



*Committee on Legal Affairs
The Chair*

27.6.2023

Mr Juan Fernando LÓPEZ AGUILAR,
Chair
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Mr Robert BIEDROŃ
Chair
Committee on Women's Rights and Gender Equality
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a Directive combating violence against women and domestic violence (COM(2022)0105 – C9-0058/2022 – 2022/0066(COD))

Dear Mr Chairs,

By letter of 3 May 2023¹, the Chair of the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Chair of the Committee on Women's Rights and Gender Equality (FEMM) requested the Committee on Legal Affairs (JURI), pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of adding Article 83(2) of the Treaty on the Functioning of the European Union (TFEU) as legal basis for the proposal for a Directive on combating violence against women and domestic violence (2022/0066(COD))² (hereinafter "the proposed Directive").

JURI Committee considered the above question at its meeting of 27 June 2023.

I - Background

The LIBE and FEMM Committees are working jointly under Rule 58 of the Rules of Procedure on the proposed Directive.

¹ D(2023)16808.

² COM(2022) 105 of 8.3.2022.

The Commission proposal was based on Article 82(2) and Article 83(1) TFEU.

The co-Rapporteurs have proposed to add Article 83(2) TFEU as an additional legal basis of the proposed Directive, in relation to a new provision on offences concerning sexual harassment in the world of work, which they would like to add in the proposed Directive. The shadow rapporteurs as well as the coordinators of both FEMM and LIBE Committees agreed to request the opinion of JURI Committee on the appropriateness of the proposed new legal basis, pursuant to Rule 40 of the Rules of Procedure.

II - The relevant Treaty Articles

Chapter 4 (“Judicial cooperation in criminal matters”) of Title V of Part Three TFEU reads, *inter alia* (emphasis added):

*Article 82
(ex Article 31 TEU)*

- 1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.*

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

- (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;*
 - (b) prevent and settle conflicts of jurisdiction between Member States;*
 - (c) support the training of the judiciary and judicial staff;*
 - (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.*
- 2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.*

They shall concern:

- (a) mutual admissibility of evidence between Member States;*
- (b) the rights of individuals in criminal procedure;*

(c) the rights of victims of crime;

(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

3. *Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.*

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

*Article 83
(ex Article 31 TEU)*

1. *The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. *If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice*

to Article 76.

3. *Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.*

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

III – CJEU case law on the choice of legal basis

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred powers (Article 5 of the Treaty on European Union) and determining the nature and scope of the Union's competence³.

According to well-established case law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure⁴.

If examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component⁵. Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases⁶. This would however only be possible if the procedures laid down for the respective legal bases are not incompatible with and do not undermine the right of the European Parliament⁷.

³ *Opinion 2/00 ("Cartagena Protocol")*, ECLI:EU:C:2001:664, para 5.

⁴ Case C-300/89, *Commission v Council ("Titanium dioxide")*, ECLI:EU:C:1991:244, paragraph 10.

⁵ *Ibid.* paragraph 30 and Case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paragraph 53 and case-law cited.

⁶ Case C-300/89, paragraphs 13 and 17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, paragraph 38; *Opinion 2/00*, paragraph 23; Case C-94/03, *Commission v Council ("Rotterdam Convention")*, ECLI:EU:C:2006:2 and Case C-178/03, *Commission v Parliament and Council*, ECLI:EU:C:2006:4, paragraphs 36 and 43.

⁷ Case C-300/89, paragraphs 17-25; Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:461.

IV – Aim and content of the proposed Directive

The proposed Directive aims to effectively combat violence against women and domestic violence throughout the Union. It addresses different areas: the criminalisation of and sanctions for relevant offences; protection of victims and access to justice; victim support; prevention; coordination and cooperation.

The proposed Directive uses three different means to achieve its mission: (1) it makes the current Union legal instruments relevant to combating violence against women and domestic violence more effective; (2) it creates upwards convergence and fills gaps in protection, access to justice, support, prevention and coordination and cooperation; and (3) it aligns Union law with established international standards. Additionally, the proposal takes into account the recent phenomena of cyber violence against women.

Currently, no specific piece of Union legislation comprehensively addresses violence against women and domestic violence, the proposed Directive would be the first such act. The proposed targeted measures on criminal offence and victims' rights lay down minimum rules that would enable the Member States to set higher standards and leave flexibility for the Member States to take into account country-specific situations. In particular, the proposed Directive foresees, *inter alia*, to criminalise certain forms of violence that disproportionately affect women and that are not sufficiently addressed at national level and fall within the Union's remit, based on existing legal bases.

Against this background of the original proposal, the LIBE and FEMM Committees are proposing to insert a new Article 6d which would specifically criminalise sexual harassment at work: “*Member States shall ensure that intentionally engaging at work or in the context of access to employment, self-employment, vocational training or promotion, in serious unwanted conduct of a sexual nature, with the purpose or effect of violating the dignity of another person, is punishable as a criminal offence.*”

This seems to be inspired by the so-called “gender equality directives” (Directive 2004/113/EC⁸ and Directive 2006/54/EC⁹). Those directives define sexual harassment in similar terms that the one proposed by LIBE and FEMM Committees and prohibit it as discrimination.

The Commission did not propose criminalising sexual harassment at work, deeming, in Recital 4, that the proposed “*Directive should apply to criminal conduct which amounts to violence against women or domestic violence, as criminalised under Union or national law. This includes the criminal offences defined in this Directive [...] and criminal conduct covered by other Union instruments [...]. Lastly certain criminal offences under national law fall under the definition of violence against women. This includes crimes such as [...] sexual harassment [...]*”. In point 2 of the explanatory memorandum to the proposed Directive, under “Legal basis”, it explains the choice of Article 83(1) TFEU as legal basis as follows: “*The*

⁸ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373, 21.12.2004, p. 37).

⁹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ L 204, 26.7.2006, p. 23).

term ‘sexual exploitation’ in Article 83(1) TFEU can be understood as any actual or attempted abuse of a position of vulnerability, differential power or trust, including, but not limited to, profiting monetarily, socially or politically from a sexual act with another person. The exploitative element can refer to the achievement of power or domination over another person for the purpose of sexual gratification, financial gain and/or advancement.”

V – Analysis

The question, in essence, is whether the addition of new Article 6d requires an additional legal basis to the proposed Directive or whether it is not (i) already covered by Article 83(1) TFEU, and (ii) whether it is not merely incidental.

The scopes of the two legal bases in paragraphs 1 and 2 of Article 83 TFEU obviously differ. Paragraph 1 serves as the basis for criminal law measures in the areas expressly listed in its second subparagraph which contain, inter alia, sexual exploitation of women.

Article 83(2), on the other hand, enables criminalisation and sanctioning of other types of offences in order to ensure an efficient implementation of harmonised Union policies, also through criminal law.

Consequently, Article 83(1) TFEU seems to be the appropriate legal basis for criminal law measures that concern offences falling within its explicit scope. With regard to those measures, it is therefore not necessary to verify that the conditions laid down in Article 83(2) are fulfilled.

Sexual harassment in the world of work taken up in the suggested Article 6d, read in conjunction with the definition in Article 4, point (g), of the proposed Directive, is “*any form of unwanted verbal, non-verbal or physical conduct of a sexual nature, where it occurs in the course of, linked with, or arising in matters of employment, occupation and self-employment, with the purpose or effect of violating the dignity of the victim, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment*”. In order for the conduct to be punishable, it must be of sexual nature.

It follows from this that the conduct as proposed in Article 6d by the LIBE and FEMM Committees fits the definition of sexual exploitation in the Commission proposal, that is “*any actual or attempted abuse of a position of vulnerability, differential power or trust, including, but not limited to, profiting monetarily, socially or politically from a sexual act with another person*”.

The conduct in Article 6b would thus fall under the scope of Article 83(1) TFEU, one of the legal basis already chosen by the Commission for the proposed Directive.

It follows from the above that Article 83(2) TFEU should not be added as legal basis and that the examination of the second question, whether the component is merely incidental in relation to the main and predominant purpose, does not appear to be necessary.

VI – Conclusion and recommendation

At its meeting of 27 June 2023 the Committee on Legal Affairs accordingly decided, by 14

votes in favour, 4 against and no abstentions¹⁰, to recommend to the Committee on Civil Liberties, Justice and Home Affairs and the Committee on Women's Rights and Gender Equality not to add Article 83(2) TFEU as a legal basis for the proposed Directive.

Yours sincerely,

Adrián Vázquez Lázara

¹⁰ The following were present for the final vote: Adrián Vázquez Lázara (Chair), Sergey Lagodinsky (Vice-Chair), Marion Walsmann (Vice-Chair), Lara Wolters (Vice-Chair), Raffaele Stancanelli (Vice-Chair), François Alfonsi (for Marie Toussaint pursuant to Rule 209(7)), Pascal Arimont, Isabel Carvalhais (for Maria Manuel Leitão Marques pursuant to Rule 209(7)), Ilana Cicurel, Angel Dzhambazki, Andrzej Halicki, Pierre Karleskind, Gilles Lebreton, Karen Melchior, Luděk Niedermayer (for Jiří Pospíšil pursuant to Rule 209(7)), Emil Radev, René Repasi, Javier Zarzalejos.