

To the President of GREVIO,
Mrs. Feride Acar,

Lisbon, 4th of September 2017

Excellency,

The **Portuguese Association of Women in Legal Careers** (APMJ - Associação Portuguesa de Mulheres Juristas), a non-governmental organization of jurists founded in 1988 with the objective of contributing to the critical study of Law from the perspective of the support of Women's Human Rights, in the terms of article nr. 68, nr. 5 of the Council of Europe Convention on preventing and combating Violence Against Women and Domestic Violence, hereby presents information regarding the implementation of the above mentioned Convention.

While taking into account that the Convention is not a self-executing treaty but rather several legislative alterations are needed in order for it to be efficiently applied, some legislative measures were introduced in Portugal in order to adapt the internal legal system to the scope of the Convention.

Therefore, in 2015, the Parliament approved some alterations to the Criminal Code and to the Civil Code and also changed a law related to the legal framework about prevention of Domestic Violence and victim support, with the objective of adapting internal legislation with the legal imperatives

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enshrined in the Convention. Furthermore, in 2017, it introduced other legislative modifications in the same legal framework with identical objective.

Even though the **Portuguese Association of Women in Legal Careers** considers these legislative alterations relevant and laudable, it finds such legal instruments - Law nr. 83/2015, of the 5th of August, Law nr. 122/2015, of the 1st of September, Law nr. 129/2015 of the 3rd of September, and Law nr. 124/2017 of the 24th of May - are still insufficient in order to carry out the intended objective, as **A.P.M.J.** will attempt to demonstrate further on in this document and so, in the context of the procedure of monitoring and implementing of the Istanbul Convention in Portugal, the **Portuguese Association of Women in Legal Careers** considered it should communicate its considerations to the GREVIO Committee.

I

In what concerns the crime of Domestic Violence, it is important to refer that article nr. 152 of the Criminal Code, which is the rule which establishes and punishes the crime at stake, was not yet altered in accordance with the Istanbul Convention, namely, in what concerns the definition of the objective elements of the legal type.

Thus, the typical conduct indicated by that rule refers one to the infliction of “physical or psychological ill treatment”, and even though it is consensual today, both in Doctrine and Jurisprudence, that several different behaviours are included in this concept, it is important to take into account that the Istanbul Convention provides in article nr. 3, b) that the scope of comprehension and the concept of domestic violence extends to all acts of “physical, sexual, psychological or economic violence”.

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As a consequence of this, the **Portuguese Association of Women in Legal Careers** considers that it is of the utmost importance that a legal definition is produced regarding the referred concept of physical and psychological ill treatment which explicitly includes what is provided in article nr. 3, b) of the Convention.

The **Portuguese Association of Women in Legal Careers** also considers that the rule in question should take into account the different conceptual nature of the conducts that may integrate Domestic Violence, whether they are a demonstration of gender violence or not.

Furthermore, the **Portuguese Association of Women in Legal Careers** judges that the provision and punishment of the conducts that amount to gender violence should be autonomous in relation to those which don't amount to it.

This autonomisation would allow not only for an adequate collection of statistics as referred in article nr. 11 of the Convention, but also for a more correct definition of the necessary public policies for the eradication of Violence and the promotion of Equality.

II

In what concerns the definition of sexual crimes, namely, the crimes of sexual coercion and rape - articles nr. 163 and 164 of the Criminal Code - , the **Portuguese Association of Women in Legal Careers** considers that the definition of their typical legal elements did not give due relevance to the concept of the absence of the consent of the victim as it is defined in the Convention, in the sense that the requirement of “constraint” continues to

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exist, and hasn't been abolished the requirements of violence, severe threat, making the victim unconscious or incapable of resisting.

In accordance with this, the **Portuguese Association of Women in Legal Careers** considers there is a need for a legislative alteration that adapts the definition of the typical elements of those crimes to what is established in the Convention.

In the same way, the **Portuguese Association of Women in Legal Careers** considers that the behaviours established in article nr. 40 of the Convention - sexual harassment - are not adequately included in the legal provision and punishment of the crime of sexual harassment in article nr. 170 of the Criminal Code, or in any other normative rule of a criminal nature.

Therefore, the **Portuguese Association of Women in Legal Careers** considers that the wording of the above mentioned article nr. 170 of the Criminal Code should be altered in a way that the sphere of understanding of article nr. 40 of the Convention is unequivocally covered by it.

III

Furthermore, it should also be indicated that the Law which altered the Criminal Code in order to adapt it to the Convention completely forgot the content of its article nr. 46.

So, the aggravating circumstances that are set out in this article were not taken into consideration and therefore they aren't considered applicable regarding the crimes which are specified in the Convention and laid down in internal legislation.

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Thus, the **Portuguese Association of Women in Legal Careers** considers a legislative alteration is necessary in order to overcome this situation.

IV

Furthermore, the **Portuguese Association of Women in Legal Careers** would like to alert for the circumstance that, in the Association's point of view, the definition of the concept of victim of domestic violence which is relevant for the application of the specific legal framework of protection and support of its victims is not in accordance with what is established in the Convention.

The **Portuguese Association of Women in Legal Careers** considers that, according to articles 1, 2 and 3 of the Convention, one should consider a victim of an act of violence against women, namely of domestic violence, not only the person who has suffered damage, whatever its nature – pecuniary or non-pecuniary – but also the person who was the object of a behaviour which is prone to result in harm and also the person who was the object of the threat of the undertaking of harm.

And furthermore, that it is taken into consideration that one can be a victim of violence against women, namely of domestic violence, not only if one is specifically targeted by the conduct of the agent, whether it is commissive or omissive, but also as the people who suffer the harmful result of the criminal act.

In the case of domestic violence, this is a flagrantly common occurrence with children and even with people members of the family victim or/and those who are in closer contact with the victim.

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However, the legal document which establishes the legal system for the prevention of domestic violence and protection and assistance to its victims reproduces the content of the definition of victim stated in Directive 2012/29/EU of the European Parliament and the Council, of the 25th of October 2012, which reduces the concept of a victim of a crime to the person who suffered a damage, whether on a physical or psychological level, and whether the harm is emotional or moral, or whether it is pecuniary, as long as it is directly caused by an act or omission in the context of a crime.

This definition, which as also adopted by the Code of Criminal Procedure – Law nr. 130/2015 of the 4th of September – is valid for all crimes with provision and punishment in the internal legal framework, consists of a significant reduction of the sphere of comprehension of the concept of victim established by the Convention, because it does not foresee the inclusion of the person who was the object of a behaviour which can result in harm and also of the person who was the object of a threat of the undertaking of damage, as well as the person who suffers the harmful result of the criminal action.

*Therefore, the **Portuguese Association of Women in Legal Careers** considers that a definition of the concept of the victim of gender violence in accordance to the one established in the Convention should be included in internal legislation.*

V

*Moreover, the **Portuguese Association of Women in Legal Careers** would like to raise another issue in relation to the protection of the most defenceless victims of domestic violence: the children, as it considers that*

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internal legislation does not adequately correspond to the demands of the Convention.

In fact, the Convention not only points out that the rights and needs of children who witness all forms of violence should be taken into account - article nr. 26, nr. 1 -, but also establishes in article nr. 31 that any “incidents of violence” should be taken into account in the regulation of parental responsibilities.

*This aspect is particularly relevant in what concerns the protection of the rights of victims of domestic violence, especially in countries like Portugal where, as **A.P.M.J.** has defended, the legal frameworks regarding divorce and the attribution of parental responsibilities not only do not afford the appropriate safeguards to the rights of victims of family violence, but also enables the occurrence of the circumstances that maintain or intensify that same violence.*

Therefore, in the legal proceedings of the regulation of parental responsibilities in which situations of family violence occur, including child sexual abuse, and in which there is a refusal of contact of the child with its parent with whom the child doesn't normally reside, a concept is frequently used - parental alienation - and a theory - the syndrome of parental alienation - which has raised profound controversy regarding its nature, causes and consequences, and which scientific validity is largely questioned.

Furthermore, the legal imposition of the joint exercise of parental responsibilities as a general rule and the absence of an express legal provision regarding domestic violence as a cause of divorce without consent of the other spouse has led to an aggravation of family violence and the lack of protection of its victims.

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Actually, the phenomenon of family violence can't be reappointed to a mere conflict susceptible of being overcome by consensus or mediation, as the Convention expressly states in article nr. 48.

Neither is it admissible that equal responsibility in the custody and care of a child is given to the aggressor and to the victim, not only due to the fact that it ignores the suffering provoked to the child who experienced a situation of family violence, even in the cases where it did not directly target the child, but also due to the fact that it belittles the practice of such a reprehensible crime.

Nor is it conceivable that a victim of domestic violence, who was even legally attributed this status, can't benefit of this recognition in that context.

This differential treatment of the victims of domestic violence compromises their fundamental rights regarding the safeguard of their dignity and personal integrity, and creates great constraint in these people regarding the exercise of their rights, as well as significant fear and insecurity regarding their future and the future of their children.

And, this legitimises the behaviour from the point of view of the aggressor, creating a feeling of impunity, which contributes decisively to the upsurge and reinforcement of new violent attitudes.

Such a situation represents a real conflict of laws as, even though they are directed to the same recipient – the victim of violence – and considering the same factual framework – family violence – they differ in what concerns their scope and function within the area of Law to which they report to.

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*Thus, and notwithstanding the recent entry into force of Law nr. 124/2017 of the 24th of May, which aims to safeguard the more burdensome and urgent situations of this kind, the **Portuguese Association of Women in Legal Careers** considers that it is necessary to reconsider the need for the protection of the most defenceless victims of gender violence and domestic violence, in order to adapt it to the imperatives of the Istanbul Convention.*

Yours sincerely,

The A.P.M.J. President of the Board

(Maria Teresa Féria de Almeida)

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