

Protecting vulnerable victims: an analysis of the EU legal framework for victims of gender-based violence

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Abstract

Since the 2010 Stockholm Programme, the EU has been dedicated to setting minimum standards for victims' rights. However, it was only in the 2020-2025 Victims' Rights Strategy that the urgent need for a specific framework addressing victims of gender-based violence became evident. This chapter analyses the legal framework governing their rights, evaluating its effectiveness in achieving EU goals in accordance with the Istanbul Convention and in the Commission's Equality Strategy. To this end, the Commission's proposed Directive on combating violence against women and the Council's ratification of the Istanbul Convention is examined to understand their capacity to improve victims' access to protection, support, and justice rights across the EU. This analysis also considers whether this proposed Directive should incorporate gender-based violence to the list of Euro crimes to ensure comprehensive prosecution of these offences across all Member States, meeting the EU's international obligations in this area.

1. Introduction

Since the 1970s, EU Member States have increasingly recognised the role of victims within the criminal justice system.¹ In this context, most EU Member States have either constitutionally protected or considered victims' rights as fundamental rights within the domestic legal framework.² Although the specific rights recognised across the EU and their status in criminal proceedings varies, these have become essential to understand the functioning of the criminal justice system across the Member States. The European Union, in turn, is a latecomer to the recognition of these rights and setting of minimum standards in this area. This can be partially attributed to the late development of competences within the Area of Freedom, Security and Justice (AFSJ), which were only fully "communitarised" with the Treaty of Lisbon.

¹ On the evolution of victims' rights in Europe: Marc Engelhart, 'Victims and the European Convention on Human Rights', in Gabrio Forti (ed.), *Victims and Corporations. Legal Challenges and Empirical Findings* (Wolters Kluwer Italia 2018); Sandra Walklate et al., 'Victim stories and victim policy: Is there a case for a narrative victimology?' (2019) 15(2) *Crime, Media, Culture* 199.

² Elodie Sellier & Anne Weyembergh, *Criminal procedural law across the European Union: A comparative analysis of selected main differences and the impact they have over the development of EU legislation* (LIBE Committee 2018), 144.

Within the AFSJ, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime³ (hereinafter “the Victims’ Rights Directive”) constitutes the first truly comprehensive instrument adopted by the Union setting minimum standards within the field of victims’ rights. This came to replace the Framework Decision on the standing of victims in criminal proceedings⁴ which, despite introducing for the first time ‘hard-law’ to set minimum victim rights’ standards, faced significant implementation challenges that questioned its adequacy and challenged its effectiveness.⁵ Regardless of the progress represented by the Victims’ Rights Directive, the evidence available shows that the rights recognised by this instrument are not fully available to all victims of crime, with cross-border victims holding the weakest position in this area.⁶ In this context, the European Commission adopted, on 24 June 2020, its first EU strategy on victims’ rights that will cover the period 2020-2025.⁷ In it, the Commission stated that particular attention would be paid to the protection of the rights of victims of gender-based violence.⁸ Since then, the Commission has proposed a Directive on combatting violence against women and domestic violence (hereinafter “proposed Directive on domestic violence”),⁹ proposed a revision of the Victims’ Rights Directive¹⁰ and included fighting domestic and gender-based violence as a priority within its Equality Strategy 2020-2025,¹¹ whilst the Council has ratified the Istanbul Convention.

Efforts to improve the rights of victims and, more particularly, victims of gender-based violence have centred on developing a comprehensive framework of rights that encompasses protection measures, access to support, and access to justice. This chapter will critically analyse the initiatives adopted within this area and will evaluate whether the harmonisation of minimum standards under the Victims’ Rights Directive (and its proposed revision) and the proposed Directive on domestic violence may improve access of victims of gender-based violence to protection, support measures, and justice. This analysis seeks to critically examine the effectiveness of the EU’s approach to harmonising victims’ rights under Article 82(2)c TFEU, which links harmonisation efforts in the field of criminal law to ‘facilitating mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension’. This chapter will consider how this instrumental

³ 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 315/57 (*Victims’ Rights Directive*)

⁴ Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [2001] OJ L 82/1.

⁵ See Antony Pemberton & Carmen Rasquete, ‘Victims in Europe – Assessment of the Implementation of the Framework Decision on the Standing of Victims in Criminal Proceedings: Preliminary Results’, in Jutta Hartmann (ed.), *Perspektiven professioneller Opferhilfe: Theorie und Praxis eines interdisziplinären Handlungsfelds* (Springer 2010); Victim Support and APAV, *Victims in Europe: Implementation of the EU Framework Decision on the standing of victims in the criminal proceedings in the Member States of the European Union* (2009), 123-133.

⁶ European Commission, EU Strategy on victims’ rights (2020-2025), COM(2020) 258 final.

⁷ *ibid.*

⁸ *ibid.*, 1.

⁹ Proposal for a Directive on combating violence against women and domestic violence, COM/2022/105 final.

¹⁰ Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, COM/2023/424 final (Proposal amending the Victims’ Rights Directive).

¹¹ European Commission, A Union of Equality: Gender Equality Strategy 2020-2025, COM/2020/152

understanding of victims' rights limits the EU's harmonisation efforts to the adoption of (sometimes) vague standards that facilitate the persistence of disparities across the domestic criminal justice systems.

This analysis will proceed as follows. Section 2 will examine one of the EU's first attempts to legislate within the field of domestic violence, namely Article 13 of the Citizenship Directive,¹² and will expose the limited scope of this initiative that was linked to the fulfilment of economic aims. Then, Section 3 will focus on EU horizontal instruments for the protection of victims' rights and will critically examine how these have improved (and failed) the protection of the rights of victims, with Sections 3.1 and 3.2 examining the Victims' Rights Directive and the Directive on the European Protection Order, whilst Section 3.3 will evaluate the limitations of this framework and the need for reform to guarantee the rights of victims across the EU. Finally, Section 4 will focus on measures that increase the protection of victims of gender-based violence, namely the Council's decision to ratify the Istanbul Convention (Section 4.1) and the Commission's proposals for new instruments within the field of victims' rights, particularly the proposed Directive on Domestic Violence (Section 4.2). These sections will evaluate the changes introduced/proposed by these instruments, whilst Section 4.3 will consider the need to expand the list of Euro crimes to incorporate an offence of gender violence and will evaluate whether such an approach could contribute to fulfilling the goals set by the Commission in its Strategy on Victims' Rights 2020-2025.

2. Article 13 of the Citizenship Directive: an analysis of the early initiatives to fight against domestic violence

The Declaration accompanying Article 8 TFEU included the elimination of gender inequalities and combatting domestic violence as EU-wide objectives with the Treaty of Lisbon.¹³ Since then, the European Commission has adopted a number of strategies that have sought to implement this goal. The latest one is the Gender Equality Strategy 2020-2025, which incorporates the compromise to present a new Victims' Rights Strategy addressing the specific needs of victims of gender-based violence.¹⁴

But even before the adoption of the TFEU, the EU legal framework contained measures aimed at providing a certain level of protection to victims of domestic violence. For instance, Article 13 of the Citizenship Directive includes a rule that permits third country nationals victims of domestic violence to retain residency rights after marriage has ended. However, this right is very limited and merely establishes an exception that is far from being part of a comprehensive strategy for vulnerable victims, namely migrant women victims of domestic violence. Instead, this Directive seeks to guarantee the effective exercise of free movement rights of EU citizens, which might be impeded if these cannot move together with their third country family members. In the context of this provision, Article 13(2)c introduces

¹² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Citizenship Directive).

¹³ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47, Declaration on Article 8.

¹⁴ Gender Equality Strategy 2020-2025 (n 6) 3-4.

a limit to this teleological approach by which the rights of third country nationals are linked to their EU spouses, when the third country national is a victim of domestic violence. Despite this limitation, and even within the context of the Commission's proposed Directive on domestic violence, victims of domestic abuse continue to be in the most vulnerable position, with limited measures introduced to protect their status as victims and residency rights.¹⁵

Article 13(2)c can be seen as introducing some (albeit limited) "social sensibility"¹⁶ into legislation designed to prioritise economic goals, i.e. the exercise of free movement rights within the internal market. These additional residency rights are only granted to third country nationals who are victims of domestic violence and linked to mobile EU citizens, whilst third country nationals in similar situations but in purely domestic scenarios would fall under the competence of Member States. Limited additional measures have been introduced by the Commission in the proposed Directive on domestic violence despite the obligations acquired under the Istanbul Convention.¹⁷

An added problem of this provision is that its application is not open to all victims of gender-based violence. Instead, it is limited to victims of domestic violence only who must fulfil an additional economic requirement to retain residency rights: they must qualify as workers or self-employed individuals or have sufficient resources to support themselves as well as comprehensive sickness insurance.¹⁸ These requirements disregard the situation of victims of domestic violence who may have been victims of different types of abuse, including financial, physical, and psychological abuse and degrees of controlling and abusive behaviour that prevent them from actively participating in the labour market and having access to financial resources.¹⁹ Third country nationals who would have, in many cases, arrived in the EU through an abusive relationship might lack the necessary skills (whether linguistic, economic or employability) to actively participate in the labour market. In order to do so, they would require extensive support to heal and be able to integrate fully in the Member State of residency. Conversely, the provision of specialised services for victims to recover from violence (irrespective of their nationality) is part of the compromises acquired by the signatories of the Istanbul Convention²⁰ and is part of the rights granted to all victims under the Victims' Rights Directive.²¹ At the same time, the limited scope of protection offered to

¹⁵ Amnesty International, Recommendations on the proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence (2023) available at https://www.amnesty.eu/wp-content/uploads/2023/06/TIGO_IOR_10_2023_4160_AI-Position-Paper-VAW-Directive.pdf accessed on 26 October 2023, 6.

¹⁶ Adam Weiss, 'Transnational Families in Crisis: An Analysis of the Domestic Violence Rule in E.U. Free Movement Law' (2009) 30 Michigan Journal of International Law 841, 871.

¹⁷ Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, art. 4 (*Istanbul Convention*).

¹⁸ Case C-930/19 *X v the Belgian State*, ECLI:EU:C:2021:657; Case C-115/15 *Secretary of State for the Home Department v N.A.*, ECLI:EU:C:2016:487; Case C-218/14 *Kuldip Singh and others v Minister for Justice and Equality*, ECLI:EU:C:2015:476.

¹⁹ On the impact of domestic violence on the economic stability and self-sufficiency of victims, see: Adrienne E. Adams, 'Measuring the Effects of Domestic Violence on Women's Financial WellBeing' (2011) CFS Research Brief 2011-5.6; Marilyn Ford-Gilboe, Judith Wuest et al., 'Modelling the effects of intimate partner violence and access to resources on women's health in the early years after leaving an abusive partner' (2009) 68 Social Science & Medicine 1021.

²⁰ Istanbul Convention (n 17), arts. 4, 20 and 22.

²¹ Victims' Rights Directive (n **Error! Bookmark not defined.**), art. 9.

third country nationals victims of domestic violence under the Citizenship Directive is at odds with the Gender Equality Strategy 2020-2025, which acknowledges the intersectional nature of gender inequality and violence against women and establishes that this intersectionality shall be incorporated into all EU policies and Commission initiatives.²²

3. An overview of the legal safeguards for victims of gender-based violence

3.1 The Victims' Rights Directive as a framework

The emergence of groups that support or represent victims of crime has grown in importance across European states,²³ particularly in Nordic states that have been at the forefront of the development of victim policy-making in Europe.²⁴ Nevertheless, the harmonisation of the rights of victims within criminal proceedings at EU level took a back seat due to the relatively late development of Justice and Home Affairs as a field of EU competence and the security-driven conception of this area that devoted limited efforts to the harmonisation of rights until the Treaty of Lisbon.

Early attempts to recognise victims' rights within criminal proceedings precede the Lisbon Treaty and can be found in the Framework Decision on Victim Participation from 2001 (hereinafter "the Framework Decision").²⁵ The Framework Decision was the first legal instrument at EU level that partially recognised victims' rights already contained in other international instruments, including Council of Europe recommendations.²⁶ Despite the ambitious rights included within it, the deficient implementation of this instrument and the different standards that persisted at Member State level meant that victims were not sufficiently protected or supported, lacked access to justice, and had insufficient access to compensation or restorative justice initiatives.²⁷ These limitations can be partially explained by the lack of explicit competences present in the treaties to legislate within the field of victims' rights. Within this legal framework, victims' rights were conceived in a very limited manner as linked to the rights of cross-border victims who were negatively affected by the

²² Gender Equality Strategy 2020-2025 (n 6), 2 & 15-16.

²³ Sandra Walklate, Jane Maree Maher et al., 'Victim stories and victim policy: Is there a case for a narrative victimology?' (2019) 15 *Crime, Media, Culture* 199, 200; Vanessa Barker, 'The politics of pain: A political institutionalist analysis of crime victims' moral protests' (2007) 41 *Law & Society Review* 619.

²⁴ Maija Helminen, 'We need to make sure that we are always something else': Victim support organisations and the increasing responsibility of the state in supporting crime victims in Finland and Norway' (2019) 25 *International Review of Victimology* 157; Fanny Holm, 'Successful Human Rights Implementation? Victims of Crime and the Swedish Example' (2022) 40 *Nordic Journal of Human Rights* 529; Henrik Tham, Anita Rönnelid, and Lise-Lotte Rytterbro, 'The Emergence of the Crime Victim: Sweden in a Scandinavian Context' (2011) 40 *Crime and Justice* 555.

²⁵ Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceeding [2001] OJ L 82/1.

²⁶ For an in-depth analysis of the EU FD on Victims of Crime: Marc S. Groenhuijsen & Anthony Pemberton, 'The EU Framework Decision for Victims of Crime: Does Hard Law Make a Difference?' (2009) 17 *European Journal of Crime, Criminal Law and Criminal Justice* 43; Antony Pemberton & Carmen Rasquete, 'Victims in Europe – Assessment of the Implementation of the Framework Decision on the Standing of Victims in Criminal Proceedings: Preliminary Results', in Julia Hartmann (eds) *Perspektiven professioneller Opferhilfe. VS Verlag für Sozialwissenschaften* (Springer 2019).

²⁷ Matrix Insight and Andersson Elffers Felix, 'A study for an Impact Assessment on Ways of Improving the Support, Protection and Rights of Victims across Europe' (2010).

absence of a harmonised framework in this area when exercising their free movement rights.²⁸

The Treaty of Lisbon changed this, elevating the construction of the AFSJ to an objective with the same standing as the completion of the internal market, and conferring the EU the competence to harmonise minimum standards in the field of victims' rights.²⁹ The setting of these minimum standards, nonetheless, remains instrumental to the attainment of security goals: victims' rights shall be harmonised only 'to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters'.³⁰ In other words, the harmonisation of victims' rights post-Lisbon is primarily linked to the attainment of security aims, such as the strengthening of judicial and police cooperation in criminal matters. In this context, Article 82(2)c TFEU ties the harmonisation of minimum standards in the field of victims' rights to the need to guarantee the smooth functioning of mutual recognition instruments that advance these security goals.

Despite the requirements imposed by Article 82(2) TFEU, the entry into force of the Treaty of Lisbon facilitated the adoption of the first comprehensive strategy approved by the Commission for the protection of victims' rights.³¹ This Strategy recognises the need to adopt minimum standards in the field of victims' rights as an essential step to enhance the trust of EU citizens in the notion of justice.³² Furthermore, it explicitly refers to the victims of domestic abuse and domestic violence, with the Commission acknowledging that 'there is a gender dimension to victims' rights' that needs to be addressed.³³ This gender perspective is present in the two main action points that the Commission adopted in this Strategy: a Directive establishing minimum standards on the rights, support and protection of victims of crime³⁴ and a Regulation on mutual recognition of protection measures in civil matters.³⁵ Both of these instruments aim at guaranteeing rights that are essential to all victims but, particularly, to vulnerable victims, such as victims of gender-based violence.

The Victims' Rights Directive is the most relevant horizontal instrument adopted in this area and recognises a number of rights for victims that can be broadly classified as right to information and support, right to participate in criminal proceedings, and right to protection. Nevertheless, its most relevant feature is its capacity to produce direct effect, which overcomes some of the limitations that characterised the deficient implementation of the former 2001 Framework Decision. The use of framework decisions within the field of Justice and Home Affairs before Lisbon, together with the European Commission's inability to

²⁸ Marianne Johanna Lehmkuhl, 'The Value of Legal Provisions for an Adequate Treatment of Victims of Crime: Does the Victims' Rights Directive of the European Union Set a New Benchmark?', in Janice Joseph & Stacie Jergenson, *An International Perspective on Contemporary Developments in Victimology* (Springer 2020), 185.

²⁹ Art. 82(2)c TFEU.

³⁰ Art. 82(2) TFEU.

³¹ European Commission, Strengthening victims' rights in the EU, COM(2011) 274 final.

³² *ibid*, 2-3.

³³ *ibid* 1.

³⁴ 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 315/57 (*Victims Rights' Directive*).

³⁵ Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters [2013] OJ L 181/4.

initiate infringement proceedings for this lack of domestic implementation, resulted in a deficient implementation of this instrument.³⁶ The Lisbonisation of the AFSJ, together with the capacity of this Directive to produce direct effect, set the potential for a more robust legal framework in the field of victims' rights.

Although the Directive does not contain specific measures for victims of gender-based violence, the harmonisation of minimum standards to safeguard the right to protection and access to support services also benefit this category of victims. The protection of particularly vulnerable victims, such as victims of gender-based violence, had already been incorporated into the Stockholm Programme,³⁷ which recognised the needs of these victims to access support and legal protection within all Member States.³⁸ Although protection rights recognised under the Directive grant a lot of leeway to Member states, the need to carry out an individual assessment to identify specific protection and support needs of victims meets a traditional demand of victims of gender-based violence across the EU.³⁹ However, the analysis becomes more complex when considering the implementation of this right to access support services or victims' access justice at Member State level. In these areas, the Directive provides extensive flexibility to the Member States, and the minimum standards that they have to implement are quite vague. This can be explained by a variety of factors that range from the financial costs required to modify these aspects within the domestic justice systems,⁴⁰ particularly when analysing support services, to the different characteristics of national criminal justice systems and the status of victims within these procedures.⁴¹

Overall, the Victims' Rights Directive incorporated a wide range of rights for all victims of crime, considering their individual needs and including measures to prevent their re-victimisation and secondary victimisation (a priority for victims of gender-based violence). Nevertheless, the reports commissioned by the European Commission and European Parliament have shown that 'the full potential of the Directive has not been reached yet' due to the incomplete and/or incorrect transposition of this instrument at Member State level.⁴² These limitations have been found to affect, particularly, provisions concerning access to information, the quality of support services, and the availability of protection measures necessary to satisfy victims' individual needs.⁴³ These issues, in turn, are likely to affect vulnerable victims, such as victims of gender-based violence, more severely, as these are likely to require more extensive support and protection. At the same time, this Directive provides significant leeway to the Member States when regulating victim participation rights due to the persistent differences in national legal systems and the financial costs that any reforms in

³⁶ Maria McDonald, Guide for Lawyers to the Victims Directive and the Criminal Justice Act 2017 (Irish Council for Liberties 2018), 4.

³⁷ European Council, The Stockholm Programme — An open and secure Europe serving and protecting citizens [2010] OJ C 115/1 (*Stockholm Programme*).

³⁸ *ibid*, para. 2.3.4.

³⁹ Art. 22 Victims' Rights Directive.

⁴⁰ *ibid*.

⁴¹ Report from the Commission to the European Parliament and the Council on the implementation of 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, COM(2020) 188 final, 10.

⁴² *ibid* 9.

⁴³ *ibid* 10.

this area may involve.⁴⁴ This challenges the effective realisation of justice rights and shows that despite the innovative nature of the Victims' Rights Directive, further harmonisation is required to guarantee that all victims can effectively access and exercise their rights.

3.2 Mutual recognition as a tool to expand rights: the case of the European Protection Order

One of the key action points in the EU's strategy on victims' rights was the adoption of a Regulation on mutual recognition of protection measures for victims taken in civil matters (hereinafter "the EPM Regulation"), which was later included in the Council's Roadmap on victims' rights.⁴⁵ However, the EPM Regulation was not approved until 2013,⁴⁶ two years after the Union approved the Directive on the European Protection Order (hereinafter "the EPO"),⁴⁷ which regulates the mutual recognition of these protection measures adopted in the context of criminal proceedings. This instrument became the first one within the package on victims' rights that, despite applying to all types of victims of violent crime, had victims of domestic and gender-based violence as their primary focus.⁴⁸ But, overall, the EPM Regulation and the EPO Directive addressed a category of victims whose rights to protection have been identified as particularly difficult to guarantee, namely cross-border victims.⁴⁹ Cross-border victims who may have a protection order in a Member State but move to another one (either temporarily or permanently) usually struggle to see these protection orders recognised in their new state of residence.

The EPO was the first initiative in this area, launched under the Spanish Presidency of the Council in 2010 to ensure that protection measures issued in a Member State (in the context of criminal proceedings) would be applied across the EU irrespective of the Member State in which the victim may be resident. This instrument did not set minimum standards for these protection measures nor did it seek to harmonise the type of instruments used in this field. Indeed, the EPO Directive states that '[it] does not create obligations to modify national systems for adopting protection measures nor does it create obligations to introduce or amend a criminal law system for executing a European protection order'.⁵⁰ Instead, it focuses on mitigating the impact that intra-EU mobility may have on victims of crime, by facilitating the mutual recognition of these measures in other member states. Consequently, the EPO focuses on cross-border victims who have moved from a Member State and seek the recognition of the protection in their new Member State of residency. The EPM Regulation pursues similar aims and utilises mutual recognition to recognise protection orders across the

⁴⁴ Lehmkuhl (n 28) 196.

⁴⁵ Resolution of the Council on a Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings [2011] OJ C 187/1 (*Roadmap on victims' rights*).

⁴⁶ Regulation (EU) No 606/2013 of the European Parliament and of the Council on mutual recognition of protection measures in civil matters [2013] OJ L 181/4.

⁴⁷ Directive 2011/99/EU of the European Parliament and of the Council on the European protection order [2011] OJ L 338/2 (*EPO Directive*).

⁴⁸ EPO Directive, Rec. 9.

⁴⁹ Report from the Commission to the European Parliament and the Council on the implementation of Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, COM(2020) 187 final, 2-3.

⁵⁰ *ibid*, Rec. 8.

EU, but it refers to civil protection measures rather than those approved in the course of criminal proceedings.

Although the existence of two instruments (i.e. the EPM Regulation and the EPO Directive) tries to cover the different national regimes at Member State level, with some Member States using civil law and others criminal justice proceedings to impose protection measures, this has created significant confusion in their application.⁵¹ The main problem here arises when the executing Member State requires a proceeding that is completely different in nature to the one foreseen by the issuing Member State. For instance, Spain would not be able to execute the EPM requests for protection measures and would only accept EPO certificates, as protection measures are criminal in nature and require the guarantees of a criminal procedure in the issuing Member State to be recognised.⁵² This is not exceptional, and the persistence of a dual regime, together with the lack of standardisation of protection measures in the EU, raises important questions about the operability of the system, with some scholars going as far as to call it “a waste of time”.⁵³

An additional question that arises when examining these instruments concerns the adequacy of mutual recognition as a governance principle used to expand the use of protection measures across borders. Mutual recognition has been relatively successful in advancing security goals in areas such as criminal law, with the EAW as the paradigmatic example of this process. Nevertheless, mutual recognition in criminal matters has not operated in a vacuum, being highly “managed” through extensive harmonisation of standards in a number of areas,⁵⁴ such as defence rights or the regulation of *in absentia* proceedings. Despite the lessons learnt in this area, which highlight that a minimum level ground is necessary for mutual recognition to operate, the EU’s strategy in the field of victims’ rights has prioritised the preservation of legal diversity⁵⁵ at the expense of sacrificing the effective enforcement of protection orders across the EU.

These limitations have resulted in significant delays to transpose and implement both the EPO Directive and EPM Regulation, with the last Member State (Belgium) transposing the EPO Directive in May 2017, two years after the deadline.⁵⁶ Although there is limited data available regarding the protection measures issued and executed under both instruments,⁵⁷

⁵¹ Delphine Porcheron, ‘Le principe de reconnaissance mutuelle au service des victimes de violences. Règlement (UE) n° 606/2013 du Parlement et européen et du Conseil du 12 juin 2013 relatif à la reconnaissance mutuelle des mesures de protection en matière civile’ (2016) 2 *Revue critique de droit international privé* 267, 270; Sellier & Weyembergh (n 2), 164. .

⁵² Weyembergh and Sellier (n 2), 165; Raquel Borges Blazquez, ‘La orden de protección europea y su aplicación en España’ (2020) 41 *Revista jurídica de la Universidad Autónoma de Madrid* 93.

⁵³ Suzan van der Aa & Jannemieke Ouwerkerk, ‘The European Protection Order: No Time to Waste or a Waste of Time?’ (2011) 19 *Eur J Crime Crim L & Crim Just* 267, 287.

⁵⁴ On the notion of “managed” mutual recognition and the need of ex-ante harmonisation of minimum standards, see: Christine Janssens, *The Principle of Mutual Recognition in EU Law* (OUP 2013), Ch 4; Markus Möstl, ‘Preconditions and Limits of Mutual Recognition’ (2010) 47 *Common Market Law Review* 405; Susanne Schmidt, ‘Mutual Recognition as a New Mode of Governance’ (2014) 14 *JEPP* 667, 673.

⁵⁵ EPO Directive (n 47), Rec. 8.

⁵⁶ Weyembergh and Sellier (n 51) 166.

⁵⁷ *Ibid*; Artemis Network, Promoting the right of protection of women through the application of the EC Directive 2011/99/EU and the European Protection Order (2020); Elisabet Cerrato, Teresa Freixes et al.,

it seems clear that their use is very limited, showing that these have not addressed the problems that victims face when moving across borders. Based on the data provided by Member States, only 37 EPOs had been issued in the period 2015-2018 and only 15 of these had been executed.⁵⁸ Furthermore, there were 10 Member States during this period that did not issue, execute or recognise any EPOs.⁵⁹ This is particularly striking if compared with the data of a single Member State, Spain, which, in 2022, had 71,357 protection measures registered as “active” in its Central Register for the Protection of Victims of Domestic Violence (*Registro Central para la Protección de las Víctimas de Violencia Doméstica y de Género*).⁶⁰

This analysis demonstrates that cross-border cooperation in criminal matters based on mutual recognition without the approximation of minimum standards tends to be ineffective and does not help cross-border victims. The persistence of different legal regimes at Member State level make protection measures issued in a Member State nearly impossible to execute in another state. Faced with this situation, reports have concluded that it is easier for cross-border victims to apply for national protection measures when they move to a different Member State despite the cost, time, and difficulties that they may experience in this process.⁶¹ Based on this analysis, it seems clear that it is necessary to reform the protection system of cross-border victims (a system that is essential to victims who have a close relationship with the abuser, such as victims of gender-based violence) to ensure that these can exercise their free movement rights without jeopardising their security. If mutual recognition is favoured in these reforms, the Commission should consider the need to approximate protection measures at Member State level to facilitate the unimpeded operation of this governance principle and the free movement of protection orders across borders.

3.3 Revisiting the current framework for victims' rights: an analysis from the perspective of victims of gender-based violence

The strengthening of victims' rights has been a priority for the EU since the Stockholm Programme.⁶² This priority is in line with other international obligations adopted by the Member States, including the UN's Sustainable Development Goals which include a duty to promote appropriate legislation, policies and actions on victims' rights⁶³ and the Istanbul Convention, which includes the obligation of parties to incorporate “measures to protect the rights of victims”⁶⁴ (in this case, victims of gender-based violence). As explained in previous sections, these obligations crystallised in the Victims' Rights Directive, as the main instrument

European Protection Order Directive 2011/99/EU: European Implementation Assessment (European Parliamentary Research Service 2017), 17-18.

⁵⁸ Artemis Network (n 57) 7.

⁵⁹ *ibid.*

⁶⁰ Instituto Nacional de Estadística de España, *Estadística de Violencia Doméstica y Violencia de Género (EVDVG) de 2022* (31 May 2023). Available at https://www.ine.es/prensa/evdvg_2022.pdf accessed on 24 October 2023.

⁶¹ Weyembergh and Seller (n 51) 99

⁶² European Council, *The Stockholm Programme — An open and secure Europe serving and protecting citizens* [2010] OJ C115/1.

⁶³ UN Sustainable Development Goals, Goal 16, target 16.3.

⁶⁴ Istanbul Convention (n 17), art 4.

setting the minimum standards for victims' rights across the EU. Additionally, the EU has developed other instruments, such as the EPO Directive and EPM Regulation to strengthen the right to protection of cross-border victims.

Nevertheless, most evaluation projects have shown that neither the Directive nor the EPO Directive or EPM Regulation have been effective in guaranteeing victims' rights to protection, with standards in this area varying from country to country.⁶⁵ The latest report conducted by the Commission on the Victims' Rights Directive refers specifically to the lack of measures available in many Member States to prevent contact between the victim and offender.⁶⁶ This affects, particularly, victims of domestic violence who due to the close relationship with the offender and, in many cases, the maintenance of long-term ties due to children visitation rights require specific measures to protect their safety and prevent their re-victimisation. Equally, it has been concluded that the lack of adequate standards for support services across Member States means that these services vary greatly across the EU and, in many cases, cannot guarantee the right to access support services contained in the Directive.⁶⁷ This affects, particularly, vulnerable victims, such as victims of gender-based violence who require extensive physical, psychological and sometimes financial support to recover from the consequences of the violence experienced.

The lack of harmonisation initiatives in these areas and the limited financial support available to develop support services have resulted in the Victims' Directive not developing its full potential.⁶⁸ At the same time, the reliance on domestic protection mechanisms and mutual recognition instruments to guarantee the protection of cross-border victims has been incapable of guaranteeing that they can effectively exercise their rights. As a result, in its analysis of the protection of victims' rights in Europe, VOCIARE found that 'protection measures (in the EU) only rarely function for victims who need them'.⁶⁹ The Commission has acknowledged some of these failings and proposed a Directive on combatting violence against women and domestic violence and a Directive revising the Victims Rights' Directive, which reinforce the right to access protection across the EU. The following sections will assess these proposals, considering their capacity to deliver on the compromises adopted by the EU and the Member States under the Istanbul Convention.

⁶⁵ Commission Staff Working Document: Evaluation of 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 [2022] SWD(2022) 179 final, 20.

⁶⁶ *ibid.*

⁶⁷ ICF, Study to support the evaluation of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2021), final report, p. 44.

⁶⁸ Victim Support Europe, Victims of Crime Implementation Analysis of Rights in Europe (VOCIARE), October 2019, 59; Commission Staff Working Document (n 65), 12.

⁶⁹ *ibid* 136.

4. Towards a legal framework for victims of gender-based violence

4.1 The Istanbul Convention as a milestone

The Istanbul Convention (hereinafter “the Convention”) is considered a milestone for the elimination of violence against women and girls in Europe.⁷⁰ It entered into force on 1 August 2014, with the main objective of preventing all forms of gender-based violence, including domestic violence, which affects women disproportionately.⁷¹ The Convention builds on the case law of the ECtHR⁷² and develops the standards elaborated under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to prevent and tackle gender-based violence.⁷³

Although all EU Member States and the EU itself have signed it, its ratification has not been equally completed across the EU. Bulgaria, for instance, decided not to ratify the Convention, as the Constitutional Court of this country considered the term “gender” in this instrument incompatible with the constitutional understanding of “sex”.⁷⁴ Additionally, this Member State stated that the Convention threatens traditional values and leads to the legalisation of same-sex marriage and the recognition of transgender rights.⁷⁵ On the other hand, Poland and Hungary have also indicated their intention to withdraw from the Convention due to their disagreements over the origins of violence against women and girls.⁷⁶ Hungary has gone a step further and criticised the Convention for being rooted on ‘destructive gender ideologies’.⁷⁷ Other Member States, such as Slovakia, refused to ratify it due to its alleged incompatibility with the constitutional definition of marriage as a union between a man and a woman.⁷⁸ In response to these allegations, the Council of Europe issued a legal opinion⁷⁹ clarifying that ‘the Istanbul Convention does not imply the obligation to legally recognise a third sex or to provide legal recognition of same-sex marriages’.⁸⁰ Despite these

⁷⁰ Council Decision on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to institutions and public administration of the Union (2023) Doc 5514/23, para. 1.

⁷¹ Istanbul Convention (n 17), art. 2.

⁷² *ibid*, preamble.

⁷³ UN Convention on the Elimination of all Forms of Discrimination against Women, Resolution 34/180 of 18 December 1979 (CEDAW).

⁷⁴ On the position of Bulgaria regarding the Istanbul Convention: Miriana Ilcheva, ‘Bulgaria and the Istanbul Convention - Law, Politics and Propaganda vs. the Rights of Victims of Gender-Based Violence’ (2020) 3 Open Journal of Legal Studies 49; Radosveta Vassileva, ‘Bulgaria’s Constitutional Troubles with the Istanbul Convention’ (*Verfassungsblog*, 20 Aug 2018) <<https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention/>> accessed on 26 October 2023.

⁷⁵ *ibid*.

⁷⁶ Weronika Grzebalska & Andrea Pető, ‘The gendered modus operandi of the illiberal transformation in Hungary and Poland’ (2018) 68 Women’s Studies International Forum 164, 166-167.

⁷⁷ Hungarian Parliament, ‘Political Declaration on the Protection of Women and Children’ (5 May 2020).

⁷⁸ Petra Guasti, ‘Same Same, but Different: Domestic Conditions of Illiberal Backlash Against Universal Rights in the Czech Republic and Slovakia’, in Astrid Lorenz & Lisa H Anders, *Illiberal Trends and Anti-EU Politics in East Central Europe* (Palgrave MacMillan 2021), 180-181.

⁷⁹ Council of Europe, ‘Convention on preventing and combating violence against women and domestic violence (CETS No 210) – scope of obligations’ (11 January 2018)

⁸⁰ *ibid*, para 18.

clarifications, some Member States are still withholding ratification, which has made EU accession to this instrument all the more relevant to achieve the goals of the Convention.

The EU signed the Convention on 13 June 2017 and, despite the disagreements that some Member States have introduced in the debate, the Council requested the consent of the European Parliament to adopt a decision on the conclusion of the Convention in February 2023. On 1 June 2023, the European Council issued a decision on the accession to the Istanbul Convention and, on 28 June 2023, the instrument of accession was deposited with the Secretary General of the Council of Europe. This decision followed the CJEU's reasoning in *Opinion 1/19*,⁸¹ in which the Court clarified that following the requirements laid down in Articles 218(2), (6), and (8) of the TFEU, the Council could not add a further step in the conclusion process based on reaching a common agreement between the Member States.⁸² However, nothing prevented it from waiting before adopting the decision of accession to achieve unanimity within the Council.⁸³ In other words, the Council could wait until Member States reached a unanimous agreement to accede to the Istanbul Convention, but it could not add an additional requirement of unanimity to the Council decision. Following the CJEU's Opinion, the Council's decision to move ahead with ratification without this unanimous agreement was a positive development in the advancement of EU goals in the field of gender.⁸⁴ In parallel, the Commission has already adopted a series of measures, such as the elaboration of the proposed Directive on domestic violence, to achieve the goals of the Convention at EU and Member State level.

Nevertheless, the EU's decision to ratify the Convention has a disadvantage: this remains a mixed agreement, where some Member States have still not ratified the Convention and have not agreed on the Council's decision to ratify it. This permits that Member States that have not ratified the Convention are bound by it only when EU competences are exercised.⁸⁵ Despite this limitation, the Istanbul Convention is likely to become a key standard for the interpretation of EU law, including the protection of EU fundamental rights and equality laws.⁸⁶ This includes the protection of the rights of victims of gender-based violence. As seen earlier, the EU already has competences and has developed legislation in this area, for which the Convention has now become a key interpretative tool.

Overall, the Istanbul Convention advances the EU's strategy in the field of victims' rights, particularly in the field of protection. The Convention develops a comprehensive framework of protection and support to victims of gender-based violence; mandates the criminalisation of various forms of gender-based violence; emphasises the principles of non-discrimination and gender equality as fundamental to addressing violence against women,

⁸¹ *Opinion 1/19* of the Court (Grand Chamber) of 6 October 2021, ECLI:EU:C:2021:198.

⁸² *ibid*, para. 254-258.

⁸³ *ibid*, para. 253.

⁸⁴ Gender Equality Strategy 2020-2025 (n 14), 4.

⁸⁵ On the difficulties of mixed agreements: Panos Koutrakos, 'Confronting the Complexities of Mixed Agreements-*Opinion 1/19* on the Istanbul Convention' (2022) 47 *European Law Review* 247; Fernando Castillo de la Torre, 'El *Dictamen 1/19* del TJUE sobre el Convenio de Estambul sobre la Prevención y Lucha contra la Violencia contra la Mujer y la Violencia Doméstica: entre el rigor y el pragmatismo' (2023) 84 *Revista Española De Derecho Europeo* 93.

⁸⁶ Kevät Nousiainen and Christine Chinkin, *Legal implications of EU accession to the Istanbul Convention* (European Commission December 2015), 84.

and promotes preventative initiatives to change cultural and societal norms that perpetuate this violence. The Commission's proposed Directive on domestic violence builds on these goals closely, albeit in a more limited manner, and becomes an essential instrument to operationalise these obligations at Member State level.

4.2 The Commission's proposals on victims' rights: an analysis of their impact on victims of gender-based violence

The proposed Directive on domestic violence is an essential instrument to fulfil the Commission's Presidency guidelines, which included ending violence against women, widening protection for victims of these offences, and punishing offenders as priorities for the period 2020-2025.⁸⁷ The adoption of this Directive relies on criminal justice competences under Articles 83(1) and 82(2) TFEU, which is consistent with the main goals of the proposal that combines the criminalisation of certain offences that target women disproportionately and the strengthening of the rights of such victims.⁸⁸ This initiative was followed, in July 2023, by the presentation of a legislative initiative to amend the Victims' Rights Directive.⁸⁹ This proposal incorporates reforms in areas that are essential for victims of domestic violence and gender-based violence, such as improvements in crime reporting; access to specialist support for vulnerable victims; increased participation of victims in criminal proceedings; access to compensation for victims, and the development of victims' protection measures based on an assessment of victims' needs. This section will consider how these two initiatives seek to address some of the gaps identified in the exercise of the rights to protection and access to justice by victims of domestic and gender-based violence.

Overall, the proposed Directive on domestic violence is a step in the right direction to achieve the objectives of the Istanbul Convention, particularly in harmonising the definition of certain offences. For instance, Article 5 of the proposed Directive on domestic violence harmonises the definition of rape, by making the lack of consent the essential element of this offence and eliminating the requirement of violence or intimidation that some Member States still maintain within their domestic legislations. This definition is in line with Article 36(1)a of the Istanbul Convention, which considers the lack of consent essential to the fulfilment of the *actus reus* of all sexual offences. However, Article 5 does not consider other types of non-consensual acts of sexual nature that are also criminalised under Article 36(1).⁹⁰ In other words, the Commission's proposal leaves out instances of sexual abuse and sexual assault without penetration, implementing a very restrictive reading of the Convention and the centrality of consent and women's autonomy that it imposes.

On the other hand, when discussing victims' rights, it is noteworthy that the proposed Directive on domestic violence does not regulate the right of victims of gender-based violence

⁸⁷ President Ursula Von der Leyen, A Union that strives for more: My agenda for Europe (Political Guidelines for the next European Commission 2019-2024), 11.

⁸⁸ Proposal for a Directive on combating violence against women and domestic violence (n 9), Explanatory Memorandum, para. 1.

⁸⁹ Proposal for a Directive amending Directive 2012/29/EU (n 10). For an analysis of this proposal, see Thomas Wahl, *Commission Proposes Reform of Victims' Rights Directive* (EUCrim, 22 September 2023). Available at <https://eucrim.eu/news/commission-proposes-reform-of-victims-rights-directive/> accessed on 14 December 2023.

⁹⁰ Amnesty International Recommendations (n 15) 6-7.

to participate in criminal proceedings. Chapter 3 of the proposed Directive on domestic violence includes “access to justice” within its title, but references to victims’ standing and access to justice in criminal proceedings are very limited. As explained in Section 3.1, victims’ access to justice and their standing in criminal trials is recognised as a right of victims under the Victims’ Rights Directive.⁹¹ Nevertheless, differences concerning the legal status of victims across Member States and their capacity to participate in proceedings and access remedies persist. For instance, in some Member States, victims have full status as a third party during criminal proceedings whilst, in others, they are only considered witnesses during trial.⁹² These differences, together with the limited harmonisation impact under the Victims’ Rights Directive, means that significant differences persist across the EU in the guarantee of this right.⁹³

The proposed revision of the Victims’ Directive seeks to fix some of these issues by expanding on the right to access information and support in court⁹⁴ and reinforcing the right of victims to challenge decisions that affect their rights, independently of their formal status under national law in the criminal proceedings.⁹⁵ This reform, if adopted, would expand on the right of victims to have access to effective remedies at Member State level even when judicial decisions affect their rights, provided that strict requirements are met. However, little is proposed in terms of facilitating their full participation in criminal proceedings, a significant gap identified in this area and explained above. Articles 10a and b explicitly acknowledge the differences that persist in terms of victims’ formal status at Member State level and does not seek to address these divergencies.

In turn, Chapter 3 of the proposed Directive on domestic violence focuses on the regulation of protection measures and the individual needs’ assessment as an essential instrument in assessing these. The inclusion of an obligation upon Member States to provide protection measures for victims of gender-based violence⁹⁶ and the regulation of the individualised assessment as a tool to identify these needs is a welcome development that mirrors the obligations adopted under the Convention.⁹⁷ On the other hand, the proposal to reform the Victims’ Rights Directive reinforces the importance of the individual needs’ assessment and its role in determining physical protection needs from the first contact with the authorities.⁹⁸ This reform supports the steps taken by the proposed Directive on domestic violence in terms of guaranteeing the safety of victims of domestic violence, but does not address the problems faced by cross-border victims due to the persistence of different regulations and protection measures across the EU. These disparities are particularly problematic when seeking the cross-border enforcement of protection orders, as examined

⁹¹ Victims’ rights Directive (n **Error! Bookmark not defined.**), Chapter 3.

⁹² Lehmkuhl (n 28) 196.

⁹³ Women Against Violence Europe (WAVE), Public statement on the proposal for a Directive on Combating Violence Against Women and Domestic Violence (November 2022), 2. Available at https://wave-network.org/wp-content/uploads/151122_WAVE_RedLinesNovember_F.pdf accessed on 26 October 2023.

⁹⁴ Proposal for a Directive amending Directive 2012/29/EU (n 10), art. 10a.

⁹⁵ *ibid*, art. 10b.

⁹⁶ Proposal for a Directive on combating violence against women and domestic violence (n 9), arts. 21 and 22.

⁹⁷ *ibid*, art. 18

⁹⁸ Proposal for a Directive amending Directive 2012/29/EU (n 10), art. 10b(10).

in the context of the EPO Directive and the EPM Regulation in Section 3.2.⁹⁹ Cross-border victims, in turn, are particularly vulnerable to secondary victimisation and re-victimisation, and access to protection is more difficult for them to obtain, but none of these proposals address this particular problem. These proposals do not incorporate harmonisation of minimum standards for protection measures, which means disparities across the EU are likely to remain, perpetuating the difficulties encountered for the cross-border enforcement of protection measures.¹⁰⁰

Additionally, some organisations have criticised the lack of appropriate protection measures that take into account the specific needs faced by victims of domestic violence in the proposed Directive on Domestic Violence, particularly when offender and victim have children in common.¹⁰¹ The Istanbul Convention, in its Article 31, requires that judicial authorities consider violent criminal offences, including instances of gender-based violence within the scope of the Convention, before granting visitation rights to the abuser. The Commission's proposal to reform the Victims' Rights Directive, nonetheless, does not include any reference to this situation and only incorporates references to children as victims, in terms of reporting crime (Article 5a) and their access to adequate support (Article 9a). To guarantee the physical protection of victims and wellbeing of children it would be important that the Commission include a provision linking the protection of the victim of gender-based violence, the existence of that violence, and the visitation rights of the accused in the proposed Directive on domestic violence. These are all issues that the judicial authority should consider to ensure that the protection of both the child and the victim are guaranteed in accordance with their individual needs. In this context, some authors (and some Member States) have gone further to suggest that a provision should be added 'obliging Member States to ensure that violence by an intimate partner is a decisive factor when determining custody and visitation rights'.¹⁰²

Overall, the proposals for a Directive on domestic violence and a reform of the Victims' Rights Directive have clarified the scope of application of some of the rights that are essential to victims of gender-based and domestic violence and strengthened the binding nature of such rights, particularly the rights to access support services or protection. Nevertheless, very little has been done to address some of the issues surrounding their implementation and harmonisation at Member State level, particularly when discussing the rights of cross-border victims. The proposal to reform the Victims' Rights Directive has gone a step further in this area by clarifying the obligation of States to provide physical protection measures from the first contact and by incorporating the duty of States to establish and revise such measures according to the assessment of individual needs. However, the absence of minimum standards regulating protections measures facilitates that very different standards persist across the EU, restricting the effectiveness of protection orders.

⁹⁹ See Section 3.2.

¹⁰⁰ *ibid.*

¹⁰¹ Women Against Violence Europe (WAVE) (n 93), 5-6.

¹⁰² *ibid.* 6.

4.3 Gender-based violence as a Euro crime

The proposed Directive on Domestic Violence focuses on the criminalisation of a number of criminal offences including the definition of rape across the EU, the practice of female genital mutilation, and certain forms of cyber violence, such as cyber stalking, cyber harassment, cyber incitement to violence or hatred against women, and the non-consensual sharing of intimate or manipulated material. These conducts are amongst those included in the Istanbul Convention, but the Commission proposal has left out other forms of gender-based violence especially recognised by this instrument, such as forced marriage (Article 37 of the Istanbul Convention) or the denial of sexual and reproductive rights (Article 38 of the Istanbul Convention). This limitation could have been overcome by either broadening the offences incorporated in the proposed Directive on Domestic Violence or by criminalising all conducts constitutive of gender-based violence under Article 83(1) TFEU. The latter is a possibility supported by NGOs that have examined this proposal and favoured an approach that would permit an easier adaptation of this legislation to changing times.¹⁰³

Article 83(1) TFEU would facilitate this flexibility by including gender-based violence within the list of the so-called “Euro crimes”, namely particularly serious offenses that have a cross-border dimension and pose a significant threat to the interests of the EU as a whole. If the requirements of gravity (serious offence) and cross-border nature are met, Article 83(1) permits the establishment of minimum standards for the definition of such offences and their sanctions. Some examples of gender-based violence are already criminalised as Euro crimes under Article 83(1) TFEU, such as the sexual exploitation and trafficking of women and children.¹⁰⁴ Nevertheless, extending this list to encompass all instances of gender-based violence would require widening the exhaustive list of criminal offences for which the European Parliament and the Council may establish minimum rules.¹⁰⁵ The European Parliament has shown support for this possibility. On 16 September 2021, it supported the possibility of extending such a list and adopted a legislative proposal by 427 votes in favour, 119 against, and 140 abstentions to list gender-based violence as a new Euro crime under Article 83(1) TFEU.¹⁰⁶

However, Article 83(1) TFEU requires that the Council adopts a decision identifying areas of particularly serious crime with a cross-border dimension due to their nature or impact or from the need to combat such offences. And this might be a particularly high standard to incorporate gender-based violence within the list of Article 83(1) TFEU. As seen in Section 4.1, some Member States are reluctant to recognising the structural and widespread nature of gender-based violence as defined by the Istanbul Convention. This

¹⁰³ Amnesty International Recommendations (n 15) 8-9.

¹⁰⁴ Article 83(1) TFEU; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

¹⁰⁵ According to Article 83(1) TFEU, this list includes: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

¹⁰⁶ European Parliament, ‘Make gender-based violence a crime under EU law, MEPs say’ (Press Release), 19 September 2021. Available at <https://www.europarl.europa.eu/news/en/press-room/20210910IPR11927/make-gender-based-violence-a-crime-under-eu-law-meps-say> accessed on 29 October 2023.

might restrict the possibilities of obtaining unanimity in the Council to broaden the list of Euro Crimes and explain the preference of the Commission for the selective approach explained above. This, however, does not explain why it excluded two key offences under the Istanbul Convention: forced marriage and the denial of sexual and reproductive rights.

In the long-term, Article 83(1) TFEU continues to provide an alternative to harmonise all types of gender-based violence in line with the main objectives of the Istanbul Convention. On the one hand, these offences meet the threshold of “particularly serious offence”. Gender-based violence covers a broad range of conducts that range from the most serious of offences, namely femicide, which affects an average of two women daily across the EU,¹⁰⁷ to other types of sexual, physical, financial, or psychological violence, which affects 1 in 2 women across the EU.¹⁰⁸ The statistics show the structural nature of these fundamental rights violations that represent one of the most prevalent examples of gender inequality across EU Member States and.¹⁰⁹ From the consequences that this type of violence can have, which range from chronic mental and physical health problems to labour market exclusion, poverty, and even the loss of life, it is clear that these type of conducts meet the threshold of “particularly serious offences”. On the other hand, the statistics analysed above demonstrate the “cross-border element” of gender-based violence. Gender-based violence is prevalent across all Member States examined, and it is estimated that it has a cost of over €366 billion for the European Union (approx. €175 billion correspond to domestic or intimate partner violence).¹¹⁰ At the same time, this violence has an impact on women’s exercise of fundamental rights and fundamental freedoms, including their right to move freely across the EU and their capacity to exercise their citizenship rights.

Ultimately, the criminalisation of gender-based violence, although not providing a definite solution to all of these issues (the Istanbul Convention and the proposed Directive on domestic violence recognise the necessity to tackle the root causes of inequality as the only long-term solution to this violence), would provide a powerful tool to combat gender-based violence across the EU. At the same time, this would meet the EU’s obligations under Chapter V of the Istanbul Convention, which should set a benchmark in the fight against gender-based violence.

5. Conclusions

Traditionally, victims have had a secondary role in criminal proceedings limited to them acting as witnesses from which facts could be extracted to obtain the conviction of the accused. In other words, victims lacked specific rights and did not play any relevant role in

¹⁰⁷ European Institute for Gender Equality, *Gender Equality Index Report 2023: Towards a green transition in transport and energy* (Publications Office of the European Union 2023).

¹⁰⁸ EU Agency for Fundamental Rights, *Crime, Safety and Victims’ Rights: Fundamental Rights Survey* (2021), 18-19.

¹⁰⁹ On the prevalence and characteristics of gender-based violence in Europe: Caroline Bradbury-Jones, Jane V. Appleton et al., ‘A Profile of Gender-Based Violence Research in Europe: Findings From a Focused Mapping Review and Synthesis’ (2019) 20 *Trauma, Violence and Abuse* 470; Graciela Malgesini, Letizia Cesarini Sforza & Marija Babović, *Gender-based Violence and Poverty in Europe* (European Anti Poverty Network 2019).

¹¹⁰ European Institute for Gender Equality, *The costs of gender-based violence in the European Union* (Publications Office of the European Union 2021), 21.

criminal proceedings.¹¹¹ This traditional vision of the criminal justice system started changing in the EU in the early 2000s with the adoption of the Framework Decision on the standing of victims in criminal proceedings. Since then, the EU has adopted, amongst other instruments, the EPO, the EPM Regulation and the Directive on Victims' Rights aiming at standardising the rights of victims in criminal proceedings and guaranteeing their access to support, protection, justice, and compensation across the EU. Nevertheless, the success of these efforts has been limited, particularly when considering the position of vulnerable victims such as victims of gender-based violence.

The EU lacked a specific approach towards the rights of victims of gender-based violence until the Commission adopted the Gender Equality Strategy 2020-2025 and the EU Strategy on Victims' Rights 2020-2025. These strategies have permitted the drafting of a proposed Directive on domestic violence, which develops a series of rights that are essential for all victims but, particularly, for victims of gender-based violence. This proposal, together with the Commission's proposal to reform the Victims' Rights Directive, has reinforced the binding nature of, *inter alia*, the right to access to protection measures, access to justice, or access to support services. Despite these advances, this chapter has shown the difficulties that these victims still face when trying to exercise them. These difficulties continue to exist due to the differences across Member States, the financial difficulties in implementing some of the measures introduced by the Victims' Rights Directive, the differences across Member State criminal justice systems, and the limited harmonisation impact in this area. These difficulties continue to affect, particularly, cross-border victims, who are more likely to be re-victimised and whose rights to free movement are likely to be affected by the lack of effective cross-border protection measures.

The Council's accession to the Istanbul Convention and the proposed Directive on domestic violence have been seen as a turning point that may provide a comprehensive framework to end gender-based violence and overcome these difficulties. Nevertheless, this chapter has shown that, whilst these instruments are essential to promote an EU-wide approach to this type of violence, the proposed Directive on domestic violence falls short of the commitments adopted by the EU and most Member States under the Istanbul Convention. For instance, it fails to criminalise all instances of gender-based violence incorporated in this instrument and does not address the protection needs of these victims. Despite the difficulties examined in Chapter 4.3, the criminalisation of this offence as a Euro Crime could help address some of these limitations, help the Commission fulfil some of its commitments in the field of combatting gender-based violence and contribute to the development of a truly comprehensive framework to combat these offences.¹¹²

¹¹¹ Vicente Emilio Gaviria Londoño, 'Estado actual de los derechos de las víctimas en el proceso penal: evolución (¿involución?) dogmática, jurisprudencial y legislativa' (2009) 30 *Derecho Penal y Criminología* 37, 39.

¹¹² Amnesty International Recommendations (n 15) 3.