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Minister Felix Bolaños,
President of the Justice and Home Affairs Council,
Justus Lipsius,
Rue de la Loi 175

7th December 2023

Dear Minister,

We, as rapporteurs and shadow rapporteurs on the Directive on combating violence against women and domestic violence representing the European Parliament, are writing to you today to express our deep disappointment and quite frankly, outrage, on behalf of the citizens of the European Union at the Council's unwillingness to include the crime of rape based on lack of consent in the Directive.

This is an unacceptable position that the women of Europe will not accept. We cannot have a situation where different minimum standards of justice apply to women across the Union if we are to really seek to achieve one of our founding principles: equality between women and men. To quote the President of the European Commission, Ursula von der Leyen, "There can be no true equality without freedom from violence".

We note that some Member States have expressed concern as to the legal basis to include the crime of consent-based rape legislation, yet we in the European Parliament and the European Commission are united and confident regarding the legal basis of "sexual exploitation" being inclusive of rape.

The expression "sexual exploitation" cannot be understood only as an element of the offence of trafficking of human beings. Article 83(1) itself refers to "areas of crime" and such interpretation would restrict the area of crime "trafficking of human beings and sexual exploitation of women and children" to the specific offence of trafficking. Moreover, throughout the drafting process, the wording of this area of crime evolved from "trafficking in human beings, particularly exploitation of women, sexual exploitation of children" to "trafficking of human beings and sexual exploitation of women and children"

The legal advice of the Council in addition points out that this legal basis has already been used for a piece of legislation unrelated to trafficking: the Child Sexual Abuse Directive. While acknowledging the unique vulnerability of children, it would still be legally incorrect to say that the same legal basis could not be used to include rape in the Directive on combating violence against women and domestic violence - clearly it could. It is therefore a political choice if Member States choose to include rape in the Directive.

The inclusion of rape in the definition of sexual exploitation is a legal concept that already exists at both international and national level. The UN Glossary on Sexual Exploitation and Abuse defines sexual exploitation as "any actual or attempted abuse of position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another".

According to the Council's legal advice, the notion of "sexual exploitation" is characterised by "a component of essentially exploitative nature related, in particular, to taking unjust advantage of a sexual activity imposed upon a person in a vulnerable situation". The key element seems to be the situation of



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vulnerability of the victim, which is precisely one of the elements of the offence of rape: it is because this situation of vulnerability that the victim is subjected to a sexual act without having given its consent to it freely [that the will of the victim is overcome].

The situation of vulnerability might result from the specific circumstances, such as the use of coercion, force or threat, the situation of dependence of the victim, but it might also result from the structural discrimination of women resulting from the unequal powers relations between men and women.

We have multiple definitions of rape within the European Union as compared to murder, another of the most serious crimes, which is universally understood as intentionally taking the life of another, how can we justify this differentiation when it comes to rape?

As such, we once again ask the Council to reconsider your position as regards the inclusion of the offence of rape based on a lack of consent, and ask **for your support to include the crime of rape based on lack of consent in Article 5**. To exclude this most heinous crime from this Directive would be unacceptable to our citizens and indeed very difficult to explain.

We ask you to ensure that this historic and ground-breaking piece of legislation includes the crime of rape and ask that you support its inclusion in the Directive.

In the EU we condemn rape when it is used as crime of war - we must also have consistency and clarity when it comes dealing with this crime during peacetimes.

We hope you and your colleagues can find high-level pragmatic solutions on a way forward that accurately interpret the EU legal basis and respect the rights and safety of women all over Europe.

Warm regards,

Frances Fitzgerald MEP & Evin Incir MEP

Co-Rapporteurs for an EU Directive on combating violence against women and domestic violence

Nathalie Colin-Oesterlé MEP

Pina Picierno MEP

Lucia Ďuriš Nicholsonová MEP

María Soraya Rodríguez Ramos MEP

Sylwia Spurek MEP

Diana Riba i Giner MEP

Assita Kanko MEP

Malin Björk MEP

Eugenia Rodríguez Palop MEP

Shadow Rapporteurs for an EU Directive on combating violence against women and domestic violence