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# Definitions of rape in the legislation of EU Member States

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## IN-DEPTH ANALYSIS

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This publication provides an overview of the legal provisions on rape in the 27 EU Member States, focusing on the issue of rape victims' lack of consent. It attempts a comparative analysis of these provisions against the background of the ongoing interinstitutional negotiations on the proposed EU directive on combating violence against women and domestic violence. The EPRS 'EU legislation in progress' briefing on the proposal for an EU directive '[Combating violence against women and domestic violence](#)', published in September 2023, provides more information in this respect.

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## Executive summary

The introduction of common European Union (EU) standards for the definition of the crime of rape has become one of the major points of contention between the European Parliament and the Council in the ongoing negotiations on the proposal for a directive to combat violence against women and domestic violence. Disagreement focuses mainly on the existence of a legal basis in the Treaties providing the EU with the power to impose such a definition. However, the Parliament's insistence on maintaining rape in the directive warrants more extensive analysis as to why this is necessary.

The traditional approach to defining rape in national legislation in the EU has been to base it on the assumption of violence, threats or the impossibility for rape victims to resist the aggression. In light of new cases of rape and new knowledge on victims' reactions, this approach has come to be seen as seriously deficient. The narrow definition of rape based on force and coercion does not take into account the fact that a reaction known as 'frozen fright' or 'tonic immobility', and not active physical resistance, is rape victims' most common response. Besides situations in which victims fear for their life and are thus involuntarily passive, traditional force-based definitions also ignore many other situations in which the victim is unable to react, such as surprise aggression, aggression against a background of power relations, sexual aggression as part of a generalised pattern of violence in abusive relations, etc. Moreover, blaming the victims themselves (such as by arguing provocation in the way they were dressed, they behaved, their sexual morality, etc.) has been part of the traditional approach to rape, often endorsed by courts of law. As a 2016 Eurostat survey revealed, stereotypes attributing blame for rape on victims' behaviour remain widespread in Europe.

The entry into force of the Council of Europe Convention on preventing and combating violence against women (the Istanbul Convention)<sup>1</sup> in 2014, whose provisions on rape were inspired by the rich case law of the European Court of Human Rights, marked a turning point. Of the 21 EU countries that have ratified this Convention, 14 EU countries have amended their legislation since 2014, to bring their laws into line with the relevant provisions of the Convention on sexual violence, and specifically on rape, including 3 EU countries whose legislation already included the notion of consent as a constitutive element of the crime of rape. The Netherlands is currently amending its legislation. Ireland, which already has in place a consent-based definition going back to 1981, is amending its legislation to make it more comprehensive. On the other hand, five states parties to the Istanbul Convention (Estonia, France, Italy, Poland and Romania) have not taken any steps to include consent in their criminal definition of rape. The six EU countries which have not ratified the Istanbul Convention (Bulgaria, Czechia, Hungary, Latvia, Lithuania, and Slovakia) have not amended their legislation, although public debates have started on the issue in some of these countries.

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<sup>1</sup> The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), [Council of Europe](#), 2011.

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## 1. Lack of consent in the definition of rape

The establishment of minimum EU standards for defining the crime of rape features in the current European Commission's agenda on combating gender-based violence and domestic violence. The European Parliament has long supported the adoption of EU legislation to fight gender-based violence, with its first resolution<sup>2</sup> proposing such legislation adopted in 2014. The objective of the Commission's proposed definition of rape is to make evidence of victims' lack of consent the central element of the crime. Such reform reflects social and legal changes in this respect at both national and international level. This EPRS paper looks into the legal situation with regard to the definition of rape in EU Member States. It starts by explaining the reasons behind the Commission and Parliament's efforts to impose an EU-wide definition of rape based on lack of consent, and why a slight majority of EU Member States have already reformed their definition of rape to make lack of consent a constitutive element. A significant number of Member States have not amended their legislation, and insist they have legitimate reasons not to do so.

### 1.1. Arguments for a change of paradigm in addressing rape and sexual violence

The traditional approach to defining rape in national legislations in the EU<sup>3</sup> has been to base the definition on the assumption of violence, threats or rape victims' incapacity to resist the aggression. In the absence of evidence of violence, or of circumstances making it difficult for rape victims to physically oppose their aggressors (such as fear, surprise or disability), laws and judicial practices have often exonerated perpetrators. In light of new cases of rape and new knowledge on victims' reactions, this approach has come to be seen as seriously deficient. Several studies<sup>4</sup> have shown that a reaction known as 'frozen fright' or 'tonic immobility',<sup>5</sup> rather than active physical resistance, is the most common response among rape victims. Traditional force-based definitions of rape ignore this psychological reality – that many victims are unable to fight back against rape or sexual assault. Thus, the narrow definition of rape based on force and coercion omits many situations in which the aggression occurs against the victim's will. Such situations include not only situations of extreme danger, but also surprise aggression, aggression against a background of power relations, sexual aggression as part of a generalised pattern of violence in abusive relations, etc., which render the victim unable to react. Evidence of victims' verbal resistance without evidence of physical struggle

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<sup>2</sup> European Parliament [resolution of 25 February 2014](#) with recommendations to the Commission on combating violence against women.

<sup>3</sup> In English-speaking jurisdictions (such as certain US states and Canada), on the other hand, consent in relation to rape has been legally codified in law for much longer than in continental Europe, but has been surrounded by conceptual ambiguity – in certain cases meaning merely 'assent', or passive acceptance of the sexual attack. For a comprehensive terminological analysis see K. Ferzan, University of Pennsylvania Carey Law School, P. K. Westen, [How to Think \(Like a Lawyer\) About Rape](#), University of Michigan Law School, 2017. This common law tradition is reflected in the Irish and Cypriot legislation, the first to include lack of consent as a constitutive element of the crime of rape (albeit retaining a certain degree of conceptual ambiguity) among EU countries (see respective chapters).

<sup>4</sup> Such as the expert opinion submitted to the European Court of Human Rights in the case of *M.C. v Bulgaria*, or A. Möller, H. P. Söndergaard, L. Helström, [Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression](#), *Acta Obstetrica et Gynecologica Scandinavica*, Volume 96, Issue 8, 2017.

<sup>5</sup> According to the study quoted above, 'Tonic immobility (TI) in animals has been considered an evolutionary adaptive defensive reaction to a predatory attack when resistance is not possible and other resources are unavailable.'

(saying no, but not fighting back) is another situation that force-based definitions may not cover appropriately.

Expecting victims of rape to always fight back is part of what are called 'rape myths' or stereotypes<sup>6</sup> about how a rape victim 'should' behave before, during and after a sexual attack. These myths tend to perpetrate the idea that rape is often committed by strangers in public spaces, in the dark and usually with a weapon, while the existing data show that most rapes are committed by acquaintances and indoors.<sup>7</sup> Victims of this latter type of offence are often treated with disbelief, including by law professionals. Rape myths also often put the blame on the victim for provocative or promiscuous behaviour, or attribute rape accusations to an assumed desire for revenge, thus excusing or justifying the perpetrator.

In the judicial realm, the forced-based approach has been driven by the assumption that material evidence of violence and resistance, or of serious threats, is needed to prove that the perpetrator is guilty beyond any reasonable doubt,<sup>8</sup> as required by a fundamental principle of criminal justice in democratic societies. Concern that innocent men may be victims of false allegations and thus wrongly condemned are legitimate,<sup>9</sup> but concerns about the number of rape proceedings that are closed without a conviction, and the high number of unreported cases of rape and sexual violence are equally so.<sup>10</sup>

Even if all these arguments are accepted, an important question arises in this context: is the shift to a consent-based definition of rape necessary, or could courts interpret force-based definitions in such a comprehensive way as to tackle the issues described above? Numerous legal experts, feminist advocates, civil society organisations (such as Amnesty International) and international organisations (see next section) favour a shift to consent-based definitions of rape. In Europe, this approach has crystallised around European Court of Human Rights case law and has been enshrined in the Istanbul Convention (see the Council of Europe Convention on fighting violence against women and domestic violence), as explained in the next section.

However, some take a position that insists consent does not need to be mentioned explicitly for legal definitions to actually cover all cases of non-consensual sex. For example, in their response to monitoring undertaken by the Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), countries criticised for their definition of rape

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<sup>6</sup> 'Rape myths' were first conceptualised by social psychologist Martha Burt in her 1980 article cultural myths and supports for rape, which proposes a scale of 'rape myths acceptance' based on 19 survey questions. See M. Burt, [Cultural myths and supports for rape](#), *Journal of Personality and Social Psychology*, 38(2), 1980, pp. 217-230.

<sup>7</sup> See, for example, this academic article by G. F. Waterhouse, A. Reynolds, V. Egan, [Myths and legends: The reality of rape offences reported to a UK police force](#), in *The European Journal of Psychology Applied to Legal Context*, Volume 8, Issue 1, January 2016, pp. 110.

<sup>8</sup> A cautionary instruction, attributed to British Lord Hale in the 17th century, is testimony of this traditional approach: rape 'is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.' (quoted from this 1976 article [Criminal Law--Rape--Cautionary Instruction in Sex Offense Trial. Relating Prosecutrix's Credibility to the Nature of the Crime Charged is No Longer Mandatory: Discretionary Use is Disapproved](#), *Fordham Urban Law Journal*, Vol. 4.4, No 2, 1976).

<sup>9</sup> See, for example, C. Young, [Crying Rape False rape accusations exist, and they are a serious problem](#), in *The Slate*, 2014. See also the case of Eleanor Williams, convicted in 2023 of perverting the course of justice in the United Kingdom, [Eleanor Williams jailed for eight and a half years after rape and trafficking lies](#), *The Guardian*, March 2023.

<sup>10</sup> As evidenced by a study funded by the EU Daphne 2 programme: L. Kelly, J. Lovett, [Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries](#), CWASU, London Metropolitan University, 2009. According to the authors, 'the proportion of cases designated as false allegations were extremely low, ranging from 2 % to a maximum of 9 %. This is extremely strong evidence that the extent of false allegations is exaggerated by professionals, but this over-estimation creates a culture of scepticism'. The study also concluded that 'the majority of women reporting rape across Europe do not see justice done'. [Similar data](#) were collected in the United States.



(such as Denmark, France, Poland and Romania)<sup>11</sup> argued that their legislation fulfils all the requirements of a consent-based definition – even if it does not mention consent. This view was also supported by the Polish Supreme Court opinion of 29 April 2021 on the bill to amend the Polish criminal code with regard to the definition of rape (see section on Poland below).

Some feminist scholars<sup>12</sup> also find that definitions which make lack of consent the core of the crime are not necessarily more effective in increasing reporting and ensuring justice for victims. Moreover such definitions do not take into account the structural inequalities between men and women, which raise serious questions about how free women's consent really is in a context of gender inequality. Other academics<sup>13</sup> question the objective of reforming social norms around sex and communication by using criminal law reform – a stated objective of proponents of this reform.<sup>14</sup>

A 2016 Eurostat survey<sup>15</sup> revealed how powerful and widespread rape-related stereotypes regarding women's behaviour and responsibility remain in the EU. According to this survey, 22 % of respondents agreed that women often make up or exaggerate claims of abuse or rape, with proportions varying from 47 % in Malta to 8 % in Sweden. Some 27 % of respondents said sexual intercourse without consent may be justified, particularly in situations such as the victim being drunk or on drugs (12 %), voluntarily going home with someone (11 %), wearing revealing, provocative or sexy clothing, or not clearly saying no or not physically fighting back (both 10 %). Respondents in Romania, Bulgaria and Hungary are the most likely to endorse the view that there is a justification for sex without consent, while those in Sweden and Spain are the least likely to say so (see Figure 1).

<sup>11</sup> See [Comments submitted by Denmark on GREVIO's final report on the implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence](#), Council of Europe, 2017: 'The Danish Government believes that the chapter adheres to the requirements of the Convention by including all factors that preclude valid consent to sexual activity. [...] It is [...] left to the Parties to decide on the specific wording of the legislation and the factors that they consider to preclude freely given consent.' However, after a change of government in 2019, the definition was modified (see chapter on Denmark). For France, see [Commentaires soumis par la France sur le rapport final du GREVIO](#), Council of Europe, 2019. For Poland, see [Commentaires soumis par la Pologne sur le rapport final du GREVIO](#), Council of Europe, 2021. For more details on Romania, see chapter on Romania.

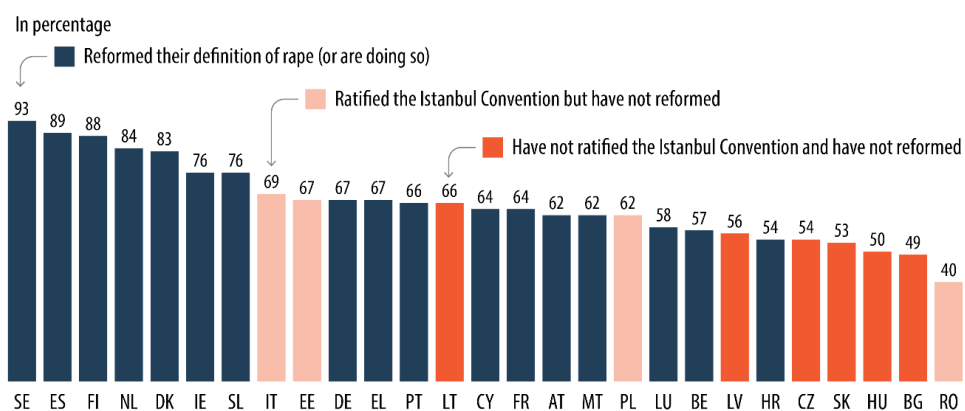
<sup>12</sup> C. A. MacKinnon, a Law Professor at University of Michigan and Harvard Law School, has criticised the focus on lack of consent in the definition of rape, for example in her article [Rape Redefined](#), Harvard Law and Policy Review, 2016. Looking at US states, which present a good mixture of rape laws based on consent only, consent and force, as well as force only, she contends that the focus on consent has made little difference in practice. She also analyses the groundbreaking decision of the European Court of Human Rights case *M.C. v Bulgaria* and finds that there were enough elements of force against the victim in this case to make lack of consent by the victim superfluous for a conviction. MacKinnon states that 'rape is less a question of unwanted sex than of unequal sex' and her proposal is to reframe rape as a crime of gender inequality.

<sup>13</sup> See K. Kessler Ferzan, [Consent, Culpability, and the Law of Rape](#), University of Pennsylvania Carey Law School, 2016: 'Codes that adopt affirmative expression models may be admirably attempting to protect women. However, we do not currently consent under the presumption that "only yes means yes". Accordingly, a man might believe, or even reasonably believe, that a woman is assenting despite her expression of non-consent. So, too, a woman might misinterpret her partner's inexpressiveness and believe that her partner assents. If these potential defendants are punished in order to cause social change or to protect women by creating prophylactic rules, then we are punishing individuals who are nonculpable as to what we really care about (non-consensual sex) in order to accomplish our goal (better and more accurate communication about consent). We are punishing the morally innocent. We should pause before punishing the innocent for the collective good.'

<sup>14</sup> See for example, L. Wegerstad, [Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden](#), *German Law Journal*, 22(5), 2021, pp. 734-752.

<sup>15</sup> [Special Eurobarometer 449](#) on gender-based violence.

Figure 1 – Percentage of people who consider that none of the reasons presented to them in a public survey justify rape, by EU Member State



Data source: Eurostat, Special Eurobarometer 449 on gender based violence, 2016.

Corroborating the findings of the 2016 Eurostat survey with our data on which countries have reformed their legislation since 2014 to make the lack of consent a constitutive element of the crime of rape (see Chapters 2 and 3 below), a clear pattern emerges in Figure 1. Countries with fewer rape stereotypes that have made legal reforms tend to cluster together at one end, while those with widespread stereotypes and no legal changes cluster at the other end, with a few exceptions.

## 1.2. International norms

The need for a fundamental change in the legal approach to rape has been recognised by international human rights bodies. The United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW) made clear, in its General Recommendation No 35 of 2017<sup>16</sup> that 'the definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account coercive circumstances'. With this, the Committee gave general effect to the conclusions of its jurisprudence, particularly its Communication No 34/2011, in *R. P. B. v The Philippines*.<sup>17</sup> Here, it asked the Philippine government to 'review the legislation of rape so as to remove any requirement that sexual assault be committed by force or violence, and any requirement of proof of penetration, so as to place the lack of consent at its centre'.

Under the European Convention on Human Rights (ECHR), a member state must effectively investigate and prosecute and punish all forms of rape and sexual abuse. In 2002, the member states of the Council of Europe (CoE), through the Committee of Ministers, agreed, in their Recommendation on the Protection of Women against Violence,<sup>18</sup> that national laws should 'penalise any sexual act committed against non-consenting persons, even if they do not show signs of resistance'.

<sup>16</sup> [General Recommendation No 35](#) (2017) on gender-based violence against women, updating general recommendation No 19 (1992), UN Committee on the Elimination of Discrimination against Women.

<sup>17</sup> [Communication no. 34/2011](#), UN Committee on the Elimination of Discrimination against Women: views adopted by the Committee at its 57th session, 10-28 February 2014.

<sup>18</sup> Recommendation [Rec\(2002\)5](#) of the Committee of Ministers to member states on the protection of women against violence, Council of Europe.

In applying the ECHR, the European Court of Human Rights has adopted a number of important, even ground-breaking, decisions,<sup>19</sup> in which it found that CoE member states have failed to properly investigate cases of rape and sexual abuse. Particularly, its 2003 decision in the case of *M.C. v Bulgaria*<sup>20</sup> clearly endorsed what the Court considers an emerging approach in many national legislations.<sup>21</sup> This puts consent and not force and physical resistance at the centre of the definition of rape: 'The Court is persuaded that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member states' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.' The Court considers that, even in the absence of 'direct' proof of rape such as traces of violence and resistance or calls for help, authorities must assess the evidence of presence or lack of consent in light of all surrounding circumstances. At the same time, the Court leaves national authorities a considerable margin of discretion.

In another case, *J.L. v Italy*,<sup>22</sup> the Court found that Italian judicial authorities breached Article 8 (right to respect for private life) of the Convention, by allowing considerations about the victim's previous sexual conduct to be taken into account in the final verdict. It found that the language and arguments used by the Italian court of appeal conveyed prejudices existing in Italian society regarding the role of women and could be an obstacle to providing justice to victims of gender-based violence (GBV).

The specific legal instrument of the Council of Europe for fighting violence against women and domestic violence – the Istanbul Convention, which entered into force in 2014 – imposes an obligation on its states parties to adapt their definitions of rape in criminal law to make the lack of consent their central element. According to Article 36 of the Convention, the following intentional conduct should be criminalised:

*a. engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;*

*b. engaging in other non-consensual acts of a sexual nature with a person;*

*c. causing another person to engage in non-consensual acts of a sexual nature with a third person.*

*2. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.*

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<sup>19</sup> Factsheet – [Violence against women](#), European Court of Human Rights, November 2022.

<sup>20</sup> See the Press release issued by the Registrar, [Chamber judgment in the case of M.C. v Bulgaria](#), 4.12.2003. See also [full text](#) of the judgment.

<sup>21</sup> The Court also found that 'For example, in some legal systems "force" is considered to be established in rape cases by the very fact that the perpetrator proceeded with a sexual act without the victim's consent or because he held her body and manipulated it in order to perform a sexual act without consent. As noted above, despite differences in statutory definitions, the courts in a number of countries have developed their interpretation so as to try to encompass any non-consensual sexual act'.

<sup>22</sup> *J.L. v Italy* – [5671/16](#), Judgment 27.05.2021.

### 1.3. EU legislative initiative to establish common minimum standards on the definition of rape

The EU is currently working on adopting a directive on violence against women and domestic violence, which contains provisions that establish common standards for criminalising rape EU-wide, including a definition as well as minimum maximum penalties<sup>23</sup>. In March 2022, the European Commission put forward a proposal for this directive, which provides for criminal law definitions for several offences, including rape. In the Commission's view, such definitions would be based on the competences conferred on the EU through Article 83(1) of the Treaty on the Functioning of the European Union (TFEU). This article provides that Parliament and Council can adopt directives establishing 'minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. The same article lists 'sexual exploitation of women and children' among the crimes that would qualify as such euro-crimes. If the Council wishes to identify a new area of euro-crime, it has to act by unanimity. In the explanatory memorandum to the legislative proposal (Chapter 2 on the legal basis), the Commission argues for an interpretation of sexual exploitation that would include rape. The Parliament endorsed this approach when deciding on its position, and moreover proposes the inclusion of further crimes to be defined at EU level, all based on Article 83(1):<sup>24</sup> sexual assault, intersex genital mutilation, forced sterilisation, forced marriage, sexual harassment in the world of work, and the unsolicited receipt of sexually explicit material. However, the Council is divided on this issue and has been unable to secure a majority in this respect. It therefore proposes to eliminate the definition of rape from the directive.

The Commission proposal<sup>25</sup> would impose an obligation on Member States to criminalise rape as 'intentional conduct', consisting of 'engaging with a woman in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object', as well as causing a woman to engage with another person in such non-consensual sexual acts (article 5(1)). The fact that the text mentions only women as possible victims (an approach now rejected by most Member States in their legislation) is explained by the legal basis (Article 83(1) TFEU listing sexual exploitation of women and children among euro-crimes) and the scope of the directive. However, as a minimum standard, it does not limit in any way the capacity of Member States to adopt definitions encompassing all victims. The other provisions of the directive concerning the protection of victims of GBV, which are based on Article 82(2) TFEU, are not constrained by the legal basis in this respect. As explained in recital no 5 of the proposal and provided for in its article 4 on definition of victims, the term 'victim' encompasses all persons, regardless of their sex or gender.

The proposal furthermore provides a definition of consent inspired by the Istanbul Convention:

*2. [...] a non-consensual act is understood as an act which is performed without the woman's consent given voluntarily or where the woman is unable to form a free will due to her physical or*

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<sup>23</sup> This means that Member States would be obliged to set maximum penalties for rape above a certain common threshold.

<sup>24</sup> See also the European Parliament's Committee on Legal Affairs (JURI) opinion: [Opinion on the legal basis of the proposal for a Directive combating violence against women and domestic violence](#), which considers that sexual assault in the world of work should fall under Article 83(1).

<sup>25</sup> Proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence, [COM\(2022\)105](#) final, 8 March 2022.

*mental condition, thereby exploiting her incapacity to form a free will, such as in a state of unconsciousness, intoxication, sleep, illness, bodily injury or disability.*

*3. Consent can be withdrawn at any moment during the act. The absence of consent cannot be refuted exclusively by the woman's silence, verbal or physical non-resistance or past sexual conduct.*

Inciting and aiding and abetting, as well as the attempt to do so, should also be criminalised by Member States (article 11). The proposal obliges Member States to have a minimum highest penalty of 8 years and 10 years imprisonment in case of aggravating circumstances in rape, respectively.

The Parliament has endorsed these elements of the proposal in its position for interinstitutional negotiations. The joint report<sup>26</sup> by the Committee on Women's Rights and Gender Equality (FEMM), the Committee on Civil Liberties, Justice and Home Affairs (LIBE), which outlines this position, furthermore proposes to add sexual assault (defined as any non-consensual act of a sexual nature) to the acts criminalised at the EU level. The Parliament also broadens the understanding of non-consensual acts. It adds further elements, such as the need to take into account 'personal and external circumstances'; making explicit that fear is not limited to the threat of a criminal act; extending the list of particularly vulnerable situations; and including 'stealthing', i.e. the removal of contraceptive means during intercourse, which should qualify as either rape or sexual assault.

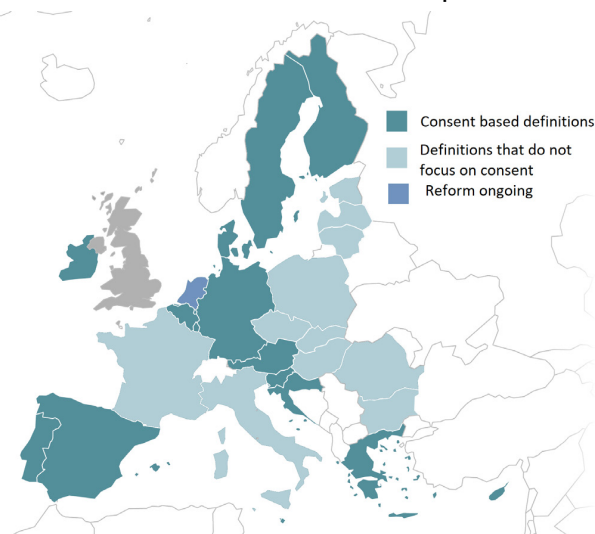
## 2. Definition of rape in the EU Member States parties to the Istanbul Convention

A comparative analysis of legislation in the Member States that have ratified the Istanbul Convention, as presented in the country sections below, indicates that most have reformed their legislation to bring it into line with the Convention. Of 27 EU Member States, 21 have ratified the Istanbul Convention, which entered into force in 2014 (see Table 1 in annex). Since its entry into force, 14 EU Member States have amended their legislation to incorporate or make more explicit the notion of consent as a constitutive element of the crime of rape (or of a more general crime of sexual aggression). The Netherlands and Ireland are currently reforming their legislation. In four Member States, criminal legislation included the notion of consent as a constitutive element before the Convention's adoption: Cyprus (1956), Ireland (1981), Belgium (1989) and Luxembourg (2011), but all four Member States have either reformed their legislation once again to make the notion of consent more explicit or are currently doing so (Ireland). Thus, **in 15 Member States, lack of consent features as a constitutive element of the crime of rape/sexual aggression, while the Netherlands is conducting a legislative reform.**

On the other hand, five Member States (Estonia, France, Italy, Romania and Poland) have not taken any steps to include consent in their criminal definition of rape, even if some of them have recently amended their legislation with regard to other aspects (Romania and France, as explained below). The Estonian definition refers to a violation of the will of the victim, but links this to use of force or threats.

<sup>26</sup> Report on the proposal for a directive of the European Parliament and of the Council on combating violence against women and domestic violence ([A9-0234/2023](#)), European Parliament, July 2023.

Figure 2 – Consent based definitions of rape in the EU



Source: National law (as explained below) and GREVIO positions (see Table 1).

'Consent' is meant in the sense of Article 36 of the Istanbul Convention.

including the traditional elements of force and threat, Belgian, Croatian, Finnish, Luxembourgish, Spanish and Swedish legislation considers that such elements always preclude consent without changing the nature of the crime. There is also considerable diversity concerning the punishment for rape defined through the lack of consent (ranging from a minimum of six months imprisonment in Slovenia, or even a fine in the Netherlands – to a maximum of life imprisonment in Cyprus).

The countries that are not parties to the Istanbul Convention have not modified their definitions. In several of them, however, public debate is under way on the need to amend the definition of rape, to make the lack of consent a constitutive element (as explained in Table 2 in annex).

## 2.1. Austria

Austria reformed its criminal code in 2015 and introduced a new article 205a StGB (Violation of sexual self-determination), which provides that sexual acts against the victim's will are punishable by law. According to this paragraph, 'anyone who engages in sexual intercourse or a sexual act equivalent to sexual intercourse with a person against their will, by taking advantage of a situation of compulsion or after prior intimidation, is liable to a prison sentence of up to two years, unless the act is punishable by a more severe penalty under another provision [such as for rape]'.<sup>27</sup> The same paragraph provides that it is a criminal offence to induce someone against his/her will to engage in sexual intercourse or a similar act, or to perform sexual acts on oneself.

<sup>27</sup> National legal provisions presented in this section do not represent an official translation in any way. The text reproducing or paraphrasing legal provisions have a purely indicative character. The reader is advised to check the legal text in its original language, available in the footnotes or the table below, should more precise information be needed.

As far as the substantive content of the relevant provisions is concerned, the countries that have reformed display a diversity of approaches. Austrian legislation distinguishes between a crime of violation of self-determination and the crime of rape, for which it retains an element of force or coercion. Other countries' legislation provides for a general crime of sexual aggression defined by the lack of consent (Germany, Spain), with rape constituting an aggravated crime, subject to a more severe penalty, defined by penetration or an equivalent act. The Portuguese or Greek provisions on rape provide for two sexual offences with and without force, subject to different prison sentences. In terms of

As a result of this reform, the criminal code distinguishes between the criminal offence of violation of sexual self-determination, and rape. According to Article 201 StGB, the definition of rape retains force as a central element and does not mention consent: rape occurs when a person is forced to perform or submit to sexual intercourse or to a sexual act equivalent to sexual intercourse through violence, deprivation of liberty or through threats of danger to life or limb. Rape is liable to a punishment of 2 to 10 years imprisonment, which is more than for violation of self-determination (up to 2 years).

## 2.2. Belgium

Belgium is one of the EU countries that have pioneered the consent-based approach. Its first legislative reform in this regard goes back to 1989. The Law of 4 July 1989 amending certain provisions concerning the crime of rape, which broadened the definition of rape to also include marital rape, defined rape with a focus on the lack of consent: as any act of sexual penetration of any kind and by any means whatsoever, committed on or with the assistance of a person who does not consent.

In its 2020 baseline evaluation report, the Council of Europe expert body supervising the implementation of the Istanbul Convention, GREVIO, commended this definition as complying with Article 36 of the Istanbul Convention. However, the Belgian legislator felt that this legal provision was not sufficient to protect the right to sexual freedom. A further reform was conducted through the Law of 21 March 2022, amending the criminal code as regards sex crimes, which marked a legislative turning point. The law changed the qualification of sexual crimes from crimes against the family order and public morality (going back to 1867), to crimes against the person. In this modified version, Chapter I/1 of the criminal code now includes a separate provision (Article 417/5) defining consent as 'given freely'. It further specifies that 'this needs to be assessed in the light of the circumstances of the case. Consent cannot be inferred from the victim's mere lack of resistance. Consent may be withdrawn at any time before or during the sexual act'. The 2022 amendment broadens the list of circumstances that preclude consent. These now include: the victim's state of fear; the influence of alcohol, narcotics, psychotropic substances or any other substance with a similar effect; an illness or a situation of disability, altering the victim's free will; threat, physical or psychological violence, coercion, surprise, trickery or any other punishable behaviour; as well as unconsciousness or sleep. A minor aged under 16 is considered unable to give consent (excepting in case of relations between a minor over 14 years and another minor or a person no more than three years older). The Belgian law also condemns other forms of sexual aggression, such as voyeurism; unauthorised sharing of intimate images; as well as the violation of sexual integrity, which includes any act of sexual nature performed on or by a non-consenting person. The new law significantly increases prison sentences for rape from 5 to 10 years, to 10 to 15 years.

The 2022 Belgian reform had strong backing from civil society. Amnesty International Belgium launched a campaign on rape and consent<sup>28</sup> in 2020, to educate young people about the importance of consent. Their joint survey with SOS Viol<sup>29</sup> showed that 20 % of women in Belgium had been victims of rape. Revelations<sup>30</sup> about sexual aggressions, including rape, suffered by

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<sup>28</sup> Amnesty International, [#JDIWI pour le consentement](#).

<sup>29</sup> Amnesty International, [Sondage sur le viol en 2020 : des chiffres alarmants](#).

<sup>30</sup> See, e.g. T. Dejace, [Balance ton Bar : on en est où ?](#), *La Libre*, 4 July 2022.

women in Brussels nightspots also galvanised public opinion. The reform was broadly welcomed<sup>31</sup> by civil society.

## 2.3. Croatia

Croatia has recently modified its legislation on rape to make consent a constitutive element of the crime of rape. In its modified form, Article 153 of the Croatian criminal code, entitled 'Rape', determines that rape is sexual intercourse, or other equivalent sexual act, that is performed without the victim's consent. Rape may also take the form of the mere inducement of the victim without his/her consent to commit sexual intercourse or an equivalent act with a third person or upon themselves. The punishment for rape is one to five years imprisonment. Use of force or threat are considered aggravating circumstances. In such cases, the punishment increases to 3 to 10 years in prison. Consent is admitted only if the person decided to engage in intercourse of their own free will and was capable to make and express such decision. Consent is considered lacking especially if the rape was committed with the use of threat, deception, abuse of power or taking advantage of the state of a person due to their inability to express their rejection or over a person unlawfully deprived of liberty.

The new provision on rape is the result of a recent amendment, which took effect in January 2020. Before this change, the criminal code did not identify sexual acts committed without a victim's consent as rape, but provided for a specific crime under an article entitled 'Sexual act without consent'. The punishment for that crime was six months to five years imprisonment. Unlike 'sexual act without consent', rape required the use of force or threat on behalf of the perpetrator.

As part of a package on combating violence against women and domestic violence, the Croatian government intends<sup>32</sup> to make further changes to the law on rape seeking to increase the punishment for rape from 1 to 5, to 3 to 8 years imprisonment, and for aggravated rape from 3 to 10, to 5 to 12 years, among other things.

## 2.4. Cyprus

Absence of consent has featured as a central element of the definition of rape in the Cyprus criminal code since its adoption in 1959, in the pre-independence period. Until its amendment in 2020, Article 144 of the code provided that any person who has unlawful carnal knowledge of a female, without her consent; or with consent,<sup>33</sup> if such is obtained by force or fear of bodily harm; or, in the case of a married woman, by impersonating her husband; is guilty of the felony termed rape. Courts in Cyprus have interpreted these provisions in the sense that lack of consent even without physical resistance from the victim indicates rape.<sup>34</sup>

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<sup>31</sup> See C. Wernaers, [Une réforme "historique" du code pénal sexuel ? Ce qu'en pensent les associations féministes](#), RTBF, 1 April 2022. Some still consider that the reform does not go far enough. For example, an organisation defending women's rights ([Soralia](#)) considers that the new law defines what consent is not, but not what it is.

<sup>32</sup> See this [piece of news](#) on the website of the Croatian government.

<sup>33</sup> Consent in this legal provision is not necessarily meant in the same way as envisaged in the Istanbul Convention, as expressing the free will of the victim, since it can be also extracted through force and threat. For this reason, GREVIO asks Cyprus to clarify its concept of consent (see GREVIO position in Table 1).

<sup>34</sup> See this study on the application of the criminal law provisions on rape in Cyprus during 2010 to 2020: A. Constantinou, [The exposition of rape in Cyprus: From the crime scene to the court room](#), *The International Journal of Evidence & Proof*, 27(3), 2023, pp.169-191. According to this article, 'As the above law [on rape] has been interpreted by the (common law bound) Cypriot courts, in order to prove the offence of rape, it is not necessary that the victim (complainant) demonstrates or explicitly communicates to the offender (defendant) that she does not consent to a



The criminal code was amended in November 2020. Today, Article 144 on rape still classifies rape as a crime against morality. It replaces 'carnal knowledge' with unlawful intercourse by vaginal, anal or oral penetration of the penis into the body of another person, without his/her consent or with consent given under force, threat or fear. It introduces a distinct offence of sexual assault by penetration with an object or any part of the body (Article 146B), for which the lack of consent is also a constitutive element of the crime, alongside force, threat or fear. This reform was needed to bring the definition of rape and other sexual offences in line with contemporary realities, such as extending sexual offences to crimes committed against men. It also criminalises attempted rape or sexual assault, as well as coercion of a third person to commit rape or sexual assault.

A 2019 case of alleged gang rape dismissed by the Cypriot authorities, which received much public attention and led to the sentencing of the complainant, showed that there are still serious deficiencies<sup>35</sup> in the way the Cypriot police and judiciary treat reports of sexual violence.

## 2.5. Denmark

The Danish minister of justice put forward a proposal<sup>36</sup> for reforming the definition of rape in Danish penal law on 11 November 2020. The existing rape provision assumed that a perpetrator had used coercion or that a victim had been in a state or situation where they were unable to resist the act. Numerous reports had called this definition into question in recent years, by showing that rape was a widely under-reported crime in Denmark.<sup>37</sup>

The bill proposed that section 216(1) of the Danish criminal code on rape be amended to state that sexual intercourse with a person without their consent is rape. The amendment was adopted by the Parliament on 17 December 2020, with no votes against or abstentions. The new law<sup>38</sup> entered into force on 1 January 2021. The Danish government assessed that the introduction of a rape provision based on consent would not only have an impact on how rape cases are assessed and handled by the police, the prosecution and the courts, but that it would also contribute to a general change of attitude in society, increasing focus on respect for other people's boundaries and freedom, as well as the right to decide over one's own body.

## 2.6. Estonia

The Estonian criminal code (§ 141(1)) defines rape as 'sexual intercourse with a person against his or her will by using force or taking advantage of a situation in which the person is not capable of initiating resistance or comprehending the situation' and sets the punishment as one to six years' imprisonment. While the legal provision states that rape is 'intercourse against the will of the victim', the use of force or abusing a situation of vulnerability remain constitutive elements of the crime, an interpretation endorsed by GREVIO. In its 2022 Baseline Evaluation Report, GREVIO expressed regret

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sexual intercourse (R v Malone [1998] 2 Cr App R 447).<sup>15</sup> It is also not necessary to prove that the victim has put forward any resistance (R v Olugboja [1982] QB 320).<sup>16</sup> However, the prosecution must prove that the victim's consent had not been given or, if it was given, was not the result of the victim's free will and that the action was illegal, as there was no consent on the part of the victim, Kailis v Republic [2004] 2 CA 251.'

<sup>35</sup> According to experts cited by S. Haynes, 'Our Broken System Has Been Exposed.' [How a British Woman's Rape Case in Cyprus Has Become a Rallying Cry for Activists](#), *Time*, 4 January 2020: 'According to a 2018 Amnesty International report, Cyprus has the EU's highest rate of reporting sexual violence to the police, yet experts say that the conviction rate in such cases is low, and that women are often not taken seriously by the authorities.'

<sup>36</sup> See [bill](#).

<sup>37</sup> See e.g. [Amnesty International, Denmark: "Give us respect and justice!" Overcoming barriers to justice for women rape survivors in Denmark](#), March 2019.

<sup>38</sup> [LOV nr 2208 af 29/12/2020](#).

that in order for non-consensual sexual behaviour to constitute rape, the Estonian criminal code requires that force is used in the commission of the act, or that the perpetrator take advantage of the victim's inability to resist. GREVIO urged the Estonian authorities to speedily reform the legal definition of all sexual offences to fully incorporate the notion of freely given consent.

Public debate has taken place on the need to amend the criminal code, and the issue formed part of the electoral platforms of some political parties (for instance, the Social Democrats), but no specific action has been taken, nor any timeline set.

## 2.7. Finland

In Finland, new legislation entered into force on 1 January 2023, which reformed the criminal code with regard to sex crimes. Key changes include an amended definition of rape, now based on consent.

Section 1 of Chapter 20 (Sexual offences) of the Finnish criminal code now reads as follows:

### *Rape*

*A person who has sexual intercourse with a person who does not participate in it voluntarily shall be sentenced for rape to imprisonment for at least one year and at most six years. The participation of a person in sexual intercourse shall not be considered voluntary if:*

- 1) the person has not verbally, through his or her behaviour or in any other way expressed that he or she is participating in it voluntarily,*
- 2) the person has been coerced into sexual intercourse by using violence against a person or by making a threat, or*
- 3) the person has not been able to formulate or express his or her will due to unconsciousness, illness, disability, state of fear, state of intense intoxication, reduced consciousness, sudden nature of the situation, serious abuse of a special position of power or another comparable reason.*

*An attempt is punishable.*

The aim of the reform<sup>39</sup> was to strengthen everyone's right to sexual self-determination and the protection of personal integrity. At the same time, the extensive reform harmonises and clarifies the provisions of the criminal code concerning sexual offences.

In addition to rape, most other provisions on sexual offences in Chapter 20 of the criminal code were amended. An important change is, for example, that when the act is sufficiently severe, sexual harassment (*seksuaalinen ahdistelu*) can be committed through acts other than touching. Non-consensual dissemination of a sexual image is punishable under the amended legislation, which also addresses online sexual abuse in many ways.

## 2.8. France

Article 222-22 of the French criminal code defines sexual aggression as any act of a sexual nature committed with violence, coercion, threat or surprise. Coercion can be physical or moral. When it occurs against a minor, any sexual act is considered sexual aggression (except when the age difference between perpetrator and victim is small, as defined by the law). Rape is a specific, aggravated form of sexual aggression: more precisely any act of sexual penetration and any oral-

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<sup>39</sup> According to the Ministry of Justice (*Oikeusministeriö*), [Rikoslain uudistaminen vahvistaa seksuaalista itsemääräämisoikeutta](#), (in English) February 2022.

genital act committed by violence, coercion, threat or surprise. Other sexual aggressions than rape are criminalised in a separate article, and are subject to lesser punishment than rape. The French legal provisions on rape and other sexual aggressions do not refer to the absence of victim consent.

France has amended its legislation on rape and sexual aggression several times in recent years, but without making the lack of consent an explicit element of the crime. The 2018 Schiappa law<sup>40</sup> broadened the definition of rape in Articles 222-23 of the criminal code to also include rape committed by a woman against a man (not previously the case): 'Any act of sexual penetration, of whatever nature, committed on another person or on the person of the perpetrator by violence, coercion, threat or surprise is rape'.

A further reform in 2021<sup>41</sup> defines constrained non-penetrative oral-genital relations as rape (previously qualified as sexual assault). It also defines as rape any penetrative and oral-genital sexual acts between a minor less than 15 years of age and an adult, or between an adult and a minor above this age when age difference is more than 5 years.

A recent public opinion survey<sup>42</sup> by IFOP/AVAAZ shows strong support among French citizens for legal reform. Legal experts also argue in favour of reform.<sup>43</sup> According to available information,<sup>44</sup> France has opposed an EU-wide definition in the Council and seems to believe that 'the definition of rape advocated by the European Commission and the European Parliament is not in line with that of the Istanbul Convention, which focuses more on the circumstances of such an act'.

## 2.9. Germany

With the 50th Act to amend the criminal code to improve the protection of sexual self-determination,<sup>45</sup> which came into force on 10 November 2016, Germany fundamentally reformed its criminal law relating to sexual offences and transposed the provisions of Article 36 of the Istanbul Convention into German law. In particular, it ensures that any sexual act against the recognisable will of the victim is covered by criminal law (the 'No means no' rule). Prior to the reform, non-consensual sexual acts were penalised, insofar as the offender used force or threats or exploited certain vulnerable situations to coerce a victim into performing or tolerating sexual acts on or from the perpetrator or another person (previous Section 177(1) of the German criminal code, 'sexual coercion'). 'Rape' qualified as an aggravating circumstance. According to a legal expert,<sup>46</sup> 'several scenarios could not be prosecuted even though the lack of consent was evident. These were arguably: saying "no" without physical resistance; surprise attacks (if a sexual touching happens quickly, without the victim's prior awareness of what is coming, there is no need for coercion to bend the victim's will); the silent victim in "climate of violence" cases (after repeated assaults in relationships and families, violence or threats are no longer needed to achieve submission); threats of harm other than serious physical violence or death'.

<sup>40</sup> [LOI n° 2018-703](#) du 3 août 2018 renforçant la lutte contre les violences sexuelles et sexistes.

<sup>41</sup> [LOI n° 2021-478](#) du 21 avril 2021 visant à protéger les mineurs des crimes et délits sexuels et de l'inceste.

<sup>42</sup> [Sondage 24/11/2023](#), Les Français et la notion de consentement dans la définition juridique d'un viol.

<sup>43</sup> See G. Christian, « [On crée le crime en le nommant : pour une redéfinition du viol](#) », *Revue de science criminelle et de droit pénal comparé*, 2020/2 (N° 2), p. 255-268.

<sup>44</sup> Agence Europe, [Europe Daily Bulletin No. 13264](#).

<sup>45</sup> [Fünfzigstes Gesetz zur Änderung des Strafgesetzbuches](#) – Verbesserung des Schutzes der sexuellen Selbstbestimmung vom 4. November 2016.

<sup>46</sup> T. Hörnle, '[The New German Law on Sexual Assault](#)', in Tatjana Hörnle (ed.), *Sexual Assault: Law Reform in a Comparative Perspective* (Oxford University Press, 2023).

What counts today is that the perpetrator commits 'sexual assault', but ignores a victim's recognisably opposing will. According to Article 177(1) of the German criminal code, anyone who performs sexual acts against the discernible will of another person, or has that person perform sexual acts on them, or causes that person to perform or acquiesce to sexual acts being performed on or by a third person, shall be punished for 'sexual assault' by imprisonment for a term of between six months and five years. The subsequent paragraph equally penalises cases where communicating refusal is impossible or unnecessary. According to Hörnle, '[T]he German approach is based on a mixed or hybrid model of consent, which combines the attitudinal element with a performative, expressive element'. The offence requires intent by the perpetrator (Section 15 German criminal code), meaning the perpetrator must have known that the victim did not agree or seriously considered it possible that the sexual act was against the will of the other person and acceptingly continues (*dolus eventualis*). Offences termed 'sexual coercion' and 'rape' remain part of Section 177 of the German criminal code, but 'sexual coercion' is no longer the basic offence but (like 'rape') qualifies as an aggravating circumstance (Section 177(5)). Rape presupposes 'sexual intercourse' or 'similar sexual acts, ... which are particularly degrading for the victim' and no longer requires a coercive act by the offender (Section 177(6), No 1). Attempting these offences is punishable (Section 177(3)).

## 2.10. Greece

Greece amended its definition of rape in 2019, to bring it into line with the Istanbul Convention (ratified by Law 4531/2018). Article 336 *et seq*<sup>47</sup> of the criminal code provides that sexual violence and rape are recognised as crimes against sexual freedom. Before the 2019 reform of the criminal code, Article 336 on the crime of rape referred to forcing another person by physical violence, or by threat of great and immediate danger, into intercourse or another immoral act or into tolerating these. In its current form, the article on rape adds a new offence based on the lack of consent. Paragraph 1 of Article 336 retains the previous definition of rape as coercion to sexual intercourse or indecent assault, by corporal violence or threat of great and imminent danger. If more than one perpetrator acts together, the act is considered to constitute a more serious crime. By amending the criminal code, Law 4619/2019<sup>48</sup> introduces a new provision in Article 336, providing in Point 4: 'Whoever, except in the case of par. 1, commits a sexual act without the consent of the victim, is punished by imprisonment for up to ten (10) years'. This therefore criminalises any sexual act without the consent of the victim. 'Sexual act' means sexual intercourse and any other act of equivalent gravity. In addition, Law 3500/2006 on combating domestic violence criminalises marital rape. The legislative reform was supported by civil society.<sup>49</sup>

## 2.11. Ireland

Irish legislation provides that 'a man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and (b) at that time he knows that

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<sup>47</sup> The Government of Greece's response of March 2009 is available in the [UN Women Global Database on Violence against Women](#).

<sup>48</sup> On 6 March 2019, the Greek Minister of Justice, Transparency and Human Rights presented a new [draft criminal code](#) for public consultation.

<sup>49</sup> For example, Amnesty International, in its [Submission on the Legal Definition of Rape in Greece](#), called on Greece to become one of the countries to criminalise rape based on lack of consent in line with international law and standards, and insisted on this aspect being included in the new legislation.

she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it' (Criminal Law (Rape) Act 1981, Section 2).

Additionally, a 1990 legislative amendment<sup>50</sup> widened the definition of rape. Thus, 'rape under Section 4' means a sexual assault that includes: (a) penetration (however slight) of the anus or mouth by the penis, or (b) penetration (however slight) of the vagina by any object held or manipulated by another person. Section 5 of the act introduced the abolition of marital exemption in relation to rape.

Ireland is currently in the process of amending its legislation in relation to sexual offences, addressing some long-standing issues affecting victims and survivors of sexual violence. The Sexual Offences and Human Trafficking Bill 2023<sup>51</sup> which amends the Criminal Law (Rape) Act 1981 is currently before Dáil Éireann (lower house) as part of the legislative process.

In 2018, the minister for justice appointed a working group, with representatives from key criminal justice agencies, to review and report upon the legislation and the protections available for vulnerable witnesses in the investigation and prosecution of sexual offences. The working group was established in the wake of a high-profile rape case, which had taken place in Northern Ireland earlier that year. The case and its outcome brought considerable attention to the conduct of rape trials and the experiences of complainants not just in the Northern Ireland jurisdiction, but also in the Republic of Ireland. In 2020, the working group presented its recommendations,<sup>52</sup> which informed the new bill. The bill would strengthen the legal provisions on consent, knowledge and belief in rape cases. It changes the current situation, where an accused person is not guilty of rape if they believed they had obtained consent, to one where rape occurred if the accused held a subjectively honest but mistaken belief that the complainant consented.<sup>53</sup> Thus, point b of Section 2 would require that the accused has a 'reasonable belief' that the victim 'consents to the intercourse'. Under the proposal, juries would be obliged to consider what steps, if any, the accused took to check whether the complainant was consenting, as well as the accused's decision-making capacity at that time and whether the accused's defence that they believed the complainant was consenting is one that a reasonable person would have held in the circumstances.

Certain elements of the proposed bill are designed to improve the victim's journey through their case and the criminal justice system. The bill would also provide for anonymity for victims and the accused in all trials for sexual offences and not just in rape trials. It also extends the victim's right to separate legal representation to trials for sexual assault if, for example, they are being questioned about their previous sexual history. Also included is the exclusion of the public from sexual offence trials. In addition, the bill removes the obligation for the verdict and sentence to be announced in public.

## 2.12. Italy

Article 609-bis of Italy's criminal code, defines rape as follows:

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<sup>50</sup> [Criminal Law \(Rape\) \(Amendment\) Act](#), 1990.

<sup>51</sup> [Criminal Justice \(Sexual Offences and Human Trafficking\) Bill 2023](#).

<sup>52</sup> Known as the [O'Malley Review](#).

<sup>53</sup> See on this point e.g., M. Hilliard, [Mistaken belief of consent no defence to rape accusation under new law](#), *The Irish Times*, July 2023: 'Under current law, a rape accused can be cleared where they claim to have been honestly but mistakenly under the belief that consent had been given. The new laws would objectively test whether such a belief would have been held by a reasonable person in the circumstances.'

*Whoever, by violence or threat or by abuse of authority, forces someone to perform or undergo sexual acts shall be punished by imprisonment of six to twelve years.*

*The same punishment shall apply to anyone who induces someone to perform or be subjected to sexual acts*

*1) by abusing the physical or mental inferiority of the offended person at the time of the act*

*2) by misleading the offended person by substituting himself for another person.*

*In less serious cases, the penalty is reduced by an amount not exceeding two thirds.*

Analysis of the current formulation of Article 609-bis of the Italian criminal code shows that there have been no recent amendments to align it with the Istanbul Convention, which Italy ratified with Law 77/2013.<sup>54</sup> In particular, no mention of consent in the formulation of Article 609-bis is comparable to that of Article 36 (1)(a) of the Istanbul Convention. However, the need to prove lack of consent has been consistently affirmed in Italian case law<sup>55</sup> as an essential consideration for the requirements for the felony of sexual violence to be fulfilled. For example, recent judgment<sup>56</sup> of the Criminal Supreme Court 32447 of 26 July 2023 confirms a consolidated orientation of case law requiring that consent is present at the moment of the act (despite provocative behaviour) and must be present all along the sexual act (point 6).

Further elements were highlighted in the second alternative civil society report,<sup>57</sup> submitted in the framework of Italy's reporting to GREVIO, as an indication of a lack of full implementation<sup>58</sup> of the Istanbul Convention in the policy approach and in the related Italian regulations intended to adapt to the Istanbul Convention. These include a lack of access to anti-violence protection for women, access to justice, etc.

## 2.13. Luxembourg

Under Article 375 of the criminal code, as modified by the Law of 16 July 2011,<sup>59</sup> '(a)ny act of sexual penetration, of whatever nature and by any means, committed against a person who does not consent to it, including by means of violence or serious threats, by trickery or artifice, or by abusing a person who is unable to give free consent or to resist, constitutes rape and shall be punishable by imprisonment for five to ten years'. The provision further clarifies that when the crime is committed against a child under the age of 16, the victim should be considered incapable of giving free consent. While the perpetrator will be subject to imprisonment for 5 to 10 years in the former case, the imprisonment will reach 10 to 15 years in the latter. Article 376 enumerates the aggravating circumstances (e.g. the assault results in the illness or permanent incapacity of the victim, death of the victim). Article 376, as modified by the Law of 21 February 2013,<sup>60</sup> clarifies that the penalties will

<sup>54</sup> [LEGGGE 27](#) giugno 2013, n. 77.

<sup>55</sup> Giurisprudenza Penale, [Violenza sessuale: ai fini della consumazione del reato è richiesta la mera mancanza di consenso e non la manifestazione di dissenso](#), 11 May 2023.

<sup>56</sup> [Cass. pen. Sez. III, Sent., \(ud. 14/06/2023\)](#) 26-07-2023, n. 32447.

<sup>57</sup> [Second Alternative Report of Italian women's organisations](#), July 2023; see [overview](#).

<sup>58</sup> See Forum Italiano Della Disabilità, [Rapporto ombra al meccanismo di monitoraggio della Convenzione di Istanbul](#), April 2023.

<sup>59</sup> [Law of 16 July 2011](#) on the approval of the Council of Europe Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse, opened for signature in Lanzarote on 25-26 October 2007 and the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and amending certain articles of the Penal Code and the Code of Criminal Procedure.

<sup>60</sup> [Loi du 21 février 2013](#) relative à la lutte contre les abus sexuels et l'exploitation sexuelle des enfants et portant modification de plusieurs dispositions du Code pénal.

be increased when the perpetrator is a member of the family, has authority over the victim, or when the victim is in a situation of vulnerability in relation to the perpetrator.

Most recently, the Law of 7 August 2023<sup>61</sup> modified the criminal code to introduce a new Article 371-2 which states that: 'Consent to a sexual act is assessed in light of the circumstances of the case. It cannot be inferred from the victim's lack of resistance. Consent can be withdrawn at any time before or during the sexual act.' Article 371 clearly states that: 'A violation of sexual integrity consists of performing an act of a sexual nature on a person who does not consent'.

The main idea of the reform was to link the violence to the consent in order to criminalise any non-consensual sexual act, including when the victim has not resisted physically. In addition, the reform explicitly spelled out that consent might be withdrawn at any time, and thus the withdrawal of consent during sexual intercourse holds legal relevance. It also introduced an irrefutable presumption<sup>62</sup> of absence of consent when the victim is a minor under 16 years.

## 2.14. Malta

Malta revised its criminal code in 2018 to make the lack of consent a constitutive element of sexual offences. Prior to 2018, Article 198 of the criminal code defined rape as 'carnal knowledge' achieved through violence. According to Article 198 of the criminal code in its current form, engaging in non-consensual 'carnal connection', i.e. vaginal, anal, or oral penetration, is a criminal offence. Elements of coercion, listed in the same article in a subsequent paragraph (force, bribery, deceit, deprivation of liberty, improper pressure or any other unlawful conduct or threats of such conduct causing another person to engage in any of the non-consensual acts described by the law with any person), make the perpetrator liable to the same punishment as for rape. The notion of consent is excluded for persons under 12 years and when the person abused was unable to offer resistance owing to physical or mental infirmity (Article 201). Article 207 makes any non-consensual act of a sexual nature, other than those of a penetrative nature already covered by other provisions, a criminal offence.

Paragraph 3 of Article 198 provides a definition of consent: it must have been 'given voluntarily, as the result of the person's free will, assessed in the context of the surrounding circumstances and the state of that person at the time, taking into account that person's emotional and psychological state, amongst other considerations'.

## 2.15. The Netherlands

Currently, the 1991 force-based definition of rape still applies in the Netherlands. Article 42 of the Dutch criminal code, as modified in 1991,<sup>63</sup> defines rape as 'actions comprising or including the sexual penetration of the body that have taken place by force'. Force is specified as 'coercion through violence, the threat of violence or through another act or the threat of another act'.

A 2021 bill<sup>64</sup> revising the sexual offences legislation, adopted by the Dutch House of Representatives on 4 July 2023 and before the Dutch Senate at the time of writing, is about to change this. A key

<sup>61</sup> [Loi du 7 août 2023](#) portant modification :1° du Code pénal;2° du Code de procédure pénale;en vue de renforcer les moyens de lutte contre les abus sexuels et l'exploitation sexuelle des mineurs. - Mémorial A n° 520 de 2023.

<sup>62</sup> The irrefutable presumption (*praesumptio iuris et de iure*) is that which cannot be disproved.

<sup>63</sup> [Wet van 9 oktober 1991 tot wijziging van de artikelen 242 tot en met 249 van het Wetboek van Strafrecht](#).

<sup>64</sup> [Wetsvoorstel seksuele misdrijven](#). See [here](#) for adoption by the Dutch House of Representatives and [here](#) for situation in the Dutch Senate.

element of the proposed reform is the expansion of the lower limit for criminal liability for sexual assault and rape. In the new bill, it is sufficient<sup>65</sup> that there is 'knowledge or serious reason to suspect that sexual acts are taking place while the other person's will to do so is lacking'. The bill furthermore distinguishes between sexual assault and rape that is intentional (Articles 241 and 243) – with a higher maximum penalty in case of force, violence or threat – and sexual assault and rape where intent cannot be established, but where the perpetrator had serious reason to suspect that the other person did not consent ('guilt variant' – Articles 240 and 242). Central to the new threshold for sexual assault and rape is the absence of will: when the other person shows explicit verbal or physical restraint in behaviour, markedly passive behaviour, or when, obvious (non-)verbal signs, indicate reluctance on her or his part.<sup>66</sup>

The aim of the proposed reform is to provide an up-to-date legal framework that reflects social reality and gives police and prosecutors more and better opportunities to act against sexually transgressive criminal behaviour. To this end, the violence is no longer linked to coercion, but to the absence of will, in order to criminalise any non-consensual sexual act, including when the victim has not resisted physically. The bill also modernises the offence definition of rape, so that all forms of coerced sexual penetration involving a victim's body without his or her consent can be qualified as rape.

## 2.16. Poland

The absence of consent is not included in the Polish criminal code's definition of rape. Under Article 197 § 1 of the criminal code<sup>67</sup>: 'Whoever, through violence, unlawful threat, or deceit, compels another person to engage in sexual intercourse, shall be subject to imprisonment for a term of 2 to 15 years'.

In 2021, Lewica (the Left) – then an opposition party – proposed an amendment<sup>68</sup> to the criminal code that would include the notion of consent. The proposal, developed by civil society organisations under the auspices of the Feminoteka foundation, would change the wording of Article 197 § 1 to:

*Whoever compels another person to engage in sexual intercourse without the prior expression of conscious and voluntary consent by that person shall be subject to a term of imprisonment of not less than 3 years.*

In addition, the proposal provides for a change of title for the relevant chapter in the criminal code from 'Crimes against sexual freedom and decency' to 'Crimes against sexual freedom and autonomy'. However, the proposal has not been debated in the Sejm (the lower chamber of the Polish Parliament) thus far, as in 2021, the Council of Ministers negatively evaluated<sup>69</sup> this parliamentary bill and did not recommend it for further legislative proceeding, resulting in the bill being 'frozen'.

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<sup>65</sup> See Explanatory Memorandum [Wizynging van het Wetboek van Strafrecht en andere wetten in verband met de modernisering van de strafbaarstelling van verschillende vormen van seksueel grensoverschrijdend gedrag \(Wet seksuele misdrijven\)](#).

<sup>66</sup> Ibidem.

<sup>67</sup> [Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny](#).

<sup>68</sup> [Poselski projekt ustawy o zmianie ustawy - Kodeks karny](#).

<sup>69</sup> See [here](#).



The Polish Ombudsman has repeatedly called<sup>70</sup> for the criminal code to be amended to include consent in the definition of rape. The Ombudsman noted that under the law currently in force, consent can only be derived through appropriately directed interpretation from the elements of 'violence', 'unlawful threat', and 'deceit'. In his view, in light of the international legal standards applicable to Poland, the absence of consent should be a sufficient, independent, and clear indicator of this crime. While welcoming that context-sensitive interpretations were emerging in Polish jurisprudence and that some courts offered very extensive interpretations of the term 'deceit', in its 2021 Baseline Evaluation Report on Poland, GREVIO urged Polish authorities to reform all sexual offences to 'fully incorporate the notion of freely given consent as required by Article 36' of the Istanbul Convention.

In 2023, numerous civil society organisations, including Feminoteka, made a pledge<sup>71</sup> to the Speaker of the Sejm to 'unfreeze' the bill and enable further work on it. Feminoteka has been lobbying for the relevant change in law since 2019.

## 2.17. Portugal

Portugal reformed its legislation in 2015 and 2019, broadening the understanding of coercion to redefine the crime of rape.<sup>72</sup> The 2015 law criminalised any type of coercion to an act of sexual intercourse or penetration (and not only based on force and threats as was previously the case), while the 2019 law added an explicit definition of coercion, as acting against the cognisable will of the victim. This reform was necessary to take account of the GREVIO recommendation. In its evaluation report of 2019 (issued before the second legislative amendment), GREVIO noted that the offensive conduct was qualified by the use of the verb 'constrain' and considered that this wording was 'not sufficient to definitively break away from the long-standing practice of Portuguese courts to require proof of the victim's resistance in order to sentence the perpetrator'.

Article 164 on rape of the Portuguese criminal code now criminalises any type of coercion. Coercing another person to '(a) engage in copulation, anal intercourse or oral intercourse with the perpetrator or with another person; or b) perform acts of vaginal, anal or oral introduction of body parts or objects is punishable'. Under a separate point, the same article now criminalises coercion by means of violence or serious threat, or after having rendered the person unconscious or unable to resist, to perform or tolerate such acts, and provides for more severe punishment in this case. The same article in the ensuing paragraph 3, provides a definition of consent, as being 'understood to be any means, not provided for in the previous paragraph 1, used to carry out the acts referred to in the article against the victim's cognisable will'. Paragraph 3 of Article 164 was introduced by the 2019 reform, with the purpose of stressing that a sexual act without the victim's knowable will is rape. It moves the emphasis from 'serious threat, having been rendered unconscious, rendered unable to resist', to 'any means' used against the victim's knowable will.

## 2.18. Romania

Romania last amended its definition of rape with the adoption of its 2009 criminal code, five years before the country's ratification of the Istanbul Convention in 2014. The new Romanian criminal code, which entered into force in 2014, does not focus on consent as required by the Istanbul Convention, but on circumstances that preclude consent. Article 218 defines rape as 'sexual

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<sup>70</sup> See [here](#).

<sup>71</sup> See [here](#) on Feminoteka website.

<sup>72</sup> Laws [No 83/2015 of 5 August 2015](#) and [No 101/2019 of 6 June 2019](#).

intercourse, oral or anal intercourse with a person, committed by coercion, by making it impossible to defend oneself or express one's will, or by taking advantage of this state'. The same article provides that any other acts of vaginal or anal penetration committed in similar circumstances are subject to the same punishment. Article 219 of the criminal code defines sexual assault as an act of sexual nature other than rape committed in the same circumstances as rape. Inciting someone to rape or sexual assault is not covered specifically, but incitement to any crime is subject to the same punishment as the crime (Chapter VI of the criminal code).

In 2022, GREVIO recommended that Romania change its definition of rape to match the requirements of Article 36 of the Istanbul Convention, by incorporating the notion of freely given consent, and to ensure that such provisions are effectively applied in practice. The Council of Europe Committee of the Parties endorsed this recommendation. However, Romania has replied<sup>73</sup> that, while different in wording, its legislation on rape fully complies in substance with the Istanbul Convention. There is no limitation to the number of ways in which the lack of consent may be manifested, so the law covers any impossibility to give consent – including that of a psychological/traumatic nature ('tonic immobility'). The reply also stresses that it is up to the judiciary to prove the commission of the crime (including the lack of consent), and any other interpretation would reverse the burden of proof on the accused, infringing thus on the presumption of innocence.

Romania has recently amended its legislation on sexual crimes<sup>74</sup> to criminalise any sexual intercourse committed by an adult with a minor under 16 years. In case the act was committed through coercion, the punishment is more severe. This legislative change has left the definition of rape otherwise untouched.

## 2.19. Slovenia

The criminal code, which entered into force on 1 November 2008, defined rape as an act of forcing another person to engage in sexual intercourse or sexual acts by using force or threatening a direct attack on life or body.

At the beginning of January 2019, media coverage<sup>75</sup> of a rape case, handled by the Koper High Court caused uproar in Slovenia. According to High Court<sup>76</sup> 'when the perpetrator uses force only after sexual intercourse has already taken place, or after the sexual intercourse has been completed [...] then the crime of rape is not committed'. The court decision was widely criticised,<sup>77</sup> especially regarding the legal definition of the crime of rape.

On 15 January 2019, Amnesty International Slovenia, Ključ Association, SOS Telephone Association, Peace Institute and the Legal Information Center of Non-Governmental Organisations appealed<sup>78</sup> to the minister of justice for a change in the definition of rape. The actors called for change in the definition of the crime of rape to make it consistent with international human rights standards and based on the absence of consent.

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<sup>73</sup> See Romania's [reply](#).

<sup>74</sup> [LEGE nr. 217 din 10 iulie 2023](#), applicable from 1 January 2024.

<sup>75</sup> Mladina, [Oproščen posilstva, ker je žrtev na začetku spolnega napada spala](#), January 2019.

<sup>76</sup> See High Court [judgment](#).

<sup>77</sup> See e.g. lus-info, [Sodba v primeru spolnega napada odmeva v javnosti](#), January 2019.

<sup>78</sup> Amnesty International Slovenije, Društvo Ključ, Društvo SOS telefon, Mirovni inštitut, Pravno-informacijski center nevladnih organizacij - PIC, [Poziv k spremembi definicije kaznivega dejanja posilstva](#), January 2019.

On 4 June 2021, the National Assembly of the Republic of Slovenia adopted the Act<sup>79</sup> amending and supplementing Articles 170, 171 and 172 of the criminal code. The legislator changed the legal definition of rape, from the coercion model, to the 'yes means yes' or affirmative consent model. The latest statutory definition of rape is regulated in the first paragraph of Article 170 of the code and reads: 'Anyone who, without the consent of another person, achieves sexual intercourse with another person or conducts sexual acts equivalent to this, shall be punished by imprisonment from six months to five years'.

According to the Slovenian redefinition of rape, rape is a criminal act when there is no free consent to sexual behaviour (intercourse or equivalent sexual behaviour); the use of force or threat is thus no longer a condition for the existence of the criminal act of rape. The existence of force or threat becomes the aggravating circumstance, as defined in the third paragraph of Article 170.

As regards consent, the second paragraph of Article 170 stipulates that the 'consent is given if the person consented to sexual intercourse or equivalent sexual behaviour according to their outwardly perceptible, unequivocal and free will and was capable of making such a decision'. A person concerned must therefore not be subject to any coercive circumstances regarding their will. He/she must also be capable to make a decision to engage in sexual intercourse, which excludes cases of victims under the age of 15, who are presumed to be unable to give such consent.

## 2.20. Spain

On 6 September 2022, the Spanish Parliament adopted the Bill on Comprehensive Guarantee of Sexual Freedom.<sup>80</sup> The law known in Spain as the 'yes means yes' (*solo sí es sí*) law now requires positive sexual consent. According to its current Article 178, sexual consent would be understood as such only when freely expressed through acts, which in light of the circumstances of the case, show in a clear manner the will of the person. Any sexual act committed against the sexual freedom of another person without their consent is considered sexual aggression and thus punishable by four years imprisonment. Consent is precluded in the following cases: use of violence, intimidation or abuse of a situation of superiority or vulnerability of the victim, as well as in cases of acts carried out on persons who are sensory deprived or whose mental situation is abused, as well as those carried out when the victim's will is denied for any reason. Rape is criminalised in Article 179, which concerns vaginal, anal or oral intercourse or vaginal and anal penetration by a body part or object, and is liable for a more severe prison sentence (4 to 10 years) than sexual aggression in general. Before this legal reform, the Spanish law required the use of force or threats for an act to constitute rape, otherwise it would qualify as sexual assault. Today, the use of force or threat is considered an aggravating circumstance for all types of sexual aggression (Article 178.2)

The legislative reform in Spain followed a public outcry caused by the sentencing of perpetrators of a gang rape case (known as the '*La Manada*' case) against an 18-year-old victim in Pamplona in 2016, during the San Fermín celebrations.<sup>81</sup> The five perpetrators were convicted at first instance of the lesser crime of sexual assault, a conviction endorsed by a higher court in appeal. However, the Spanish High Court overturned their sentence in 2019, considering that they had committed rape.

<sup>79</sup> [Zakon o spremembah in dopolnitvah Kazenskega zakonika](#), Official Gazette of the Republic of Slovenia, no. 95/21.

<sup>80</sup> [Ley Orgánica 10/2022, de 6 de septiembre, de garantía integral de la libertad sexual](#).

<sup>81</sup> R. Rinçon, [Supreme Court raises convictions in "Wolf-Pack" sexual assault case to 15 years](#), *El País*, June 2019.

The amendment to the law had however the unintended effect of reducing the prison term for more than 1 000 sexual offenders,<sup>82</sup> including one of the perpetrators in the *La Manada* case. This was because the new law reduced the minimum prison term for rape and convicted persons were able to benefit<sup>83</sup> from this more favourable provision.

## 2.21. Sweden

Sweden modified its rape legislation to broaden the definition of rape to any act of penetration committed without the consent of the victim in 2018. Previously, the Swedish criminal code was based on the concept that rape must involve force or the threat of force or other circumstances where the victim could not resist: 'sleep, serious fear, intoxication or other drug influence, illness, physical injury or mental disturbance, or otherwise [when the victim] in view of the circumstances, is in a particularly vulnerable situation'. The change to the rape definition occurred after several highly mediatised cases<sup>84</sup> of sexual violence ended in acquittal, and particularly the sexual aggression of a 15-year-old girl in 2013, provoked an intense public debate.<sup>85</sup> Under the new law, it is no longer necessary to prove the use of threat, force, or that the perpetrator took advantage of a victim's vulnerable situation. More specifically, the new law defines rape as sexual intercourse with a person who is not participating voluntarily. The law does not determine the concept of voluntariness exhaustively, but lists situations (mostly retained from the previous version) in which participation is always considered involuntary:

- participation is a result of assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person;
- the perpetrator improperly exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise in view of the circumstances; or
- the perpetrator induces the person to participate by seriously abusing the person's position of dependence on the perpetrator.

Sexual assault is defined similarly to rape, as including sexual acts other than intercourse and is subject to a lower penalty. Inducing another person to undertake or submit to either rape or sexual assault is punishable similarly to committing these acts.

According to an academic researcher, 'the Swedish model may most accurately be described as a modified affirmative consent model: "[O]nly yes means yes—with some exceptions".<sup>86</sup> The Supreme Court has found that victim's passivity does not represent consent, but does not necessarily mean a lack of consent either, only the entire context makes an assessment possible.

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<sup>82</sup> Poder judicial, [Los tribunales han acordado 1.205 reducciones de pena en aplicación de la Ley Orgánica 10/2022](#), September 2023.

<sup>83</sup> M. Marraco, [El Gobierno ya tiene la respuesta del Supremo: la revisión de sentencias por la ley del sí es sí "es obligatoria"](#), *El Mundo*, December 2022.

<sup>84</sup> See G. Nilsson, [Towards voluntariness in Swedish rape law. Hyper-medialised group rape cases and the shift in the legal discourse](#), in *Rape in the Nordic Countries*, 1st edition, 2019.

<sup>85</sup> See e.g. this interview with Women's rights activist Demet Ergun, IPPF, [Anything less than yes is rape: the campaign for a consent-based rape law in Sweden](#), November 2022.

<sup>86</sup> L. Wegerstad, [Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden](#), in *German Law Journal*, 2021, 22, pp. 734–752.

A particularity of Swedish legislation is the introduction of a new crime of 'negligent' rape (and negligent sexual assault), which is subject to a less severe criminal (prison) sentence than rape itself. In such situations, the perpetrator does not have the active intent to commit rape, but is grossly negligent regarding the circumstance that the other person is not participating voluntarily. On 11 July 2019, Sweden's Supreme Court issued its first judgment<sup>87</sup> on negligent rape. The new offence of negligent rape had a comparatively low application after introduction, with only 12 convictions out of 400 judgments in 2019. The Swedish Council for Crime Prevention (BRÅ) suggested<sup>88</sup> that this was due to the imprecise definition of 'gross negligence'.

Overall, the new law has led to a significant rise in convictions – with a 75 % increase<sup>89</sup> in 2019 compared to the previous year – but its implementation has not been without challenges for the courts. The precise meaning of non-voluntary participation was a disputed issue in the legislative process,<sup>90</sup> and the legislation as it is now leaves to the courts the task of deciding on an individual basis, in light of the surrounding circumstances, whether participation was voluntary or not.

The objectives of the law are considered broader than of a purely penal nature. According to experts,<sup>91</sup> the 'new legislation was explicitly designed to transform societal norms around sexual interactions', with the objective to encourage 'an active voluntary participation that is communicated, either through word or deed or in some other way'.

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<sup>87</sup> [Supreme Court's Judgment Case no. B 1200-19](#), delivered in Stockholm on 11 July 2019.

<sup>88</sup> According to the Swedish Council for Crime Prevention (BRÅ), [Den nya samtyckes-lagen i praktiken](#), 2020:6.

<sup>89</sup> Ibidem.

<sup>90</sup> Swedish Council for Crime Prevention (BRÅ), [The new consent law in practice. An updated review of the changes in 2018 to the legal rules concerning rape](#). English summary of Brå report 2020:6 'The courts' assessment of the provision of consent: The main criticism of the changes to the law raised by lawyers was that it would be difficult to adjudge whether the injured party had participated voluntarily or not. [...] The picture presented by the review is that, in those cases that resulted in a conviction for rape, it has been clearly established that the injured party did not wish to participate. In some cases, she has been taken by surprise; in other cases, she has not given the accused any signals that she wishes to have sex, and has reacted with passivity during the act due to being paralysed. It is primarily in those cases that resulted in a conviction for negligent rape that there is greater uncertainty as to how the injured party's reaction – or failure to react – is to be interpreted. The judgments illustrate a range of different problems of application, and, in several of these cases, the outcome is far from given.'

<sup>91</sup> L. Wallin, S. Uhnöo, Å. Wettergren & M. Bladini, [Capricious credibility – legal assessments of voluntariness in Swedish negligent rape judgements](#), in *Nordic Journal of Criminology*, 2021, 22:1, pp. 3-22.

### 3. ANNEX

Table 1 – Legislative situation in the EU Member States that are parties to the Istanbul Convention

Member State	National legislation: definition of rape in relation with consent (all emphasis - <b>bold</b> - has been added by author)	Punishment (prison term)	GREVIO comments or recommendation	Year of reform
AT	<b>Violation of sexual self-determination</b> (distinct from rape): engaging in sexual intercourse or an equivalent sexual act with a person <b>against their will...</b> ( <a href="#">§205a StGB</a> ) Rape retains an element of force ( <a href="#">§201 StGB</a> ).	Up to 2 years	Austria was one of the first parties to adapt its criminal law to the requirement of Istanbul Convention Article 36 ( <a href="#">GREVIO BER*, 2017</a> )	2015
BE	<b>Rape:</b> Any act of sexual penetration, regardless of its nature and by whatever means, committed against a <b>non-consenting person</b> ( <a href="#">criminal code</a> , Article 417/11) <b>Definition of consent:</b> consent must be 'given freely. This needs to be assessed in the light of the circumstances of the case. Consent cannot be inferred from the victim's mere lack of resistance. Consent may be withdrawn at any time before or during the sexual act' <a href="#">criminal code</a> , Article 417/5	10-15 years	GREVIO commends Belgium for its definition of sexual violence, which rests on the victim's lack of consent, in line with Istanbul Convention Article 36 ( <a href="#">GREVIO BER, 2020</a> )	1989 2022
HR	<b>Rape:</b> committing sexual intercourse or an act equivalent to it with another person <b>without their consent</b> (criminal code, <a href="#">Article 153</a> )	1-5 years	GREVIO notes with satisfaction that the legal definition of rape has undergone significant changes with the criminal amendments that entered into force in 2020 ( <a href="#">GREVIO BER, 2023</a> )	2020
CY	<b>Rape:</b> unlawful intercourse by vaginal, anal or oral penetration of the penis into the body of another person, <b>without his/her consent</b> or with consent given under force, threat or fear (criminal code, <a href="#">Article 144</a> )	life	GREVIO welcomes the inclusion in the Cypriot criminal code of a definition of rape and sexual abuse by penetration, criminalised on the basis of the lack of consent given by the victim GREVIO recommends that Cyprus take legislative or other measures to qualify more precisely the concept of consent, clarifying that it should be given voluntarily as the result of the person's free will, assessed in the context of the surrounding circumstances ( <a href="#">GREVIO BER 2022</a> ) Similar recommendation from Council of Europe, <a href="#">Committee of the Parties, December 2022</a>	2020

Definitions of rape in the legislation of EU Member States

Member State	National legislation: definition of rape in relation with consent (all emphasis - <b>bold</b> - has been added by author)	Punishment (prison term)	GREVIO comments or recommendation	Year of reform
DK	<b>Rape:</b> sexual intercourse with a person who has not consented thereto ( <a href="#">criminal code</a> , Article 216)	Up to 8 years		2021
EE	<b>Rape:</b> Sexual intercourse with a person <b>against his or her will</b> by using force or taking advantage of a situation in which the person is not capable of initiating resistance or comprehending the situation ( <a href="#">criminal code</a> , Article 141)	1-6 years	GREVIO regrets that Article 141 of the penal code requires that in order for non-consensual sexual behaviour to constitute rape, force must be used in the commission of the act or the perpetrator must take advantage of the victim's inability to put up resistance ( <a href="#">GREVIO BER 2022</a> ) Reform also required <a href="#">Committee of the Parties, December 2022</a>	
FI	<b>Rape:</b> sexual intercourse with a person <b>who does not participate in it voluntarily</b> ( <a href="#">Section 1 of Chapter 20 (Sexual offences) of the Finnish criminal code</a> )	1-6 years	<a href="#">Committee of the Parties conclusions (June 2023)</a> welcome the introduction of consent based definition of rape in the criminal code	2023
FR	No mention of consent or will of the victim (See <a href="#">Article 222-22</a> , and following, of French criminal code)	15 years	The wording chosen by the French legislator emphasises the evidential elements that make it possible to establish the absence of consent, to the detriment of the centrality of the absence of consent GREVIO urges the French authorities to base the definition of sexual violence on the victim's lack of free consent, in accordance with Istanbul Convention Article 36 (GREVIO BER <a href="#">Committee of the Parties conclusions, June 2023</a> , require reform	
DE	<b>Sexual assault</b> (general offence): performing or causing to be performed, <b>against the apparent will of another person</b> , sexual acts on that person, or causing that person to perform or tolerate sexual acts on or by a third person ( <a href="#">criminal code</a> , <a href="#">Section 177 (1)</a> ) <b>Rape:</b> aggravated sexual assault consisting of sexual intercourse or particularly degrading acts (Section 177(6))	6 months to 5 years at least for 2 years for rape	GREVIO welcomes the introduction of a definition of rape and sexual violence based on consent and notes with satisfaction that the reform process has been accompanied by important awareness-raising campaigns that have led to a broad public debate ( <a href="#">GREVIO_BER 2022</a> )	2016

Member State	National legislation: definition of rape in relation with consent (all emphasis - <b>bold</b> - has been added by author)	Punishment (prison term)	GREVIO comments or recommendation	Year of reform
EL	<p><b>Article on rape</b> provides for two distinct offences: sexual act (intercourse or act of equivalent gravity) <b>without the consent</b> of the victim (criminal code, <a href="#">Article 336(4)</a>) coercion to sexual act, by corporal violence or threat of great and imminent danger (criminal code, <a href="#">Article 336(1)</a>)</p>	Up to 10 years for a paragraph (4) offence, at least 10 years for a (1) offence	No report yet, evaluation ongoing	2019
IE	<p><b>Rape:</b> A man commits rape if (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse <b>does not consent to it</b>, and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it (<a href="#">Criminal Law (Rape) Act 1981</a>, Section 2)</p>	Up to 10 years	No report yet, ongoing	ongoing
IT	<p>No mention of consent or of the victim's will (see <a href="#">criminal code</a>, Article 609-bis)</p>	6-12 years	<p>Italy's legislation does not therefore define sexual violence as an offence based on the lack of consent given voluntarily as the result of a person's free will and assessed in the context of the surrounding circumstances, in accordance with the terms of Istanbul Convention Article 36</p> <p>GREVIO strongly encourages the Italian authorities to consider amending their legislation to base the offence of sexual violence on the notion of freely given consent as required by Article 36, paragraph 1, of the Istanbul Convention (<a href="#">GREVIO BER, 2020</a>)</p>	
LU	<p><b>Rape:</b> Any act of sexual penetration, of whatever nature, by any means whatsoever, <b>committed on a person who does not consent</b>, including using violence or serious threats by ruse or artifice, or abusing a person incapable of giving consent or free to oppose resistance (criminal code, <a href="#">Article 375</a>)</p>	5-10 years	<p>GREVIO is pleased to note that Article 375 of the criminal code defining rape was amended in 2011 to make it easier to take evidence of the absence of consent from the victim</p> <p>GREVIO encourages the Luxembourg authorities to ... bring the definition of consent more into line with that set out in Article 36 (<a href="#">GREVIO, BER 2023</a>)</p>	2011



Definitions of rape in the legislation of EU Member States

Member State	National legislation: definition of rape in relation with consent (all emphasis - <b>bold</b> - has been added by author)	Punishment (prison term)	GREVIO comments or recommendation	Year of reform
MT	<p><b>Rape:</b> engaging in <b>non-consensual carnal connection</b>, that is to say, vaginal, anal or oral penetration with any sexual organ of the body of another person (<a href="#">Criminal Code</a>, Article 198)</p> <p><b>Definition of consent:</b> acts shall be deemed to be non-consensual unless consent was given voluntarily, as the result of the person's free will, assessed in the context of the surrounding circumstances and the state of that person at the time, taking into account that person's emotional and psychological state, amongst other considerations.</p>	6-12 years	GREVIO commends Malta for having made great strides in the legislative framework governing sexual violence and rape. It welcomes in particular that the definition of rape was modified following the entry into force of the GBVDV Act, in line with requirements of the convention ( <a href="#">GREVIO BER 2020</a> )	2018
NL	<p><b>No mention of consent</b> or the victim's free will (see <a href="#">criminal code</a>, Article 242 on rape and Article 246 on sexual assault)</p>	Up to 8 years or fifth category fine	As currently drafted, the provisions on rape (Section 242 CC) and indecent assault (Section 246 CC) require evidence of compulsion. This has been interpreted to mean the suspect deliberately causing the victim to undergo acts against their will which would not be in line with Article 36 of the Istanbul Convention GREVIO encourages the Dutch authorities to speedily reform the criminal code provisions covering sexual violence ( <a href="#">GREVIO BER 2020</a> )	ongoing
PL	<p><b>No mention of consent</b> or the victim's free will (see Article 197 § 1 of the criminal code on rape, <a href="#">Ustawa z dnia 6 czerwnca 1997 r. - Kodeks karny</a>)</p>	2-15 years	GREVIO notes with concern that neither the offence of rape nor the additional sexual offences are based exclusively on the lack of consent. Instead, they continue to be categorised according to the degree of physical violence or threat employed, or to the degree of the victim's helplessness, inability to offer resistance or to express their consent/will GREVIO urges the Polish authorities to reform all sexual offences to fully incorporate the notion of freely given consent as required by Article 36 ( <a href="#">GREVIO BER 2021</a> ) Reform required by the <a href="#">CoP, December 2021</a>	

Member State	National legislation: definition of rape in relation with consent (all emphasis - <b>bold</b> - has been added by author)	Punishment (prison term)	GREVIO comments or recommendation	Year of reform
PT	<p>The article on rape provides for two sexual offences: without and with force:</p> <ul style="list-style-type: none"> <li>• <b>Coercing another person</b> to engage in copulation, anal intercourse or oral intercourse with the perpetrator or with another person; or perform acts of vaginal, anal or oral introduction of body parts or objects (<a href="#">criminal code</a>, Article 164(1))</li> <li>• <b>Coercion by means of violence or serious threat</b>, or after having rendered the person unconscious or unable to resist; to perform or tolerate such acts (<a href="#">criminal code</a>, Article 164(2))</li> </ul> <p><b>Definition of constraint:</b> any means, not provided for in the preceding paragraph [2], used for the practice of the acts referred to in the respective points a) and b) [of paragraph (1)] against <b>the knowable will</b> of the victim.</p>	1-6 years for the crime under paragraph (1)	GREVIO report and <a href="#">Committee of the Parties recommendation, January 2019</a> , predated the legislative amendment of 2019, which introduced paragraphs (1) and (3) of Article 164	2019
RO	No mention of consent or the free will of the victim, see criminal code, Article 218	5-10 years	<a href="#">GREVIO</a> recommended Romania to change its definition of rape to match the requirements of Article 36 in 2022, by incorporating the notion of freely given consent, and to ensure that such provisions are effectively applied in practice. The Committee of the Reform required by <a href="#">Committee of the Parties, December 2022</a>	
SL	<p><b>Rape:</b> sexual intercourse or equivalent sexual acts, <b>without the consent of another person</b> (<a href="#">criminal code</a>, Article 170(1))</p> <p><b>Definition of consent:</b> The consent shall be given if a person, through his/her outwardly perceptible, unambiguous and free will, consented to sexual intercourse or equivalent sexual conduct and was able to make such a decision (<a href="#">criminal code</a>, Article 170(2))</p>	6 months to 5 years	In this context, GREVIO welcomes the recent amendment of the criminal code [...] However, since this amendment came very recently to GREVIO's attention, being adopted by the Slovenian Parliament after the submission of the government's comments on GREVIO's draft evaluation report, GREVIO is not in a position to assess its content ( <a href="#">GREVIO, BER 2021</a> )	2021
ES	<p><b>Sexual assault:</b> any act that violates the sexual freedom of another person without his/her consent (<a href="#">criminal code</a>, Article 178(1))</p> <p><b>Rape:</b> sexual assault consisting of vaginal, anal or oral carnal access, or introduction of bodily limbs or objects through one of the first two pathways</p> <p><b>Definition of consent:</b> Sexual consent would be understood as such only when it was freely expressed through acts that, in view of the circumstances of the case, clearly expressed the will of the person (<a href="#">criminal code</a>, Article 178(1))</p>	4-12 years for rape	GREVIO report ( <a href="#">BER, 2020</a> ) pre-dated the legislative amendment	2022

Definitions of rape in the legislation of EU Member States

Member State	National legislation: definition of rape in relation with consent (all emphasis - <b>bold</b> - has been added by author)	Punishment (prison term)	GREVIO comments or recommendation	Year of reform
SE	<p><b>Rape:</b> vaginal, anal or oral intercourse, or other comparable sexual act with a person <b>who is not participating voluntarily</b> (<a href="#">criminal code</a>, Chapter 6, Section 1)</p> <p><b>Consent:</b> When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way (criminal code, Chapter 6, Section 1)</p> <p><b>Negligent rape:</b> rape committed with gross negligence regarding the circumstance that the other person does not participate voluntarily (criminal code, Chapter 6, Section 1A)</p>	3-6 years for rape	A recent amendment to the criminal code now ensures that all non-consensual sexual acts are criminalised. Sections 1 and 2 of Chapter 6 on sexual offences criminalise intercourse or any other sexual act with a person 'who is not participating voluntarily'. Participation in a sexual act must be voluntary and this must be perceptible. Passivity cannot be considered a sign of voluntary participation per se ( <a href="#">GREVIO, BER 2019</a> )	2018

Source: national legislation and Council of Europe [monitoring](#) of Istanbul Convention implementation.

\* GREVIO is the Group of Experts on Action against Violence against Women and Domestic Violence, BER refers to the baseline monitoring report.

Entries shaded in orange indicate countries that do not include the notion of consent in their definition.

Table 2 – EU Member States not parties to the Istanbul Convention

Member State	Legislation on rape and proposals for reform
CZ	<p><b>The Czech penal code</b> (<a href="#">Act No. 40/2009 Coll.</a>) defines rape in Article 185 as forcing another person to have sexual intercourse by violence or the threat of violence or the threat of other serious harm, or by abusing the victim's defencelessness for such an act.</p> <p>The absence of consent is not included in the definition, but <a href="#">public debate</a> is ongoing on reforming the legislation, supported by civil society (e.g. through petitions <a href="#">chce to souhlas</a>, <a href="#">Amnesty petition</a>). The issue has become highly mediated in the context of <a href="#">rape accusations</a> against a Czech Member of Parliament. The government is considering changing the definition, and the justice minister has <a href="#">presented</a> two proposals in this respect.</p>
LT	<p>Article 149 Rape of the <a href="#">Lithuanian criminal code</a></p> <p>'1. A person who has sexual intercourse with a person against his will by using physical violence or threatening the immediate use thereof or by otherwise depriving of a possibility of resistance or by taking advantage of the helpless state of the victim, shall be punished by a custodial sentence for a term of up to seven years.'</p> <p>There has been no recent reform of the law.</p>
LV	<p>Section 159 Rape of the <a href="#">criminal law</a> of the Republic of Latvia provides that:</p> <p>'(1) For a person who commits an act of sexual intercourse taking advantage of the state of helplessness of a victim or an act of sexual intercourse against the will of the victim by means of violence, threats or using trust, authority or exerting other influence over the victim (rape), the applicable punishment is the deprivation of liberty for a period of four and up to ten years and with probationary supervision for a period of up to five years.'</p> <p>There has been no recent reform of the law.</p>
BG	<p>Article 152 of the <a href="#">Bulgarian penal code</a> (official translation into English published on <a href="#">cyrilla.org</a>) provides the following definition of rape:</p> <p>'(1) Whoever copulates with a female person:</p> <ol style="list-style-type: none"> <li><b>1. unable to defend herself and without her consent;</b></li> <li><b>2. forcing her to it by force or threat;</b></li> <li>3. by bringing her to a helpless state, shall be punished for rape by imprisonment of two to eight years.' </li></ol>
SK	<p>The <a href="#">provision</a> of the criminal code § 199 par. 1 which defines rape focuses on force:</p> <p>'Anyone who forces a woman to have intercourse by force or the threat of imminent violence, or who exploits her defencelessness for such an act, shall be punished by imprisonment for five to ten years.'</p>
HU	<p>The Hungarian <a href="#">criminal code</a> defines sexual violence (Article 197) in relation to the use of force, threats or the exploitation of the victim's incapacity to defend themselves or to express their will. Sexual coercion to perform or tolerate sexual activities (Article 196) is defined exclusively based on force. The law does not mention consent. However, the <b>terminology of 'consent' is used in the <a href="#">ministerial explanation of the criminal code</a></b>, according to which 'exploitation/coercion to perform or tolerate a sexual act</p>

Member State	Legislation on rape and proposals for reform
	<p>includes any behaviour where the victim does not <b>voluntarily and freely consent</b> to the sexual act. It must therefore always be investigated whether the victim consented to the sexual act. In the absence of consent, it is coercion.' Existing <a href="#">case law</a> still emphasises however that the victim must resist, while recognising that this does not exclude abandoning resistance in hopeless situations.</p> <p>The need to improve the legislation has been recognised by legal experts and <a href="#">civil society</a>. <a href="#">The Courts of Hungary</a> have asked for an interpretative provision in the criminal code to clarify sexual coercion. Even if several proposals, emanating from the <a href="#">scientific and professional fields</a>, have been put forward to amend the criminal code, provisions related to sexual crimes, there is no plan for a legislative reform.</p>

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This comparative analysis of the national legislation on rape in European Union Member States provides an overview of legal provisions with a focus on the notion of consent. According to the proposed EU directive on violence against women and domestic violence, lack of consent from victims of rape should be made a constitutive element of the crime.

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