

## Towards an EU criminal law on violence against women: The ambitions and limitations of the Commission's proposal to criminalise image-based sexual abuse

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### Abstract

In March 2022, the European Commission proposed a new landmark Directive on combating violence against women and domestic violence which includes measures on the non-consensual distribution of intimate and manipulated images. We refer to this form of violence against women as ‘image-based sexual abuse’, a term that encompasses all forms of the non-consensual creating, taking or sharing of intimate images or videos, including threats to share such material and altered material. In this article, we provide a new analysis of current Member State laws covering all forms of image-based sexual abuse, as well as the first detailed examination of the Commission’s proposals to tackle this form of violence against women. We suggest that the Commission’s proposal is characterised by both its ambition and limitations. It is ambitious in its attempts to set minimum rules in challenging areas of criminal law and, in doing so, recognises the serious harms of image-based sexual abuse. At the same time, by seeking to expand the reach of EU criminal law, inevitably requiring compromise, the scope of the proposed measures is somewhat limited. Such compromises and limitations risk entrenching hierarchies between different forms of abuse and, ultimately, the proposal fails to provide a comprehensive response reflective of victims’ experiences.

### Keywords

Image-based sexual abuse, revenge porn, European criminal law, deepfakes, violence against women, Article 83.1 TFEU, harmonisation

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## Introduction

In 2021, the United Nations (hereinafter: the UN) declared violence against women and girls a ‘shadow pandemic’.<sup>1</sup> While the nature and extent of such violence and abuse was already significant, the Covid-19 pandemic had intensified rates of violence, particularly domestic violence and online abuse.<sup>2</sup> Accordingly, the UN called for coordinated and worldwide action to reduce prevalence, support victims and ensure legal responses are comprehensive and effective.

In this context, the European Commission published in March 2022 a landmark proposal for a Directive on combating violence against women and domestic violence (hereinafter: the Commission’s proposal or the draft Directive).<sup>3</sup> The overall aim of the Directive is to ‘effectively combat violence against women and domestic violence throughout the EU’ by laying down minimum rules on the definition of relevant criminal offences and penalties, as well as proposing measures relating to access to justice, victim support and prevention.<sup>4</sup> The Commission’s proposal draws on recent activity across the European Union (hereinafter: the EU or the Union) to expand the scope of measures targeting violence against women and girls, particularly the initiatives funded by the European Commission<sup>5</sup> and the many European Parliament resolutions.<sup>6</sup> Nonetheless, the Commission’s proposal marks a significant shift, by proposing common legislative action to ensure minimum standards in key, and often controversial, areas of criminal law, such as rape and female genital mutilation, as well as specific areas of online abuse such as cyber-stalking and the non-consensual sharing of intimate material.<sup>7</sup>

The Commission’s proposal is characterised by both its ambition and limitations. It is ambitious in its attempts to harmonise the laws of the Member States in challenging areas of criminal law and policy. At the same time, by seeking to expand the reach of EU criminal law, inevitably requiring compromise, the scope of the proposed measures is somewhat limited. Such compromises and limitations risk entrenching hierarchies between different forms of abuse which are not reflective of

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1. UN Women, ‘Measuring the Shadow Pandemic: Violence against Women during COVID-19’ (2021) <<https://data.unwomen.org/sites/default/files/documents/Publications/Measuring-shadow-pandemic.pdf>> accessed 27 July 2022.
  2. *ibid.* 5.
  3. European Commission Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence’ [2022] COM(2022)105 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0105>> accessed: 27 July 2022.
  4. *ibid.* 1.
  5. Under the current Multiannual Financial Framework (2021-2027), for example, the Commission allocates funding with a focus on preventing and combating violence and supporting and protecting victims. In Council Regulation (EU) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027 [2020] OJ L1433/11.
  6. See *infra*: European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence (2021) <[https://www.europarl.europa.eu/doceo/document/TA-9-2021-0489\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0489_EN.pdf)> accessed: 27 July 2022. European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU (2021) [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0388\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0388_EN.html) accessed: 27 July 2022. European Parliament Resolution of 13 February 2019 on experiencing backlash in women’s rights and gender equality in the EU [2020] OJ C449/102. European Parliament Resolution of 12 September 2017 on the proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence [2018] OJ C337/167.
  7. At the time of writing, the proposal is still awaiting a committee decision from the European Parliament. For more information on the legislative schedule, see: [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0066\(COD\)&l=en](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2022/0066(COD)&l=en) accessed: 27 July 2022.

victims' experiences, as well as embedding existing assumptions and approaches to violence and abuse which will inhibit future reforms.

With scholarship to date focussing on the draft Directive's proposal regarding rape,<sup>8</sup> and other EU institutions expressing their opinion across all measures,<sup>9</sup> this article aims to provide the first comprehensive analysis of the measures on the 'non-consensual sharing of intimate or manipulated material' in Article 7.<sup>10</sup> We refer to this form of violence against women as 'image-based sexual abuse', a term that encompasses all forms of the non-consensual creating, taking or sharing of intimate images or videos, including threats to share such material and altered material. This new analysis demonstrates the twin challenges of the Commission's proposal – ambition and limitations – in that while it provides a welcome recognition of the serious harms of image-based sexual abuse, it fails to provide a comprehensive response reflective of victims' experiences.

The article examines, first, the prevalence, nature and extent of image-based sexual abuse, as well as addressing issues of terminology. It then explores how image-based sexual abuse is regulated across the Member States, showing a piecemeal and confusing landscape. With this in mind, the article discusses the EU competence on the harmonisation of violence against women and the specific proposals in Article 7 on the criminalisation of the non-consensual sharing of intimate or manipulated material. As the proposal is currently progressing through the legislative process, we conclude with some recommendations for reform so that the Commission's ambitions for the proposal can be realised.

## Understanding image-based sexual abuse

### *Terminology and its impacts*

While the draft Directive refers to the 'non-consensual sharing of intimate or manipulated material', in this article, we adopt the broader terminology and concept of 'image-based sexual abuse'.<sup>11</sup> This term refers to all forms of the non-consensual creating, taking or sharing of intimate images or videos, including altered or manipulated media, and threats to distribute such material. It is an

8. Carlotta Rigotti, 'A Long Way to End Rape in the European Union: Assessing the Commission's Proposal to Harmonise Rape Law, through a Feminist Lens' (2022) 13 *New Journal of European Criminal Law* 153.

9. European Economic and Social Committee, 'Opinion on Combating Violence against Women – Proposal for a Directive of the European Parliament and of the Council on Combating Violence against Women and Domestic Violence' (2022) <<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/combating-violence-against-women>> accessed 27 July 2022. Izabela Cristina Bacian and Nora Hahnkamper-Vandenbulckle, 'Violence against Women and Domestic Violence. The New European Commission Proposal in Light of European Parliament Requests' (2022) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2022\)730329](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2022)730329)> accessed 27 July 2022.

10. In terms of methodology, the article provides original analysis of the primary sources of legislation in thirteen member states, as well as the first, detailed analysis of the Commission's proposal as regards image-based sexual abuse (see further below). In assessing the effectiveness of the proposals, it also draws on secondary sources, including existing research and reports, to examine the extent, nature and harms of image-based sexual abuses, as well as the limitations of current approaches. Child sexual abuse material falls outside of the scope of this article, considering also that the Explanatory Memorandum to the Commission's Proposal regards the EU legal framework on combating child sexual abuse as *lex specialis* (n 3) 5-6.

11. For the original development and explanation of this term, see: Clare McGlynn and Erika Rackley, 'Image-Based Sexual Abuse' (2017) 37 *Oxford Journal of Legal Studies* 534.

‘umbrella’ term capturing a range of interrelated forms of abuse, and not therefore limited to the non-consensual distribution of intimate materials.<sup>12</sup>

The term ‘image-based sexual abuse’ includes practices problematically labelled as ‘revenge porn’ where malicious ex-partners share intimate material without consent, as well as other behaviours such as threats to share without consent and the sharing of hacked images.<sup>13</sup> Significantly, the term image-based sexual abuse goes beyond distribution, to encompass the non-consensual *creation* of intimate images or videos, particularly using technology and artificial intelligence to alter material to make it sexual or pornographic, often known as ‘deepfakes’.<sup>14</sup> It also includes the *taking* of intimate images without consent, including situations where victims are filmed or photographed without their knowledge when they are changing, showering, asleep, or drug- or alcohol-affected, or with the aid of hidden cameras in public places or on public transport, or as a result of coercion. Many of these forms of abuse are given specific labels such as ‘upskirting’ or ‘sextortion’, and also includes images of sexual assault.<sup>15</sup>

The aim of bringing together these forms of abuse and conceptualising them as ‘image-based sexual abuse’ is to better reflect the nature and extent of abuse, specifically victims’ experiences some of whom describe their experience as a form of sexual assault.<sup>16</sup> Further, this concept identifies the overlapping and inter-related nature of these forms of abuse, ensuring they are better understood as part of a pattern of offending, rather than as separate, specific, isolated behaviours. It also provides the normative space to future-proof laws, policies and terminology when new ways of perpetrating such abuse are developed. Besides, this approach recognises image-based sexual abuse as a form of sexual violence and ensures the connections are made between this form of digital, online abuse and other forms of ‘offline’ or ‘physical’ sexual violence.

In addition, the term image-based sexual abuse was developed in response to the dominant use of the term ‘revenge porn’ which remains in common use across the world, but is both misleading and victim-blaming. Many victims experience the term as blaming them for their abuse, as it implies that they are somehow responsible for precipitating the ‘revenge’ actions. The term is also misleading when used to describe this broad phenomenon, as it only covers one type of abuse – where a malicious ex-partner distributes images without consent. In focussing on only one form of abuse, and only one motivation for abuse, the term ‘revenge porn’ has distorted law and policy debates across the world in ways not reflective of victims’ interests or experiences.

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12. The term draws on Liz Kelly’s concept of the ‘continuum of sexual violence’ in Liz Kelly, *Surviving Sexual Violence* (Polity Press ; B Blackwell 1988). See further: Clare McGlynn, Erika Rackley and Ruth Houghton, ‘Beyond “Revenge Porn”: The Continuum of Image-Based Sexual Abuse’ (2017) 25 *Feminist Legal Studies* 25.
  13. For a discussion of the problematic nature of the term ‘revenge porn’, see McGlynn and Rackley (n 11). For a discussion of the differing ways in which image-based sexual abuse is perpetrated, see: Nicola Henry and others, *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (Routledge 2020) particularly chapter 2.
  14. Chesney, Bobby and Citron, Danielle, ‘Deep Fakes: A Looming Challenge for Privacy’ (2019) 107 *California Law Review* 1753.
  15. See a discussion of the range of behaviours, see: McGlynn, Rackley and Houghton (n 12). For some specific examples, see: ‘Germany Makes ‘upskirting’ a Punishable Crime’ *DW* (Berlin, 3 July 2020) <<https://www.dw.com/en/germany-makes-upskirting-a-punishable-crime/a-54037371>> accessed 12 September 2022. ‘Facebook Live “broadcasts Gang Rape” of Woman in Sweden’ *BBC News* (London, 23 January 2017) <<https://www.bbc.com/news/world-europe-38717186>> accessed 12 September 2022.
  16. See: Clare McGlynn and others, ‘Shattering Lives and Myths: A Report on Image-Based Sexual Abuse’ <<https://claremcglynn.files.wordpress.com/2019/10/shattering-lives-and-myths-revised-aug-2019.pdf>> accessed 12 September 2022.

This is why the choice of terminology is significant; it shapes public discourse and legal measures.<sup>17</sup> In practice, the use of the term ‘revenge porn’ is a key reason for the limited scope of many criminal laws and reduced understanding of the phenomenon of image-based sexual abuse. Unfortunately, these constraints and misunderstandings are also evident in the Commission’s proposal, despite the broader terminology and understanding of image-based sexual abuse being used in many European contexts. For example, the European Parliament has deployed the term image-based sexual abuse in its work on violence against women and girls, recognising that terms such as ‘revenge porn’ are unsuitable.<sup>18</sup> This was also the terminology originally deployed in the Parliament’s recent proposals to amend the Digital Service Act.<sup>19</sup> In its general recommendation on the digital dimension of violence against women and girls, the expert body responsible for monitoring the implementation of interpreting the Council of Europe Convention against violence against women and domestic violence (hereinafter: the Istanbul Convention) uses the term ‘image-based sexual abuse’ in delineating the scope of online sexual harassment.<sup>20</sup> Further, a range of organisations across Europe also recognise the need to use terminology and concepts beyond ‘revenge porn’ showing a developing awareness of this phenomenon and its connections to broader forms of violence against women and girls.<sup>21</sup>

### *Nature and extent of image-based sexual abuse*

As with other forms of online violence against women and girls, image-based sexual abuse is alarmingly common.<sup>22</sup> For example, in 2020, over 100,000 images of Irish women and girls were leaked online which ultimately led to the introduction of new legislation criminalising all forms of image based sexual abuse.<sup>23</sup> Comparable experiences have been reported in other countries, such as in Italy where websites

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17. While we use ‘image-based sexual abuse’, there are other terms which similarly reflect a more victim-focussed approach, such as ‘intimate image abuse’, ‘non-consensual pornography’ and ‘non-consensual intimate imagery’. The key point is that ‘revenge porn’ is limited and inappropriate, and other terms better focus on the breadth of activity experienced by victims. See further: Sophie Maddocks, ‘From Non-Consensual Pornography to Image-Based Sexual Abuse: Charting the Course of a Problem with Many Names’ (2018) 33 *Australian Feminist Studies* 345.
  18. European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence (n 6) Recitals T, U and Recommendation 17.
  19. Proposed Article 24b of the Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC 2022 <[https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/IMCO/DV/2021/12-13/DSACA9\\_EN.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2021/12-13/DSACA9_EN.pdf)> accessed: 12 September 2022. However, Article 24b is no longer included in the revised draft of the Digital Service Act, which was ultimately adopted by the European Parliament on 5 July 2022. See: European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (P9\_TA(2022)0014) 2022; Jelena Prtorić, ‘EU’s Amended Digital Services Act Fails to Better Regulate “Revenge Porn”’ [2022] *OpenDemocracy* <<https://www.opendemocracy.net/en/5050/revenge-porn-european-union-digital-services-act/>> accessed 28 October 2022.
  20. GREVIO, ‘General Recommendation No. 1 on the Digital Dimension of Violence against Women’ (2021) para 38 <<https://rm.coe.int/grevio-rec-no-on-digital-violence-against-women/1680a49147>> accessed 12 September 2022.
  21. For example, the organisations HateAid (Germany), #NaoPartilhessee (Portugal), @stopfisha (France), and many Irish organisations including Irish Council for Civil Liberties and Women’s Aid Ireland.
  22. For further data on the prevalence of online abuse, see: European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence (n 6).
  23. ‘Gardaí Looking into Allegations That Large Number of Images of Women Were Shared Online without Their Consent’ *Thejournal.ie* (Dublin, 19 November 2020) <<https://www.thejournal.ie/images-of-irish-women-shared-without-consent-5271799-Nov2020/>> accessed: 12 September 2022.

with thousands of users sharing sexual images without consent were recently uncovered.<sup>24</sup> A 2021 survey of 51 countries, including many European countries, reported that 57% of women had been victims of image-based sexual abuse.<sup>25</sup> This high incidence reflects patterns across the world, with a study across Australia, New Zealand and the UK finding 1 in 3 adults reporting victimisation across all forms of image-based sexual abuse.<sup>26</sup> Incidence and experiences vary considerably depending on multiple characteristics and structural inequalities, with victimisation higher among younger people, sexual minorities, disabled people and black and minority ethnic individuals.<sup>27</sup>

In relation to threats specifically, there is a dearth of data relating to the EU, though recent statistics from Ireland reveal an 85% increase over the last year in cases involving threats to share intimate images.<sup>28</sup> Other studies have found that 1 in 5 participants have experienced such threats, with over half of participants identifying as victims of image-based sexual abuse reporting threats.<sup>29</sup>

Image-based sexual abuse also includes the non-consensual creation and/or distribution of imagery altered or manipulated to make it sexual or pornographic, using various forms of technology including artificial intelligence, often referred to as 'deepfakes'.<sup>30</sup> The vast majority of deepfakes, estimated at around 96%, are pornographic.<sup>31</sup> In terms of understanding the scale of the problem, in one international survey, 14% of participants disclosed that someone had either created or shared digitally altered nude or sexual images of them without their consent.<sup>32</sup> Specifically, of those whose images had been taken without their consent, in one third (34%) of cases the images had been digitally altered.<sup>33</sup> Recent Irish reports reveal that thousands of deepfake pornographic images of women are being created and traded online.<sup>34</sup> Not surprisingly, therefore, when German organisation HateAid conducted a survey in 2021, it found that 30% of women across the EU fear that fake intimate images of them may be shared without their consent.<sup>35</sup> A similar phenomenon is that

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24. Wired, 'Dentro Il Più Grande Network Italiano Di Revenge Porn, Su Telegram' *Wired* (Milan, 3 April 2020) <[https://www.wired.it/internet/web/2020/04/03/revenge-porn-network-telegram/?refresh\\_ce=](https://www.wired.it/internet/web/2020/04/03/revenge-porn-network-telegram/?refresh_ce=)> accessed: 12 September 2022.
  25. Economist Intelligence Unit, 'Measuring the Prevalence of Online Violence against Women' (2021) <<https://onlineviolencewomen.eiu.com>> accessed 12 September 2022.
  26. See: Henry et al., *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery* (n 13) 11.
  27. See above and Asia A. Eaton and Clare McGlynn, 'The Psychology of Nonconsensual Porn: Understanding and Addressing a Growing Form of Sexual Violence' (2020) 7 *Policy Insights from the Behavioral and Brain Sciences* 190.
  28. The Irish Examiner, 'Almost 40 Reports of the Sharing of Intimate Images Made to Gardaí' <<https://www.irishexaminer.com/news/courtandcrime/arid-40924586.html>> accessed 12 September 2022.
  29. Henry and others (n 13) 11.
  30. See: Chesney and Citron (n 14). And discussion in Erika Rackley and others, 'Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse' (2021) 29 *Feminist Legal Studies* 293.
  31. Ajder Henry and others, 'The State of Deepfakes: Landscape, Threats, and Impacts' (2019) <[https://regmedia.co.uk/2019/10/08/deepfake\\_report.pdf](https://regmedia.co.uk/2019/10/08/deepfake_report.pdf)> accessed 12 September 2022.
  32. Rackley and others (n 30) 308.
  33. *ibid.*
  34. 'Sickos Creating Thousands of Deepfake Porn Pics and Videos Using Faces of Innocent Irish Victims and Circulating Them Online' *The Irish Mirror* (Dublin, 24 August 2022) <<https://www.irishmirror.ie/news/irish-news/crime/sickos-creating-thousands-deepfake-porn-27814966>>.
  35. HateAid, 'Boundless Hate on the Internet – Dramatic Situation across Europe' (2021) <[https://hateaid.org/wp-content/uploads/2022/04/HateAid-Report-2021\\_EN.pdf](https://hateaid.org/wp-content/uploads/2022/04/HateAid-Report-2021_EN.pdf)> accessed: 12 September 2022.

of ‘nudification’ apps, accessed by millions worldwide, where non-sexual images can be uploaded and almost instantly a nude image is generated.<sup>36</sup>

It is also vital to recognise the inter-relationship between these various forms of abuse. In one international study, for example, two-thirds of victims experienced more than one form of image-based sexual abuse.<sup>37</sup> That many victims experience multiple forms of abuse, and as one overall connected experience, challenges legal approaches which seek to separate out the abuses into different legal categories and those jurisdictions that may not even criminalise some forms of abusive conduct. As will be discussed further below, legal responses which are reflective of victims’ experiences will be comprehensive in covering all forms of abuse.

Finally, in considering prevalence, it is also important to recognise that just as there is considerable under-reporting of violence against women and girls, this will also be the case for online abuse and image-based sexual abuse.<sup>38</sup> Further, many women and girls will be unaware that they have been victims of image-based sexual abuse, particularly deepfakes and forms of voyeurism with hidden cameras, or where material is shared in groups and internet fora where victims are unaware their material has been distributed.<sup>39</sup> The reported incidence of abuse, therefore, is likely to be a considerable under-estimate.

This under-reporting and the nature of hidden victimisation points to the gendered nature of image-based sexual abuse. Studies consistently report that women and girls experience image-based sexual abuse at higher rates than men and boys.<sup>40</sup> Not only do women and girls experience higher levels of online abuse and image-based abuse, but the vast majority of images and targets of abuse on dedicated ‘revenge porn’ websites are of women.<sup>41</sup> While men do experience image-based sexual abuse, their experiences often differ. For example, when women report abuse to the UK’s Revenge Porn Helpline an average of 42 images are reported, whereas it is less than two for male victims.<sup>42</sup> Further, the vast majority of perpetrators of image-based sexual abuse are men, with studies finding motivations including seeking power and control, misogyny and masculine entitlement, sexual gratification, a “prank”, distress, humiliation and to build up social capital.<sup>43</sup> This

36. “‘Nudifying’ AI Tools Which ‘Undress’ Women in Photos Are Gaining Traction, but What Is Being Done to Stop It, and How Can We Protect Our Images Online?” *Glamour* (London, 7 December 2021) <<https://www.glamourmagazine.co.uk/article/nudification-intimate-image-abuse>> accessed: 12 September 2022.

37. Rackley and others (n 30) 297-298.

38. European Union Agency for Fundamental Rights, *Crime, Safety and Victims’ Rights* (Publications Office of the European Union 2021) 75 ff; EIGE, ‘Cyber Violence against Women and Girls’ (2017) <<https://eige.europa.eu/publications/cyber-violence-against-women-and-girls>> accessed 12 September 2022.

39. See, for example, a recent Irish case where police found over 280,000 upskirt and other harassment images in an offender’s possession. In ‘Eagle-Eyed Garda Spots Upskirting Offender on the Luas and Unearths a More Sinister Case’ *The Irish Examiner* (Dublin, 24 July 2022) <<https://www.irishexaminer.com/news/spotlight/arid-40924316.html>> accessed 12 September 2022.

40. For example, Yanet Ruvalcaba and Asia A. Eaton, ‘Nonconsensual Pornography among U.S. Adults: A Sexual Scripts Framework on Victimization, Perpetration, and Health Correlates for Women and Men.’ (2020) 10 *Psychology of Violence* 68.

41. See Matthew Hall and Jeff Hearn, ‘Revenge Pornography and Manhood Acts: A Discourse Analysis of Perpetrators’ Accounts’ (2019) 28 *Journal of Gender Studies* 158. Nicola Henry and Asher Flynn, ‘Image-Based Sexual Abuse: Online Distribution Channels and Illicit Communities of Support’ (2019) 25 *Violence Against Women* 1932.

42. Revenge Porn Helpline, ‘Revenge Porn Helpline Release Report: “Intimate Image Abuse, an Evolving Landscape”’ (2021) <<https://swgfl.org.uk/magazine/revenge-porn-helpline-release-intimate-image-abuse-an-evolving-landscape/>> accessed 12 September 2022.

43. Henry and others (n 13). Hall and Hearn (n 41). Colette Mortreux and others, ‘Understanding the Attitudes and Motivations of Adults Who Engage in Image-Based Abuse’ (2019) <[https://www.esafety.gov.au/sites/default/files/2019-10/Research\\_Report\\_IBA\\_Perp\\_Motivations.pdf](https://www.esafety.gov.au/sites/default/files/2019-10/Research_Report_IBA_Perp_Motivations.pdf)> accessed 12 September 2022.

underscores that it is long-standing gender inequality that underpins much of this behaviour, particularly evident in what is referred to as the ‘collector culture’ where men are trading and sharing intimate images without consent across internet fora and private groups.<sup>44</sup>

### *Harms and impacts of image-based sexual abuse*

Image-based sexual abuse can be life-ending and it is often life-shattering. It often leads to a ‘social rupture’ – an extreme, unsettling and intrusive violation that leads victims to dividing their lives into ‘before’ and ‘after’ the abuse.<sup>45</sup> Rather than experienced as a discrete incident which happens and then comes to pass, victims feel the ‘constancy’ of the abuse, with each new distribution or viewing being experienced as abusive. Threats can in and of themselves have significant, life-threatening impacts, with victims describing the paralysing effect they have on their daily lives.<sup>46</sup> Perhaps not surprisingly, therefore, many victims experience a profound sense of ‘isolation’, the abuse shattering their trust and connections with family and friends, the online world and social media.<sup>47</sup> Many withdraw from social media, notwithstanding the significant adverse impacts on their social and professional lives, and other forms of civic engagement. It can adversely impact financial stability and employment, as many victims incur significant financial costs from forced to leave employment, legal costs and the expenses for psychological treatment and similar.<sup>48</sup> In terms of physical and mental impacts specifically, studies have found significant adverse psychological impacts on victims, including depression, self-harm and suicide ideation, as well as many physical symptoms.<sup>49</sup> It also has severe implications for women’s participatory rights online, reducing women’s voices in public debate.<sup>50</sup> Finally, image-based sexual abuse, as with all forms of online abuse and violence against women and girls, has significant adverse economic impacts across all of society.<sup>51</sup>

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44. On the trading of nude images of women without their knowledge, see: ‘Inside the Secret World of Trading Nudes’ *BBC News* (London, 22 August 2022) <<https://www.bbc.co.uk/news/uk-62564028>> accessed 12 September 2022; ‘I Have Moments of Shame I Can’t Control’: The Lives Ruined by Explicit “Collector Culture”’ *The Guardian* (London, 6 January 2022) <<https://www.theguardian.com/world/2022/jan/06/i-have-moments-of-shame-i-cant-control-the-lives-ruined-by-explicit-collector-culture>> accessed 12 September 2022.
45. Clare McGlynn and others, ‘“It’s Torture for the Soul”: The Harms of Image-Based Sexual Abuse’ (2021) 30 *Social & Legal Studies* 541.
46. McGlynn and others (n 16).
47. McGlynn and others (n 45); McGlynn and others (n 16). See also: English Law Commission, ‘Intimate Image Abuse: A Consultation Paper’ (2021) 121-126 <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf>> accessed 12 September 2022.
48. Ásta Jóhannsdóttir, Mari Helenedatter Aarbakke, and Randi Theil Nielsen, ‘Online Violence Against Women in the Nordic Countries’ (2017) <[https://www.lokk.dk/media/drblmypyg/online\\_violence\\_against\\_women\\_in\\_the\\_nordic\\_countries.pdf](https://www.lokk.dk/media/drblmypyg/online_violence_against_women_in_the_nordic_countries.pdf)> accessed 12 September 2022.
49. See: *ibid.*; Samantha Bates, ‘Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors’ (2016) *Feminist Criminology*; Ruvalcaba and Eaton (n 39).
50. GREVIO (n 20); Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, ‘Gender Justice and Freedom of Expression - A/76/258’ (2021) <<https://www.ohchr.org/en/documents/thematic-reports/a76258-gender-justice-and-freedom-expression-report-special-rapporteur>> accessed 12 September 2022.
51. Indeed, recent estimates suggest a higher annual cost to the EU of gender-based violence of €290 billion, compared to the cost of organised crime and terrorism respectively at €110 billion and €16 billion: Cecilia Navarra, Meenakshi Fernandes, and Niombo Lomba, ‘Gender-Based Violence as a New Area of Crime Listed in Article 83(1) TFEU - European Added Value Assessment’ (2021) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2021\)662640](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)662640)> accessed 12 September 2022.



Overall, therefore, image-based sexual abuse is a common experience, particularly for younger women, sexual minorities and women from minority ethnic and religious communities, with many experiencing multiple, inter-related forms of this abuse due to intersecting racism, sexism and other structural inequalities. It often generates significant adverse impacts which span all aspects of victims' lives, including their economic and professional roles, their relationships, physical and mental well-being and ability to contribute to society through online and civic engagement. It is a gendered practice, with women more commonly being victims and experiencing more significant harms, with the perpetrators being predominantly men. Furthermore, the ways in which the abuse is perpetrated and the harms which result are due to deeply entrenched gendered norms in society, particularly regarding women's sexuality.<sup>52</sup>

### **Member State laws on image-based sexual abuse: divergent, piecemeal and confusing**

Before assessing the Commission's proposal, we examine below Member States' current criminal laws targeting image-based sexual abuse. However, undertaking such an analysis poses significant challenges. Image-based sexual abuse is not a category of law common to many jurisdictions and therefore identifying the extent to which existing laws cover such behaviours is not straightforward. Partly, this is due to criminal laws, as with law in general, not being originally developed to tackle gendered harms: common categories of criminal law have long failed to reflect women's harms and experiences.<sup>53</sup> This is particularly evident in relation to image-based sexual abuse where research with victims has identified the holistic ways in which they experience the taking, sharing and threats to share of intimate images, as well as the variety of perpetrator motives, defying the focus of many laws which only criminalise a limited category of specific acts, or only proscribe specific perpetrator motives. This myopic approach is compounded by, or even may result from, the fragmentary character of criminal law and a general reluctance to recognise the extent of the harms generated by image-based sexual abuse,<sup>54</sup> with the effect that not all such acts are subject to criminal sanction. Further, that much of this abuse is perpetrated through rapidly evolving technology has meant that legal systems continue to lag behind technological developments, often due to regulation being considered an impediment to innovation.<sup>55</sup>

In this context, it is perhaps not surprising that there is as yet no comprehensive analysis of Member State laws on image-based sexual abuse. An expert report by Sara De Vido and Lorena Sosa, prepared for the European Commission in 2021, provides a valuable starting point, but only

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52. McGlynn and Rackley (n 11) 544. See also European Commission, *2021 Report on gender equality in the EU* (Luxembourg: European Commission).

53. See for example: Linnea Wegerstad, 'Theorising Sexual Harassment and Criminalisation in a Swedish Context' (2022) 9 *Bergen Journal of Criminal Law & Criminal Justice* 81; Boris Burghardt and Leonie Steinel, 'Sexual Violence and Criminal Justice in the 21st Century' (2021) 22 *German Law Journal* 691; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (2nd ed, Federation Press 2002); Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Norwegian University Press, 1987).

54. EIGE (n 38). On the fragmentary character of criminal law, see: Nils Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521, 525–526.

55. Ronald Leenes, 'Regulating New Technologies in Times of Change', in Leonie Reins (ed.), *Regulating New Technologies in Uncertain Times* (Springer) 9.

examines non-consensual *distribution* of intimate images, rather than all forms of image-based sexual abuse.<sup>56</sup> Our analysis draws on this report and goes further, providing a more detailed analysis, by examining all forms of image-based sexual abuse laws across a selection of Member States. Nonetheless, our analysis remains preliminary as we are constrained by the availability of information from some jurisdictions and language barriers. Our analysis is based on the laws of thirteen Member States, and we recognise there will likely be nuances and complexities of national law and practice that would further enrich future studies.<sup>57</sup> We focus on five key areas: conceptual foundations; definitions and scope of material covered; the required mental element and questions of intent and motivation; the range of conduct criminalised; and sanctions.<sup>58</sup>

### Conceptual foundations

As suggested above, image-based sexual abuse is commonly experienced as a breach of sexual autonomy and form of sexual assault. For many victims, therefore, this abuse is best conceptualised as a sexual offence.<sup>59</sup> This has been recognised by the European Parliament which has called on Member States to update their national laws to include ‘image-based sexual abuse’ in the ‘list of sexual offences’.<sup>60</sup> Some jurisdictions, such as Romania, have adopted this approach, enacting new criminal laws against some forms of image-based sexual abuse as sexual offences, as part of their transposition of the Istanbul Convention.<sup>61</sup> Similarly, Belgium classifies some forms of image-based sexual abuse as crimes against sexual integrity, sexual self-determination and public morality.<sup>62</sup> While other jurisdictions may not have formally labelled these crimes as sexual offences, this is the common understanding. For example, recent legislation in Ireland proscribing the taking and sharing of intimate images without consent was routinely referred to by Government ministers and in public discourse, and recently by the Irish Prime Minister, as ‘image-based sexual abuse’.<sup>63</sup>

Many other jurisdictions characterise image-based sexual abuse as predominantly a privacy violation, as with recent French legislation.<sup>64</sup> In an even more specific way, the Spanish Criminal

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56. Sara De Vido and Lorena Sosa, *Criminalisation of Gender-Based Violence against Women in European States, Including ICT Facilitated Violence. A Special Report* (Publications Office of the European Union, 2021) 135.

57. The thirteen jurisdictions are Austria, Belgium, France, Germany, Ireland, Italy, Malta, the Netherlands, Poland, Portugal, Slovakia, Spain, and Sweden, being to our knowledge countries where specific legislative initiatives to target some forms of image-based sexual abuse have been taken. Except for the German and Swedish legislation, all the translations of the non-English laws are unofficial.

58. Further areas for future analysis include definitions of consent, procedural issues such as anonymity for complainants and special protections in court, as well as guidance for investigators and prosecutors.

59. As discussed in McGlynn and Rackley (n 11).

60. European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence (n 6) Recital 17.

61. GREVIO, ‘Baseline Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Romania’ (2022) 12 <<https://rm.coe.int/final-report-on-romania/1680a6e439>> accessed 27 July 2022.

62. Chapter I/1, Articles 417/8, 417/9, and 417/10 of the Belgian Criminal Code

63. ‘Dáil Statement by the Taoiseach, Micheál Martin on Violence against Women’ <<https://www.gov.ie/en/press-release/53368-dail-statement-by-the-taoiseach-micheal-martin-td-on-violence-against-women/>> accessed 12 September 2022; ‘Image-Based Sexual Abuse Now a Criminal Offence as President Higgins Signs Legislation’ *Independent.ie* (Dublin, 28 December 2020) <<https://www.independent.ie/irish-news/image-based-sexual-abuse-now-a-criminal-offence-as-president-higgins-signs-legislation-39906848.html>> accessed 12 September 2022.

64. Section 1, Articles 226-1, 226-2, 226-2-1, 226-3 and 226-3-1 of the French Criminal Code

Code compares the non-consensual distribution of private images with the ‘discovery and disclosure of secrets’ and as part of those crimes targeting privacy and intimacy.<sup>65</sup> Swedish law includes many forms of image-based sexual abuse as acts of ‘intrusive photography’ and a breach of privacy, as well as part of laws on ‘liberty’ and ‘peace’.<sup>66</sup> Another example can be found in the Slovakian Criminal Code which includes some provisions under the section “Criminal Offences against other Rights and Freedoms”.<sup>67</sup>

The point here is not that one conceptualisation is necessarily better than others, as there are relative benefits to each of the above approaches and the concepts overlap, such as when characterising these abuses as breaches of ‘sexual privacy’.<sup>68</sup> However, the approach adopted does impact on the scope and nature of any legal reforms. From these varied conceptual foundations, therefore, it is unlikely that we will see much harmony across the jurisdictions in terms of specific criminal measures.

### *Defining the scope: sexual, private or intimate images or videos*

The first issue of comparison relates to the scope of the images (to include videos but excluding text),<sup>69</sup> with three main approaches focussing on definitions of sexual, private or intimate images. In their analysis of Member State legislation, De Vido and Sosa found that ‘most’ countries refer to the ‘sexual’ nature of the material being disseminated.<sup>70</sup> Nonetheless, this broad term covers a range of approaches. For example, the Italian Criminal Code refers to ‘sexually explicit content’, with no further clarification.<sup>71</sup> The Dutch legislation refers to ‘sexual’ material, with the explanatory report broadly stating that an image should be considered of a sexual nature if it is “of such an intimate sexual character that any reasonable person would consider the image to be private.”<sup>72</sup> These relatively broad definitions of ‘sexual’ can be contrasted with Maltese provisions which state that the term “sexual shall include the depiction of all or part of a person’s exposed genitals or pubic area, or, in the case of females, of the breasts, or of any content that, when taken as a whole, a reasonable person would consider to be sexual because of its nature.”<sup>73</sup>

Most criminal frameworks construe the interpretation of the sexual dimension with reference to the nudity of the person being depicted and/or their engagement in sexual activities. This is the case

65. Title X, Chapter I, Article 197 of the Spanish Criminal Code, but this provision has already proved not to be able to cover the non-consensual taking of intimate images in public, see: ‘Spanish Women Filmed Urinating Left Humiliated by Judge’ *BBC News* (London, 1 October 2021) <<https://www.bbc.com/news/world-europe-58747084>> accessed: 12 September 2022.

66. Chapter 4, section 6a (intrusive photography) and Chapter 4, Section 6c (unlawful breach of privacy), Chapter 4 section 7 on molestation and Chapter 6 Section 10 on sexual molestation.

67. Chapter 9, Section 360b of the Slovakian Criminal Code

68. Chesney and Citron (n 14).

69. Note that, for example, Article 226-1 of the French Criminal Code includes an offence of recording or transmitting audio recordings and Article 192 of the Portuguese Criminal Code also covers written and oral communications.

70. De Vido and Sosa (n 56) 140.

71. Article 612ter of the Italian Criminal Code. For a detailed discussion of the Italian laws on image-based sexual abuse, see: Gian Marco Caletti, ‘Can Affirmative Consent Save “Revenge Porn” Laws? Lessons from the Italian Criminalization of Non-Consensual Pornography’ (2021) 25 *Virginia Journal of Law and Technology* 112.

72. Article 139h of the Dutch Criminal Code; Navarra, Fernandes, and Lomba (n 50) 178. See also: Marthe Goudsmit, ‘Criminalising Image-Based Sexual Abuse: An Analysis of the Dutch Bill against “Revenge Pornography”’ (2019) <<https://marthegoudsmit.com/wp-content/uploads/2020/07/AA20190442.pdf>> accessed 12 September 2022.

73. Article 208/A(4) of the Maltese Criminal Code.

of Articles 417/8, 417/9, and 419/10 of the Belgian Criminal Code, as well as Article 191a of the Polish Criminal Code. The Austrian and German legislators, instead, have referred to places that are specially protected from view and have listed specific body parts to be covered, including specifics on whether wearing underwear is included, though without legally qualifying this content as ‘sexual’.<sup>74</sup> In this way, it is likely the law will also cover nude images taken without consent in changing rooms, toilets and other public spaces.

Another approach is to delineate the scope by reference to ‘intimate’ images. This terminological choice could serve as a synonym for the word ‘sexual’, or be included as additional clarification, or expand the scope. For example, section 1 of the Irish Harassment, Harmful Communications and Related Offences Act 2020 refers to ‘intimate’ images, defined as encompassing “what is, or purports to be the persons’ genitals, buttocks or anal region and, in the case of a female, her breasts”, the underwear covering these body parts, the nudity of the person being depicted, and their engagement in sexual activities. This therefore includes sexual material and nudity, all within the idea of ‘intimate’ images. The Irish provision, therefore, while adopting language of intimacy, remains similar in scope to other jurisdictions in focussing on sexual and nude imagery.

Nonetheless, the terminology of ‘intimate’ images could be interpreted more broadly. In particular, it could include images which are deemed sexual and/or intimate in some marginalised or minority communities, such as images of women from black and minoritised groups not wearing their expected dress, such as headscarves and other religious attire.<sup>75</sup> Imagery from other cultures also expands what is conventionally considered sexual in dominant communities in European democracies, such as images of black and minoritised women dancing in a private group, in attire which would not be worn publicly. These are intimate and sometimes sexual images, though not obviously included in existing definitions and approaches in current laws across Europe which reflect a predominantly white, ‘western’ cultural approach.<sup>76</sup> Nonetheless, it may be that in the future such interpretations are introduced where there are sufficiently broad definitions, such as Swedish laws on ‘intrusive photography’ covering covert images taken of a person in a private space and Belgian criminal provisions on ‘voyeurism’ targeting the disclosure of a body part that, because of their sexual integrity, the person would have kept hidden, if they had known someone was observing or recording.<sup>77</sup>

Another area not covered by most Member State laws is whether the scope includes images created by altering non-sexual images to make them nude, sexual or intimate using technology such as photoshopping, or more recently the development of AI, generating what are commonly known as ‘deepfakes’. Irish law specifically covers altered material stating that ‘intimate image’ includes images ‘made by any means including ... digital representation’.<sup>78</sup> Dutch law refers to ‘creating’ images which may include altered imagery and deepfakes,<sup>79</sup> with most other jurisdictions making no specific

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74. Section 120a of the Austrian Criminal Code and Article 184k of the German Criminal Code

75. Rackley and others (n 30) 308-309; English Law Commission (n 46) 84-86.

76. *Ibid.*

77. Chapter 4 Section 6a. Swedish Criminal Code; Article 417/8 Belgian Criminal Code

78. Section 1 of the Irish Harassment, Harmful Communications and Related Offences Act 2020

79. Article 139h of the Dutch Criminal Code; Daphne Stevens, ‘Criminalizing Revenge Pornography’ (SecJure Juridisch Faculteitsblad, 04 January 2022) <<https://www.secjure.nl/2021/01/04/criminalizing-revenge-pornography/>> accessed 27 July 2022; Tweede Kamer der Staten-Generaal, ‘Wijziging van Onder Meer Het Wetboek van Strafrecht in Verband Met de Herwaardering van de Strafbaarstelling van Enkele Actuele Delictsvormen (Herwaardering Strafbaarstelling Actuele Delictsvormen’ (2019) <<https://www.tweedekamer.nl/kamerstukken/stemmingsuitslagen/detail?id=2019P08294&did=2019P08294>> accessed 27 July 2022.

provision for altered images. Therefore, while it is possible that future interpretations may expand to include such material, this is by no means certain, leaving current victims without options for redress.

A final element of scope relates to whether laws exclude images which were originally taken or shared with consent. Such distinctions introduce elements of blame, such that the victim is held responsible for their own harms, as they originally shared the image themselves, though without consent for onward sharing. In principle, there should be no such distinctions, as the focus should be on any subsequent non-consensual taking or distribution, regardless of whether an image was first taken or shared with consent.<sup>80</sup> Belgian law endorses this principle, making it clear by specifically referring to the fact that an offence can be committed ‘even if the person has consented to it being taken’;<sup>81</sup> an approach also taken by the Spanish Supreme Court.<sup>82</sup> Irish law makes no distinction, focussing on non-consent as the key wrong,<sup>83</sup> as is also the case for Malta,<sup>84</sup> Slovakia<sup>85</sup> and Portugal.<sup>86</sup>

However, many other jurisdictions do differentiate between these situations. French law provides for different offences depending on whether the images were first taken with consent, making the law complicated and confusing as different criteria and penalties apply in the different circumstances.<sup>87</sup> Dutch law also differentiates between images unlawfully created and other sexual images, requiring proof of an intention to harm the victim in the latter case.<sup>88</sup> Italian law requires an additional threshold of proof of an intention to harm the victim where material was originally taken or shared with consent,<sup>89</sup> and Polish law only applies where the image was originally taken with force, threat or deception.<sup>90</sup>

These differences demonstrate the confusing and complicated nature of the law in some Member States, with victims, prosecutors and courts being left to navigate many different legal provisions, and different thresholds, to determine their applicability to each situation. This neglects to understand victims’ experiences which may, for example, involve the non-consensual distribution of images that were both taken with consent and some without. It also underlines different conceptual approaches, with cases where images were originally consensual not being taken as seriously, despite there being no evidential basis in victims’ experiences for such legal differences.

### *Conduct: criminalising taking, creating, sharing and threats*

As discussed above, image-based sexual abuse involves a range of behaviours including the non-consensual taking and creating of intimate images, distribution and threats to distribute material. The extent to which Member States criminalise these acts varies considerably. Examining non-consensual distribution first, the study by De Vido and Sosa found ten Member States have recently introduced specific legislation broadly criminalising this conduct.<sup>91</sup> The study also suggests that all other jurisdictions cover non-consensual distribution in other criminal laws, though the details and extent of

80. As set out in De Vido and Sosa (n 56) 139.

81. Article 371/1(2) of the Belgian Criminal Code as discussed in *ibid.*

82. *ibid.*

83. Sections 1-3 of the Irish Harassment, Harmful Communications and Related Offences Act 2020

84. Article 208/A of the Maltese Criminal Code

85. Article 360b of the Slovakian Criminal Code

86. Article 192 of the Portuguese Criminal Code

87. De Vido and Sosa (n 56) 139.

88. *ibid.*

89. *ibid.*; Caletti (n 71).

90. De Vido and Sosa (n 56).

91. Note that the report refers to 11 countries, but this includes the UK, *ibid.* 137-138.

such laws are not known.<sup>92</sup> There are likely to be many thresholds and limitations on the applicability of such general laws to forms of image-based sexual abuse, such as requiring repeated actions (for harassment prosecutions) or particularly explicit or obscene images (for some pornography and communications offences). Nonetheless, this does suggest that, at a very general level, there is consensus around criminalising the non-consensual distribution of some forms of intimate image.

It is less clear the extent to which threats to distribute images without consent are covered. The recently enacted Irish provisions make it a specific offence to threaten to distribute intimate images without consent,<sup>93</sup> recognising the potentially life-shattering experience of threats, commonly arising in contexts of abusive relationships or sexual extortion and blackmail. While some laws are relatively comprehensive, such as Austria's coverage of taking and distributing intimate images, it does not cover threats. However, it may be that there are more general provisions in some countries covering threats. But the risk is that the applicability of such provisions is not widely known or understood, inhibiting reporting and investigations, and/or that there are specific thresholds and limits to such more general provisions (likely intentions to cause direct harm) which limit the scope of such laws to threats to distribute intimate images without consent.

Compared to non-consensual distribution of images, the situation regarding taking and creating images is more difficult to discern due to the patchwork of coverage, often due to some older laws covering behaviours such as voyeurism, or laws recently adopted to cover specific forms of abuse, such as upskirting. For example, Austrian law criminalises taking images of intimate body parts that the person had protected from public view (thereby including upskirting for example), or the person is in a dwelling or room specially protected from view, thereby covering conventional voyeuristic images. Similarly, German law covers conventional voyeurism, now supplemented by the recently introduced provisions specifically targeting upskirting and which notably also include 'downblousing'.<sup>94</sup> Nonetheless, there remain different criteria and thresholds for the various provisions, including what types of images are covered, meaning the law is piecemeal and potentially confusing.

Further, while Austrian and German laws have extended beyond conventional approaches to voyeurism, such limits remain in the laws of France where the offence is one of recording the image of a person in a 'private place'. This is also the case under Belgian law which criminalises observing or taking images of someone naked or engaged in sexual activity in private circumstances. It is not clear, therefore, whether Belgian and French law will cover non-consensual taking of images in public, such as upskirting,<sup>95</sup> or where images are taken without consent in private spaces but by friends and partners who are legitimately present.<sup>96</sup>

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92. *ibid.*

93. Section 2 of the Harassment, Harmful Communications and Related Offences Act 2020

94. 'Downblousing' is where an image is taken 'down' a woman's top to reveal her breasts which may or may not be covered with underwear. While a common form of harassment, often referred to as a 'creepshot', few laws specifically cover this behaviour. The Austrian and German laws discussed here potentially include downblousing as the definitions cover images of breasts, or underwear covering these parts of the body, where the person has protected this body part from view. See further: Clare McGlynn, 'Criminalisation at the Margins: Downblousing, Creepshots and Image-Based Sexual Abuse', in Heather Douglas and others (eds), *The Criminalisation of Violence Against Women: Comparative Perspectives* (Oxford, Oxford University Press, 2023).

95. Article 417/8 of the Belgian Criminal Code, Article 226-3-1 of the French Criminal Code.

96. There is also confusion over whether Czech law covers upskirting, with recent discussions suggesting the possibility of prosecution for an offence against 'civil coexistence' which carries a maximum fine of around €800. See: *Expats.Cz*, 'Is "Upskirting" a Crime in Czechia? Prague Metro Incident Raises Questions' *Expats.Cz* (Prague, 28 July 2022) <<https://www.expats.cz/czech-news/article/upskirting-in-prague>> accessed 31 July 2022.

On a final note, it is worth noting that to our knowledge no Member State criminalises the mere creation of an intimate image by digital technology, such as deepfakes, the only exception potentially being Article 139h of the Dutch Criminal Code.<sup>97</sup> This is a significant issue in view of the increasing prevalence of digitally manipulated content and the potential for pornographic deepfakes to cause considerable harm.<sup>98</sup>

### *Mental requirements: intent, motivations and harm*

Across the Member States, the criminal provisions all require proof of the offender's intent, though Ireland extends this to reckless intention in specific cases. Other elements of the mental requirements vary in crucial ways. For example, a key distinction is between provisions which focus on non-consent, and those requiring additional proof relating to the perpetrator's motivations. Maltese law, for example, requires proof in all cases that a perpetrator intended to cause distress or harm to the victim.<sup>99</sup> While Irish law does provide a basic offence focussing on non-consent, requiring only proof of intentional recording or distributing an intimate image without consent, nonetheless it must also be proven that such acts either caused harm or are likely to seriously interfere with a victim's peace and privacy.<sup>100</sup> There are further examples of where the harm caused remains part of the offence, though also separate from the mental intention. Section 6c, Chapter 4 of the Swedish Criminal Code illustrates this, when making the unlawful breach of privacy dependent on the serious damage brought about to the person being depicted. Likewise, Article 197(7) of the Spanish Criminal Code requires the disclosure to undermine the right to privacy.

Other differences emerge such as under Italian law where no intent to harm is required where images are stolen or taken without consent, but if acquired consensually, distribution without consent requires the intention to harm.<sup>101</sup> In other countries, an intention to cause harm is an aggravating circumstance in relation to sentencing (*e.g.*, Article 160b(3) of the Slovakian Criminal Code) or an element of a more serious crime (*e.g.*, Article 417/10 of the Belgian Criminal Code and section 2 of the Irish Harassment, Harmful Communications and Related Offences Act 2020).

### *Sanctioning image-based sexual abuse*

Regarding the non-consensual distribution of intimate images, the average maximum sentence is normally up to one to two years' imprisonment (*e.g.*, Section 201a of the German Criminal Code, Article 192 of the Portuguese Criminal Code), with higher penalties possible in Belgium (5 years), Italy (6 years) and Ireland (7 years), depending on the specific crime.<sup>102</sup> In most cases, the prison

97. Stevens (n 77); Tweede Kamer der Staten-Generaal (n 77).

98. *ibid.*; Mariëtte van Huijstee and others, 'Tackling Deepfakes in European Policy' (2021) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_STU\(2021\)690039](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)690039)> accessed 31 July 2022.

99. Section 208E of the Maltese Criminal Code, as discussed in Sara De Vido and Lorena Sosa (n 56).

100. Section 3 of the Irish Harassment, Harmful Communications and Related Offences Act 2020. Note that there is a more serious offence in section 2 which does require proof of a specific intention to cause harm.

101. De Vido and Sosa (n 56) 141.

102. Note the recent proposal in Portugal to increase the maximum penalty to five years: ANSAMed, 'Portugal wants to stiffen revenge porn punishment', 4 October 2022, available at <[https://www.ansamed.info/ansamed/en/news/sections/generalnews/2022/10/04/portugal-wants-to-stiffen-revenge-porn-punishments\\_e0d08cf5-95e5-40af-92f8-05b0fcf27d9a.html](https://www.ansamed.info/ansamed/en/news/sections/generalnews/2022/10/04/portugal-wants-to-stiffen-revenge-porn-punishments_e0d08cf5-95e5-40af-92f8-05b0fcf27d9a.html)>

sentence can be replaced by a fine (*e.g.*, Article 139h of the Dutch Criminal Code, Article 197.7 of the Spanish Criminal Code), although in some cases the fine is or can be a mandatory part of the sentence. In France, for instance, a person found guilty of the non-consensual distribution of a sexual image will be fined up to €60,000, while, in Italy, the range is between €5000 and €15,000. The variety of sanctions reflects the divergence in national approaches to punishment and imprisonment which is identifiable across all criminal offences.<sup>103</sup>

### *Divergent, piecemeal and confusing*

Overall, therefore, it can be seen that the Member State laws vary considerably in how they tackle image-based sexual abuse. This divergence begins with differing conceptual foundations and continues into the specific focus of laws both in terms of definitions of material to be included and the conduct to be criminalised. While there are some examples of Member States taking a more holistic approach, recognising the inter-related nature of various forms of image-based sexual abuse as experienced by victims, there are many more examples of a myopic approach which has not kept pace with emerging understandings of harm, particularly the nature of threats, or with new technology, particularly altered imagery and deepfakes. In relation to the digital dimension of violence against women, the Istanbul Convention's expert group noted that few states 'consider and specifically address the compound experiences of women and girls and do not place it in the context of a continuum of violence against women that women and girls are exposed to in all spheres of life, including in the digital sphere.'<sup>104</sup> Unfortunately, this is particularly the case for Member State actions relating to image-based sexual abuse.

## **Developing the Commission's proposal: background and legal basis**

### *Evolving EU measures targeting online violence against women*

The EU has a long-standing commitment to combating violence against women, the origins of which can be traced back to a European Parliament Resolution in 1986.<sup>105</sup> This resolution was ground-breaking in recognising a European dimension to violence against women as a human rights and public health problem, moving beyond the EU's focus on equal opportunities in the labour market.<sup>106</sup> By 2016, the European Commission was recognising that gender-based violence happens "everywhere – at home, at work, at school, in the street and online."<sup>107</sup> Around the same time, the European Parliament expressed alarm at the widespread harassment of women online and

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103. See, for example: Vincenzo Ruggiero and Mick Ryan, *Punishment in Europe: A Critical Anatomy of Penal Systems* (Palgrave, 2013).

104. GREVIO (n 20) para 16.

105. European Parliament Resolution of 11 June 1986 on violence against women [1986] OJ C 176/73. See further Sharron Fitzgerald and May-Len Skilbrei, *Sexual Politics in Contemporary Europe* (Switzerland: Palgrave Macmillan, 2022).

106. E Emanuela Lombardo and Petra Meier, 'Framing Gender Equality in the European Union Political Discourse' (2008) 15 *Social Politics: International Studies in Gender, State & Society* 101, 110-111, 113.

107. European Commission, *Strategic Engagement for Gender Equality 2016-2019* (Publications Office of the European Union, 2016) 8



the rise of gender-based cyberviolence, including the distribution “on social media of private images and videos without the consent of the people involved”.<sup>108</sup>

In 2021, the Parliament called on the EU and its Member States to take action to eradicate cyber violence against women, understood as a continuum of the sexual violence and abuse women experience offline.<sup>109</sup> It has also recognised the extensive range of forms that online violence against women and girls can take including ‘online sexual and psychological harassment, cyber-bullying, cyberstalking, non-consensual disclosure of sexual images, sexist hate speech online and new forms of online harassment such as zoom bombing or threats online’.<sup>110</sup> In particular, it has explicitly identified ‘image-based sexual abuse’, including where a ‘sexual encounter was recorded or disseminated without consent’ is ‘weaponised’ against women, and the growing problem of deepfake pornography whereby artificial intelligence is harnessed to ‘exploit, humiliate and harass women’.<sup>111</sup>

It is in this context that in 2020 the European Commission proposed tackling gender based-violence either via EU accession to the Istanbul Convention or by means of a legislative proposal designed to reach the same goals.<sup>112</sup> In view of accession remaining blocked due to the reference to the notion of gender in its text,<sup>113</sup> the Commission introduced its proposed directive in March 2022.<sup>114</sup> The proposed Directive is ambitious in seeking to establish European rules on areas of significant public interest and controversy, including criminalising rape in the absence of consent, moving away from definitions requiring force, as well as measures on female genital mutilation, various forms of cyber

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108. European Parliament Resolution of 26 October 2017 on combating sexual harassment and abuse in the EU [2017] (2017/2897(RSP))
  109. European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence (n 6) Recital F; European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU (n 6) Recital C .
  110. European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU (n 6) para 33.
  111. European Parliament resolution of 14 December 2021 with recommendations to the Commission on combating gender-based violence: cyberviolence (n 6) Recitals T-U.
  112. ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Union of Equality: Gender Equality Strategy 2020-2025’ [2020] COM (2020)152 final, 3.
  113. In 2021, the European Court of Justice held that the Council can wait for common agreement amongst the Member States, before deciding whether and to what extent the EU will accede to the Istanbul Convention, even though the vote for this decision only requires a qualified majority. This, however, means that the Istanbul Convention is likely to remain blocked in the Council indefinitely, considering that some Member States, such as Bulgaria and Slovakia, argue that the Istanbul Convention and its reference to the notion of gender could threaten the ‘natural order’ of their society. In C1/19 Istanbul Convention [2021] ECLI:EU:C:2021:198, para. 189-190, 229-274. See also: European Women’s Lobby, ‘ECJ Decision on the Istanbul Convention: A Missed Opportunity’ (2021) <<https://womenlobby.org/ECJ-Decision-on-the-Istanbul-Convention-a-missed-opportunity?lang=en>> accessed 31 July 2022.
  114. European Commission Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence’ (n 3).

violence including stalking and incitement, as well as the provisions on the non-consensual distribution of intimate and manipulated material.<sup>115</sup>

### *Examining the legal basis for action*

In terms of the legal basis, the Commission relies on Article 83.1 TFEU which provides competence to establish minimum rules and define criminal offences “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”.<sup>116</sup> This provision proceeds to list the specific crimes within scope to include ‘sexual exploitation of women and children’ and ‘computer crime’. The Commission relied on the former as the basis for the proposals on rape and female genital mutilation, though with some controversy as it excludes male rape.<sup>117</sup> The proposals on non-consensual sharing of intimate images, cyber stalking and cyber harassment, on the other hand, are characterised as a form of ‘computer crime’ which is understood to mean any criminal offence “against or intrinsically linked to the use of information and communication technologies”<sup>118</sup> and therefore includes most forms of image-based sexual abuse having a serious and cross-border dimension.

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115. There are a range of other EU measures impacting on this field, including the Victims’ Rights Directive (Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315), the European Protection Order Directive (Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order [2011] OJ L 338) and the Compensation Directive (Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims [2004] OJ L 261). In the civil sphere, the GDPR already allows for the removal of the non-consensual, sexual images based on Article 17, even though the legal route is considered challenging and time-consuming: see the GDPR Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Similarly, the Digital Services Act aimed at improving online safety should ensure greater accountability of large internet platforms to remove unlawful content such as image-based sexual abuse, though proposals from the European Parliament to strengthen the Act by making the distribution of such material across pornography platforms more difficult were rejected: European Parliament, ‘Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (2022) P9\_TA (2022) 0014. For more information see: Lorna Woods and Clare McGlynn, ‘Pornography Platforms, the EU Digital Services Act and Image-Based Sexual Abuse’ (*LSEBlog*, 26 January 2022) <<https://blogs.lse.ac.uk/medialse/2022/01/26/pornography-platforms-the-eu-digital-services-act-and-image-based-sexual-abuse/>> accessed 27 July 2022.
116. European Commission Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence’ (n 3) 8-9. This discussion of the legal basis of the proposal draws on Rigotti’s earlier analysis in this journal of the Commission’s proposals to harmonise rape laws: see Rigotti (n 8) 166-171.
117. Rigotti (n 8); ‘WAVE’s Statement on the EU Draft-Directive on Combating Violence against Women and Domestic Violence’ <<https://wave-network.org/waves-statement-on-the-eu-draft-directive-on-combating-violence-against-women-and-domestic-violence/>> accessed 12 September 2022; European Women’s Lobby, ‘Violence against Women and Domestic Violence: A First Step towards a Europe Free of Male Violence against Women and Girls - EWL Response to the Proposal for a Directive on Combating Violence against Women and Domestic Violence’ (2022) <[https://womenlobby.org/IMG/pdf/analysis\\_directive\\_on\\_vaw\\_and\\_domestic\\_violence.pdf](https://womenlobby.org/IMG/pdf/analysis_directive_on_vaw_and_domestic_violence.pdf)> accessed 12 September 2022.
118. European Commission Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence’ (n 3) 9.

As outlined above, image-based sexual abuse should be considered a ‘serious crime’ in terms of the nature, scale, significance and impact of the wrongful conduct. It is also a threat to the normative interests of the EU, in particular equality between women and men and the fundamental rights protected in the EU Charter, especially rights to human dignity, integrity of the person, right to liberty and security, respect for private and family life and the protection of personal data.<sup>119</sup> Although there is a degree of uncertainty about how to define a serious crime, the literature has commonly drawn on similar empirical evidence identifying serious wrongs and/or has referred to the potential threat to the fundamental interests of the EU arising from the wrongdoing.<sup>120</sup>

As well as being a serious crime, crimes must have a cross-border dimension to come within Article 83.1 TFEU. There are three elements to this, namely the nature, or impact, or ‘special need’ to combat them on a common basis.<sup>121</sup> The cross-border nature can stem from the way the crime is committed, namely its nature. When image-based sexual abuse is committed through information and communication technologies, its borderless nature implies that national responses cannot adequately respond to it and the Member States need to collaborate.<sup>122</sup> A crime can also be cross-border whenever it is committed nationally, but its impact is transnational. In the case of image-based sexual abuse and the technologies involved, it is clear that while the non-consensual creating, taking, and/or sharing of a sexual image occurs within national borders, its harms spread beyond them. Next, and in relation to a ‘special need’ to tackle the crime on a common basis, Jenia I. Turner emphasises the symbolic potential harmonisation might have, stemming from the function of criminal law to re-affirm the EU’s identity and values, such as equality and fundamental rights.<sup>123</sup> Accordingly, it can be argued that the accepted wrongfulness of image-based sexual abuse further legitimises common EU action, clearly expressing that this conduct should have no place in the EU.<sup>124</sup> Accordingly, therefore, image-based sexual abuse has a transnational, negative impact, justifying Member States’ cooperation in criminal matters.<sup>125</sup>

Nonetheless, this legal basis constrains action on image-based sexual abuse and, in relation to other areas of the proposed Directive, raises serious issues of concern. A more effective and

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119. Articles 2 and 3 TFEU and Articles 1, 3, 7, and 8 of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

120. Cecilia Navarra, Meenakshi Fernandes, and Niombo Lomba (n 51) 34; Letizia Paoli and others, ‘Exploring Definitions of Serious Crime in EU Policy Documents and Academic Publications: A Content Analysis and Policy Implications’ (2017) 23 *European Journal on Criminal Policy and Research* 269.

121. These three elements are to be considered separately, as outlined by Irene Wieczorek, *The Legitimacy of EU Criminal Law* (Hart 2020) 116.

122. *ibid.*; Luis Arroyo Zapatero and Marta Muñoz de Morales Romero, ‘Droit Pénal Européen et Traité de Lisbonne: Le Cas de l’Harmonisation Autonome (Article 83.1 TFEU)’ in Geneviève Giudicielli-Delage and Christine Lazerges (eds), *Le Droit Pénal de l’Union Européenne au Lendemain du Trait é de Lisbonne* (Société de Législation Comparée 2012) 113.

123. Jenia I. Turner, ‘The Expressive Dimension of EU Criminal Law’ 60(2) *The American Journal of Comparative Law* 555.

124. On this normative justification, see: Nina Peršak, ‘Criminalising Hate Crime and Hate Speech at EU Level: Extending the List of Eurocrimes Under Article 83(1) TFEU’ (2022) 33 *Criminal Law Forum* 85; Monica Nogaj, ‘European Added Value Assessment: Combatting Violence against Women’ <[https://www.europarl.europa.eu/thinktank/en/document/IPOL-JOIN\\_ET\(2013\)504467](https://www.europarl.europa.eu/thinktank/en/document/IPOL-JOIN_ET(2013)504467)> accessed 27 July 2022; Turner (n 118) 557.

125. Regarding subsidiarity, in light of the divergent nature of Member State laws, EU action can be justified as being more effective than the current situation: Article 5.3 TFEU and Protocol (no. 2) on the application of the principles of subsidiarity and proportionality (2008) OJ 115. See further: Irene Wieczorek, ‘The Principle of Subsidiarity in EU Criminal Law’ in Chloé Brière and Anne Weyembergh (eds), *The Needed Balances in EU Criminal Law: Past, Present, and Future* (Hart 2017) 70, 77-79.

comprehensive way forward, therefore, would be to adopt the Parliament's proposal for a Council decision to include gender-based violence as a new area of particularly serious crime with a cross-border dimension.<sup>126</sup> However, the Commission's approach to the Directive, and legal basis, can be seen as pragmatic in light of the said resistance of some Member States to take broader action including objections to the very concept of gender.<sup>127</sup> The result, however, is a patchy legal protection targeting rape and female mutilation as a form of sexual exploitation against women, whereas the non-consensual sharing of intimate or manipulated material and other forms of cyber-harassment and stalking fall within the scope of computer crimes.

## **Commission's proposal on non-consensual sharing of intimate or manipulated material: ambitions and limitations**

### *Ambitions and conceptual foundations*

Article 7 states that Member States must criminalise the intentional distribution of 'intimate images or videos or other material depicting sexual activities' where the person depicted does not consent and where the material is distributed through technology to a 'multitude of end-users'. The inclusion of this provision is a welcome recognition of the prevalence and harms of a form of abuse that has spiralled over recent years, and which has led to a global movement to secure criminal justice redress. Further, setting this measure within the overall framework of violence against women recognises the gendered nature of these crimes, whilst also acknowledging that other groups, such as LGBTIQ\* communities, are also adversely impacted.<sup>128</sup> The violence against women framework should also enable greater understanding of the nature and motivations of perpetration, as well as the nature of the harms experienced, all of which impact on legal definitions, scope and sanctions.

Nonetheless, there remain concerns regarding the approach taken. While the focus on cyber violence represents a welcome recognition of the significance of these harms, its legal qualification as a computer crime risks entrenching distinctions between 'offline' and 'online' behaviours which are not reflective of women's experiences. Women commonly experience violence and abuse, such as stalking or harassment, not in separate categories depending on the mode of perpetration, but as a whole experience. While such concerns are less dominant when considering image-based sexual abuse, as this is almost exclusively a crime committed via information and communication technologies, the overall concern remains as offline/online distinctions commonly also manifest in cyber acts being taken less seriously.<sup>129</sup>

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126. European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU (n 6) para. 67.7
127. See, for instance, C1/19 Istanbul Convention [2021] ECLI:EU:C:2021:198 para 189-190 mentioned above. Besides, Poland refused to support the EU Council conclusions of 21 October 2021 on the charter of fundamental rights in the context of artificial intelligence due to the presence of the word 'gender equality': 'Poland Rejects Presidency Conclusions on Artificial Intelligence, Rights' (*Euractive*, 28 October 2020) <<https://www.euractiv.com/section/digital/news/poland-rejects-presidency-conclusions-on-artificial-intelligence-rights/>> accessed 27 July 2022.
128. European Commission Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence' (n 3) Recital no. 5.
129. It is therefore regrettable that that the European Commission has not followed the European Parliament recommendation to introduce gender-based violence as a new area of crime listed in Article 83.1 TFEU. In this way, the EU could have given voice to women's experiences, while also offering an all-encompassing legal protection to other social groups.

### *Scope and definitions*

Moving on to consider the specific scope of Article 7, the first issue is the nature of the materials included. Article 7(a) refers to ‘intimate images, or videos or other material depicting sexual activities’. In terms of the type of material to be included, the focus is on visual material, such as photos and videos, rather than text.<sup>130</sup> In relation to content, the measure covers ‘intimate’ images as well as those depicting ‘sexual activities’. This is a potentially broad definition which will certainly include images of nudity and should also include other private activities such as toileting. There is no limit in terms of public or private acts meaning that intimate images of body parts taken in public, such as upskirting and downblousing, should also be covered. Potentially, ‘intimate’ can go beyond sexual and nude images, such as those of women from some black and minority ethnic communities without their expected attire.<sup>131</sup> While no jurisdiction yet includes such images in their criminal laws, this proposal does not preclude such an option.

In definitional terms, the proposal rejects the victim-blaming approach of some Member State laws which limit the scope of redress where images were originally taken or shared with consent. The Commission text refers to images taken without the depicted person’s consent and the preamble states that the measure should apply ‘irrespective of whether the victim consented to the generation of such material or may have transmitted it to a particular person’.<sup>132</sup> Nonetheless, Member States could still apply different thresholds or sanctions in these different situations, so long as, at a minimum, there is some form of redress where material is non-consensually shared. Maintaining such a fragmented approach, however, would constitute an injustice to victims, making reporting and prosecutions more difficult and sustaining mistaken and detrimental beliefs that women who take or share intimate images with consent are somehow responsible for subsequent harms.

### *Intention and perpetrator motives*

In relation to the mental element, Article 7(a) straightforwardly refers to intentional distribution without consent, without limiting the scope to proof of specific motives such as causing distress. This ensures that the broad range of motivations are all included and rejects the dominant ‘revenge porn’ narrative where some acts are criminalised only where the perpetrator acted to harm the victim, such as in Malta. It affirms the core wrong of non-consent and that criminal sanctions should apply regardless of perpetrator motives. This should also make cases more straightforward, as evidence suggests that higher thresholds inhibit criminal justice personnel from pursuing prosecutions.<sup>133</sup>

### *Manipulated media and deepfakes*

Another demonstration of the Commission’s ambition comes in Article 7(b) which covers material that is ‘produced or manipulated’ to make it ‘appear as though another person is engaged in sexual

130. Though note that the preamble refers to ‘audio clips’. In European Commission Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence’ (n 3) preamble, para. 19.

131. Rackley and others (n 30) 308-309.

132. European Commission Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence’ (n 3) preamble, para 19.

133. Rackley and others (n 30) 305-306.

activities' without the depicted person's consent. This provision is designed to cover altered images or videos, often referred to as fakeporn or pornographic deepfakes.<sup>134</sup> In seeking to criminalise the non-consensual distribution of manipulated intimate material, the draft Directive is following international best practice where many jurisdictions are recognising altered and deepfake pornographic materials as the new frontier in image-based sexual abuse. In effect, 'real' intimate images or videos are no longer required to perpetrate harms, as intimate material can be quickly and cheaply generated using increasingly common and user-friendly technology. Unfortunately, the rate at which deepfakes are being generated demonstrates the market and virality of this content. However, across the EU there is little legislative action in this field, with recent Irish legislation being a notable exception.

However, there is a potentially significant limitation on this measure's scope. Article 7(b) only applies to material manipulated so that the person appears to be 'engaged in sexual activities'. What might constitute 'sexual activities' is likely to vary considerably and give rise to definitional confusion. There will be cases where this definition is clearly met, including much standard pornography. On the other hand, it is not clear whether it will apply to other situations such as nudity per se, as not all nudity is sexual, such as images of those changing their clothes and toileting. Secondly, the provision applies to images of people 'engaged' in sexual activities which may also rule out nudity as this may not be of someone *engaging* in sexual activities, even if the nude image itself is considered sexual. This definition, therefore, is likely to exclude all material produced through 'nudification' apps and subsequently distributed without consent.<sup>135</sup> Regrettably, therefore, the definition in the draft is not comprehensive and will lead to potential confusion and some exclusions. A more comprehensive and straightforward approach would be to cover all intimate images, defined to include nude or sexual images as in Article 7(a).

### *Accessible to a multitude of end-users*

The proposal is also limited by only applying to material made 'accessible to a multitude of end-users by means of information and communication technologies'. This limitation is unnecessary in view of the proposal's legal basis being its status as a computer crime, thereby already recognised as having a serious, cross-border dimension and being likely to reach a broad audience. If it remains in any final text, questions of interpretation will arise, potentially excluding many harmful experiences.

The preamble states that the term 'multitude' should be understood as referring to reaching a 'significant number' of end-users and that the term 'should be interpreted and applied having regard to the relevant circumstances, including the technologies used to make that material accessible and the means these technologies offer for amplification'.<sup>136</sup> This means the scope is to be determined by the relatively vague term 'multitude', understood as meaning 'significant', with

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134. The EU is also considering more general measures to regulate AI including possible transparency requirements for deepfakes. Note that the provision is technology neutral meaning that it will apply to existing technology as well as processes yet to be developed.

135. As with other definitions in the draft Directive, it will also not cover material considered intimate beyond the most common nude or sexual situations, such as where someone's dress is altered in a way that is not reflective of their common religious attire, such as the digital removal of headscarves.

136. European Commission Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence' (n 3) preamble, para 18.

dictionary definitions stating this to be a ‘large number’.<sup>137</sup> None of these terms advances our understanding. For sure, uploading material to some widely accessed websites, such as pornographic platforms, will easily be covered. Similarly, material shared on public fora such as Twitter will be within scope. What is less clear is where the boundaries will lie with more limited distributions.

Sometimes a perpetrator will share images with victims’ family and friends which might be any number of people ranging from ten, to hundreds, to thousands. However, the serious harms experienced by the victim will not necessarily be greater simply because the image has been shared with more people. A perpetrator may share the material with an employer and work colleagues, again this might be any number of people, but even small numbers could generate devastating impacts. Is it right that working for a large organisation, with a ‘multitude’ of colleagues, means possible criminal redress, but not a small employer, even though in both cases your professional life is significantly harmed? In some communities, for example some minority religious communities, disclosure to a small number may again have devastating impacts, perhaps more than where images are shared with thousands of ‘friends’ online who are not so concerned about the intimate activity being disclosed. Similar concerns have been raised by the European Economic and Social Committee, which argues that this requirement is ‘ambiguous, vague and highly open to interpretation’, nor does it ‘deal with the real reputational harm which is sometimes greater if the material is shared only with people from the victim’s close social, family or work circles’.<sup>138</sup>

While this terminology and limitations on scope might provide some flexibility for Member States, it will lead to significantly different levels of protection and redress. Redress becomes dependent not on the harms experienced, but on technical choices regarding the means by which material is disseminated without consent. Finally, it will make it more difficult to determine in advance whether conduct is criminal or not, and may hinder educative and prevention initiatives as the message regarding wrongful conduct is not clearly focussed on consent, but on technological details.

### *Conduct categories: failing to reflect victims’ experiences*

It is positive that the draft Directive includes measures to tackle the non-consensual distribution of intimate images. This ambitious element of the proposal will help to ensure that Member State laws are keeping pace with international best practice. However, limiting the measure to only distribution fails to reflect the prevalence of abuse and victims’ experiences. As noted above, victims are commonly subjected to a range of forms of image-based sexual abuse, including the taking of intimate images or videos without consent, alongside their distribution and threats to do so. In other words, they do not experience the abuse in the discrete categories of ‘taking’ and ‘distributing’, but as a whole. Having different legal categories, laws and practices varying according to specific acts is not, therefore, reflective of victims’ experiences. Further, in and of itself, the taking of intimate images without consent is experienced as a fundamental violation of privacy and sexual autonomy and should be proscribed by the criminal law. As noted above, some jurisdictions do cover some forms of taking intimate material without consent, but coverage is patchwork and the boundaries of protection are often unclear. This mosaic of laws covering image-based sexual abuse is confusing for victims, as well as criminal justice personnel, meaning fewer reports, investigations and

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137. ‘Multitude’, Cambridge English Dictionary.

138. European Economic and Social Committee (n 9) para. 3.12.

prosecutions. An alternative approach would be to include gender-based violence as a new area of crime listed in Article 83.1 TFEU which would then provide a clearer legal basis to for minimum provisions covering all forms of image-based sexual abuse.

### *Criminalising coercive threats*

The potential harm experienced when faked sexual or pornographic videos are created without consent arises from threats to subsequently distribute such material. Similarly, threats to distribute 'real' intimate material is a particularly egregious form of abuse, often experienced as life-threatening and paralysing. For others, the threat of disclosure is continuous, cumulative and can become overwhelming, casting a relentless shadow over victims' lives. It is welcome, therefore, that Article 7(c) provides that it should be a criminal offence to intentionally threaten to distribute intimate images or videos, including deepfakes. As with the provision on manipulated material and deepfakes, including within the Directive threats demonstrates the ambition of the proposal as it will require many Member States to alter their criminal laws.

However, as with other elements, the provision on threats is not comprehensive as it only includes where done so 'in order to coerce another person to do, acquiesce or refrain from a certain act'. This will include coercive circumstances such as sexual extortion where a victim has already shared intimate images and the perpetrator threatens to distribute them, unless further intimate material is shared. It should also cover blackmail where the perpetrator demands money to prevent distribution, a more common form of extortion where adults are the victims. The provision may also cover some situations of domestic abuse where a perpetrator threatens to distribute material as part of a broader pattern of control and abuse which might include a direct focus on a 'certain act' as required by the provision. However, the prosecutorial challenge will be identifying and proving the 'certain act' and its connection with the specific threats to distribute intimate material.

But this is as far as the measure goes. It will not, therefore, cover threats made with the aim of causing distress to the victim. For example, an ex-partner may threaten to distribute intimate images to deliberately cause distress, rather than to coerce the victim to do a particular act. Similarly, many other perpetrators may make threats for reasons not always apparent, but designed to cause direct harm, perhaps to exercise power and control over the victim, but without it being related to 'certain acts'. Regrettably, therefore, while it is positive that the provision includes threats, limiting it to only certain threats means the provision fails to live up to its ambition and leaves considerable gaps in protection. In addition, it applies an additional threshold which will make prosecutions more challenging and therefore less likely.

### *Sanctions*

In terms of sanctions, Article 12(6) provides that the criminal offences in Article 7 must be punishable by a maximum penalty of at least one year of imprisonment. This penalty has been criticised by the EESC which considers that the sanction should be equivalent to the minimum for cyber-stalking which is a maximum of two years' imprisonment.<sup>139</sup> If there was a change to two years, many more countries would also need to revise their laws. There are difficulties with ranking violence against women offences, assuming some are more intrinsically 'serious' than others, when

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139. *ibid.* para. 3.18.



victims' experiences vary considerably. Further, increasing criminal penalties is not necessarily the best way to target abuse. Criminalisation is a necessary foundation for establishing that conduct such as image-based sexual abuse is serious and harmful, but with the aim of changing societal cultures and behaviours, rather than increasing imprisonment.<sup>140</sup>

### *Revising Article 7 towards a more comprehensive, straightforward proposal*

Overall, therefore, while the inclusion in the draft Directive of measures covering some forms of image-based sexual abuse is positive, particularly the key focus on consent, and the inclusion of threats and altered imagery, revisions are required to ensure that the measure is straightforward, comprehensive and offers the real opportunity of redress for many victims. The Article should be revised to cover taking intimate and sexual images or videos without consent, reflecting victims' holistic experiences. In relation to the provisions on altered images and deepfake pornography, the restriction of scope to only material of people 'engaging in sexual activity' should be removed, utilising the broader definition of intimate images to ensure harmony across the provisions of Article 7. Similarly, in relation to threats, the limitation of this provision to only cases where it can be proven the threat was designed to coerce the individual into specific acts or omissions should be removed. A threat to distribute such material, without consent, is harmful, regardless of the motives. The focus should be on the harm to victims, not the specific motives of perpetrators.

## **Conclusions: Towards a European law criminalising image-based sexual abuse**

We welcome the Commission's ambitious plans for a Directive targeting violence against women and girls. As the European Women's Lobby has stated, the proposal is an 'essential first step in the direction of an harmonised approach to violence against women and girls in the EU.'<sup>141</sup> In particular, while there remain legitimate concerns regarding the approach to rape, in relation to online abuse, the proposal marks a significant step forward in seeking to introduce minimum rules regarding many forms of cyber violence and harassment, as well as the non-consensual distribution of intimate and manipulated images.

Nonetheless, despite these ambitions, there are serious limitations to the proposed Directive. The specific proposal represents a missed opportunity to take a more holistic and comprehensive approach to online abuse, particularly image-based sexual abuse, thereby continuing the misrecognition and misunderstanding of women's experiences. While some Member States and many organisations representing victims and civil society recognise the need to shift our understandings from existing categories of criminal law, towards an approach reflective of victims' experiences and all manifestations of intimate image abuse, the proposed Directive risks reifying existing categories and assumptions. In providing for minimum standards only in relation to the non-consensual *distribution* of intimate images, it sustains and reproduces the current confusing and piecemeal

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140. On the expressive role of the criminal law regarding image-based sexual abuse, and the need for broader cultural change and education, see Clare McGlynn and Erika Rackley (n 11) and on the necessity and limits of criminalisation for violence against women, see further: Clare McGlynn, 'Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking' (2022) 93 *Women's Studies International Forum* 102614.

141. European Women's Lobby (n 118).

approach to victims' justice and redress that arises from the current divergent, patchwork of legal provisions.

Accordingly, we urge the Commission and EU institutions to review the approach to online violence against women and girls in the draft Directive and revise it to better reflect victims' experiences. An approach which takes women's experiences at its core, exemplified in the concept of image-based sexual abuse, will also better future-proof law and policy, particularly as technology develops and we move towards the immersive world of the metaverse.

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