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**European Added Value**  
**of a Directive on combatting violence against women**

**ANNEX II**

**Economic aspects and  
legal perspectives for action at EU level**

**Research paper  
by Prof. Sylvia Walby  
and Philippa Olive**

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## **Part I**

# **Economic aspects of the added value of measures to combat violence against women**

**Research paper  
by Sylvia Walby and Philippa Olive**

### **Abstract**

The paper investigates the economic cost of violence against women for the EU and compares the costs of action and inaction. Violence against women is estimated to cost the EU EUR 226 billion each year, including EUR 45 billion for services and EUR 24 billion in lost economic output. The costs of preventive measures are substantially less than the cost of the violence.

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## Executive Summary

Violence against women costs the EU EUR 226 billion each year.

The cost is estimated using methods that are found from a review of the relevant literature.

There are three major components of the cost: services, lost economic output, and the pain and suffering of the victims. Services include criminal and civil legal systems, health services, and specialised support services. The cost of services is largely borne by the state, or by the public through the pooling of costs through insurance. Lost economic output is a consequence of injuries leading to lost days of work. The public's willingness to pay to avoid pain and injury is included since it is a part of cost-benefit exercises in adjacent policy fields, such as, road building and other forms of crime.

The cost of services is EUR 45 billion; the value of lost economic output is EUR 24 billion; the value placed on pain and suffering is EUR 158 billion.

The estimates were developed using existing studies on the cost of domestic violence and other forms of violence against women in EU member States. Costs were extrapolated to the EU, based on population size.

The costs of inaction are high.

# 1 Introduction

The purpose of this paper is to contribute to an assessment of the added-value of adopting a comprehensive, legally binding EU instrument (in the form of a Directive) on combatting all forms of violence against women, by contrasting the effects and costs of action with those of inaction. The specific aim of the paper is the comparison of the costs of action with the costs of inaction. This is achieved by the identification of the components of the economic costs of violence against women in the EU, in its different forms, for the various stakeholders; the estimation of the costs of violence against women in the EU; and the comparison of the costs of violence against women with the costs of inaction.

Gender-based violence against women is a major harm and detriment to the quality of life causing pain and suffering. In legal terms it is both a form of gender discrimination, since it is violence that is disproportionately against women, and it is a violation of women's human rights. In terms of health, it is a major detriment to public health. In terms of the economy it is a significant detriment to economic productivity and output and to the potential for economic growth. Violence against women is a detriment to social inclusion.

The focus on the cost of violence against women is thus one among several possible foci when investigating its harms and the case for action. Cost is not the only or major reason for action, but it is nonetheless important. The purpose of comparing the cost of action and inaction is that it contributes to the assessment of the impact of proposed legislation. Costing violence against women enables this impact assessment to use the same tool, the same unit of assessment, as that for other policies, that is, money. It thus allows for the comparison of policies to combat violence against women with other policy priorities. In particular, it contributes to the assessment as to whether action at the EU-level is proportionate to the harm. Proportionality is a core aspect of the principle of subsidiarity in which decision-making should take place at the level of the Member State unless there is sufficient reason for EU-level action.

The methodology to measure the cost of gender-based violence against women is relatively new, developing over the last 20 years or so. It draws on the widespread use of cost-benefit analysis in adjacent policy fields. Data to support the analysis are developing, but remain uneven and with significant gaps. This means that current estimates are under-estimates of the impact of the harms.

In addition to this introduction, the paper has five further sections:

- methodology and literature review
- identification of the types of impact of violence against women;
- estimation of the cost of violence against women;
- comparison of the costs of the violence with the cost of measures to combat the violence; and
- concluding points.

## 2 Methodology

### 2.1 Review of literature

The method and data for this paper are drawn from many sources, following a review of relevant academic, policy and statistical literature. This review identified the categories into which violence can be divided, where data are to be found, and the analytic procedures to estimate the costs.

The literature reviewed includes: Chan and Cho (2010); Council of Europe (2012); Day, McKenna and Bowlus (2005); Heise et al (1994); Laing and Bobic (2002); Morrison and Orlando (2004); Walby (2004); and Willman (2009); and of studies of the costs of violence against women in selected countries, focused on the EU, Denmark: Helweg-Larson et al (2010); EU: Nectoux (2006); Finland: (Piispa and Heiskanen 2001); France: Nectoux et al (2010); the Netherlands (Korf, Meulenbeck, Mot and van den Brandt, 1997); Spain (Andalusia) Villagómez (2003; 2010); Sweden: Envall et al (2006); and UK (Walby 2004, 2009); with some extension to OECD and beyond: Australia (Roberts 1988; Access Economics, 2004; NCRVAW&C, 2009); Canada: Zhang et al (2013); Switzerland (Godenzi and Yodanis 1999); US (Miller et al 1996; National Center for Injury Prevention and Control 2003).

This paper especially draws on Walby's (2004) *The Cost of Domestic Violence* published by the UK Department for Trade and Industry, and quality assured by the UK Office for National Statistics.

The procedure is to identify the impacts of violence against women; estimate their size; estimate their cost; attribute these costs to different stakeholders; and then to scale up from Member State to EU-level. These costs are attributed to different stakeholders, in particular: state and public; business and economy; the victims. The methodology is dependent on sources of data as to the extent of violence against women; the use of services by victims; the cost of these services; the size of the impact on the employment of victims; and an estimation of a value of the pain and suffering.

The data to support the analysis are of uneven quality with gaps so that some costs cannot be measured. This means that the costs are an under-estimate. If it is not possible to robustly measure the size of the effect and the cost, then the paper errs on the side of caution and offers a conservative estimate. The impacts for individuals and wider society for which the precise scale of effects are not known robustly and thus not included in the costs are reported in Section 3. This may be regarded as an agenda for further research.

### 2.2 Defining violence against women

The subject of this paper is gender-based violence against women. The UN defines 'violence against women' as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including

threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life' (UN 1993).

There have been a variety of alternative approaches to the subject including: domestic violence against men and women; domestic violence against women; gender-based violence against men and women; and all forms of violence against women. Many of the issues of methodology needed for this study apply to each one of these various formulations so they are included in the review of literature and approaches. The calculation of the costs will make appropriate revisions to return to 'gender-based violence against women'.

## **2.3 Identifying the components of the cost**

The components of the cost of violence against women are derived from the literature. The variations between studies are sometimes related to limitations of data sources and at other times to conceptual disagreements as to what should be included. There are different ways of identifying the categories into which costs fall, including for example, distinctions between: tangible/intangible. In this paper, the costs of violence against women identified in the literature are initially grouped into five types (following Walby 2004): legal; health; specialised support services; business/economy; and pain and suffering.

- Legal costs can be divided into the criminal justice and civil justice systems; the criminal justice system includes police, courts, prisons; civil legal costs includes specialised legal devices such as non-molestation or protection orders.
- Health costs can be divided into physical and mental. Aspects include: doctors, prescriptions for drugs, hospital care, ambulances.
- Specialised support services. These include: places of refuge and shelter, emergency housing, advice.
- Business/economy. This includes time lost from employment due to injuries.
- Pain and suffering. Accounts vary as to whether to include a sum to represent pain and suffering. Some include this as 'willingness to pay' to avoid this harm. Health-facing systems of analysis sometimes include DALYS, the loss of 'disability adjusted life years' (Heise et al 1994; Dolan et al 2005; WHO 2013), though not in EU studies.

In the latter parts of this paper, these five categories are reduced to three for ease of presentation: state and public services (primarily legal, health, specialised support services); lost economic output; pain and suffering of the victim.

## 2.4 Attributing the costs to different stakeholders

For the purposes of this report, which addresses the costs and benefits of action by the EU and Member States, the focus is on the costs to the wider society. The categories selected for attributing costs to different stakeholders are: the cost to the state/public; the cost to the economy/business; and the cost to victims. Categorised in this way, the costs to the wider society, those who are not direct victims of the violence, but who nonetheless pay a price for the existence of the violence are differentiated from the cost to the victim.

## 2.5 Methods used to identify size of impacts and attribute a monetary value

There are several approaches to the identification of the size of the impacts and to the attribution of a monetary value to these. These include: expert judgement; victim recall studies; surveys; administrative data; statistical correlations; parallel studies of similar harms. It is common for any given study to use different approaches to the measurement of different kinds of costs.

**Expert judgement: asking experts what they think are the services used and how much** (e.g. Nectaux 2006). This approach was used in early studies and has the advantage of simplicity and ease. But it is not reliable, since it is little more than well-informed speculation. It is not used in this paper.

**Victim recall studies: using in depth interviews with a relatively small number of victims to recall which services they used and how much** (Roberts 1988). This approach may appear to be useful in its utilisation of the experiences of survivors, but it is severely limited by the absence of information as to the representativeness of these experiences. It is not used in this paper.

**Surveys: asking a representative sample of the population whether they have been victims of violence; nature of the impact; and what services they used and how often.** This approach is useful and important in ascertaining the extent to which the major forms of violence against women exist in the general population and the nature of their impact. It is much less reliable for discovering less common forms of violence (e.g. FGM, forced marriage since sample sizes of victims of these forms of violence are usually too small to be representative) and also for discovering the extent of service use partly because most victims do not use services so the sample size can be smaller than is needed to determine whether the findings are representative and partly because most surveys ask only about service use immediately after an incident, but service use that is repeated or prolonged is poorly captured. Survey methodology is recommended for discovering the extent and nature of the major forms of violence, but not for less common forms of violence against women, and only to be used with caution for the extent of service use where there is no

other method. In this paper, surveys are used to discover the extent of the major forms of violence against women and the nature of the injuries caused.

**Administrative data from services: investigating the extent of use of services by victims using data from administrative data from services.** This approach is useful for estimating the use and cost of services, but only if it is possible to identify the proportion of service use that is by victims of violence against women. It is often necessary to patch together data from several different sources in order to make the calculations needed. In this paper, administrative data are used in the estimates of the size and cost of use of legal, health and specialised services.

**Statistical analysis of correlations: investigation of the correlation between violence against women and harmful consequences using statistical analysis of large data sets** (see Willman 2009). This approach has been used in an attempt to measure the impact of violence against women on their employment. While this is a potentially powerful methodology, in practice it is weak partly because there are few if any data sets containing the relevant information at a sufficiently high level of quality, and partly because the causal pathways may not be direct and are unlikely to take a simple linear form. For example, it is difficult if not impossible to ascertain whether violence causes unemployment or unemployment causes violence in a cross-sectional data set. In this paper, this approach is not used since there are not the data to support it.

**Parallel studies of similar harms: Extrapolation from the costing of similar harms that have been studied for other purposes.** This approach is useful in linking the costs of violence against women to costs of other harms that have been authoritatively established and benchmarked elsewhere. In particular, 'injury' is a form of harm that is included in cost-benefit analysis in other, longer established, policy fields. Injury is of interest to authorities engaged in cost-benefit analyses of policies to reduce and prevent their causes, including in: road traffic accidents, other forms of crime, and public health. This includes the cost of treating injuries, in health care. It also includes the value placed on the willingness to pay to avoid a given level of injury. In this paper, the cost of 'injury' established by governmental authorities is used in relation to health care and in relation to the willingness to pay to avoid it.

This paper therefore uses the following three approaches (following Walby 2004):

- **Surveys:** to determine the extent and nature of the major forms of violence against women.
- **Administrative data:** to determine the extent of use of services by victims of violence against women; and also to determine the cost of units of service.
- **Parallel studies of injury:** use of authoritative studies of the impact of physical injury on: lost working time; use of health care services; and the public's willingness to pay to avoid such injuries.

The base-line study for the discussion in the remainder of the report is Walby's (2004) *Cost of Domestic Violence*. This remains the most comprehensive study of the costs of

violence against women in a Member State of the EU. This study for the UK Department of Trade and Industry Women and Equality Unit reached the quality standards of the UK Office for National Statistics.

There are several points of comparison of similarities and differences between Walby (2004) and earlier and later studies: it has a more comprehensive range of items than most other studies, generating typically higher estimates of costs; it uses findings from administrative sources of the estimated as its main sources of data of service use rather than relying on expert or speculative judgements; it includes a cost for the pain and suffering of the victims, which many other studies exclude; it includes the cost of lost economic output based on in-depth studies of the impact of injuries over four years on lost employment which generates more reliable and higher estimates of days lost than other methods such as victim recall over the past year. Hence, while this study produces higher estimates of costs than other studies, it achieves this using only data that is robust.

### 3 Identifying the costs

There are three main types of costs of violence against women: services, lost economic output, the pain and suffering of the victims. There are three main types of stakeholders: the public/state, economy/employers, and individual victims. The section below draws on Walby (2004) which in turn drew on many earlier studies.

#### 3.1 Services

There are three main types of services that address violence against women:

- legal system: criminal and civil;
- health services: physical and mental;
- specialised services.

**Legal system:** There are two main parts to the legal system that are relevant: the criminal justice system and the civil legal system. The criminal justice system is engaged in the deterrence and punishment of perpetrators of violence against women, while the civil legal system is involved in the complex processes of disentangling relationships broken by violence especially in relation to children and property. The criminal justice system is the larger part of this and includes: the police; prosecution; courts; prisons and probation services, involving several kinds of legal professionals. The civil legal system is involved in processes of divorce, separation and child custody as well as offering specialised legal instruments variously known as protection orders, non-molestation orders, go-orders. Their work includes solicitors, courts and other legal professionals. Most of the costs of the legal system are borne by the state, though some smaller parts especially in the civil legal system are paid for by victims and defendants.

**Health services:** Health care services are used to treat the physical and mental injuries caused by the violence. The impact of violence on health may be immediate, but it can also be longer term. Health care involves costs in relation to doctors, nurses, ambulances, hospitals, and drugs. In some countries, such as the UK, most health care costs are borne by the state; in others countries, the costs are borne by the public through the pooling of health care costs through the device of insurance (as the use of health care services increases, so too do the costs of insurance for the public).

**Specialised services:** There are several specialised services that respond to particular needs, including refuges/shelters, emergency housing, specialised advice and social services. An extensive range of services has developed across the EU (EIGE 2013). Refuges/shelters are specialised residential locations where victims can find immediate safety. There can be special access to various forms of emergency housing. Specialised advice and counselling to victim-survivors as they seek help and rebuild their lives are important. The mainstream social services sometimes offer support to children in situations where there is abuse of both children and women. While some of these services



were started by non-governmental organisations, more recently most are funded in some way by the state.

**Other interventions:** There are a range of further interventions, including education/media campaigns, increasing women's economic independence, gender-balance in decision-making in relevant policy arenas, research to inform public policy improvement. However, reliable estimates of their costs were not available, so they are not included in this paper.

### **3.2 Economy**

Violence against women reduces economic output (Lloyd 1997). The most direct effect is through injuries from the violence that leads to time off from work. This loss of working time reduces economic output. In addition to the direct effect of injuries on working time, there can be reduced productivity through reduced concentration at work. The losses are to the economy as a whole, with ramifications for the society as a whole. In a more immediate sense the losses are borne by both the worker and the employer, since in some circumstances there are losses in wages, while in others the employer absorbs the occasional days of absence.

### **3.3 The value/cost of pain and suffering**

Gender based violence against women generates pain and suffering. There are human and emotional costs to the violence. Should a price be placed on this? In parallel policy fields, including transport and other crime (Brand and Price 2000), a value has been included. In cost-benefit analyses of the building of new roads, there is an estimate included of the public's 'willingness to pay' to avoid the pain and suffering of the injuries that would be sustained in road traffic accidents if the new road was not built (Department of the Environment Transport and the Regions 1999; Department for Transport, Local Government and the Regions 2001; Mayou and Bryant 2002; McMahon 1995; Murray et al 1993). There are sophisticated analytic systems that link, or chain together, comparisons of what people would pay to avoid certain harms. If it is reasonable to include estimates of the public's willingness to pay to avoid injuries in road traffic accidents as a factor contributing to a decision as to whether to spend money on a new road, then it would seem reasonable to include such estimates in contributing to decisions as to whether to spend money on policies to reduce violence against women.

### **3.4 Additional impacts not included in the costs**

There are some costs where the amounts are hard to estimate, even though the fact of harm is beyond doubt. For example, while the long-term negative effects of domestic violence on children are widely noted, the quantitative data are not sufficiently robust to allow for an estimate of its costs to be included. Further, the cost of injuries to mental health is likely to be considerable, but this is hard to estimate with existing data. In addition, there are forms of gender-based violence against women that are not included,

such as FGM, forced marriage, trafficking for purposes of sexual exploitation, because of insufficient data. In these cases and others, this paper errs on the side of caution and reports on costs conservatively. The total figure is thus very likely to be an underestimate.

### **3.5 Attributing costs to stakeholders**

The costs are apportioned between different stakeholders: the public/state, economy/employers, and individual victims.

**State/public:** Most of the cost of services is paid by the state/public, though there are a few exceptions where victims pay small costs themselves. In relation to health this can be variously paid by the state or by the public. In the UK, most of the costs are borne by the state from general revenue; in many EU MS the costs are paid through an insurance scheme – these are effectively ‘public’ since they are pooled across the population; in all MS there are some private costs, these are small (as in the UK, where most costs are borne by the National Health Service that is free at the point of use, and private payments are either small co-payments for prescription-based medicines or voluntary spending on additional services), or moderate (e.g. some insurance-based schemes match payouts by the insurer with a moderate level of co-payments by the individual using the health service), rather than large as in countries such as the US.

**Economy:** lost economic output. Reductions in economic output are a loss to the economy as a whole and thus to the society as a whole. This is reflected in reductions to the Gross Domestic Product (GDP) of the MS and to GDP per capita (per person). There is a further way of attributing lost economic output, which is to divide it between the employer and the employee (as the proximate bearers of these costs).

**Victims:** The pain and suffering is borne by the victims.

## 4 Estimating the size of the costs

### 4.1 Introduction

While there are some variations in the cost of violence against women in different EU Member States, there are many similarities in its components. The method to estimate the costs of violence against women in the EU (EU-27) is to: identify the costs in the most comprehensive study currently available in the EU, up-dated and revised where possible and reasonable; and to extrapolate to EU-27 using data on variations where available and appropriate.

### 4.2 Baseline study

The costs estimated in the baseline study (Walby 2004) report are shown in Table 1a, below. There are three major types of costs:

- Costs to the state/public, including: a criminal and civil legal system; health services provided by the state or by insurance; specialised service provision; and further interventions to combat VAW.
- Cost to business/economy of lost working-time.
- Cost of pain and suffering to the victims.

**Table 1: Summary of costs in *Cost of Domestic Violence* (GBP million)**

Type of cost	State	Individual victim	Employers	Total Cost
Criminal Justice System	1,017			1,017
Health care (Physical)	1,206	15		1,220
Mental health	176			176
Social services	228			228
Housing and refuges	130	28		158
Civil legal costs	159	152		312
<b>All services</b>	<b>2,916</b>	<b>195</b>		<b>3,111</b>
Employment		1,336	1,336	2,672
<b>Sub-total</b>	<b>2,916</b>	<b>1,531</b>	<b>1,336</b>	<b>5,783</b>
Human costs		17,086		17,086
<b>Total</b>	<b>2,916</b>	<b>18,613</b>	<b>1,336</b>	<b>22,869</b>

Note: Costs estimated for one year for England and Wales, centred on 2001.  
Walby (2004) Table S.2, page 13.

The first transformation of the data is to translate from GBP pounds to EUR. (£1=€1.1532695 using EU convertor at 6/2011, Europa 2011). This is shown in Table 2.

**Table 2: Summary of costs in *Cost of Domestic Violence* (EUR million)**

Type of cost	State	Individual victim	Employers	Total Cost
Criminal Justice System	1173			1173
Health care (Physical)	1391	17		1407
Mental health	203			203
Social services	263			263
Housing and refuges	150	32		182
Civil legal costs	183	175		360
<b>All services</b>	<b>3363</b>	<b>225</b>		<b>3588</b>
Employment		1541	1541	3082
<b>Sub-total</b>	<b>3363</b>	<b>1766</b>	<b>1541</b>	<b>6669</b>
Human costs		19 705		19 705
<b>Total</b>	<b>3363</b>	<b>21 466</b>	<b>1541</b>	<b>26 374</b>

Note: Table 2 translated from GBP to EUR: £1=€1.1532695 using EU convertor at 6/2011, Europa 2011

For purposes of simplicity, in the following analyses, some of the costs are grouped into a smaller set of categories: the costs of criminal legal and civil legal are grouped together as legal; the costs of health care physical and mental health are grouped together as health; the costs of social services, housing and refuges are grouped together as specialised services; employment re-named economic output; and human costs re-named as pain and suffering. See Table 3 below.

**Table 3: Baseline study re-grouping costs by type and who bears it (EUR million)**

Type of cost	State/public	Victim	Employer	Total
<i>Legal</i>	1356	175		1532
<i>Health</i>	1594	17		1611
<i>Special services</i>	413	32		445
All services				3588
Economic output		1541	1541	3082
Pain and suffering		19 705		19 705
Total	3363	21 466	1541	26 374

Table 3 is a condensed version of Table 2 above.

The cost of domestic violence in England and Wales in 2001 was EUR 26374 million. The cost of domestic violence per person in the population was EUR 507 in 2001 in England and Wales, based on estimates of the population in England and Wales as 52 million (National Statistics 2002).

### 4.3 Revisions in order to calculate costs for gender-based violence against women in the EU in 2011

#### Introduction

This paper estimates the cost of gender-based violence against women in the EU in 2011. This requires the following revisions from the base-line study:

- a) Revising 'domestic violence against women and men' to 'gender-based violence against women', by deleting violence against men and adding sexual violence by non-partners;
- b) Up-dating the costs for inflation between 2001 and 2011;
- c) Extrapolating from 'England and Wales' to 'UK'
- d) Up-dating the rate of violence against women from that found in 2001 to that in 2011.
- e) Extrapolating from UK to EU27.

#### From 'domestic violence against men and women' to 'gender based violence against women'

In order to move from the costs of domestic violence against women and men to the costs of gender based violence against women, it is necessary to: delete the costs of domestic violence against men; add the cost of sexual violence and stalking against women by non-partners.

The costs of domestic violence against men are identified in the original report since costs had been disaggregated by sex, so the following costs are removed: Legal (criminal justice system) EUR 153 million; health (hospital/ambulance: GPs, prescriptions for drugs) EUR 346 million; economic output: EUR 638 million; human and emotional costs: EUR 3700 million. (No separate costs for men were identified in other fields, e.g. social service costs were only for children of abused women). Table 4 shows the reduced costs after removing the costs for men.

**Table 4: Removing cost of domestic violence against men (EUR million)**

Type of cost	State/ public	Victim	Employer	Total	Costs for men	Costs for women
<i>Legal</i>	1356	175		1532	153	1378
<i>Health</i>	1594	17		1611	346	1265
<i>Special services</i>	413	32		445		445
<b>All services</b>				3588	499	3088
<b>Economic output</b>		1541	1541	3082	638	2444
<b>Pain and suffering</b>		19705		19705	3700	16005
<b>Total</b>	3363	21466	1541	26374	4837	21537

It is necessary to add the costs of sexual assault against women from non-partners. These are in two categories: serious sexual assault which is defined as rape and other forms of penetrative sexual assault; and less serious sexual assault, defined as 'unwanted sexual touching that led to fear, alarm or distress'. Around half of serious sexual violence (54% of rape; 47% of other penetrative sexual assault), is committed by a current or former intimate partner, according to the CSEW, so extending from domestic to all serious sexual assaults doubles these numbers from 37,000 to 74,000. Of the other forms of sexual assault, 11% was by current or former intimates, so including all such cases would increase the number of instances nine-fold, from 26,000 to 234,000. These multipliers – times two for rape, times nine for lesser sexual assault are applied to the costs. In criminal justice, the crime code is used to assist the adjustment. The additional costs of sexual violence against women from non-partners are shown in Table 5 below. As was shown in Table 4, most of the costs of services are borne by the state or public; lost employment time is lost economic output; while the cost of pain and suffering is borne by the victim; Table 5 offers a simplified presentation on this basis.

**Table 5: Adding sexual violence against women by non-partners (EUR million)**

Type of cost	Costs for violence from partners to women	Additional costs of sexual violence from non-partners to women	New total
<i>Legal</i>	1378	541	1919
<i>Health</i>	1265	35	1300
<i>Special services</i>	445		445
<b>All services</b>	3088	575	3664
<b>Economic output</b>	2444	652	3095
<b>Pain and suffering</b>	16 005	4515	20 520
<b>Total</b>	21 537	5742	27 279

Table 6 offers a further simplified presentation, grouping together the costs of different forms of services. It presents the costs in three categories: services paid for by the state/public; lost economic output; and the pain and suffering of the victim.

**Table 6: Summary costs for gender-based violence against women: state/public services, lost economic output, victim, England and Wales 2001**

Type of cost	EUR million
<b>State/public services</b>	3664
<b>Economic output</b>	3095
<b>Pain and suffering of victim</b>	20 520
<b>Total</b>	27 279

### Up-dating the costs for inflation between 2001 and 2011

Inflation means that the meaning of 2001 prices has changed by 2011. The Bank of England (2013) offers an on-line calculator to allow for the expression of prices in 2001 in 2011 prices. Table 7 expresses the costs for 2001 in 2011 prices, allowing for the average of 3.1% inflation.

**Table 7: Summary costs for gender-based violence against women: state/public services, lost economic output, suffering of victim, England and Wales, in 2011 prices**

Type of cost	EUR million 2001 prices	EUR million 2011 prices
State/public services	3664	4972
Economic output	3095	4200
Pain and suffering of victim	20520	27846
Total	27279	37018

### Extrapolating from 'England and Wales' to 'UK'

The estimates were based on England and Wales. In order to scale up to the level of the UK it is necessary to make some assumptions about the rate and costs of violence in England and Wales as compared with the rest of the UK (Scotland and Northern Ireland). There is insufficient robust evidence to support a claim that the rate and costs are different, so the assumption will be made these are the same.

The population of England and Wales (52,041,916) was 88.5% of the UK (58,789,194), in 2001. The UK population was 13% greater. Assuming the same rate of violence and proportionate costs, the cost of gender-based violence against women in 2001 was EUR 41830 million (in 2011 prices), as shown in Table 8 below.

**Table 8: Costs in England and Wales and in UK, 2001 (2011 prices) in EUR million**

Type of cost	England and Wales	UK
State/public services	4972	5618
Economic output	4200	4746
Pain and suffering of victim	27846	31466
Total	37018	41830

The cost of 'gender based violence against women in the UK in 2001' was EUR 41 828 million (2011 prices). The cost per person was EUR 712 (2011 prices).

### Up-dating for changes in the rate of violence between 2001 and 2011

There was a fall of 37% in the rate of domestic violence between 2001 and 2011 in England and Wales. Between 2001 and 2011 domestic violence reported to the main questionnaire of the Crime Survey for England and Wales fell from 626,000 incidents in 2001/2 to 391,000 incidents in 2010/11. This is a fall of 235,000 incidents; a decline in the

number of incidents of 37%. This is assumed to be similar across all forms of violence against women, since there is no evidence to provide a basis for estimates to the contrary. What does a 37% fall in incidents mean for costs?

Do services cost more or less? There is evidence suggesting that use of services has not declined. Indeed, there is evidence that victims are more likely to seek assistance than before. The CSEW shows that while in 2001/2 only 35% of domestic violence incidents reported to the survey were reported to the police, by 2009 this had risen to 47% (Walker et al 2009). Data from Women's Aid suggest that there has been no decline in their provision of refuges (Towers and Walby 2012). The assumption is that service provision is equivalent in 2001 and 2011.

Does lost economic output decline? If there is less domestic violence, it is likely that days taken off work for injuries sustained as a result of domestic violence will decline proportionately. The assumption is a decline of 37% in the cost of lost output.

Does pain and suffering decline? If there is less domestic violence, it is likely that pain and suffering resulting from domestic violence will decline proportionately. The assumption is a decline of 37% in the cost of pain and suffering.

On the assumption that the cost of services is static, that the cost of economic output declines by 37%, and that the cost of pain and suffering declines by 37%, there is a decline in the cost of gender-based violence against women from EUR 41830 million to EUR 28432 million for UK between 2001 and 2011 (see Table 9).

**Table 9: Costs of gender based violence against women UK, 2001 and 2011 (2011 prices), in EUR million**

Type of cost	UK 2001	UK 2011
State/public services	5618	5618
Economic output	4746	2990
Pain and suffering of victim	31 466	19 824
<b>Total</b>	<b>41 830</b>	<b>28 432</b>

### **Extrapolating from 'UK' to 'EU 27'**

There is more than one way to calculate the costs in the EU27 from estimates for the UK. One method is to assume that the cost per person/woman is the same in each member state. The calculation would then be a scaling up to the population size of EU27 from the UK. A second would be to revise the figure using available and appropriate data on differences between the UK and other parts of the EU. This requires a discussion as to the differences that are relevant and for which there is available data.

Are there differences in the rate of VAW between Member States? While there may be some variations between Member States, there is no robust evidence source as to the nature and extent of any such variation. While there have been several surveys of the extent of VAW in Member States, the methodology used is so divergent that no



conclusions can be drawn as to the differences in rates between countries in Europe (Hageman-White et al 2008). In the future, there is likely to be such an estimate, when the EU-wide survey on VAW currently being conducted by the EU Fundamental Rights Agency (FRA) reports, probably in 2014 (FRA 2013). Until this survey reports, there is no reliable evidence base on whether the rate is higher or lower in any country. Hence, the best assumption is that the rate of VAW in EU MS is the same everywhere. The use of administrative records of the extent of VAW, for example, those kept by the police, are serious under-estimates of the extent of VAW since many victims do not report to the authorities, in addition to it not being collected in comparable ways by Member States.

The best way forward is to take a figure from the survey that is the most robust, and use this as the basis for estimates in the EU. The most robust survey is the Crime Survey of England and Wales (formerly the British Crime Survey), in particular its specialised self-completion module. There is no data that would allow for a better estimate.

Are there differences in services and in service use between Member States? There has been a study documenting the nature of specialised services in each MS, but it is not available in quantitative form (EIGE 2013). It may be that future studies may gather information in a comparative quantitative form, but this does not yet exist. The administrative data on public services (legal, health, housing, social work) that address violence against women is not available in comparative quantitative form. Many services are used as a consequence of violence, such as hospitals, without reliable records of the reason that the services are used. In many countries there is little knowledge as to the extent to which mainline public services are used as a consequence of VAW. So, there is insufficient robust quantitative data on the extent of the differences between Member States to include this in the calculations. Hence there is no adjustment for any differences in the cost of providing services between countries.

Are there differences in economic value based on GDP? GDP is Gross Domestic Product, and is usually measured at either the level of the country, e.g. GDP for UK, or GDP per person, i.e. GDP per capita (loosely, income per person). There are differences in GDP per capita between EU Member States. But is it appropriate to use them to put a different value on VAW in each Member State? There is a parallel discussion in the literature that investigates the value of a statistical life. This is the implicit or explicit value placed on the life of an unknown person in cost-benefit analyses. The OECD (2012) has reviewed the practical and ethical issues concerning this estimation focused on the policy fields of environment, health and transport for the OECD, which includes many EU Member States. The OECD estimated that the value of a statistical life in the EU-27 in 2005 was centred on \$US3.6m, with a range from \$US1.8m to \$US5.4m. OECD (2012: 15) recommends that variations in income should not be used in analyses that involve the 'value of a statistical life' due to a concern for equity: 'Income: No adjustment within a country or group of countries the policy analysis is conducted for (due to equity concerns).' Put simply, the recommendation is that the lives of rich people should not be treated as if they are more valuable to society than the lives of poor people. The few adjustments recommended by the OECD concern changes over time (in inflation and GDP per capita). The arguments of the OECD that no adjustment is made for differences in average GDP per capita in Member States are convincing.

However, if the OECD recommendation were rejected, for example, as a result of an argument that the price of services varies between countries, then further calculations are necessary. In some countries the cost of the same set of services may be higher or lower than in others, and the cost of the same number of days of lost employment may be higher or lower if that employment generates higher or lower valued production. If variations in GDP were to be taken into account, it would mean that the cost of VAW (services, lost economic output, pain and suffering) in the UK should be adjusted in proportion that the GDP per capita were higher or lower in the rest of the EU. In 2011, the GDP per capita in the UK was slightly higher than that in EU 27 - Eurostat (2012) finds that if the GDP per capita of the EU 27 is taken to be 100, then that of the UK is 108. Thus if costs were to be adjusted by GDP, then the overall cost to the EU should be reduced by around 8%. The UK is sufficiently close to the EU average GDP per capita that this is not a large adjustment.

This paper accepts the OECD recommendations hence no adjustment is made for differences in average GDP per capita in Member States. It benchmarks the extrapolation from UK to EU27 on a population basis, treating each person in the EU as of equal value, rather than on GDP per capita basis.

The cost of gender-based violence in the UK in 2001 was EUR 28432 million. The size of the UK population in 2011 is 63,182,000 (ONS 2012). The cost per person for gender based violence against women is EUR 450 in the UK in 2011. The population of the EU 27 in 2011 is: 502,369,211 (Eurostat 2013a). This is 7.95 times larger. As Table 10 shows, the cost of VAW in the EU is EUR 226,035 million, or EUR 226 billion. This is EUR 450 per person in the EU.

**Table 10: Annual Costs of gender based violence against women EU 2011 (EUR million)**

Type of cost	UK	EU
State/public services	5618	44 663
Economic output	2990	23 771
Pain and suffering of victim	19 824	157 601
<b>Total</b>	<b>28 432</b>	<b>226 035</b>

Table 10 presents the best estimates of the annual costs of gender based violence against women in the EU, centred on 2011. The forms of violence included are those that are most numerous: domestic violence, sexual assault and stalking. It does not include other forms of violence, such as, FGM, forced marriage, and trafficking, hence is an under-estimate of the costs. It includes the cost of the use of major public services, including legal, health, housing as well as the much smaller cost of specialised services. It includes the cost of lost economic output insofar as this is captured by time lost from employment due to physical injuries, but does not include the impact of mental injuries on capacity to sustain employment, not second generation costs borne by children whose capacity is diminished by the violence, because data limitations do not enable these costs to be captured robustly.

## 5 Comparing costs of violence and the costs of measures to combat the violence

The cost of inaction is EUR 226 billion a year.

The cost of gender-based violence against women to the EU has been established in the preceding section as EUR 226 billion a year. This includes EUR 24 billion of lost economic output. It further includes EUR 158 billion as the value the public places on avoiding pain and suffering for equivalent injuries and EUR 45 billion a year in services. The value of GDP of the EU as a whole is EUR 12,638 billion (Eurostat 2013b).

The cost of existing measures to combat violence against women is EUR 45 billion a year, on the assumption that the concept of 'combat violence against women' is treated as equivalent to 'services provided by the state/public to address violence against women'. These services are the criminal justice system, civil justice system, health care, emergency housing, social services, and specialised services. They contribute to combatting violence against women in diverse ways, by reducing the likelihood of repetition of acts of domestic violence (e.g. police), by mitigating the harmfulness of the effects of the violence on victims (e.g. health care), by preventing damage to children (e.g. social services).

Further interventions have been recommended, for example, by the European Parliament in calling for a Directive on Violence against Women and by the Council of Europe (2012) in its Istanbul Convention. Many of the interventions called for involve the redirection of existing resources to where they are more useful, e.g. in changing criminal justice priorities, rather than resourcing entirely new services. The cost of innovative specialised services is small as compared with the cost of mainline services in which VAW is one part of their work.

Increasing measures to combat violence against women would reduce some of the costs to society of the violence. For example, it would reduce the lost economic output. This is a minimum estimation of the economic output that is lost as a result of gender-based violence against women, since it includes only time off work because of physical injuries. The estimate would have been higher if some of the more indirect adverse effects on productivity had been included.

## 6 Concluding points

Violence against women is a major cost to European society and economy. The cost to the EU of gender-based violence against women in 2011 was estimated at EUR 226 billion.

This figure includes the cost of public and state services, of lost economic output and a value attached to pain and suffering.

This figure is likely to be an under-estimate since some of the harmful effects that were identified were excluded from the costs where the quantitative data were not strong. The costs for mental injuries are underestimated, while the long term effects on children and the implications of further forms of gender-based violence against women such as FGM and trafficking are not included.

While the economic perspective is only one way among others to consider the implications of violence against women for policy, it is nonetheless an important one with significant implications for EU-level policy. Actions to reduce violence against women additionally help to reduce social exclusion. The concept of cost is best understood as closely related to the concept of harm: harm to people, harm to the economy, and harm to the society. The cost enables us to see the wider ramifications of violence to individual women for everyone.

An economic lens shows that VAW is a detriment to the economy, through reducing economic output. Actions to reduce VAW are of benefit to the economy by increasing output and productivity, and thereby increasing the likelihood of greater economic growth.

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## **Part II**

# **Legal perspectives for action at EU level**

**Research paper**  
**by Sylvia Walby**

### **Abstract**

The research paper assesses the European added-value of a directive to combat violence against women. It considers the extent to which the Treaties confer on the European Union the legal competence to develop a Directive on Violence against Women, reviewing the Treaties and the implications of the principle of subsidiarity. The paper concludes that there is scope for a directive and for other legal actions to combat violence against women.

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## Executive summary

This research paper assesses legal aspects of the European added-value of a directive to combat violence against women.

The paper investigates whether there are gaps between international standards and EU measures to combat violence against women. It identifies international standards on violence against women, both legally binding and those that are advisory, especially those developed by the UN and Council of Europe. It summarises existing EU measures to combat violence against women, including the recent wave of directives on specific aspects of violence, and identifies the legal bases under which these measures are legally justified. The paper concludes that, despite recent advances, there are significant gaps between international standards and existing EU measures.

The paper identifies the nature of EU legal competence, identifying the manner in which the division between Member State and Union-level action is drawn in relation to the conferral of powers by Member States under the principles of subsidiarity and proportionality.

The paper identifies two high level aims of the EU that justify action to combat violence against women: equality between men and women, including non-discrimination; and human and fundamental rights. Violence against women is both a form of gender discrimination and a violation of women's human rights, according to both international standards and those of the EU. This provides a necessary but not sufficient condition for action at EU level, which depends also on the conferral of powers.

The paper investigates fields, or policy areas, where there are several potential legal bases for a directive or other actions to combat violence against women: freedom, security and justice; employment and social inclusion; public health; external relations; and research and statistics. It investigates existing practice in the exercise of competence in these areas. It considers both the intersection of combatting violence against women and the policy area and the conferral of powers on the EU level in that area. In each field it draws conclusions as to the potential scope for a directive or other action.

Within the field of freedom, security and justice, a series of directives have identified specific aspects of violence against women as contrary to the proper functioning of the EU which requires the mutual recognition of and minimum standards for judicial judgements in criminal matters. Directives on trafficking, child sex abuse, protection orders and victims' rights have been developed using the legal basis of Article 82 of the TFEU (and for trafficking additionally Article 83). This field of EU action is underpinned by the EU commitment in the Treaty on the European Union to fundamental freedoms, human rights and human dignity. Specific competence for directives in criminal matters is limited to actions to support mutual recognition and judicial cooperation, with a focus on minimum standards to achieve this. There is scope for directives setting minimum standards to laws on rape (consent not force as the threshold; no marital exemption), and

on FGM (common definition), using the authority of TFEU Articles 82 and 83. There is scope for a directive on aspects of domestic violence through removing any marital exemption to the crime of assault, based on TFEU Article 82. Such directives would assist mutual recognition of judicial judgements, providing clarity and certainty, and would be proportionate since otherwise significant harms would be left unsanctioned.

Within the field of employment, a series of directives have defined harassment, both on the basis of sex and on the basis of sexuality, as constituting discrimination. Harassment and all forms of gender-based violence against women are forms of gender discrimination, and thus contrary to equal treatment and are illegal in the sphere of employment, as defined under EU law. The area within which this definition of harassment as illegal discrimination applies was initially limited to employment and was then extended to access to goods and services, with a parallel extension in the range of mechanisms to implement the law from individual complaints to tribunals and courts to national equality bodies to gender mainstreaming. Since harassment is a form of discrimination against women and so are other forms of gender based violence against women, there is scope for a directive that names all forms of violence against women to be forms of gender discrimination and illegal under EU law, so as to clarify the scope of the law, giving clarity and legal certainty. The legal competence to combat violence against women as a form of discrimination is firmly but narrowly based on TFEU Article 157, within the field of employment. Article 19 extends this competence to combat sex discrimination (which includes harassment and violence against women) to a wider range of fields, including the sale and distribution of goods and services, and potentially to further fields, though requiring the special rather than ordinary legislative procedure. A directive on violence against women could draw on either Article 157 or Article 19 TFEU, with different consequences.

There is further competence for EU-level actions to combat discrimination in Article 19 TFEU. This legal authority has been used to make illegal sex discrimination, including harassment, in the access to and distribution of goods and services. This legal competence to combat sex discrimination is not restricted to the field of employment, though its use does require a special rather than ordinary legislative procedure. Article 19 TFEU provides scope for further directives to make illegal sex discrimination including violence against women in fields beyond employment.

There are further legal bases for directives in other parts of the economic and social field relevant to combatting violence against women. There is scope for a directive to clarify that measures to support the reintegration into the labour market of those who have been excluded as a result of violence against women is within the competence of the EU, provided at TFEU Article 153. There is a scope to clarify that there is authority to use European Structural Funds to combat the social exclusion caused by violence against women, at TFEU Article 162. There is scope to clarify that the broad guidelines on economic and social policies issued by Council could include reference to violence against women, provided by TFEU 5. There is scope to clarify the regulations of the provision of specialised services to prevent violence against women and to support its victims stating that it is possible that such specialised services be designated services of

'general economic interest' rather than only 'economic interest' under authority provided at TFEU Article 14.

Within the field of public health, there is legal competence for actions short of legislation for support measures to combat violence against women. This has been drawn on to justify the Daphne initiative that exchanges best practice in order to reduce the detriment to public health caused by violence against women. In this field there is no legal competence for legislative action.

Within the field of external relations, there is legal competence for EU-level actions in pursuit of its values, provided at TFEU Article 214. This includes equality between women and men and the promotion of human and fundamental rights and hence to combat violence against women. While there are examples of this legal competence in action, legislative action to more clearly state that the framework for humanitarian aid includes combatting violence against women would add clarity and legal certainty.

Within the field of research and statistics, there is legal competence for EU-level actions to create a European research area and to provide statistics to support the pursuit of EU values and goals, provided at TFEU Article 338. This includes equality between women and men and human and fundamental rights and hence to combat violence against women. Since the utilisation of this legal competence has been relatively limited, legislative action could add welcome clarity and legal certainty that violence against women is an appropriate topic of EU-level research and statistics.

The EU has considerable, though far from unlimited, legal competence to combat violence against women. These legal competences are complex and not well understood. A directive on violence against women that clarified EU-level legal competence across these diverse policy fields would bring legal certainty and aid the EU in pursuit of its fundamental values. The primary legal authority for such a directive would be TFEU Article 19 and draw on the identification of harassment as illegal gender discrimination. An alternative, slightly narrower base for a directive would be TFEU Article 157, which is centred on a broad range of mechanisms to achieve equal pay. A further alternative is the use of Article 82 (and in some circumstances Article 83) to establish minimum standards in specified crimes of violence against women, in particular rape. In addition, in diverse other fields there are additional competences to act in ways that are important to combat violence against women, but which do not include legislation.

# 1. Introduction

## 1.1 Purpose and scope

The purpose of this research paper is to assess legal aspects of the European added-value of adopting legal measures to combat violence against women, including a directive.

Violence against women is a terrible reduction in the quality of women's lives. It is a form of gender discrimination, a violation of women's human rights, a detriment to the economy, social inclusion and to public health, already illegal within legal regimes including criminal ones, and pertinent to both internal and external relations of the EU.

The research paper addresses: the extent to which a legal measures including a directive are necessary to achieve the objective of combatting violence against women; it analyses gaps between the existing framework and instruments of EU policy and international instruments; it addresses the scope for legal action as provided by the Treaty of Lisbon; it considers a wide range of potential forms of legal action including directions; it draws conclusions on the necessity, consistency and legal basis of such a Directive, including its added value in ensuring better protection and enhanced legal certainty.

## 1.2 Calls for action

On the basis of the evolving competences attributed to the Union by different modifications to the EU Treaties and, lately, also referring to the Charter of Fundamental Rights, there have been numerous calls for action to combat violence against women by EU institutions especially by the European Parliament and the European Council, including those mentioned below:

### *European Parliament*

The European Parliament has repeatedly called for greater action to be undertaken by the institutions of the European Union to end violence against women, including Resolutions in 2009, 2011 and 2013 that call for a Directive on violence against women. The European Parliament Resolution of 26 November 2009 on the elimination of violence against women included a recommendation that the Council and Commission establish a legal basis for combatting violence against women and called on the Commission to draw up a more coherent plan for the EU to combat all forms of violence against women (European Parliament 2009a). The Resolution of 25 November 2009 on the Stockholm Programme called on the EU to bring forward a Directive and European action plan on violence against women (European Parliament 2009b). The 2011 Resolution called for a new and strengthened EU policy framework to fight violence against women including a Directive on violence against women (European Parliament 2011). Most recently, in its 2013 Resolution (European Parliament 2013) on the UN Commission on the Status of Women called for a Directive on violence against women, the Parliament:

reiterates its call on the Commission to propose an EU strategy against violence against women, including a directive laying down minimum standards.

### ***Council of the European Union***

The General Affairs Council of the European Union has issued EU Guidelines on Violence against Women (European Union, 2008) for use in external as well as internal relations. The Council of the European Union (2010) called for further efforts by the Commission to eliminate violence against women, naming a wide range of actions, including devising 'a European Strategy and a general framework of common principles and appropriate instruments' and to consider if 'additional legal instruments' were warranted. In 2011, the Council (2011) adopted the European Pact for Gender Equality (2011-2020), including its commitment to

Combat all forms of violence against women in order to ensure the full enjoyment by women of their human rights and to achieve gender equality, including with a view to inclusive growth.

### **1.3 Method of analysis**

Within the Lisbon Treaty, several Articles offer potential bases for a Directive and for actions short of a Directive on gender-based violence against women. The investigation of this issue requires discussion of the extent of the overlap between aspects of violence against women and legal principles including the legislative competence of the Union. There are four issues to clarify.

The first issue is the identification of aspects of violence against women that fall within the aims and competences of the EU and which are not yet addressed by EU measures. There is more than one aspect to violence against women: there are multiple forms; there are multiple dimensions that intersect differently with various policy fields and legal competences. This is addressed by: a summary of the extent and nature of violence against women, derived from authoritative studies (e.g. UN Secretary General's 2006 study); the identification of relevant international standards, both legally binding and advisory; a summary of existing EU measures; and an analysis of the gaps between international standards and EU measures. This analysis is provided in Section 2.

The second issue is the identification of the legal competence of the EU and its division between Union level and Member States. There is a question as to whether there is competence for action at the Union level. There may be competence to act at Union only, the Member State level only, or shared competence between the Union and the Member States. The Union has few competences that are solely its own and most of the competences in pursuit of the objectives of the Treaty are shared with the Member States. The powers of the EU are subject to the principle of conferral of power in the context of the principles of subsidiarity and proportionality. The implications and deployment of the concept of 'proportionality' are relevant to legal debates that involve the evaluation of the priority of competing principles. It has been deployed at several junctures: law and judiciary/democratic politics (Everson and Joerges 2012); legal certainty/case by case basis (Harbo 2010); pluralism/universalism (Barber 2006); balance of security with freedom and justice (Gibbs 2011). The concept of proportionality can also be used to

position evidence of the scale of the problem when weighing the balance of the argument on the necessity for intervention. The division of competences between the Union level and Member States vary between different policy fields, so this issue is pursued in relation to these different fields. There is a particular issue about the extent and nature of Union competence in matters that concern criminal law (Lööf 2006; Neagu 2009). Violence against women includes criminal acts, but is not only a crime. It is also gender discrimination, a detriment to the economy and to public health, linked to conflict and humanitarian emergencies, and a subject in need of research and statistics. See Section 3 for a discussion of these matters.

The third issue is the identification of the aims of the EU and their specification at two levels of generality: high principles, largely in the Treaty on European Union; and detailed fields of application of the principles, largely in the Treaty on the Functioning of the European Union. It is argued, drawing on previous studies, that violence against women is a form of inequality between women and men, a form of gender discrimination (MacKinnon 1979; Edwards 2008) and a violation of women's human rights (Bunch 1995; Merry 2006). For the purposes of this discussion as to the basis of a directive on violence against women, there is a further discussion of whether the high principles concerning equality and human rights located in the opening articles of the Treaty on the European Union can be brought into practical application in EU-level action by the identification of fields in which the EU has competence to act that are relevant to violence against women. This concerns the ways in which the EU gives practical expression to its high level commitments to fundamental rights (Fredman 2006), and to equality between women and men (Howard 2008) beyond the workplace (Masselot 2007, ter Haar and Copeland 2010). This discussion starts with the two high level principles of equality and human rights (see Section 4), then divides into detailed discussions of potential fields of legislative action (see Sections 5, 6, 7, 8, and 9).

The fourth issue clarifies the different legal issues in five fields of potential action: freedom, security and justice; economy and social inclusion; public health; external relations; research and statistics. In each field the paper discusses whether the Treaties offer the legal basis required for a directive, or only for EU-level action short of a directive such as the coordination of policies (e.g. Open Method of Coordination in social inclusion and health policies) and other soft law like recommendations to reach the objectives set out in the Treaties. While the focus in this paper is on directives, the significance of other mechanisms for achieving policy development is not to be ignored or underestimated (Blichner and Molander 2008; Sabel and Zeitlin 2008).

## **1.4 Structure of the paper**

Following this introduction, the second section of this paper identifies the nature and scale of violence against women, the international legal and policy standards on violence against women, identifies EU measures to eliminate violence against women, and compares form the gaps between international standards and EU practice.



The third section considers the nature of legal competence in the EU including the limitations to the competence at the EU-level as a consequence of the principle of subsidiarity.

The fourth section identifies two high level legal principles that entail the Union's rejection of violence against women:

- equality between women and men, including non-discrimination; and
- fundamental rights.

Sections five, six, seven, eight and nine identify and discuss legal principles in the Treaty of Lisbon that express the Union's rejection of violence against women and offer scope for a possible directive or other legal measures. These five are:

- freedom, security and justice;
- effective economy, and social inclusion and cohesion;
- public health;
- external relations;
- research and statistics.

The final section offers conclusions on the necessity and legal basis for directives and other legal measures to combat violence against women.

## 2 Gaps between international standards and existing EU measures

### 2.1 Introduction

Are there gaps between international standards and existing EU measures, which a directive might address? There are several relevant international legal instruments and also several relevant international advisory standards on violence against women. The former are binding on the States that sign and ratify the relevant Conventions and Treaties. The latter are advisory, but the EU generally seeks to reach internationally agreed standards.

This section of the paper includes:

- The nature and scale of violence against women
- the identification of relevant international standards
  - legally binding; and
  - advisory;
- a summary of existing EU measures; and
- a comparison of existing practices in the EU with relevant international standards.

### 2.2 The nature and scale of violence against women

The definition of violence against women most often used in international settings is that of the UN Declaration on Elimination of Violence against Women, in Articles 1 and 2 of the 1993 UN General Assembly Resolution A/RES/48/104:

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

The scale of the problem of violence against women is immense. The extent and nature of violence against women around the world was documented in the UN Secretary-General's (2006) in-depth study. The World Health Organization produced a study of the specific impact of violence on health (WHO 2002). There have been numerous studies of the extent of violence in Member States of the EU, although the data they have produced is not directly comparable (Hagemann-White et al 2008). The forthcoming EU

Fundamental Rights Agency survey of violence against women in the EU will produce the first statistics on violence against women for the EU as a whole in 2014 (FRA 2011). One example of a Member State study, of gender-based violence in Britain (England and Wales) by Walby and Myhill (2004) found that 45% of women could recall being subject to domestic violence (abuse, threats or force), sexual victimisation or stalking at least once in their lifetimes; while in the year previous to their interview, 13% of women had been subject to one of these forms of violence (6% domestic abuse; 2% sexual abuse; 8% stalking – some multiply abused). The impact of violence against women on the economy and society as a whole is immense, costing the British economy an estimated GBP 23 billion in 2001 (Walby 2004). The estimate for the EU in the adjacent paper is EUR 222 billion.

When assessing the proportionality of actions to combat violence against women, the scale (13% of women abused in one year) and cost (EUR 222 billion) should be borne in mind.

## **2.3 Relevant legally binding international instruments**

Several international legal regimes have declared that violence against women in general and rape in particular is illegal. Violence against women has been addressed by international legal instruments of the United Nations and of the Council of Europe. The legal instruments of the UN include: the UN Convention for the Elimination of Discrimination against Women (CEDAW); and the Rome Statute of the International Criminal Court, and practice in international legal tribunals. The instruments of the Council of Europe include the European Convention of Human Rights and the rulings of the European Court of Human Rights that interpret the Convention; and the 2011 Istanbul Convention on preventing and combatting violence against women and domestic violence.

All EU Member States are party to the above treaties, conventions and resolutions. However, the Istanbul Convention, while adopted by all EU Member States is not, in 2013, yet signed and ratified by them all. The EU is not a party itself to any of these international instruments, although the Treaty of Lisbon means that the EU is bound to accede to the European Convention on Human Rights.

### ***UN Convention on the Elimination of Discrimination Against Women (CEDAW)***

Violence against women is a form of gender discrimination in international law. This is explicitly stated in the UN Convention on the Elimination of Discrimination Against Women (CEDAW). The concept 'discrimination against women' has meaning within the UN system as a consequence of its definition within the UN (1979) Convention on the Elimination of Discrimination Against Women (CEDAW) at Article 1:

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of

human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The UN CEDAW defines violence against women as a form of gender discrimination. The UN (1992) (CEDAW) General Recommendation 19 states:

Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. . .

The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.

### ***International Criminal Tribunals and Courts***

Sexual violence is prohibited by several international legal regimes, though its definition varies between them: international humanitarian law, international criminal law, and international law on war. All of these regimes prohibit acts such as rape, although often only indirectly by classifying sexual violence as torture, inhuman or degrading treatment. These legal regimes have established various courts, including the International Criminal Tribunal established for the Former Yugoslavia in 1993, the International Criminal Tribunal for Rwanda (ICTR) established in 1994.

The Rome Statute of the International Criminal Court recognises rape and other forms of sexual violence to be crimes under international criminal law. Article 7(1) g classifies as crimes against humanity

rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity . . . [committed] . . . as part of a widespread or systematic attack directed against any civilian population.

And in Article 8(2)(b)(xxii) classifies these same acts as war crimes.

### ***European Convention for the Protection of Human Rights (ECHR) and Fundamental Freedoms and the European Court of Human Rights (ECtHR)***

The European Court of Human Rights (ECtHR), which interprets the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 2010), has developed case law on violence against women, in particular on domestic violence and rape. It has done so despite the lack of explicit naming of violence against women within the Convention. The ECtHR has developed its jurisprudence for

domestic violence, supporting complaints of victims against the inaction of their own State. The presumption is that the Convention identifies the duties of states as the 'High Contracting Parties' to the Convention to act with 'due diligence' to guarantee these rights. The ECtHR has used Articles 2, 3, 8, 13 and 14 to address cases that pertain to acts of violence against women:

2. Right to life: Everyone's right to life shall be protected by law.
3. Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
8. Respect for private and family life: Everyone has the right to respect for his private and family life, his home and his correspondence.
13. Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.
14. Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The European Court of Human Rights has made judgements using the Convention in cases of domestic violence, rape and other forms of violence against women. Although there is no explicit mention of these categories in the Convention, the Court has interpreted cases of violence against women as meeting the criteria laid down in the Convention. In the case of domestic violence it has deployed Article 2 (right to life) in the cases of *Kontrovà v. Slovakia* 7510/04, *Branko Tomašić and others v. Croatia* 46598/06, *Opuz v. Turkey* 33401/02; Article 3 (prohibition of torture, inhuman and degrading treatment) in the case of *E.S. and others v. Slovakia* 8227/04; Article 8 (right to respect for private and family life) in the cases of *Bevacqua and S. v. Bulgaria* 71127/01, *E.S. and others v. Slovakia* 8227/04; *A. V. Croatia* 55164/08; *Hajduouva v. Slovakia* 2660/03; *Kaluczka v. Hungary* 57693/10; Article 13 (right to an effective remedy) in the case of *Kontrovà v. Slovakia* 7510/04; and Article 14 (prohibition of discrimination) in the case of *Opuz v. Turkey* 33401/02. In relation to rape it has supported complaints of victims of rape against the inaction of their own State by using Article 3 (prohibition of torture, inhuman and degrading treatment) in the cases of *Aydin v. Turkey* 23178/94, of *Maslova and Nalbandov v. Russia* 839/02, of *M.C. v. Bulgaria* 39272/98 and of *I.G. v. Republic of Moldova* 53519/07; Article 8 (right to respect for private life) in the case of *X and Y v. the Netherlands* 8978/80; and Article 13 (right to an effective remedy) in the case of *Aydin v. Turkey* 23178/94 (European Court of Human Rights, 2013). In its rulings on rape the Court uses the standard of 'lack of consent' rather than that of 'use of force' (see *M.C. v. Bulgaria* 39272/98).

The European Union will accede to the European Convention on Human Rights (ECHR), as noted in Article 6.2 of the Treaty on the European Union (TEU), and at that time its principles will apply to the EU:

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

Even before the EU accedes to the ECHR, the rulings of the European Court for Human Rights (ECtHR) have been considered a relevant benchmark (or resumé of European human rights) for judgements made by the EU's European Court of Justice (Morijn 2006).

***Council of Europe: Convention of the Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence (Istanbul Convention) (Council of Europe, 2011)***

The 2011 Istanbul Convention of the Council of Europe on Preventing and Combatting Violence against Women and Domestic Violence is a treaty, adopted (though not yet signed and ratified) by all Member States of the EU. It treats violence against women as both a violation of human rights and also as a form of discrimination against women. Article 3a states:

“violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.

The Convention creates a comprehensive legal framework that places a duty on states to prevent violence, to protect victims and to end the impunity of perpetrators. The Convention provides a detailed listing of integrated policies that are required to meet its standards. These include: comprehensive and co-ordinated policies, including financial resources to implement the policies, support for the work of civil society organisations in the field, establishment of national coordinating bodies, and the collection of data and research; measures to ensure prevention, including awareness-raising, education, training of professionals, preventive intervention and treatment programmes, participation of the private sector and the media; the protection and support of victims, including actions in the legal system, provision of information, general support services, assistance in complaints, specialist support services, shelters, telephone lines, support for victims of sexual violence, protection and support for child witnesses, encourage reporting including by professionals; the provision of remedies in civil law, compensation, safety in matters of custody of children, address the civil consequences of forced marriages; ensure the criminalisation of psychological violence, stalking, physical violence, sexual violence including rape (defined as lack of consent), forced marriage, female genital mutilation, forced abortion and forced sterilisation, sexual harassment, with effective, proportionate and dissuasive sanctions; take measures that ensure the implementation of these laws through investigation, prosecution, procedural law and protective measures, including, immediate response by law enforcement agencies, risk assessment and management, ensure the availability of emergency barring orders, restraining or protection orders, protect victims during judicial processes, provide legal

aid; ensure that the residence status of victims does not preclude justice, and that gender-based asylum claims can be recognised; states should cooperate with each other in these matters; a group of experts should monitor the implementation of the Convention.

## **2.4 Relevant international advisory standards in resolutions and codes of practice**

There are several resolutions and standards declared and set by UN bodies, agencies and conferences to which EU Member States contributed in their individual capacity that offer significant international advisory standards, although they are not strictly legally binding on the EU and its Member States. While these are not legally binding, international standards set by the UN are routinely adhered to by the EU and its Member States. Hence gaps between the standards set are pertinent when assessing gaps between the EU and international standards, even while it must be recognised that this is not legally essential. These include:

- the UN Universal Declaration of Human Rights (UN 1948);
- the 1993 Resolution of the General Assembly known as the Declaration on Violence against Women (United Nations General Assembly 1993);
- the 1995 UN Beijing Platform for Action (United Nations 1995);
- the 1996 World Health Assembly Resolution of the World Health Organization (WHO 2002);
- UN Security Council Resolutions (United Nations Security Council 2000, 2008);
- the UN Handbook on Legislation on Violence against Women (United Nations 2010); and the UN Handbook for National Action Plans on Violence against Women (UN Women 2012).

### ***UN Universal Declaration of Human Rights***

The principle of human rights is embedded in international standards of practice through the UN Universal Declaration of Human Rights. This states in Article 1 that 'All human beings are born free and equal in dignity and rights' and in Article 2 that everyone 'is entitled to the rights and freedoms set forth in [the UDHR], without distinction of any kind' including sex.

### ***UN General Assembly Resolution***

Resolution 48/100 of the UN General Assembly passed in 1993 contains several articles condemning 'gender-based' violence, which is defined in Article 1 as violence

'likely to result in...physical, sexual or psychological harm or suffering to women'

which can include

'threats of such acts, coercion or arbitrary deprivation of liberty.'

### ***UN Beijing Platform for Action***

Violence against women is one of the twelve critical areas identified in the UN Beijing Platform for Action of 1995 (UN 1995). The definitions used in the Platform are widely used in other Conventions:

112. Violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long-standing failure to protect and promote those rights and freedoms in the case of violence against women is a matter of concern to all States and should be addressed. Knowledge about its causes and consequences, as well as its incidence and measures to combat it, have been greatly expanded since the Nairobi Conference. In all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women.
113. The term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses but is not limited to the following:
- a. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
  - b. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
  - c. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

The Platform calls upon governments to engage in a series of actions:

- a. Condemn violence against women and refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination as set out in the Declaration on the Elimination of Violence against Women;
- b. Refrain from engaging in violence against women and exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- c. Enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society;
- d. Adopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders; take measures to ensure the protection of women subjected to violence, access to just and effective remedies, including compensation and indemnification and healing of victims, and rehabilitation of perpetrators;
- e. Work actively to ratify and/or implement international human rights norms and instruments as they relate to violence against women, including those contained in the Universal Declaration of Human Rights.



### ***World Health Organization***

The World Health Organization (WHO) is the health arm of the UN. WHO treats violence as an important issue of public health. The WHO (2002) has developed its analysis of violence, including violence against women, as an issue of public health, in a substantial study (WHO 2002). This is officially recognised in the World Health Assembly Resolution WHA49.25 in 1996:

declares that violence is a leading worldwide public health problem

All Member States of the EU are members of the WHO and thus individually party to this resolution.

### ***UN Security Council***

UN Security Council Resolutions 1325 and 1820 address the high rates of sexual violence in conflict zones by requiring action to increase the representation of women in decision-making in conflict zones (United Nations Security Council 2000, 2008).

### ***UN Handbooks***

The UN has issued guidance as to international standards in the development of legislation to combat violence against women (United Nations 2010) and in the development of national action plans on violence against women (UN Women 2012).

## **2.5 Existing EU Measures**

There have been significant developments in European Union law and policy on violence against women. Actions at the EU-level include Directives that refer to: harassment; trafficking; domestic violence protection orders; child sexual abuse; and the rights of victims. In addition, there are statements of intent in the strategy on equality between women and men (European Commission 2010a); the well-regarded Daphne programme that exchanges information and best practice (European Commission 2009); and studies by the European Gender Institute (EIGE 2012a, 2012b, 2013b) and the Fundamental Rights Agency (FRA 2011).

These are detailed below within the following categories: Directives; strategies; support programmes, such as Daphne; studies by the European Institute for Gender Equality; and a survey by the Fundamental Rights Agency.

### ***Directives***

A series of Directives have introduced new legal practices on specific aspects of violence against women and girls, including harassment, trafficking, child sexual abuse, protection orders, and victims', but not on violence against women overall. They are listed below, together with the legal authority on which they draw.

Harassment related to both sex and sexual harassment is included within the definition of discrimination in Directive 2002/73/EC on the implementation of equal treatment.

Although the definition of harassment remains constant to this day, the legal base identified as the authority for the illegality of harassment has changed, and the breadth of its field of application has widened in consequence. In 2002, Directive 2002/73/EC took as its basis Article 141(3) of the Treaty Establishing the European Community (today, this is Article 157(3) TFEU), which is focused on equal pay and with a field of application of employment (which includes, occupation and training) and under Article 8a the necessity of a national equality body or similar agency. In 2004, Directive 2004/113/EC, the field within which the harassment was illegal was widened under the legal authority of Article 13(1) of the Treaty of Amsterdam, so that it included processes of access to and supply of goods and services (today this is Article 19 TFEU). In 2006, Directive 2006/54/EC applied the illegality of harassment to 'occupational social security systems' (Article 1(c)) under the legal authority of Article 141(3) of the Treaty of the European Community, which focused on equal pay in the field of employment. In each of these directives, harassment is defined as a form of discrimination, as follows (Article 2, Directive 2002/73/EC):

1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
2. For the purposes of this Directive, the following definitions shall apply:
  - direct discrimination: where one sex is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,
  - indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,
  - harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,
  - sexual harassment: where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of the person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited.

Preventing and combatting trafficking in human beings and protecting its victims are the subject of Directive 2011/36/EU, deriving its legal authority from Articles 82(2) and 83(1) TFEU (European Parliament and Council 2011a). Article 1 states:

This Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of trafficking in human beings. It also introduces common provisions, taking into account the gender perspective, to strengthen the prevention of this crime and the protection of the victims thereof.

Combatting the sexual abuse and sexual exploitation of children and child pornography is addressed in Directive 2011/92/EU, deriving its legal authority from Articles 82(2) and 83(1) TFEU (European Parliament and Council, 2011b). Article 1 states:

The Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes. It also includes provisions to strengthen the prevention of those crimes and the protection of the victims thereof.

The European protection order, established by Directive 2011/99/EU, which has particular relevance to instances of intimate partner violence, derives its legal authority from Article 82(1)(a) and (d) TFEU which concerns judicial cooperation in criminal matters (European Parliament and Council, 2011c). Article 1 states:

This Directive sets out rules allowing a judicial or equivalent authority in a Member State, in which a protection measure has been adopted with a view to protecting a person against a criminal act by another person which may endanger his life, physical or psychological integrity, dignity, personal liberty or sexual integrity, to issue a European protection order enabling a competent authority in another Member State to continue to the protection of the person in the territory of that other Member State, following a criminal conduct, or alleged criminal conduct, in accordance with the national law of the issuing State.

The minimum standards on the rights, support and protection of victims of crime, established by Directive 2012/29/EU, include specific reference to the special needs of victims of gender-based violence; it derives its legal authority from Article 82(2) TFEU (European Parliament and Council, 2012). Article 1(1) of the Directive states:

The purpose of this Directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.

Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.

### ***Strategies***

The Commission 'Strategy for equality between women and men' includes 'violence against women' as one of its five priorities (European Commission, 2010a). The Women's Charter reiterates this commitment to action in the field of violence against women (European Commission, 2010b). The Advisory Equal Opportunities Committee of the European Commission (2010c) offered an opinion in favour of developing an EU strategy on violence against women and girls.

### ***Daphne***

The Commission has funded a programme to support the development and exchange of best practice by NGOs and other actors, known as Daphne; now in its third phase, 2007-2013 (European Commission 2009; European Parliament and Council, 2007).

### ***EU European Institute for Gender Equality***

The European Institute for Gender Equality (EIGE), established by the European Parliament and Council in 2006 as part of the aim to foster equality between women and

men, included gender-based violence in its work programme (EIGE 2013a) and has conducted several studies on aspects of violence against women including: a study to map existing data and resources on sexual violence against women in the EU (EIGE 2012a); a review of the implementation of the Beijing Platform for Action in the EU Member States in relation to support services for victims of violence against women (EIGE, 2012b); and a study on female genital mutilation in the EU (EIGE 2013b).

### ***EU Fundamental Rights Agency***

The European Union Fundamental Rights Agency (FRA, 2011) is conducting an EU-wide survey on violence against women.

### ***Summary of developments and their legal basis***

There have been very significant developments in EU provision to combat violence against women. A first wave expressed this in directives that defined harassment as a form of discrimination that was illegal in employment and training, and later also in access to goods and services. This action, focused on harassment as discrimination in employment and related civil law, drew on Articles in the Treaties on equal pay (now 157 TFEU) and on non-discrimination (now Article 19 TFEU). A second wave, following the Treaty of Lisbon, expressed this in directives that draw on provisions to assist the development of judicial cooperation in criminal matters (Articles 82 and 83 TFEU) and which embed a gender dimension into relevant fields of criminal law (trafficking, child sex abuse, protection orders, victims' rights).

## **2.6 Gaps between EU provision and international legal instruments**

Despite these advances, there remain significant gaps between existing EU provision and the international legal instruments and advisory standards.

Evidence on the extent and nature of actions at Member State level on violence against women has been collected by a number of studies and official means, including: European Court of Human Rights Factsheet on cases of violence against women before the court that includes instances where Member States of the European Union have fallen short of the legal standards of the European Convention on Human Rights (European Court of Human Rights 2013); European Institute for Gender Equality studies on resources to combat sexual violence in the EU (EIGE 2012a), on the implementation of the Beijing Platform for Action area on violence against women by EU Member States (EIGE 2012b), and on actions to prevent female genital mutilation by EU Member States (EIGE 2013b); and a Commission funded review of legislation on violence against women in EU Member States (Commission 2010d). These reviews have found considerable unevenness in actions, including in legislation, the implementation of the law in the criminal and civil legal systems, the provision of services to victims, and in the gathering of administrative data.

The Member States of the EU do not all reach the legal standards set by international bodies to which they agreed by ratifying the respective Conventions. Notwithstanding

the lack of a harmonised crime code, the ECtHR identifies the category of 'violence against women' (for example in its public statements, ECtHR 2013), as well as setting standards for categories of violations it names as 'rape' and 'domestic violence', despite these not being named as such in its authorising Convention. It is thus apparent that the ECtHR considers that there are concepts and categories of crimes of 'violence against women', 'rape' and 'domestic violence' that are sufficiently robust and widely understood in law and in practice to be relevant for deployment within its legal regime.

The ECtHR finds that some EU Member States do not meet the thresholds for the exercise by states of their responsibility for due diligence to protection individuals from human rights abuses. These instances include the threshold for the definition of rape that the European Court of Human Rights sets at 'absence of consent' rather than force (in the case of Bulgaria).

Further, many Member States of the EU do not reach the advisory standards set by international bodies of which they are members. Other research finds that Malta still retains a marital exception for rape, which is outside the standard set by the UN (European Commission 2010d).

The gaps between the EU Member States and international legal and advisory standards vary between different forms of violence against women. In particular, rape has been subject to legal regulation to a greater extent than the wider and newer category of gender based violence against women. Hence it is on occasion relevant to separate the discussion of gaps in legal and advisory standards on rape from those on gender based violence against women.

There are major gaps between actions in the EU (both EU-level and Member State-level) and those itemised in the Istanbul Convention of the Council of Europe to combat violence against women. The extent of the gaps is varied between Member States, some of which adhere more closely to the Convention than others, though it is beyond the scope of this report to itemise these in detail. It is not uncommon to find gaps in legislation to ensure the availability of criminal and civil legal remedies; the procedures and institutions necessary to implement the laws effectively; the provision of general and specialised support services to victims; and the availability of statistics and data on all forms of violence against women.

## 3 Legal competence of the European Union

### 3.1 Introduction

This section discusses the nature of legal competence in the EU, which is necessary to understanding whether there is competence to go further than existing actions and, in particular, to adopt a directive on violence against women. It reviews the nature of EU legal competence in the context of the principles of conferral, subsidiarity and proportionality.

### 3.2 What is a legal base for an EU action?

#### *Treaties*

The legal bases for EU actions are to be found in the Treaties that constitute its legal foundation.

The European Union is based on the rule of law. This means that every action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU member countries. For example, if a policy area is not cited in a treaty, the Commission cannot propose a law in that area. A treaty is a binding agreement between EU member countries. It sets out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its member countries (Europa 2013).

The legal foundations of the EU have been established by a series of Treaties that have been revised and consolidated into the Lisbon Treaty (2008/C115/01), which consists of two parts: the Treaty on European Union (TEU) (EU 2010) and the Treaty on the Functioning of the European Union (TFEU) (EU 2012).

These Treaties refer to some other Treaties and Conventions, but these clarify rather than extend the competencies of the Union. They include: international law and the principles of the United Nations Charter, in Article 3 of the Treaty on European Union, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 6 of the Treaty on European Union:

In its relations with the wider world, the Union shall . . . contribute to . . . the strict observance and the development of international law, including respect for the principles of the United Nations Charter (TEU, Article 3).

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties (TEU, Article 6.2).

#### *Directives*

A Directive is a legal act of the European Union, as defined in Article 288 of the Treaty on the Functioning of the European Union:

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

The European Union institutions may adopt other legal acts: regulations, decisions, recommendations and opinions. Regulations are binding and directly applicable; decisions are binding but only on those to whom they are addressed; recommendations and opinions have no binding force (Article 288 TFEU).

A Directive is usually brought into being by ordinary legislative procedures involving the Commission, Parliament and Council.

The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission (Article 289 TFEU).

Each Directive has a single legal authority, derived from one (or occasionally two) Articles of the current EU Treaty.

#### *Legal competence of the European Union: subsidiarity and proportionality*

The Member States confer competence on the European Union for specific purposes. The boundary between the competence of the European Union and of the Member States is identified by the principles of subsidiarity and proportionality in Article 5 of the Treaty on European Union.

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaty (Article 5 TEU).

The implication of these principles regulating the conferral of powers on the EU-level is that the EU can only create Directives if there is significant value added beyond that which individual Member States could achieve themselves. Most areas of competence are shared by the EU and the Member States, so the issue of added value is important, though not the only consideration.

#### *Legal bases cited in existing EU directives on aspects of violence against women*

The existing EU directives on aspects of violence against women draw on parts of four articles in the TFEU for their authority. The Directives (identified by their original number) are as follows:

Article 157(3): Directive 2002/73/EC on harassment (in employment)

Article 19: Directive 2004/113/EC on harassment (in access to and distribution of goods and services)

Article 82(1)(a) and (d): Directive 2011/99/EU on protection orders

Article 82(2): Directive 2011/36/EU on trafficking; Directive 2011/92/EU on child sex abuse; Directive 2012/29/EU on victims' rights

Article 83(1): Directive 2011/36/EU on trafficking

Article 157(3):

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

Article 19 TFEU

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 82(1)(a) and (d):

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;

(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Article 82(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.

Article 83(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, this 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.

This list of citations from the TEU and TFEU used by existing directives that combat aspects of violence against women does not mean that there are not potentially further articles of the Treaty of Lisbon that might be used for the purposes of directives to combat violence against women.

## **4 High level aims: equality between women and men; fundamental rights**

### **4.1 Introduction**

Violence against women is contrary to two of the EU's highest level aims: equality between women and men, and combatting sex discrimination; and fundamental and human rights. Violence against women is identified as a form of gender discrimination in international law (see discussion of General Recommendation of the UN Convention for the Elimination of Violence Against Women General Recommendation in section 2.4 above). The aim of reducing and eliminating violence against women is a necessary part of achieving the aim of gender equality. Violence against women is identified as a violation of women's human rights in the UN 1993 Declaration. This places a responsibility of due diligence to stop this violation on all parties to the UN Declaration.

The EU adopts equality between women and men, combatting sex discrimination and protecting fundamental and human rights as fundamental values in the Treaty of Lisbon. These are applied to all the activities of the EU. But, because of the division of powers between the Union and the Member State levels, the implication for the development of directives is a complex not straightforward issue. This section addresses the link between violence against women and these high level aims. Subsequent sections address the links between violence against women within smaller fields where the Union has legal capacity to act either alone or with Member States.

All EU Member States have ratified the European Convention on Human Rights so are individually bound to follow the rulings of the European Court of Human Rights. The jurisprudence of this Court, which has included rulings on various forms of gender-based violence against women including rape and domestic violence, thus affects Member States individually (for example the necessity to use the consent standard for the definition of rape if a state is to be considered to exercise due diligence in preventing torture means that several Member States are currently in violation of this Convention). When the EU accedes to the European Convention on Human Rights as required by the Treaty of Lisbon, this will raise issues at the EU-level, but the process of accession is not complete, so this issue is not included in the discussion below.

### **4.2 Equality between women and men**

The Lisbon Treaty includes legal provisions for actions towards equality between women and men, combatting discrimination and respect for human rights. These take a variety of forms, including some at a very high level within the Treaties.

Treaty on the European Union Article 2:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in

which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Treaty on the European Union Article 3:

The Union's aim is to promote peace, its values and the well-being of its peoples. . . .

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

The aim is not only to combat discrimination but to move towards the larger goal of equality between women and men. The aim to eliminate inequalities and promote equality between men and women is further specified in the TFEU Article 8. This article, referring to 'all' the 'activities' of the EU, provides the basis for the strategy of mainstreaming gender equality into all areas of EU activities, including policy formation and implementation:

In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Violence against women is a violation of women's human rights. This was established beyond doubt in international law by a Resolution of the UN General Assembly in 1993 (as above).

The aim of 'equality between women and men' has a high priority in the Treaty of Lisbon and is applicable to all areas of the competence of the Union. Since discrimination on the grounds of sex is under the current Treaties illegal in all activities of the EU, so gender based violence against women is illegal in all the activities of the EU in which it has competence to act. However, in accordance with Article 7 TFEU, this competence is in accordance with the principle of conferral of powers. Hence it is necessary to investigate the extent to which the Union has relevant powers, in the sections below.

### **4.3 Human Rights**

Human rights are identified as a fundamental value of the EU in the Treaty on the European Union (TEU) in Article 2:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

and in TEU Article 6, as a key aim:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. . . .

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

As TEU, article 6 notes, The *Charter of Fundamental Rights of the European Union* was first adopted in 2000 (European Union 2000) and in adapted form in 2007 by the European Parliament, Council and Commission (2007). Several of the fundamental rights articulated in the Charter are relevant to gender based violence against women. This includes:

1. Human dignity is inviolable. It must be respected and protected.
2. 1. Everyone has a right to life.
3. 1. Everyone has a right to respect for this or her physical and mental integrity.
4. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
5. No one shall be held in slavery or servitude.  
No one shall be required to perform forced or compulsory labour.  
Trafficking in human beings is prohibited.
21. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
23. Equality between women and men must be ensured in all area, including employment, work and pay.  
The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

While the TEU (EU 2010) refers to other international treaties and conventions (including the European Convention for the Protection of Human Rights and Fundamental Freedoms), it asserts that these are its own values and aims and hence there is no need to extend the competence of the EU in order to take account of the accession to these Conventions. Indeed all Member States of the EU have individually signed this convention.

#### **4.4 Conclusion**

Equality between women and men and respect for human rights are high aims of the Treaty of Lisbon and are of relevance to 'all' of its 'activities'. However, the competence to act in order to realise aims is carefully circumscribed in the procedures for the conferral of powers. It is necessary to investigate these in order to investigate the Union's competence for a directive.

## **5 Freedom, security and justice**

### **5.1 Introduction**

The EU seeks to establish an area of freedom, security and justice. The Treaty of Lisbon developed the description of the field of activities at the EU-level in relation to establishing an area of freedom, security and justice, consolidating the development of this competency from the Treaty of Amsterdam. There is only limited capacity in this field allows for the development of directives in criminal law. The field of freedom, security and justice contains, but is not confined to, criminal law. A significant part of the discussion as to the competence of the EU in relation to violence against women has focused the competence of the EU in relation to criminal law. While the question of EU competence in criminal law is addressed in this section, it does not provide a complete answer to the question of EU competence, since fields of law other than criminal law are also relevant.

### **5.2 Legal basis**

The area of freedom, security and justice is identified in the TFEU at Article 67.1:

The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

There is competence to develop judicial cooperation in civil legal matters based on the principle of mutual recognition of judgements in Article 81 of the Treaty on the Functioning of the European Union:

81.1 The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decision in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

This applies in Article 81.2 to

- (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases
- (b) the cross-border service of judicial and extrajudicial documents;
- (c) the compatibility of the rules in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

There is competence for judicial cooperation in criminal law in Article 82, based again on the principle of the mutual recognition of judgements:

82.1 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 judgements 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.

82.2 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.

For a specified set of crimes that are particularly serious and with a cross-border dimension or where there is a particular need to address them on a common basis, further competence is provided in Article 83. This includes aspects of violence against women in its inclusion of 'trafficking in human beings and sexual exploitation of women and children':

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 crimes 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. . . .

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.

In areas of crime that do not cross these thresholds of cross-border implications or specified forms of seriousness, there are weaker competences for the European Union, in Article 84:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

There follow references to the role of Eurojust, Europol and a wide range of measures to establish police cooperation, including data collection and staff training. Article 87.1 states:

The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

The EU appears to make a specific commitment to combat domestic violence. The Council of The European Union (2010) considers that Declaration 19 on Article 8 of the TFEU states should be interpreted as including a commitment to combat domestic violence and names it as a crime:

Declaration 19 on Article 8, whereby, in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence, and the Member States should take all necessary measures to prevent and punish these criminal acts and to support and protect victims.

The aim to combat discrimination on grounds of sex is additionally specified in the TFEU Article 10:

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Further, Article 19(1) of the TFEU allows for the adoption of directives to combat discrimination based on sex under the special legislative procedure:

Without prejudice to other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.

### 5.3 Use in practice

Since 2011, four directives have included aspects of violence against women and have cited parts of Articles 82 or 83 of the TFEU as their source of legal authority. The directive on 'trafficking' cited article 82.2 and 83.1, on 'child sexual abuse' Article 82.2 and 83.1, on the European protection order Article 82.1a and 82.1d, and on 'victims' rights' Article 82.2 (European Parliament and Council, 2011a, 2011b, 2011c, 2012). These directives are examples of the use in practice of the provisions of the TFEU to extend EU-level actions in the area of violence against women. These directives have provided minimum standards some areas of combatting violence against women across the EU at EU-level. This is in addition to the practice of mutual recognition of judicial judgments.

### 5.4 Gaps

These directives establish minimum standards in criminal law in some aspects of violence against women, but there are gaps in other aspects of violence against women. The competence of the Union to develop a directive on violence against women has been the subject of discussion and study.

A report published by the European Commission (2010d) suggested that there was little or no legal competence for the EU for legislative action in the field of violence against women; and that such legislation as might be pertinent would require a special legislative route that would be unlikely to be successful. However, this report is based on a flawed interpretation of the TFEU: it underestimates the significance of the need for legal clarity in cross-border judicial matters; it underestimates the significance of the cross-border dimension for crimes of violence against women; it underestimates the extent to which parallel legal authorities (the ECtHR) have already created an effectively harmonised field of crimes of violence against women in Europe.

The argument here is that there is legal competence. This argument is supported by the development of directives in several aspects of violence against women. It is further supported in the arguments below. There are two routes within the area of freedom, security and justice: a series of directives specialised on different aspects of violence against women (e.g. rape, FGM, domestic violence); or a single directive on violence against women. A third route is considered in the following section that discusses competence in the field of the economy.

The gaps between existing EU measures and international standards may be addressed one by one; or altogether in a more general initiative. This question will be addressed in relation to 'rape', FGM, 'domestic violence', and 'violence against women'.

#### Rape

In the case of rape, there is a specific case to be made for minimum standard of the definition rape for purposes of effective judicial cooperation when there is a cross-border issue in bringing an alleged offender to justice. Rape law is an area where there is a tendency towards harmonisation in the EU, but which is not yet complete according to



research (European Commission 2010d). There are established international standards used by the European Court of Human Rights drawing on the European Convention of Human Rights, which are also endorsed by the UN in its guidance on legislation (2010). These standards include the use of the threshold of 'consent' rather than the use of force, and the refusal of any exception by reason of marriage. Despite standards on the definition of rape being internationally recognised, there are still Member States that do not use them. One Member State, Bulgaria, was found in violation of the ECHR by the ECtHR (no. 39272/98) over the consent standard in 2003, while Kelly and Lovett (2009) and also European Commission (2010d) found several further Member States failing to meet this standard several years later. The marital exception is reportedly still in place in Malta (European Commission 2010d).

Legislative action on minimum standards for the definition of rape passes the several tests for the legal competence of the EU. Rape is a form of 'sexual exploitation of women', which is one of the forms of crimes explicitly named as open to this process. Further, rape can meet the criterion of having a cross-border dimension if the accused leaves the country in which the alleged rape had taken place before enquiries and prosecution are complete. Indeed, rape is one of the offences named in the Council Framework Decision as not needing the establishment of dual criminality before its use in the execution of the European Arrest Warrant (EAW) (Council of the European Union 2002). The instance of rape meets the criterion of a need to establish legal clarity. The absence of legal clarity on the legal definition of rape is a problem for judiciaries in the EU which is in need of remedy. This problem of lack of legal clarity on the definition of rape was one of the issues that entailed extensive judicial activity and several appeals on the occasion of the attempt by Sweden to use the European Arrest Warrant to achieve the surrender of Julian Assange to them by the UK judicial authorities (Royal Courts of Justice 2011; UK Supreme Court 2012). In this case, lawyers for Assange argued that there was a significant difference between the definition of rape used in the Swedish issued EAW and that used in the UK. Eventually the appeals all failed. Clarity in the definition of rape through the use of agreed minimum standards would have facilitated speedier judicial cooperation in this case.

There is a question as to whether the procedure to adopt appropriate legislative measures would require the 'ordinary legislative procedure' or whether it would require the 'special legislative procedure'. However, since rape is a form of 'sexual exploitation of women', is a 'serious' crime, and has 'cross-border dimensions' since the accused may well flee from such a serious charge, then it meets the requirements for the use of the 'ordinary' rather than the 'special' procedure.

It is concluded here that there is legal competence for a directive on rape, so as to ensure that there are minimum rules, namely a consent based definition and no marital exemption. It is needed for legal clarity in order to ensure mutual recognition of judicial judgements. The legal authority is TFEU Articles 82 and 83.

## **FGM**

Female genital mutilation is a form of violence against women. It meets the EU criteria for a directive. It is a serious crime in that it has irrevocable deleterious effects on women. It is a form of sexual exploitation of women, since it is intended to control women's sexuality. It can often involve crossing borders, since girl children can be taken abroad for the procedure to be performed. The pattern and extent of the practice in the EU are reported by EIGE (2013b). There is legal scope for a directive to set minimum standards so as to ensure the mutual recognition of judicial judgements. The legal authority is TFEU Articles 82 and 83.

## **Domestic violence**

The EU makes a specific commitment to combatting domestic violence, naming it as a crime that should be punished and victims should be supported (Declaration 19 on Article 8, above), though only within its competence and policies. Does domestic violence cross the various thresholds necessary to activate EU competence in a directive using criminal law? There are arguments in both directions. On the one hand, European Commission (2010d) suggests that the field of law is too disparate for such a venture. On the other hand, the EU has issued a directive in relation to domestic violence that addresses the mutual recognition of civil legal measures, those of protection orders. So it was considered a sufficiently serious crime, with sufficient cross border dimensions to be appropriate for a directive to secure mutual recognition of a legal instrument, the protection order. There is an argument for developing minimum standards in criminal law. The European Court of Human Rights (as noted above) has made rulings in cases that it categorises as domestic violence, even though it does so using the other legal categories that are available, so as to ensure that states exercise their duty of due diligence in protecting such victims. While recognising that domestic violence is not generally used as a legal crime category in EU Member States, action on a legal crime category that is in common use across the EU would achieve a similar remedy. This would be a directive to remove any marital exception to laws on assault and any other crime of violence against the person. This would help to put in a threshold or floor for Member States that is consistent with the rulings of the ECtHR. This speaks to the issue of domestic violence, while cognisant of the variety of legal traditions within which these crimes are located. While acknowledging that domestic violence is currently a legal category with disparate interpretations, such a minimum rule on a widely used crime category that is pertinent to this matter, would be of assistance in the effective prosecution of domestic violence in Member States, and improve the legal clarity that is necessary for effective judicial cooperation. The legal authority is TFEU Article 82.

## **Violence against women**

Is there legal competence for a directive on gender-based violence against women? The category 'violence against women' is relatively new and is not consistently codified in criminal law across EU Member States. There is an argument for the setting of the minimum standards of the criminal law in each of several forms of violence against women named first, before returning to review the category of violence against women

as a whole in criminal law. However, there is a stronger case that law is sufficiently developed for a directive to be appropriate. The European Court of Human Justice has established jurisprudence in this field, as noted above. There are UN handbooks of guidance, as noted above. The EU Daphne programme has for many years defined the field for purposes of funding the exchange of good practices. The EU Fundamental Rights Agency considers the field sufficiently settled to be able to fund an EU-wide survey on violence against women. All EU Member States treat aspects of violence against women as a crime in some way. These developments suggest that the field is sufficiently well defined for European-level minimum standards to succeed. In addition, violence against women is a form of gender discrimination that is relevant to other fields of competence in the EU, and a further case will be made for a directive under the EU's competence on the economy, next.

## **5.5 Conclusion**

The EU is developing an area of freedom, security and justice. While it leaves most of the action in this field to Member States, the Union level does have some competence in defined circumstances. The EU has recently developed four directives on specific aspects of violence against women since 2011 and largely uses TFEU Article 82 as the source of its legal authority to do so, with secondary use of Article 83. There would appear grounds to use these Articles for further specific aspects of violence against women, including: rape (TFEU 82, 83); FGM (TFEU 82, 83); forced marriage (TFEU 82, 83); and removing the marital exception in crimes of assault, thereby extending the protection of victims of domestic violence (TFEU 82). A directive on violence against women might also have a legal authority under TFEU 82, though the case here is more tenuous since the claim that this is an existing field of criminal law is less strong. In addition, it is important to note that criminal law is only one of several forms of law relevant to the elimination of violence against women.

## **6 Economy, non-discrimination and social inclusion**

### **6.1 Introduction**

The European Union intervenes in the economy in order to pursue balanced economic growth, full employment and social progress, among other goals. Aspects of violence against women intersect with aspects of these goals for the economy; and at such points of intersection there is sometimes competence for the EU to act to combat violence against women, either through legislative action leading to directives or through actions involving other measures.

The most important example of EU interventions in violence against women is its treatment of harassment as a form of discrimination against women that has been addressed through directives on equal treatment and non-discrimination, both in the field of employment and in the sale and distribution of goods and services. There is scope to consider the further utilisation of this approach in a directive to combat violence against women.

The goal of full employment is challenged by violence against women that reduces women's capacity for employment, leading to their social exclusion. There are potential EU-level instruments to address this impairment to women's capacity for employment, including: measures to assist the reintegration into the labour market women subjected to such violence; the deployment of the social and structural funds to combat such social exclusion; and the refinement of the broad guidelines that assist the coordination of the economic policies of Member States produced by the Council.

An indirect effect of EU measures to create balanced economic growth has been the restructuring of the commissioning of the specialised services to combat violence against women within the economy; within the competence to regulate services there is scope for action to assist actions to combat violence against women.

The cost of violence against women to the economy through its detriment to women's employment is relevant to the consideration of the proportionality of measures to combat violence against women. Violence against women is a cost to business (time lost due to injuries; lower productivity due to distractions e.g. attending court, moving house) and a further cost to business in the taxes needed to pay for public services (health, criminal justice system); so reducing this cost would improve business performance and the economy (For more details, see Walby 2004 and also Walby and Olive 2013). Violence against women reduces their employment, since injuries and the need to move can make it harder to stay employment; hence it is a form of social exclusion, since those affected are less able to participate in employment and the full range of social life. Reducing violence against women would thus be of benefit to the performance of the economy, to the goals of full employment and economic growth and would increase social inclusion.

## 6.2 Legal basis

The high level principles that justify intervention into the economy by the Union are found in TEU Article 3.3, which states:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

There are several further articles in the TFEU that potentially provide the scope for the Union to act to combat violence against women in the broad field of the economy, non-discrimination and social exclusion. These are: TFEU Articles 5, 14, 19, 153, 157, 162. Their potential application is investigated in the sections below on:

- Harassment as discrimination: Articles 19, 157;
- Reintegration into the labour market: Article 153;
- European Social Fund: Article 162;
- Broad economic guidelines: Article 5;
- Specialised services: Article 14.

## 6.3 Harassment as discrimination

The EU recognises harassment related to the sex of a person and sexual harassment as forms of discrimination in the 2002 Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions which is based on article 157§3 (Council of the European Union 2002). The 2002 Directive identifies four forms of discrimination: direct, indirect, harassment and sexual harassment in Article 2.

For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

For the purposes of this Directive, the following definitions shall apply:

direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,

indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary,

harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,

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

Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited.

A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.

An instruction to discriminate against persons on grounds of sex shall be deemed to be discrimination under the meaning of this Directive.

Harassment, as defined by this Directive, logically includes all forms of gender-based violence against women, although this phrase was not used in the definition of harassment. Since harassment is defined as 'unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment,' and sexual harassment is different only in specifying the nature of the conduct as any unwanted 'verbal, non-verbal or physical conduct of a sexual nature' it is hard to imagine that any form of gender based violence against women would be considered not to be within one of these definitions.

In so far as discrimination is illegal in the EU, then harassment is illegal in (some fields of activities of) the EU. In so far as harassment is illegal in the EU, then gender based violence against women is illegal in the EU (in specified fields of activity) in the EU.

The field for the application of this ruling on harassment is broader today than in the first directive that made harassment illegal. At the time of initial definition of harassment as illegal discrimination in Directive 2002/73/EC, the field of application was employment, although broadly defined. In 2002 the field of application is the same as that in Article 1 of the 1976 Directive and is limited to access to employment, promotion, vocational training, and working conditions with progressive application to social security:

The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as 'the principle of equal treatment'.

With a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council, acting on a proposal from the Commission, will adopt provisions defining its substance, its scope and the arrangements for its application.

In 2004, the field of application of the ruling that harassment was illegal was extended. The Treaty of Amsterdam introduced new powers to combat discrimination in Article 13. Directive 2004/113/EC drew on the former Article 13 of the Treaty of Amsterdam, now Article 19 TFEU (rather than 157§3 as for the 2002 Directive), to extend the field of application of this prohibition of harassment, additionally including access to and supply of goods and services, stating in Article 1:

The purpose of this Directive is to lay a framework for combatting discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.

Directive 2006/54/EC clarified the law and the inclusion of occupational social security schemes within its remit. It extended the range of mechanisms to implement the principle of equal treatment to include 'equality bodies' (Article 20), 'social dialogue' (Article 21), 'dialogue with non-governmental organisations' (Article 22) and 'gender mainstreaming' (Article 29).

20.1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.

21.1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

22. Member States shall encourage dialogue with appropriate non-governmental organisations which have, in accordance with their national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex with a view to promoting the principle of equal treatment.

29. Member States shall take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

Directive 2010/41/EU extended the principle of equal treatment to the self-employed.

There is legislative competence to issue directives to secure equality between women and men, which includes harassment and other forms of violence against women, since these are forms of gender discrimination. The legal authority is found in TFEU Article 19 on non-discrimination as well as in TFEU Article 157 on equal pay. Under the authority of Article 19 TFEU, the range of mechanisms that Member States must utilise to combat harassment include: 'equality bodies', 'social dialogue', 'dialogue with non-governmental

organisations' and 'gender mainstreaming'. The field to which the directives that include harassment have been applied under Article 19 TFEU includes: employment, including training; occupational social security, self-employment, access to and supply of goods and services.

## **6.4 Reintegration into the labour market**

The EU has the goal of full employment. For example, TFEU Article 147 states:

The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.

The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities.

The goal of full employment is further reiterated in the context of social policy, where it is supplemented by the goal of combatting exclusion, in TFEU Article 151:

The Union and Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed in Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion.

The competence to pursue the achievement of 'the integration of persons excluded from the labour market' is provided in TFEU Article 153.1 and explicit permission is given for directives in 153.2:

153.1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields . . . .

(h) the integration of persons excluded from the labour market, without prejudice to Article 166;

(i) equality between men and women with regard to labour market opportunities and treatment at work;

153.2. To this end, the European Parliament and the Council . . . .

(b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.

There is scope for the EU to develop directives and programmes to support the integration into the labour market of women who have been excluded as a consequence of violence against women provided in TFEU Article 153.



## 6.5 Social exclusion and the European Social Fund

Violence against women is a detriment to their employment and thus is a form of social exclusion. This has been noted in both studies and in the use of the open method of coordination on social inclusion and health. The review of violence against women in relation to gender equality, social inclusion and health strategies for D-G Employment, Social Affairs and Equal Opportunities (European Commission 2010e). There is reference to violence against women in the development of social policy within some National Plans of Action that are subject to the Open Method of Coordination on employment and social inclusion (European Commission 2010e).

There is competence to combat social exclusion in Article 153 TFEU, though this does not extend to a directive:

153.1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields . . . .

(j) the combatting of social exclusion. . . . .

153.2. To this end, the European Parliament and the Council . . . .

(b) may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States.

The EU has established a European Social Fund, at TFEU Article 162:

In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

Since violence against women is a source of social exclusion, the use of the social and structural funds to reintegrate women is justified. An example is the mobilisation of social and structural funds in Greece to support the reintegration into employment of women excluded from full and effective employment by violence against women. While the significance of violence against women for women's exclusion is noted in studies and acted on in some instances, this is not yet systematic. One area of EU competence to combat violence against women is to deploy its structural funds, in particular the European Social Fund, to support women for whom violence has led to social exclusion. This is action but not a directive. There is legal competence to direct the deployment of the European Social Fund to address the social exclusion of women that is a consequence of violence against women provided in TFEU Article 162.

## 6.6 Broad guidelines for economic policies

Economic and social policies have impacts on aspects of violence against women especially in the field of employment (see discussion above and European Commission 2010e). There is a two-way relationship between violence against women and full employment. Not only does violence against women constitute a detriment to women's full employment but women's employment can be a source of resilience to violence against women.

There is competence at EU-level to offer guidance to Member States on the nature of their economic and social policies provided in Article 5 TFEU, which states:

The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies . . . .

The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.

The Union may take initiatives to ensure coordination of Member States' social policies

Guidance can be offered by the Union-level to Member States on economic and social policies that help to combat violence against women in the broad guidelines produced by Council, although Article 5 TFEU does not provide scope for a directive.

## 6.7 Specialised services for violence against women

The EU permits the regulation of specialised services in different ways in TFEU Article 14:

Without prejudice to Article 4 of Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

There are specialised services to prevent violence against women and to assist victims. In some countries these specialised services have been marketised along with other services. The marketisation of services in general has been an aspect of recent changes in the regulation of the economy in which the EU has been involved (Penna and O'Brien 2006). There has been controversy as to potentially detrimental consequences to the quality of these services if they are subject to the full rigours of the market, rather than protected as a specialised set of services delivered by experts to victims with special needs. There is a need for legal clarity that the EU does not insist on the marketisation of specialised

services to combat violence against women, but rather that any such marketisation is a matter for each Member State, depending on its circumstances. Regulations developed through the ordinary legislative procedure could make it clear that the EU permits specialised services for violence against women to be treated as services of 'general economic interest' not only as services of 'economic interest', through the legal authority provided in TFEU Article 14.

## **6.8 Conclusion**

Violence against women is recognised in international law (UN CEDAW, signed by all Member States) as discrimination against women. Harassment, a form of violence against women, has been recognised as discrimination in EU law since the 2002 Directive on equal treatment in employment. The series of directives on equal treatment in employment and related matters has defined the field of EU-level action very broadly, including pay, pensions, promotion, working conditions, social security, and access to all goods and services across the single European market, and now draw their legal authority from TFEU Articles 19 (non-discrimination) and TFEU 157 (equal pay). TFEU 19, while potentially broadly drawn in relation to the fields on which discrimination is illegal, has only so far been used in relation to access to and distribution of goods and services. Article 19 offers a potential legal basis to extend the field beyond goods and services to other aspects of economy and society.

Violence against women is a form of gender discrimination. Hence Article TFEU 19 provides legal authority that offers scope for a directive to combat violence against women, not only harassment, since all forms of violence against women are forms of gender discrimination. A directive would provide legal clarity that all forms of violence against women, not only harassment are illegal in the fields to which TFEU applies. Hence, Article 19 of the TFEU could be the legal basis of directive on violence against women that legally clarifies that forms of violence against women in addition to harassment are illegal in the workplace, in the sale and distribution of goods and services, and potentially other fields of economy and society.

Violence against women is a form of social exclusion that is a detriment to full employment and thereby to economic growth. Article 153 TFEU offers scope for a directive to support the integration into the labour market of women who have been excluded as a consequence of gender-based violence. Article 162 offers scope for instructions to be issued for the use of the European Social Fund to combat the exclusion of women consequent on gender-based violence. Article 5 TFEU offers scope to include combatting violence against women within the broad guidelines on economic and social policies issued by the Council.

Specialised services for violence against women are recognised as important in preventing repetitions of and mitigating the impact of violence against women. There is a case that they should be treated as services of 'general economic interest' not only as services of 'economic interest', in order to facilitate their development. The legal authority to regulate on this matter is provided in TFEU Article 14.

## 7 Public health

### 7.1 Introduction

Violence is a detriment to health, in the injuries that it causes to physical and mental health and to human well-being. Violence against women is recognised by the EU and World Health Organization as a public health issue. There is a legal basis for action on violence against women within the EU Treaties, but it is limited to actions short of legislation.

### 7.2 Legal basis in EU

Public health is an area of competence of the European Union. This is specified in the Treaty on the Functioning of the European Union, at Article 6(a), Article 9 and Article 168:

6(a) The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health

9. In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fights against social exclusion, and a high level of education, training and protection of human health.

168. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combatting serious cross-border threats to health.

The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation.

This legal provision extends to a wide range of support actions including incentives, but does not extend to legislative actions, which are expressly excluded in Article 168.5:

168.5 The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges,

measures concerning monitoring, early warning of and combatting serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

### **7.3 Use in practice**

Within the EU, the Daphne programme, 2007-2013, to prevent and combat violence against children, young people and women and to protect victims and groups at risk, is funded under the EU Treaty provisions related to public health. The budget allocated is substantial, at EUR 116.85 million for the period 2007-2013 (European Parliament and Council, 2007). There have been three phases to this programme, the first starting in 2000, under which many projects related to violence against women have been funded (European Commission 2009).

The Decision by the European Parliament and Council to establish the Daphne programme in 2007 makes reference to Article 152 of the Treaty establishing the European Community (European Parliament and Council, 2007), which states:

A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.

This Article, in slightly revised form, is included in the current Treaty on the Functioning of the European Union, as Article 168, as above.

### **7.4 Conclusion**

Violence against women is recognised as a matter of public health by the EU and the World Health Organization. There is legal competence to engage in actions on violence against women under the public health provisions of the Treaties, specifically the Treaty on the Functioning of the European Union Article 168. This has been the legal basis for funding the Daphne programme of actions against violence against women. However, the legal basis for action is limited and there is no competence for legislative action at EU-level under the public health remit.

## **8 External relations**

### **8.1 Introduction**

Violence against women, especially sexual violence, is known to be higher in conflict zones and in times of disaster. The increased presence of women among decision-makers in conflict zones offers a degree of protection against the rise in this violence. Violence against women is recognised as a violation of women's human rights. The UN Security Council has recognised this issue in its Resolutions, including UNSCR 1325. Humanitarian aid packages have been called upon by the G8 to routinely include specialist assistance in relation to rape. The EU has developed competence in its external relations with other countries, in its own neighbourhood, in conflict zones and in supplying humanitarian aid. It is possible to utilise EU legal competence in its external relations in combination with the recognition of violence against women as a violation of human rights and a form of gender discrimination to support EU interventions to promote and to develop policies reduce violence against women in its external relations.

### **8.2 Legal basis**

The EU establishes aims of its actions in external relations in Articles 3.5 and 21.2 of the Treaty on the European Union that could include combatting violence against women. Article 214 of the TFEU establishes the Union's competence to act.

The general aim in Treaty on the European Union Article 3.5 states:

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Further, Article 21.2 of the Treaty of European Union states:

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders . . . (g) assist populations, countries and regions confronting natural or man-made disasters

TFEU Article 214 provides the legal competence for EU humanitarian action that could include actions to combat violence against women:

214.1 The Union's operations in the field of humanitarian aid shall be conducted within the framework of the principles and objectives of the external action of the Union. Such operations shall be intended to provide *ad hoc* assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these different situations. The Union's measures and those of the Member States shall complement and reinforce each other.

214.2. Humanitarian aid operations shall be conducted in compliance with the principles of inter-national law and with the principles of impartiality, neutrality and non-discrimination.

214.3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures defining the framework within which the Union's humanitarian aid operations shall be implemented.

Article 214.3 provides authority for the ordinary legislative procedure to be used to define the framework within which the Union's humanitarian operations are conducted. Potentially, this procedure could be used to give priority to combatting violence against women within EU humanitarian aid operations abroad.

### **8.3 Use in practice**

There are some examples in which the EU has successfully contributed to the promotion of women's human rights and to policies to reduce violence against women in some of its external relations activities in its neighbourhood, conflict zones and in humanitarian crises.

### **8.4 Conclusions**

The EU has the competence to act in its external relations to promote its values which include respect for human rights and thus to support policies that combat violence against women. The Union has competence to act externally, including in its neighbourhood, in the pursuit of peace in conflict zones, and in humanitarian crises. The requirement that the EU acts externally to uphold and promote its values, which include human rights and equality between women and men, means that there is competence to combat violence against women in its external relations. This is not competence to act to combat violence against women within the EU, but rather competence to act to combat violence against women in the EU's external relations. This is not competence for a directive but for the use of the ordinary legislative procedure to define the priorities of the framework. For purposes of clarity and legal certainty, the priority of the EU to combat violence against women in its external relations as part of its humanitarian aid, enabled by TFEU Article 214, could be defined in measures developed in accordance with the ordinary legislative procedure.

## **9 Research and statistics**

### **9.1 Introduction**

The EU has the aim to strengthen science in the European research area and to develop statistics as needed by the Union, in TFEU Articles 179 and the legal competence to act at Union level in TFEU 338. The EU is required to act in its activities in accordance with the principles of human rights and the pursuit of equality between women and men, according to Articles 2 and 3 on the Treaty on the European Union, which means that it should take action to combat violence against women in those areas where it is competent to act. In the fields of research and of statistics, the Union has legal competence to engage in actions to combat violence against women.

### **9.2 Legal basis**

There is legal competence to act at EU-level on matters of scientific research and statistics. Article 179 of the TFEU states:

179.1. The Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry, while promoting all the research activities deemed necessary by virtue of the other Chapters of the Treaties.

Article 338 in the Treaty on the Functioning of the European Union states:

338.1. Without prejudice to Article 5 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, the European Parliament and the Council, acting in accordance with ordinary legislative procedure, shall adopt measures for the production of statistics where necessary for the activities of the Union.

338.2. The production of Union statistics shall conform to impartiality, reliability, objectivity, scientific independence, cost-effectiveness and statistical confidentiality; it shall not entail excessive burdens on economic operators.

### **9.3 Use in practice**

There are a few examples of actions in line with this competence. The work of the European Institute for Gender Equality (for example, see EIGE 2012a, 2012b, 2013b) and the survey on violence against women by the Fundamental Rights Agency (FRA 2011) could be considered to fall within this competence. In so far as the Daphne programme has delivered scientific research and statistics on violence against women, this has been under the legal authority of the public health competence, rather than research and statistics. There are, however, as yet, only a few examples of work on violence against women within the mainline research and statistics entities and programmes of the EU under these competences.



## **9.4 Conclusion**

There is legal competence to produce research and statistics on violence against women as a result of the application of the legal principles of human rights and equality between women and men to the fields of research and statistics within which there is competence to act at EU-level. Two of the EU specialised agencies for equality and human rights, EIGE and FRA, have exercised these competences to produce research and statistics on violence against women. These legal competences could be exercised more widely in mainstream programmes of research and statistics. The EU needs statistics and research on violence against women in order to achieve its aims. There is legal basis in TFEU 338 for the EU to take measures for the production of statistics and research on violence against women.

## 10 Conclusion

The European Parliament and Council have been calling for greater action by the EU to combat violence against women, including a directive. The EU has been developing directives to combat specific forms of violence against women and other instruments to combat violence against women in general. There have been significant developments in international legal instruments to combat violence against women, including by the UN and the Council of Europe, in particular, the 2011 Council of Europe Convention to Combat Violence against Women and Domestic Violence. There are now significant gaps between the legal and advisory instruments at the international level and existing measures by the EU.

The EU has a high level aim under Treaty provisions to act to promote equality between women and men, to promote human rights, which may be reasonably interpreted to entail combatting violence against women, since violence against women is a form of discrimination against women and a violation of women's human rights. The Union-level has competence to act in certain fields of activities, but not in others, under the principles of conferral, subsidiarity and proportionality. The fields in which it has competence to act at the EU-level include some aspects of: freedom, security and justice; employment, economy and social exclusion; public health; external relations; research and statistics.

Within the field of freedom, security and justice, a series of directives have identified specific aspects of violence against women as contrary to the proper functioning of the EU which requires the mutual recognition of and minimum standards for judicial judgements in criminal matters. This field of EU action is underpinned by the EU commitment in the Treaty on the European Union to fundamental freedoms, human rights and human dignity. Specific competence for directives in criminal matters is limited to actions to support mutual recognition and judicial cooperation, with a focus on minimum standards to achieve this. There is scope for directives setting minimum standards to laws on rape (consent not force as the threshold; no marital exemption), and on FGM (common definition), using the authority of TFEU Articles 82 and 83. There is scope for a directive on aspects of domestic violence through removing any marital exemption to the crime of assault, based on TFEU Article 82. Such directives would assist mutual recognition of judicial judgements, providing clarity and certainty, and would be proportionate since otherwise significant harms would be left unsanctioned.

Within the field of employment, a series of directives have defined harassment, both on the basis of sex and on the basis of sexuality, as constituting discrimination. Harassment and all forms of gender-based violence against women are forms of gender discrimination, and thus contrary to equal treatment and are illegal in the sphere of employment, as defined under EU law. The area within which this definition of harassment as illegal discrimination applies was initially limited to employment and was then extended to access to goods and services, with a parallel extension in the range of mechanisms to implement the law from individual complaints to tribunals and courts to

national equality bodies to gender mainstreaming. Since harassment is a form of discrimination against women and so are other forms of gender based violence against women, there is scope for a directive that names all forms of violence against women to be forms of gender discrimination and illegal under EU law, so as to clarify the scope of the law, giving clarity and legal certainty. The legal competence to combat violence against women as a form of discrimination is firmly but narrowly based on TFEU Article 157, within the field of employment. Article 19 extends this competence to combat sex discrimination (which includes harassment and violence against women) to a wider range of fields, including the sale and distribution of goods and services, and potentially to further fields, though requiring the special rather than ordinary legislative procedure. A directive on violence against women could draw on either Article 157 or Article 19 TFEU, with different consequences.

The EU has competence to pursue: balanced economic growth; full employment; to combat social exclusion; and to promote social cohesion. Violence against women is a detriment to women's full employment due to the injuries it causes, and therefore reduces economic growth and social cohesion and produces social exclusion. The EU thus has competence to act to combat violence against women where this intersects with economic policy. There is scope for a directive to clarify that measures to support the reintegration into the labour market of those who have been excluded as a result of violence against women is within the competence of the EU, provided at TFEU Article 153. There is a scope to clarify that there is authority to use European Structural Funds to combat the social exclusion caused by violence against women, at TFEU Article 162. There is scope to clarify that the broad guidelines on economic and social policies issued by Council could include reference to violence against women, provided by TFEU 5. There is scope to clarify the regulations of the provision of specialised services to prevent violence against women and to support its victims stating that it is possible that such specialised services be designated services of 'general economic interest' rather than only 'economic interest' under authority provided at TFEU Article 14.

Within the field of public health, the Treaty on the Functioning of the European Union identifies the extent and limits of EU-level action, both allowing action but confining it to non-legislative actions. Violence, including violence against women, is recognised internationally, by the WHO, as a public health issue. The EU has used its legal competence in the field of public health to fund the well-regarded Daphne programme that exchanges knowledge and best practice among practitioners in this field. The field of public health offers a limited competence for action to combat violence against women that has been used to good effect. The articulation of this competence in further actions within the field, for example in relation to monitoring and to education, would be a further contribution. There is scope to clarify the range of actions that are available within public health to combat violence against women, but not a directive concerning legislative action.

Within the field of external relations, the Treaties on European Union and on the Functioning of the European Union provide legal competence for EU-level action in

pursuit of its values. These values include equality between women and men and fundamental rights, human dignity and human rights, as stated in the Treaty on the European Union. Violence against women is a form of discrimination and inequality between women and men and a violation of women's human rights. Hence there is legal competence for the EU to combat violence against women in its external relations. There are some examples of actions to this effect. There is scope to clarify the range of actions that may be undertaken by the EU to combat violence against women in its external relations.

Within the fields of research and of statistics, there is competence to act at EU-level in the creation of a European research area and statistics where necessary to support EU-level activities. There is EU competence to pursue the goal of combatting violence against women since it is a form of inequality between women and men and a violation of human rights. There are a few examples of the utilisation of this competence within the fields of research and of statistics. However, this utilisation has so far been quite limited. There is scope to clarify the actions that could be undertaken within the fields of research and of statistics to combat violence against women.

The EU has considerable, though not unlimited, legal competence to combat violence against women. The EU has high level principles that allow for the combatting of violence against women to be pursued since it is part of the goal of realising: equality between women and men; human and fundamental rights. The extent to which the EU has competence to pursue these goals within specific policy fields is complex and not well understood. A directive on violence against women would provide clarity and legal certainty as to the extent and limits of these competences. By provision of clarity and legal certainty, a directive on violence against women would aid the EU in pursuit of its fundamental values.

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