehmlichen Sexualkontakt gehandelt und/oder die Belastungszeugin habe ihn „verführt". [Fn.] Gleiches gilt schließlich, wenn aufzuklären ist, welche Tatfolgen beim Opfer zu verzeichnen sind und wie ihr Schweregrad zu beurteilen ist.".*

62 On this problem see also Bundesrats-Drs. 131/1/22, p. 12 f., https://www.bundesrat.de/SharedDocs/beratungsvorgaenge/2022/0101-0200/0131-22.html, last accessed 08.02.2023, but without counter-proposals that spare victims.

63 In Germany, such a formulation of section 68a of the Code of Criminal Procedure would be conceivable through an addition to the wording of the provision or in the Guidelines for Criminal Proceedings and Proceedings for the Imposing of Fines (RiStBV).

rapporteurs of the European Parliament[64] to supplement the provision by initiating proceedings ex officio is to be welcomed.

- Furthermore, the DSA and the draft directive do not provide for any (additional) claims or subjective rights of the persons concerned, but only regulations on the enforcement of claims. Rather, it is the administrative and judicial authorities responsible in the Member States to which, according to the respective law of the Member State, an application must be made for a corresponding order (for example, directed at deletion, injunction), which in turn must first be served on the provider of the intermediary service, often in another Member State, according to national civil procedure law. This usually costs time and money, as perpetrators are often not identifiable and therefore claims cannot be made against them directly. This makes it all the more urgent to implement what Art. 27 para. 1 Draft Directive provides for: not only specialised legal advice for victims of cyber violence on legal remedies and remedies to remove online content related to the crime (Art. 27 para. 1 lit. c) Draft Directive), but also the provision of sufficient human and, above all, financial resources for those affected.
- It is already necessary to call for an effective implementation of Art. 25 of the Draft Directive. It is not due to a lack of legal remedies that victims in Germany, for example, often do not report a crime or apply for an injunction. In many cases, the reason is that victim protection is not sufficiently guaranteed, as shown by the inadmissibility of giving c/o addresses in lawsuits and interim proceedings. Up to now, victims are obliged under German civil procedure law to disclose their address (ultimately also to the perpetrator); only in rare cases do courts allow the disclosure of a c/o address to be sufficient for victims of digital violence. For this reason, the djb has long supported the idea of a Digital Violence Protection Act, which is also enshrined in the coalition agreement of the federal government[65], and the introduction of class action lawsuits.[66] In the view of the federal government, the latter will now become a reality through Article 86 of the DSA.

16. Art. 37 – Training and information for professionals

The djb expressly welcomes the demands of Art. 37 of the Draft Directive for comprehensive training obligations. For several years, the djb has been advocating for comprehensive and obligatory training measures, especially for court staff, and supports the efforts to establish these obligations at EU level for all Member States.[67] This also corresponds to the requirements of the IC in Art. 15.[68]

- In order to standardise the application of the law, it is necessary for public prosecutors and judges to participate in mandatory training on the topic of gender-

64 DRAFT REPORT of the European Parliament

65 https://dserver.bundestag.de/btd/20/023/2002308.pdf, last accessed 08.02.2023.

66 Cf. https://www.djb.de/presse/stellungnahmen/detail/st19-23; last accessed 08.02.2023; https://www.djb.de/presse/pressemitteilungen/detail/pm22-24, last accessed 08.02.2023.

67 Cf. for example the issues paper: 19-28, https://www.djb.de/presse/pressemitteilungen/detail/st19-28, last accessed 08.02.2023.

68 See also the report of the djb on the implementation of the Istanbul Convention in Germany, https://www.djb.de/fileadmin/user_upload/st20-31-IK-Bericht-201125.pdf, last accessed 08.02.2023

based violence.[69] Even though there already is a wide range of voluntary training in many areas in Germany, there is currently a lack of mandatory training on dealing with gender-based and/or domestic violence in all professional groups.[70]

- In the trainings according to Art. 37 of the Draft Directive, gender stereotypes as well as sexuality and rape myths should be reflected upon. It can be observed that gender stereotypes and rape myths in court and among investigating authorities are a major obstacle to the effective prosecution of sexual offences. Rape myths occur in various forms, for example as general, massively victim-damaging ideas about sexual interactions, hostile reservations towards the victim with regard to his or her credibility, or mostly unfulfillable and always unreasonable expectations with regard to ideal victim behaviour, which have a victim-blaming and perpetrator-exonerating effect.[71] It is therefore necessary to provide training for persons who (regularly) deal with victims of violence and domestic violence in the field of law enforcement and criminal proceedings.[72] For this purpose, training measures must be available throughout the country.[73]
- The police are often the first institution to have contact with those involved in domestic violence cases. For this reason, programmes for dealing with domestic violence have been developed and implemented in some places for quite some time. There is a need for compulsory, qualified, ongoing training for all police officers who are confronted with domestic violence in the course of their duties. They must be able to assess risks and initiate first steps to stabilise the victim's situation.
- The demand for mandatory further training of healthcare professionals in the area of FGM_C (female genital mutilation) is also to be welcomed in order to raise awareness of the issue and thus ensure appropriate treatment of victims. The same applies to the demands to offer training and further educational opportunities for media professionals. Such an offer does not constitute an encroachment on the freedom of the press under Article 5 (1) of the German Constitution.

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69 Mangoldt, Hermann/Klein, Friedrich/Starck, Christian (Hrsg.): Kommentar zum Grundgesetz, Band 3: Artikel 83-146, 3. Auflage 2018, Artikel 97 GG Rn. 29; see also the opinion of the Scientific Service, https://www.bundestag.de/resource/blob/671952/7b297d8bdab137e5b71cd5a9aff7c7a8/WD-3-229-19-pdf-data.pdf, last accessed 08.02.2023. Contrary to what the Federal Council states in its statement in printed matter 131/1/22, p. 16, the existing voluntary training offer is not sufficient.

70 An implementation of the obligations of Art. 37 of the Draft Directive could be anchored in the Federal Judges Act, taking judicial independence into account.

71 See with many references Report of the German Women Lawyers' Association (djb) on the implementation of the Istanbul Convention in Germany, p. 56, https://www.djb.de/fileadmin/user_upload/st20-31-IK-Bericht-201125.pdf, last accessed 08.02.2023.

72 A legal obligation to provide further training also for judges does not violate the principle of judicial independence, cf. Mangoldt, Hermann/Klein, Friedrich/Starck, Christian (Hrsg.): Kommentar zum Grundgesetz, Band 3: Artikel 83-146, 3. Auflage 2018, Artikel 97 GG Rn. 29, see also the statement https://www.bundestag.de/resource/blob/671952/7b297d8bdab137e5b71cd5a9aff7c7a8/WD-3-229-19-pdf-data.pdf, last accessed 08.02.2023.

73 Training and further education measures on the position of the victim in criminal proceedings are now offered by the Judicial Academy, but events to reflect on gender stereotypes or rape myths that harm victims are found only sporadically at best.

Prof. Dr. Maria Wersig
President of the djb

Prof. Dr. Anna Katharina Mangold
Chairperson of the Commission for European and International Law

Prof. Dr. Leonie Steinl
Chairperson of the Commission on Criminal Law

Dr. Anna Lena Göttsche
Chairperson of the Commission Civil and Family Law, Law of Other Life Communities

Anke Stelkens
Chairperson of the Non-permanent Commission Digital Affairs