



**A SURVEY ON THE  
TRANSPOSITION OF  
DIRECTIVE 2011/93/EU  
ON COMBATING  
SEXUAL ABUSE  
AND SEXUAL  
EXPLOITATION  
OF CHILDREN  
AND CHILD  
PORNOGRAPHY**

# Index

<b>1. Foreword.....</b>	<b>4</b>
<b>2. Introduction.....</b>	<b>5</b>
<b>3. The survey.....</b>	<b>7</b>
Topic 1.....	7
Topic 2.....	15
Topic 3.....	23
Topic 4.....	42
Topic 5.....	48
Topic 6.....	52
Topic 7.....	74
<b>4. Attachment: 27 executive summaries.....</b>	<b>85</b>
Executive Summary for Austria.....	85
Executive Summary for Belgium.....	89
Executive Summary for Bulgaria.....	94
Executive Summary for Croatia.....	97
Executive Summary for Cyprus.....	101
Executive Summary for the Czech Republic.....	104
Executive Summary for Estonia.....	107
Executive Summary for Finland.....	110
Executive Summary for France.....	113
Executive Summary for Germany.....	117
Executive Summary for Greece.....	119
Executive Summary for Hungary.....	123
Executive Summary for Ireland.....	126

Executive Summary for Italy.....	130
Executive Summary for Latvia.....	134
Executive Summary for Lithuania.....	137
Executive Summary for Luxembourg.....	139
Executive Summary for Malta.....	143
Executive Summary for the Netherlands.....	146
Executive Summary for Poland.....	150
Executive Summary for Portugal.....	153
Executive Summary for Romania.....	156
Executive Summary for Slovakia.....	160
Executive Summary for Slovenia.....	164
Executive Summary for Spain.....	167
Executive Summary for Sweden.....	169
Executive Summary for the United Kingdom.....	172

## Foreword

Missing Children Europe's mission is to prevent, support and protect children from any situation of harm, abuse or neglect that may lead to result from them going missing. Sexual abuse and sexual exploitation of children play a prominent role in this context, as they may, on the one hand, constitute one of the principal reasons why children run away from home or from the care institution where they live and, on the other, through all types of "grooming" practices, attract children to risky behaviour conducting to sexual abuse or exploitation. Constant developments, such as the increased use of Internet and other types of information and communication technologies call for an adequate cross border legal framework in Europe.

Both the Council of Europe and the European Union have taken action to achieve this. The Council of Europe 2007 Lanzarote Convention and the 2011 EU Directive replacing a Framework Decision of 2003 provide such legal framework. Given the fact that it is at national level that both these instruments have to be implemented, a monitoring exercise on such implementation is essential in assessing their effectiveness and efficiency.

Missing Children Europe, eNACSO and ECPAT, two other organisations with specific expertise dealing with sexual exploitation and abuse, therefore joined forces in order to identify and survey the transposition of the Directive with regard to a limited number of topics relating to each of the 3 aims referred to in Recital 6 of the Directive: the prosecution of offenders, the protection of child victims and the prevention of criminal activities covered by the Directive.

I hope that this report exposing the findings of the survey will constitute a useful complement to the monitoring exercise currently undertaken both by the Council of Europe Lanzarote Committee on "the protection of children against sexual abuse in the circle of trust" and by the European Commission, pursuant to Article 25 of the Directive.



**Maud de Boer Buquicchio**  
**President of Missing Children Europe**  
**United Nations Special Rapporteur on the sale of children, child prostitution and child pornography**

## Introduction

“Together against sexual exploitation of children” is a study run by three NGOs actively involved in the fight against sexual abuse and sexual exploitation of children. These NGOs are: Missing Children Europe (the European Federation for Missing and Sexually Exploited Children), ECPAT Belgium/International (End Child Prostitution, Child Pornography and Trafficking in Children for Sexual Purposes), and eNACSO (the European NGO Alliance for Child Safety Online).

The study examines how seven key provisions of Directive 2011/93/EU on the fight against sexual abuse and sexual exploitation of children and child pornography (the Directive) of 13 December 2011 of the European Parliament and of the Council of the European Union have been transposed by the 27 European Union (EU) Member States bound by the Directive.<sup>1</sup>

The project builds on a previous survey by the same organisations, which was completed in the first semester of 2012 and covered 11 EU Member States. It yielded interesting results but was undertaken in a very early stage of the transposition process. Consequently, a new survey was launched in 2014 in order to better reflect the situation after the deadline for transposition.

The seven provisions of the Directive include the:

1. Obligation to criminalise “knowingly obtaining access, by means of information and communication technology, to child abuse images” (Art. 5 (1) and (3), and Recital 18);
2. Obligation to criminalise online grooming (Art. 6 and Recital 19);
3. Obligation to: (i) set up systems for disqualification arising from convictions; (ii) make screening by employers possible; and (iii) ensure the exchange of information concerning criminal records (Art. 10 and Recitals 40–42);
4. Obligation to take measures to enable investigative units to attempt to identify child victims of online abuse (Art. 15 (4));
5. Extraterritorial extension of jurisdiction (Art. 17 and Recital 29);
6. Obligation to provide for assistance, support and protection measures for child victims during the investigation and trial (Arts. 18, 19 and 20); and
7. Taking of measures against websites containing or disseminating child abuse material (Art. 25 and Recitals 46–47).

The seven topics were selected as the result of a brainstorming session between the members of the NGO coalition.

This selection is not entirely random as it covers topics related to each of the three subject matters of the Directive, as defined in Art. 1: a) minimum rules concerning the definition of offences and sanctions (Topics 1, 2 and 5); b) provisions to strengthen the prevention of such crimes (Topics 3 and 7); and c) provisions to strengthen the protection of the children (Topics 4 and 6).

The deadline fixed by the Directive for “transposing”<sup>2</sup> the Directive, i.e. “bringing into force the laws, regulations and administrative provisions necessary to comply with the Directive”, is 18 December 2013.<sup>3</sup>

The object of the survey therefore focuses on how the 27 Member States concerned indeed comply with the Directive by “achieving its result”.

- The survey is based on 27 ‘national reports’ prepared by: (i) a number of prominent European law offices who offered their assistance on a pro-bono basis; (ii) a network of rapporteurs, coordinated by the European Law Students Association (ELSA); and (iii) some of the member organisations of the NGOs concerned.<sup>4</sup>

<sup>1</sup> In accordance with Arts. 1 and 2 of the Protocol (No. 22) on the position of Denmark annexed to the Treaty on the Functioning of the European Union (TFEU) Denmark did not take part in the adoption of the Directive and is not bound by it or subject to its application (Recital 52 of the Directive).

<sup>2</sup> Under Art. 288 of the TFEU, “[A] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

<sup>3</sup> Art. 27 (1) of the Directive.

<sup>4</sup> The Smile of the Child (Greece), Fundación ANAR (Spain), Kinderhilfe (Germany), Save The Children (Romania), ECPAT (Austria), e-Enfance (France), ECPAT (the Netherlands).

The law offices involved in the project are Allen & Overy (A&O) offices or offices of established law firms whose contacts were given by A&O Belgium.<sup>5</sup>

- Most reports reflect the situation at the end of April 2014. The Cyprus report was submitted in September 2014, reflecting the new legislation transposing the Directive in Cyprus. Updates were obtained in 2015 for Germany, Estonia, Finland, and Ireland.

Given the rapid evolution of the “information and communication technology” mentioned in Arts. 5 (3), 6 and 25 of the Directive, which correspond to Topics 1, 2 and 7 of this report, a focused update effort covered these topics in 2015, utilising contacts both with the rapporteurs and wherever possible with the national authorities.<sup>6</sup>

- On 24 April 2015, the survey's findings were presented at a workshop attended by delegates from NGOs, the European Commission, the Council of Europe and five EU Member States (Belgium, Cyprus, Hungary, the Netherlands, and Sweden). The workshop focused on the topics mentioned under 2, 3 and 6 above.
- This final report presents a horizontal analysis of the transposition of each of the seven topics by the 27 Member States concerned. However, a few elements have to be kept in mind when reading this study. On the one hand, the possibility to extensively compare national laws and practices relating to the seven selected topics was limited by the large scope and content of some articles as well as the diversity of the measures implemented nationally. As the majority of the reports were submitted in 2014, despite the efforts made to acquire up-to-date data, some information might no longer be accurate. Furthermore, as the survey only focuses on the transposition of some selected legal provisions of the Directive, only sporadic and sometimes scarce information was provided by some rapporteurs in relation to the national practice. Therefore, an overall analysis of national practices could not be presented within the framework of this survey. On

the other hand, the quality of the survey is to a great extent dependent on information provided by the rapporteurs, which in a number of the reports submitted was not sufficient enough to get a comprehensive picture of the legal framework and the practical measures set forth by the Member State concerned. When possible, other sources were used to complement the reports. Therefore, the findings presented in this survey may be fragmented and/or wrongly interpreted.

Despite these limitations, several good practices and challenges were identified and can be useful for a large range of stakeholders with regard to monitoring and possible improvement of the implementation process of the Directive among EU Member States.

The analysis does not aim to ‘name and blame’, regarding the level of transposition of the provisions of the Directive into national law. Rather it endeavours to expose the different ways and methods selected by the Member States for achieving the objectives set by the Directive, thereby identifying good practices but also possible loopholes, lacunae or open questions.

<sup>5</sup>The offices involved are: Allen & Overy (Belgium), A&O (the Czech Republic), Morley Allen & Overy (Hungary), A&O (Italy), A&O (Poland), Andreas Thoma (Cyprus), Sorainen (Estonia), Roschier Attorneys (Finland and Sweden), William Fry (Ireland), Raidla Lejins & Norcous (Latvia and Lithuania).

<sup>6</sup>The national authorities consulted were the Bulgarian, Czech, Spanish, Portuguese, Hungarian and Lithuanian members of the Lanzarote Committee.

# Topic 1: Knowingly obtaining access via information and communication technologies to child pornography (Art. 5 (1) and (3) & Recitals 18)

## Boglárka Jánoskúti, External Advisor, eNACSO (European NGO Alliance for Child Safety Online)

### Article 5

#### Offences concerning child pornography

1. Member States shall take the necessary measures to ensure that the intentional conduct, when committed without right, referred to in paragraphs 2 to 6 is punishable.
2. Acquisition or possession of child pornography shall be punishable by a maximum term of imprisonment of at least 1 year.
3. Knowingly obtaining access, by means of information and communication technology, to child pornography shall be punishable by a maximum term of imprisonment of at least 1 year.
4. Distribution, dissemination or transmission of child pornography shall be punishable by a maximum term of imprisonment of at least 2 years.
5. Offering, supplying or making available child pornography shall be punishable by a maximum term of imprisonment of at least 2 years.
6. Production of child pornography shall be punishable by a maximum term of imprisonment of at least 3 years.
7. It shall be within the discretion of Member States to decide whether this Article applies to cases involving child pornography as referred to in Article 2(c)(iii), where the person appearing to be a child was in fact 18 years of age or older at the time of depiction.
8. It shall be within the discretion of Member States to decide whether paragraphs 2 and 6 of this Article apply to cases where it is established that pornographic material as referred to in Article 2(c)(iv) is produced and possessed by the producer solely for his or her private use in so far as no pornographic material as referred to in Article 2(c)(i), (ii) or (iii) has been used for the purpose of its production and provided that the act involves no risk of dissemination of the material.

### 1. Scope of Art. 5 of Directive 2011/93/EU

Knowingly obtaining access to child pornography has been criminalised under Art. 20 (1) (f) of the **Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse** (hereinafter, the Lanzarote Convention) since 2007. Paragraphs 140–141 of the [Lanzarote Convention's explanatory report](#) note that by introducing this new offence it intended to catch those who view child images online by accessing child pornography sites but without downloading and who cannot therefore be caught under the offence of procuring or possession in some jurisdictions. To be liable, the person must both intend to enter a site where child pornography is available and know that such images can be found there. Sanctions must not be applied to persons inadvertently accessing sites containing child pornography. The intentional nature of the offence may notably be deduced from the fact that it is recurrent or that the offences were committed via a service in return for

payment. The term ‘without right’ allows a Party to provide a defence regarding ‘pornographic material’ with an artistic, medical, scientific or similar merit. It also allows for activities carried out under domestic legal powers, such as the legitimate possession of child pornography by the authorities in order to institute criminal proceedings. Furthermore, it does not exclude legal defences or similar relevant principles that relieve a person of responsibility under specific circumstances.

The [explanatory memorandum of the European Commission’s proposal for the Directive 2011/93/EU](#) also foresees the criminalisation of new forms of sexual abuse and exploitation facilitated by the use of IT, which include **knowingly obtaining access to child pornography**. Referring to the Lanzarote Convention, the intention of the European Commission was to cover cases where viewing child pornography from websites without downloading or storing the images on the computer does not amount to ‘possession of’ or ‘procuring’ child pornography. Thus the Commission’s intention was to incriminate knowingly obtaining access within the EU framework.

In practice, knowingly obtaining access to child abuse images via information and communication technologies includes a situation where the user may choose to view the images on the Internet without downloading them into the computer’s hard drive. However, to speed up repeat viewing of a previously visited website, computers automatically make a copy of the data from visited websites in the form of ‘temporary internet files’ and store the data in what is called the ‘cache’. This process occurs automatically, without any prompting by the user, any time an internet user visits any website; thus, it is generally outside the control of internet users. In fact, since there the user is not notified that this process occurs, a computer user could take full advantage of the internet-surfing capabilities of his computer without ever learning what is happening behind the scenes.<sup>1</sup>

## 2. Transposition of Art. 5 (3): knowingly obtaining access to child pornography via Information and Communication Technologies (ICT)

After analysing the national reports submitted as well as cross-checking with other sources,<sup>2</sup> it can be concluded that an overwhelming majority of Member States (25) – Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Croatia, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom – transposed Art. 5 (3) into their respective national legislations. This can be regarded as a **significant development compared to the findings of the first phase** of the joint MCE-ECPAT-eNACSO survey, where only 4 out of 11 Member States complied.

According to the national rapporteur, Italy<sup>3</sup> failed to transpose Art. 5 (3). In Portugal, an amendment to the Penal Code is in the legislative pipeline, aiming at transposing Art. 5 (3) of the Directive.<sup>4</sup> Hungary reported difficulties in the implementation of Art. 5 (3) in practice.

Several Member States opted for a **literal transposition** (“knowingly obtaining access to”) of the provision: Austria, Belgium, Bulgaria, Croatia, Cyprus, Greece<sup>5</sup>, Ireland, Lithuania, Malta, the Netherlands<sup>6</sup>, Poland, Romania, Slovenia, Slovakia and Spain.

However, some Member States have chosen **different formulations**.

In Estonia, the offence was transposed under “knowingly requesting access to child pornography”<sup>7</sup>.

<sup>1</sup> Marin, G (2008), ‘Possession of child pornography: Should you be convicted when the computer cache does the saving for you?’, *Florida Law Review*, 60 (5), pp. 1–31.

<sup>2</sup> Including relevant literature on knowingly obtaining access to child pornography via ICT as well as inquiries sent to Council of Europe Lanzarote Committee’s state representatives and child rights organizations active in the field of fight against online child abuse.

<sup>3</sup> This seems to be confirmed by another source: [Preparatory colloquium section II, Prof. Lorenzo Picotti, Univ. of Verona, 2012, p. 15](#). Picotti, L. (2012), Preparatory colloquium Section II, Report, Verona, p. 15. “Art. 600-quater of the IT Penal Code criminalizes also the procurement or possession of child pornography. The mere access to child pornography is not criminalized.”

<sup>4</sup> According to the information provided by the Portuguese Lanzarote Committee Council of Europe representative in July 2015.

<sup>5</sup> Acquire access.

<sup>6</sup> Acquire access.

<sup>7</sup> Art. 175 (1) of the Estonian Penal Code



In Finland, the offence is regulated in Chapter 17, Section 19 (2) of the Finnish Criminal Code under “obtaining access to offensive material by means of ICT” and shows, as follows: “A person who in return for payment or otherwise by agreement has obtained access to a picture or visual recording depicting a child in a sexually offensive manner (‘Offensive Material’). It is arguable whether this formulation can be considered as a narrowing interpretation of Art. 5 (3) as either a transaction of payment is required or an agreement needs to be concluded on behalf of the user. Recital 18 of the Directive foresees that one way of substantiating the intentional nature of the offence is that it is recurrent or that the offence was committed via a service in return for payment. However, this cannot be regarded as an exclusive precondition allowing for the incrimination of the illegal action.

In France, Art. 5 (3) is transposed as “habitual consultation/viewing or consultation/viewing in consideration of a payment of public online communication services making available child abuse images”<sup>8</sup>. This formulation might be interpreted as narrowing since occasional consultations, even if intention can be proved, might not fall under this provision and therefore cannot be incriminated. According to the 2014 Global Alliance commitments report of France, a draft modification of this provision was in the legislative pipeline in order to also include occasional intentional access to child abuse content.

In Germany, knowingly obtaining access is criminalized under “possession” of child pornography<sup>9</sup>. According to the information submitted by Deutsche Kinderhilfe, “possession” means “the holding of actual physical control” over similar material. In the case of digital images, it includes saving on a hard disk or other media. Under German law, “saving” (possession) is when the internet browser stores the pictures viewed onto the cache files.

According to the rapporteur, Hungary transposed the offence under “possessing or obtaining pornographic images”<sup>10</sup>. However, according to the Deputy Secretariat in charge of Penal Law Codification of the Ministry of

Justice,<sup>11</sup> law enforcement agencies disagree as to whether “obtaining or possessing” covers the offence of knowingly obtaining access to child pornography. Therefore, the Hungarian Ministry of Justice recently initiated internal negotiations to clarify the issue and to set up a uniform approach.

In Latvia, the offence is criminalised under “circulation of pornographic materials”<sup>12</sup>, which includes “purchasing, acquiring into ownership, possession, use and **access** to pornographic materials”.<sup>13</sup>

Art. 384 of the Penal Code of Luxembourg also makes use of a similar terminology: “knowingly **view** print-outs, images, photographs, films or any other pornographic materials involving or depicting minors”.

In Sweden, it is punishable to “**obtain access to and view** pornographic material depicting a child”<sup>14</sup>. According to the rapporteur, in order for the act to be punishable, the person must have viewed the material. If the person has not viewed the material, the act does not fall under the offence of knowingly obtain access under Swedish law.

In the United Kingdom, the offence is criminalized under “**making** any indecent photograph or pseudo-photograph of a child”<sup>15</sup>.

### 3. Transposition of Art. 5 (1) and Recital 18

**According to Recital 18**, in order to be liable, the perpetrator should both **intend to enter a site** where child pornography is available **and know that such images can be found there**. The intentional nature of the offence may notably be deduced from the fact that it is **recurrent** or that the offence was committed **via a service** in return for payment.

**Art. 5 (1)** requires Member States to prosecute the **intentional conduct** of knowingly obtaining access. Most Member States (ex. Estonia and France) consider the intentional conduct assumed if the person visits the webpage several times, has the account for the webpage or has delivered payments.

<sup>8</sup> Art. 227-23 (4) of French Penal Code.

<sup>9</sup> Art. 184 of German Criminal Code.

<sup>10</sup> Section 204 of the Hungarian Criminal Code.

<sup>11</sup> Written contribution sent by the Deputy Secretariat in charge of Penal Law Codification of the Hungarian Ministry of Justice on 8 July 2015.

<sup>12</sup> Art. 1 (3) (a) of the Latvian Law on Pornography Restriction.

<sup>13</sup> *Ibid.*

<sup>14</sup> Chapter 16, Section 10 (a) of the Swedish Penal Code.

<sup>15</sup> Section 1 of the British Protection of Children Act 1978.

Under Dutch law, in order to decide whether a suspect had the intention to gain access, different factors can play a part: if payment was necessary to enter the site, or if recurrent behaviour to enter the sites was present. Under Dutch law, intention can also be concluded by looking at online payments that are used to get access to pornographic sites. The possession of passwords that provide access to certain websites, in combination with historical data, can also amount to prove the intention of a suspect.

In Finland, the perpetrator must be aware of the nature of the material in his/her possession and the offence should be committed in return for payment or otherwise by agreement, in order to be punishable.

Under Greek legislation, simply viewing pornographic material, for instance on a computer screen or on a mobile phone, does not in itself constitute actual dominance (ownership) of such material and cannot be considered as ownership. Furthermore, the opening of an email message or file containing such material cannot constitute ownership either, as even if it is considered as an act of dominance, deceit (**dolus**) cannot be established.<sup>16</sup>

It can be noted that in practice, proving the intentional element of the offence seems to be difficult in such cases where there is no evidence of online payments, no passwords record and no discernible recurrent behaviour. **This means that conviction in cases where the offence is committed only on one occasion remains problematic.**

Not many rapporteurs<sup>17</sup> provided information on the availability of a **provision aiming not to criminalise knowingly obtaining access to child pornography in justifiable cases** (ex. undercover operations undertaken by the police).

## 4. Adoption of more favourable provisions

According to **Art. 5, paragraph (7) of the Directive**, Member States may decide to apply the offence of knowingly obtaining access to

child pornography in the case that the person appearing to be a minor is in fact 18 years of age or older at the time of depiction. Belgium, Bulgaria, the Czech Republic, Croatia, Latvia<sup>18</sup> and Lithuania **opted for the application of this optional provision.**

According to the Belgian rapporteur, it could be argued that Art. 383bis §2<sup>19</sup> of the Belgian Criminal Code applies to the situation where the depicted person is in fact 18 years of age or older. This interpretation seems to be implemented in practice, as according to an evaluation of the criminal provisions on child pornography by the national Service for Criminal Policy between 1995 and 2000, conducted by the competent minister, when a person was depicted as a child, the offender had been prosecuted under the criminal provisions on child pornography, regardless of the true age of the person depicted.

Several Member States opted for introducing higher maximum imprisonment sentences exceeding one year (as required under the Directive): Sweden and Spain: two years; the Czech Republic, Malta and Romania: three years; Poland: five years; Slovenia and Croatia: eight years; Cyprus: ten years.

Art. 207a (3a) of the Austrian Criminal Code incriminates knowingly accessing pornographic presentation of a minor on the internet.

Art. 240b of the Dutch Penal Code refers to “an automated work or communication service”, which must be understood as a device that can gain access to the internet. The terms ‘automated work’ and ‘communication service’ are implemented to comply with Art. 20 of the Lanzarote Convention. An automated work is a device intended to store and transfer data through electronic communication. Communication service is defined in Art. 126la and further of the Dutch Criminal Code. However, all technologies that have access to internet can be regarded as either an automated work or as a communication service. According to the rapporteur, this provision therefore seems to comply with the meaning set out in Art. 5, paragraph 3 of the Directive.

<sup>16</sup> See: Decision 80/2012 of the Thessaloniki Appeal Court, Armenopoulos 2012/781.

<sup>17</sup> Sweden and Bulgaria.

<sup>18</sup> **Art. 1 (2b) on the Law on Pornography Restriction (Latvia):** Child pornography is also described as any other performance or material in which the genitals of a person having the appearance of a child are completely or partially depicted, or a person *having the appearance of a child* who is involved in the activities specified in Art. 1 (2b) (2c) Art. is depicted or described as or presented in a manner specified in Art. 1 (2a).

<sup>19</sup> **Art. 383bis §2 of Belgian Penal Code:** “Quiconque [...] aura, en connaissance de cause, accédé par un système informatique ou par tout moyen technologique à [...] ou tous autres supports visuels qui représentent des positions ou des actes sexuels à caractère pornographique, impliquant ou **présentant des mineurs**, sera puni d’un emprisonnement d’un mois à un an et d’une amende de cent [euros] à mille [euros].”

<sup>20</sup> Corporate liability is foreseen under Art. 12 of the Directive, and also Art. 26 of the Lanzarote Convention. According to the explanatory report of the Lanzarote Convention, the intention of the provision is to make commercial companies, associations and similar legal entities (“legal persons”) liable for criminal actions performed on their behalf by anyone in a leading position in them. (Awaiting EE representative’s answer to provide information on the exact application of this provision, to be sent by 15 August)

Estonia and Latvia provide for the criminalization of knowingly obtaining access to child pornography via ICT in case the offence was committed **by a legal person**.<sup>20</sup>

Estonia foresees harsher penalties in the case of **recidivism**.

Under Luxembourg and Finnish law, no explicit reference is made to **how the offence is committed**.<sup>21</sup> According to the rapporteur, the Finnish legislation seems to go further than Art. 5 (1) and (3) of the Directive, as it does not specifically mention ICT as the means for obtaining access, but instead refers generally to “obtaining access to offensive material so that it is available on a computer or another technical device”<sup>22</sup>.

## 5. Definition of child pornography

**Child pornography** is defined under **Art. 2 (c) of the Directive** as follows:

- (i) any material that visually depicts a child engaged in real or stimulated sexually explicit conduct;
- (ii) any depiction of the sexual organs of a child for primarily sexual purposes;
- (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or
- (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes (virtual child pornography).

According to Art. 5 (7) of the Directive, it shall be within the discretion of Member States to decide whether they apply the offences related to child pornography in cases involving child pornography as referred to in Art. 2 (c) (iii), where the person appearing to be a child was in fact 18 years of age or older at the time of depiction.

As the transposition of **Art. 2 of the Directive was out of the scope of this report**, it was not possible to analyse how the 27 Member States have implemented the definition of child pornography in their national legislations. However, some rapporteurs have indicated how the national definition of child pornography was transposed into national law.

On a positive note, it can be observed that **virtual child pornography**, defined by Art. 20 (3) of the Lanzarote Convention as “simulated representations or realistic images of a non-existent child”, is explicitly included in the definition of child pornography in Austria<sup>23</sup>, Belgium, Bulgaria, Germany, Italy, Luxembourg, the Netherlands, Poland, Romania and the United Kingdom.

In Cyprus, the definition of child pornography is enshrined under Art. 2 of the Law No. 91(I) of 2014 on the Prevention and Combating of Sexual Harassment and Sexual Exploitation of Children and Child Pornography as follows:

- (i) any material that depicts a child engaged in real or simulated act of sexual nature;
- (ii) any depiction sexual in nature of the genital organs of a child;
- (iii) any material that depicts any person appearing as a child engaged in real or simulated sexual act or any depiction of the genital organs of any person appearing to be a child; or
- (iv) realistic images of a child in which the child is depicted to be engaged in an act of sexual nature or realistic images of the genital organs of a child;”

It seems arguable whether the terms used under Cypriot law are in conformity with the terminology of the Directive. It is not clear whether an act of sexual nature covers a sexually explicit conduct.

According to the rapporteur’s analysis, **Dutch** national law lacks a clear definition of child pornography, as mentioned in Art. 2 (c) of the Directive. Instead, the term ‘sexual act’ is used, which covers a wide range of offences, according to the interpretation of the Dutch

<sup>21</sup> “by means of information and communication technologies” as stipulated under Art. 5 (3) of the Directive.

<sup>22</sup> Chapter 17, Section 19 of the Finnish Criminal Code

<sup>23</sup> Section 207a, paragraph 4, item 4 of the Austrian Criminal Code criminalizes virtual child pornography, covering two different case groups: a) exclusively artificially generated, but deceptively real-looking depictions; b) Realistic seeming depictions based on manipulated depictions. Depictions of adults who look like minors, or whose depictions were manipulated accordingly, are not covered by the definition of child pornography under Austrian law (written contribution provided by ECPAT Austria as of 15 July 2015).

<sup>24</sup> **Art. 240b of the Dutch Penal Code:** a) The person who distributes, offers, openly displays, produces, imports, forwards, exports, acquires, has in his possession or gains access by means of an automated work or by making use of a communication service, an image – or a data carrier containing an image – of a sexual act, in which someone who evidently has not reached the age of eighteen is involved or appears to be involved, will be punished with a term of imprisonment of at most four years or a fine of the fifth category.

Supreme Court. A 'sexual act' is required as an element of an offence in order to be considered unlawful under Art. 240b of the Dutch Penal Code<sup>24</sup>. A sexual act is considered to be a depiction of a minor who expresses a sexual pose or encounters in a sexual environment. An image that does not contain many sexual elements can still be regarded as a 'sexual act' due to the conditions or the context of the depiction, which can be susceptible for sexual arousal. The decisive element rests in whether the depiction has an obvious sexual connotation. The literal transposition of Art. 2 (c) of the Directive into Dutch national law would, according to the Dutch legislator, narrow the type of acts that fall within the scope of Art. 240b.

Finnish Criminal Code consistently refers to "pictures and visual recordings depicting a child in a sexually offensive manner", instead of using the term 'child pornography'. According to the rapporteur, technically this formulation could be interpreted more narrowly than the term 'child pornography', as defined in Art. 2(c). In government proposals, however, the rapporteur notes that the term 'child pornography' is used concurrently with 'pictures' and 'visual recordings' or 'material', which might imply that it is to be interpreted accordingly.

Germany reported that pictures or videos including children, which otherwise would fall under child pornography, could be exempted from prosecution if created for the purpose of art, science or education<sup>25</sup>. The child pornography scandal of **Edathy**, a German influential politician, raised intense public attention and identified legal gaps in German legislation in relation to child pornography. The 45-year-old SPD (Social Democratic Party) politician was on trial in Autumn 2013 for downloading child pornography to his work laptop and possessing a book, as well as a CD, which contained images considered "harmful to youths". Edathy first denied accusations of being a paedophile and contended that the pictures and videos in his possession were art and not pornography. In order to avoid conviction, the chief prosecutor demanded a credible confession of guilt from the 45 year old. Finally Edathy confessed, and the Verden District Court in the German state of Lower Saxony charged the former

SPD member with a fine of €5,000, bringing the trial to an end in March 2015. The judge applied the procedure set out under Art. 153a of the German legal code, which gives judges the option to end cases in a way that saves time and shows some leniency to defendants who admit wrongdoing. The application of this legal provision was widely criticised amongst German child rights charities, arguing that child pornography is too serious a crime; therefore, Art. 153a should not have been applied in such cases. **The case, however, resulted in the following amendments made in relation to Germany's pornography laws:** The amendment, [in its original form](#), was to prohibit the unauthorised photographing of naked minors, but those plans faced strong criticism from opposition parties in parliament. Instead, [only the sale and trade of nude images and videos of minors are to be deemed criminal](#). Furthermore, the statute of limitations on sex crimes was raised and the provision on cyber-grooming was modified, including thereafter attempts by an adult to make contact with children on the internet under false pretences, with the intent to coax them into performing sexual acts.<sup>26</sup>

The Greek rapporteur noted that in order to correctly transpose the Directive, the term "material of child pornography", as stipulated in Art. 348A, paragraph 3 of the Greek Penal Code, was replaced with the phrase "of the genital organs or the body in general of the minor". Consequently, with this amendment the definition of "material of child pornography", according to the rapporteur, was adapted correctly and inline with the terms of the Directive.

In Hungary, child pornographic material is defined as "any [...] material depicting/illustrating sexuality in a seriously pornographic overtness, targeting explicitly sexual arousal"<sup>27</sup>. This definition may also be subject to a narrowing interpretation of child pornography compared to the wording enshrined under the Directive.

According to ECPAT Luxembourg Global Monitoring Report of 2007, the definition of child pornography used in Luxembourg should be reviewed as it does not reflect the terminology used by the Optional Protocol to the Convention of the Rights of the Child on

<sup>25</sup> Written contribution of Kinderhilfe Germany, as of 1 April 2015.

<sup>26</sup> Sources: Deutsche Kinderhilfe contribution, and the following articles: <http://www.ft.com/cms/s/0/44ba3d58-c1c3-11e4-bd24-00144feab7de.html#axzz3hYN-q2Vlt>; <http://www.msn.com/en-ca/news/world/german-politician-edathy-confesses-in-child-pornography-trial/ar-BB8Aj>; <http://www.dw.com/en/german-politician-edathy-confesses-in-child-pornography-trial/a-18288566>, <http://www.dw.com/en/berlin-parliament-toughens-child-pornography-law/a-18062501> [accessed on 20 July 2015].

<sup>27</sup> Unofficial translation of Art. 204 (7) (a) of the Hungarian Penal Code.

<sup>28</sup> Art. 2 (c) of the Optional Protocol to the Convention of the Rights of the Child on the sale of children: "Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes."

the sale of children<sup>28</sup>. The Luxembourg Penal Code makes reference to print-outs, images, photographs, films or any other pornographic materials “involving or depicting minors”. However, the exact definition of child pornography is not enshrined under domestic law. Moreover, according to the [Response to the Parliamentarian question No. 136 of 5 March 2014 of MP Roy Reding](#), when applying child pornography law of Luxembourg, law enforcement agencies usually make reference to Art. 2 (c) of the [Optional Protocol to the Convention on the Rights of the Child on the sale of children](#). Consequently, it might be concluded that the Luxembourg definition of child pornography is not necessarily harmonised with the terminology used in the Directive.

## 6. Conclusion and recommendations

According to the results of the survey, it can be concluded on a positive note that the overwhelming majority of Member States has (partially or entirely) transposed the obligation to criminalise the offence of knowingly obtaining access to child pornography via ICTs into their national legislations. Portugal reported to be in the course of the legislative process of transposing Art. 5 (3). Italy reported not to be conforming to Art. 5 (3). The majority of Member States opted for the literal transposition of the provision, whereas some (Hungary and Germany) decided to implement the offence under “possession or holding”.

Some Member States (Finland and France) opted for the inclusion of a provision referring to some possible means of committing the offence reflected under Recital 18 (recurrence of the conduct or payment for accessing child pornographic material). It is debatable whether such specific reference to conducts mentioned by way of example in Recital 18 does not unduly restrict the scope of the provision. Some rapporteurs mentioned difficulties in proving the intentional element of the offence if there is no evidence of online payments, no passwords have been recorded, or recurrent behaviour cannot be established. This means that conviction in cases where the offence is committed

only on one occasion remains problematic. On the other side of the coin, the conviction of persons who inadvertently access child pornography should be avoided.

Only some rapporteurs<sup>29</sup> reported the possibility of conducting **undercover (sting) operations**<sup>30</sup> under their respective national legal frameworks.

Although the scope of the survey did not extend to the analysis of Art. 2 (1) (a) of the Directive, some rapporteurs included the national transposing provisions of **child pornography** in their respective reports. It can be noted that there are **great disparities** in the way the Member States have implemented the term ‘child pornography’ into their national laws.

As regards the adoption of **more favourable provisions**, it can be noted that the majority of the Member States failed to transpose an optional provision of the Directive<sup>31</sup> under the definition of child pornography. This leads to divergent interpretations of what can be considered as ‘child pornography material’. It also results in increased disparities in terms of implementing EU law at the Member State level. Ultimately, it further creates obstacles when fighting against child pornography, specifically with regards to conducting sting operations,<sup>32</sup> which obviously have a significant role in preventing further online child abuse.

The case of the German MP Sebastian Edathy, who was in possession of naked pictures of children aged 9–14 years, has raised attention to the fact that pictures of naked children (without showing any sexual activity) do not fall under the definition of child pornography under German law, as the viewing or possession of these images was at that time not considered illegal in Germany.<sup>33</sup> When looking into the definition of child pornography enshrined under the Directive, it can be concluded that in order for material to be categorised as child pornography under Art. 2 (a), it has to be of a sexual nature.<sup>34</sup> The Edathy case points out that the current definition of ‘child pornography’ in the Directive does not really deal with the phenomenon of ‘voyeurism’. Furthermore, raising awareness among parents on the way they circulate their children’s pictures on different online platforms is crucial in order to protect children’s well-being.

<sup>29</sup> Sweden and Bulgaria.

<sup>30</sup> And therefore, in such “justified cases” (Art. 5 (1) of the Directive), not being subject to prosecution under Art. 5 (3).

<sup>31</sup> Art. 5, paragraph 7 of the Directive states that Member States may decide to apply the offence of knowingly obtaining access to child pornography in case the person appearing to be a minor is in fact 18 years of age or older at the time of depiction.

<sup>32</sup> In case the Member State failed to transpose “a person appearing a minor who is in fact over 18” into its respective national legislation.

<sup>33</sup> The same applies to Luxembourg. For more information see: <http://www.lessestiel.lu/fr/news/luxembourg/story/13202532>

<sup>34</sup> Ex. the depiction of the sexual organs of the child for primarily sexual purposes or depiction of a child engaged in sexually explicit conduct.

The transposition of the current EU definition of child pornography should be implemented in a uniform way in Member States' national legislations to ensure the harmonised application of EU law.

Member States should be encouraged to allow law enforcement authorities to conduct undercover (sting) operations in order to prevent further online child sexual abuse to occur.

## Topic 2: Online Grooming (Art. 6 (1) and (2) & Recital 19)

### Boglárka Jánoskúti, External Advisor, eNACSO (European NGO Alliance for Child Safety Online)

#### Article 6

1. Member States shall take the necessary measures to ensure that the following intentional conduct is punishable: the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Article 3(4) and Article 5(6), where that proposal was followed by material acts leading to such a meeting, shall be punishable by a maximum term of imprisonment of at least 1 year.
2. Member States shall take the necessary measures to ensure that an attempt, by means of information and communication technology, to commit the offences provided for in Article 5(2) and (3) by an adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child is punishable.

#### 1. Introduction

It appears from the reports submitted that all Member States have, partially or entirely, transposed Art. 6 of the Directive into their respective legislations.

When looking into the responses provide by the national rapporteurs and other experts consulted with respect to the implementation of Art. 6 (2) of the Directive, it can be concluded that the 27 Member States concerned interpret the exact scope of the provision in various ways. Although the criminalisation of offline

grooming is not foreseen under the operative part of the Directive, on a positive note it has to be pointed out that many Member States opted for the prosecution of offline grooming as well.

Taking into account that the current survey focused on the transposition of Art. 6 into national legislations, there is limited information available on the potential difficulties in terms of implementing the national provisions on grooming and the challenges encountered when prosecuting potential offenders. However, some challenges were identified, including: (i) prosecuting the grooming of a person who appeared to be a minor but who in fact is an adult; (ii) criminalising grooming if the sexual abuse occurs online and an offline meeting does not take place; and (iii) criminalising the sexual communication with a child for the purpose of committing sexual abuse, where no proposal to meet was made.

#### 2. Transposition of Art. 6 (1) of the Directive

Regarding the transposition of Art. 6 (1) of the Directive, it can be concluded that a great majority of Member States have opted for the introduction of a **sui generis (specific)** criminal offence for online grooming, by an almost **literal transposition** of Art. 6 (1) of the Directive: Austria, Belgium, Bulgaria, Cyprus, Croatia, the Czech Republic, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

It can be noted that, Germany, Hungary and Italy decided to transpose Art. 6 (1) under **different offences**,<sup>1</sup> covering various forms of illicit conduct (not solely grooming). Grooming committed for the purpose of producing child pornography is incriminated under Art. 204 (6) of the Hungarian Criminal Code as the **preparatory act** of the offence of producing child pornography (“provision of the necessary or alleviating conditions for producing child pornography material”).

These transposing solutions seem to be in line with the requirement set out by Art. 288 of the Treaty on the Functioning of the European Union (TFEU). It states that a directive is only binding as to the result to be achieved and that the Member States have the choice of the form and methods used to transpose its provisions into their respective national legal systems.

Pursuant to Art. 83 (1) of the TFEU, the Directive sets minimal rules, leaving the possibility to the Member States to offer higher protection against sexual abuse and sexual exploitation of children and child pornography. On a positive note, it can be emphasised that **several Member States decided to go beyond the minimum requirements** laid down by the Directive, in various aspects.

The solicitation of children, as stated under Art. 6 of the Directive, requires the following elements to be met simultaneously in order for the offence to be considered as committed:

(intentional) Proposal to meet a child (under the age of sexual consent) by means of ICT;

For the Purpose of engaging in sexual activities (Art. 3 (4)) or producing child pornography (Art. 5 (6)); and

Material acts leading to a meeting (ex. bus ticket, hotel booking, etc.)

## 2.1. Requirement of a “proposal to meet”

The minimum requirements of Art. 6 (1) are that it be an offence for an adult to propose to meet a child by means of information and

communication technology for the purposes of committing certain sexual offences against the child, where the proposal is followed by concrete acts. However, some Member States do not require a “proposal to meet” to occur for the offence of solicitation to be considered committed, thereby opting for a wider notion of “solicitation”, thus offering a wider protection.

The Estonian Penal Code incriminates “making a proposal to meet a child under 14, or **concluding an agreement to meet** him or her, and performance of an act preparing the meeting for the purpose of [...]”. The provision for the conclusion of an agreement to meet seems to go beyond the requirements set out in Art. 6 (1) as it might cover a situation whereby the proposal to meet is initiated by the child (and subsequently agreed upon by the perpetrator).

The Finnish legal framework provides for the following formulation: to **“suggest a meeting or other contact”** with a child. Art. 155a (2) of the Bulgarian Criminal Code incriminates **“establishing contact** with a minor [...]”, without referring to a proposal to meet. The Finnish and Bulgarian provisions for grooming seem to cover a wider range of modus operandi compared to that enshrined under Art. 6 (1) of the Directive.

The French and Luxembourg laws incriminate the “making of sexual proposals by the use of a telecommunications network” to a minor. This formulation does not require a proposal to meet (or take material steps leading to a meeting) and suggests that there is no need to prove that the perpetrator intended to engage in sexual activities with the minor or wanted to produce child pornography. The sexual nature of the proposal addressed to the minor is in itself sufficient to establish the offence. It can be argued whether the term ‘sexual proposals’ does cover a wider range of conducts compared to the explicit ‘proposal to meet a child’ formulation, as set out under Art. 6 (1) of the Directive. It seems, however, that making sexual proposals could include a proposal to meet for sexual purposes. The fact that harsher penalties are foreseen under Art. 227-22 (2) of the French Criminal Code in the case that a meeting does take place seems to confirm this interpretation. Following

<sup>1</sup>“Solicit/persuade/induce/incite a child for the purpose of engaging in sexual activity.”



this approach, the fact that an explicit proposal to meet is not required under French and Luxembourg law might be perceived as an application of more favourable conditions compared to the requirements enshrined under Art. 6 of the Directive, where a proposal to meet (and material acts leading to a meeting) is required. This understanding seems to be confirmed by the [explanatory report to the Luxembourg draft grooming law](#),<sup>2</sup> which states that the legislator's intention with introducing the online grooming offence was to go beyond Art. 23 of the Lanzarote Convention. In this sense, the offence of grooming for the purpose of producing child pornography can be committed online (by asking the child to send naked pictures of him/herself), without requiring a meeting to take place.

In Germany, grooming is regulated under "inciting [influencing] a child by means of ICT or with written materials to engage in sexual activity [...]"<sup>3</sup>. A similar formulation is applied under Art. 198 (2) of the Hungarian Criminal Code: "Trying to persuade/induce a person under 14 to engage in sexual activity". According to the written contribution provided by the Deputy Secretariat in charge of Penal Law Codification of the Hungarian Ministry of Justice, "trying to persuade" covers a preparatory offence, which is incriminated as a sui generis crime under Hungarian Criminal law.

Art. 348B of the Greek Penal Code foresees the criminalisation of grooming also in the case that the groomer proposes to meet **a third person**.

The [proposal](#) for a new Irish child grooming bill<sup>4</sup> also seems to apply more favourable conditions compared to those set out under Art. 6. According to the [Explanatory memorandum to the proposed Irish child grooming law](#), the offence proposed in the bill does not require a meeting or the taking of the steps towards a meeting. This raises concerns because, if a meeting or steps towards a meeting is required, it may be too late to avert the threat to the child in question, even though grooming has already occurred. **Furthermore, as is in**

**the nature of information and communication technology, it is possible for non-contact sexual abuse to occur even without a face-to-face meeting.**

In Italy, online grooming is criminalised under the "solicitation of a minor for the purpose of committing sexual offences" and may include "any act intended to gain a minor's trust through artifices, flattery or threats, also by using the Internet or other networks or means of communication".<sup>5</sup> This formulation allows for a wider interpretation of Art. 6 (1) whereby it is not necessary for the perpetrator to propose a meeting for the child; it is sufficient if he/she intends to gain the minor's trust in various ways.

Grooming is incriminated under Art. 162<sup>1</sup> of the Latvian Criminal Code as follows: "Whoever encourages a person under 16 to get involved in sexual acts, or **encourages such person to meet** with the aim to commit sexual acts, or enter into a sexual relationship by means of information and communication technologies or other forms of communication [...]".

Art. 200a., paragraph 2 of the Polish Criminal Code incriminates the offence of "making an offer to a minor under 15 through an information system or telecommunications network to make sexual intercourse, submit or perform another sexual act, or participate in the production or preservation of pornographic material", if the perpetrator intends to carry out this offer.

Under Chapter 6, Section 10a of the Swedish Penal Code, it is punishable to "arrange to meet with the child and thereafter take any action that is likely to further such a meeting taking place, with the intent to commit a sexual offense against a child under the age of consent".

In the United Kingdom, the [Serious Crime Act 2015](#) entered into force on 3 May 2015, introducing a new grooming offence<sup>6</sup> which incriminates the mere "sexual communication with a child if committed for the purpose of obtaining sexual gratification or intended to encourage the child to make a sexual communication." This provision seems to cover a wider

<sup>2</sup> Cet Art, repris de l'Art. 227-22-1 du Code pénal français, va plus loin que l'Art. 23 de la Convention (Lanzarote) qui demande aux Parties d'ériger en infraction pénale le fait pour un adulte de proposer intentionnellement une rencontre à un enfant dans le but de commettre à son encontre une infraction si les contacts visant à nouer des liens ont été suivis d'une proposition de rencontre avec l'enfant. Il est proposé de sanctionner pénalement le fait de la sollicitation d'enfants à des fins sexuelles et de prévoir une circonstance aggravante dans l'hypothèse où cette proposition a été suivie d'une rencontre effective. ... p. 10.

<sup>3</sup> Non-official translation of Art. 176, para. 4, No. 3 of the German Criminal Code.

<sup>4</sup> Not adopted yet. **Section 3 (2A) of the Irish Child Trafficking and Pornography Act 1998:** "Any person who within the State— (a) does any of the following: (i) solicits, requests, counsels, encourages, procures or entices, by whatever means, including by means of information and communication technology, any child to do any act including the child meeting the person; or (ii) **communicates with a child** by whatever means, including by means of information and communication technology, for the purposes of gaining the trust of that child, and (b) does so **for the purpose of doing anything that would constitute sexual exploitation** of the child, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years."

<sup>5</sup> Art. 609 undecies of the Italian Criminal Code.

range of conducts than those enshrined under Art. 6 (1), which requires a proposal to meet made by the perpetrator.

## 2.2. Requirement of a "certain purpose"

Art. 6 (1) of the Directive foresees the offence of online grooming if the perpetrator proposes to meet the child for the purpose of either engaging in sexual activities (Art. 6 (1)) or producing child pornography (Art. 5 (6)). The majority of Member States cover both purposes.

However Bulgaria, Croatia and Latvia do not cover both offences cited under Article 6 (1). Art. 155a of the Bulgarian Penal Code criminalises "establishing contacts with a child for the purpose of performing indecent acts, copulation or sexual intercourse [...]". Therefore, it might be concluded that criminalisation of grooming for the purpose of producing child pornography is not foreseen under Bulgarian law. According to Art. 158 of the Croatian Criminal Code and Art. 162<sup>1</sup> of the Latvian Criminal Code, grooming is foreseen only if committed for the purpose of engaging in sexual activities.

Austria<sup>7</sup>, Belgium, the Czech Republic, Ireland, Lithuania, the Netherlands and the UK make use of a different terminology, sometimes covering a broader spectrum of potential sexual offences in addition to those referred to under Article 6 (1) of the Directive.

Art. 377quater of the Belgian Criminal Code incriminates grooming "[...] for the purpose of committing offences including indecent assault, rape, the moral decay of young people, prostitution involving minors or a breach of public decency".

Section 208a (1) of the Czech Criminal Code foresees the criminalisation of the following offence: "Whoever suggests a meeting to a child under 15 years with the intention of

committing a crime according to art. 187 par. 1, art. 192, art. 193, art. 202 par. 2 **or other sexually motivated crime** [...]."

Art. 248e of the Dutch Criminal Code foresees the criminalization of grooming if committed "with the intention of committing indecent acts with this person or for creating an image of a sexual act in which this person is involved".

The new Irish provision incriminates grooming committed "for the purpose of doing anything that would constitute sexual exploitation of the child", thereby making use of a terminology which covers types of offences that are different from the ones mentioned under Art. 6(1) of the Directive.

According to Art. 152 (1) of the Lithuanian Criminal Code, the "proposal to meet for the purpose of having sexual intercourse **or otherwise satisfying the perpetrator's sexual desires**" is punishable.

The United Kingdom's new grooming law criminalizes the mere "sexual communication with a child", if committed for the **purpose of obtaining sexual gratification** or intended to **encourage the child to make a sexual communication**.

## 2.3. Requirement of "material acts leading to a meeting"

Art. 6 (1) of the Directive foresees that not only a proposal to meet a child but also the material acts leading to the meeting need to be undertaken in order to consider the offence of grooming committed. Only very few rapporteurs provided information on whether the Member States' national legislation requires the undertaking of material acts leading to a meeting in order for the offence of grooming to be completed.

Under Austrian law a concrete preparatory action to undertake the meeting is required (ex. reservation of a table, purchase of a train/

<sup>6</sup> 15A Sexual communication with a child

1) A person aged 18 or over (A) commits an offence if—

(a) for the purpose of obtaining sexual gratification, A intentionally communicates with another person (B),

(b) the communication is sexual or is intended to encourage B to make (whether to A or to another) a communication that is sexual, and

(c) B is under 16 and A does not reasonably believe that B is 16 or over.

(2) For the purposes of this section, a communication is sexual if—

(a) any part of it relates to sexual activity, or

(b) a reasonable person would, in all the circumstances but regardless of any person's purpose, consider any part of the communication to be sexual; and in paragraph (a) "sexual activity" means an activity that a reasonable person would, in all the circumstances but regardless of any person's purpose, consider to be sexual.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years."

<sup>7</sup> "...to commit offence under Sections 201 to 207a para. 1 sub-para. 1."

bus ticket, giving directions to the meeting, etc.) in order for the offence of grooming to be completed. According to Dutch law, no meeting is required, but material acts leading to a meeting are required (a concrete proposal to meet and the action to realise the meeting). Under French and Luxembourg law, harsher penalties apply if a meeting does indeed take place. According to the [Explanatory memorandum to the Irish Criminal Law \(child grooming\) Bill 2014](#), under Irish law a meeting or a step towards a meeting does not have to take place in order for the offence of grooming to be committed. According to the Swedish rapporteur, measures need to be taken that are likely to facilitate a meeting.

## 2.4. Criminalisation of preparatory measures/ attempt to commit grooming

In the original European Commission proposal for Directive 2011/93/EU, Art. 7 (3) (b)<sup>8</sup> had foreseen to criminalise the attempt/preparatory measures to commit grooming. However, as a result of the negotiations held between the European Parliament, the Council and the Commission during the co-decision procedure, this provision was left out of the final adopted text of the Directive. Therefore it remains under the discretion of the Member States to make such conduct punishable in their respective legislations. It can be noted that paragraph 163 of [the Lanzarote Convention's explanatory report](#) follows the same reasoning whereby the criminalization of attempt/preparatory measures in relation to online grooming is left at the State Parties' discretion.

Preparatory measures in relation to grooming are also punishable under Art. 161 (2) of the Croatian Criminal Code, with respect to engaging in sexual activities.<sup>9</sup> Furthermore,

under Croatian legislation an attempt to commit grooming (online or offline) is also prosecuted when committed for the purpose of engaging in sexual activities (Art. 3 (4) of the Directive)<sup>10</sup>. Attempting to commit online grooming is also penalised under Greek law<sup>11</sup>, under Section 8(b) (3) of the Finnish Criminal Code, Art. 227-23, paragraph 7 of the French Criminal Code.

## 2.5. Transposition of Art. 6 (2)<sup>12</sup> of the Directive

According to the information provided by the rapporteurs as well as other national experts consulted within the framework of the survey, it seems that implementation of Art. 6 (2) differs from one Member State to another. Member States interpret this particular provision in various ways. Some understand it as referring to an attempt to commit grooming, others see it as an attempt to knowingly obtaining access to child pornography and attempt to producing child pornography when committed by means of ICT. This confusion might emanate from the fact that this provision was a result of a compromise reached in the trilogue phase between the Council and the Parliament. However, according to our understanding, the current Art. 6 (2) refers to the "attempt" to commit the offences of acquisition or possession of child pornography and knowingly obtaining online access to child pornography by means of online grooming of the child in order to obtain pornographic material depicting that child. The following Member States reported having transposed Art. 6 (2) into their respective national legislations: Austria<sup>13</sup>, Belgium<sup>14</sup>, Cyprus<sup>15</sup>, France<sup>16</sup>, Greece<sup>17</sup>, Malta<sup>18</sup>, the Netherlands<sup>19</sup>, and Sweden<sup>20</sup>.

No information regarding the transposition of Art. 6 (2) of the Directive was provided by

<sup>8</sup> Art. 7 (3) of the initial [COM proposal for a Framework Decision: Instigation, aiding and abetting, attempt and preparatory offences](#): "Member States shall take the necessary measures to ensure that the following intentional conduct is punishable: (b) the organisation of travel arrangements with the purpose of committing any of the offences referred to in Articles 3 to 6."

<sup>9</sup> Art. 161 (2) of the Croatian Criminal Code: "Whoever collects, gives or transfers data on a person under the age of fifteen for the purpose of committing the criminal offence referred to in paragraph 1 of this Art. shall be sentenced to imprisonment for a term up to one year."

<sup>10</sup> Art. 161 (3) of Croatian Criminal Code: "A perpetrator who attempts to commit the criminal offence referred to in paragraph 1 of this Art. shall be punished."

<sup>11</sup> According to the rapporteur the attempt to commit all the offences which concern the sexual abuse and exploitation of children, child pornography, and the solicitation of minors for sexual purposes, is criminalized and punishable with the respective penalty.

<sup>12</sup> Art. 6 (2) of the Directive: Member States shall take the necessary measures to ensure that an attempt, by means of information and communication technology, to commit the offences provided for in Art. 5(2) and (3) by an adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child is punishable.

<sup>13</sup> Section 208a (1a) of AT Criminal Code.

<sup>14</sup> Art. 433bis/1 of Belgian Criminal Code (cyber luring).

<sup>15</sup> Art. 9(2) of the Cypriot Law on Child pornography.

<sup>16</sup> Art. 227-23, para. 7 of the French Criminal Code.

<sup>17</sup> No legal provision indicated.

<sup>18</sup> Art. 41(1) of the MT Criminal Code, which makes punishable failed criminal offences where the perpetrator manifests intention to commit a crime by overt acts which are followed by a commencement of the execution of the crime.

<sup>19</sup> Art. 45 (attempt to commit a crime) in conjunction with Art. 240b (knowingly obtaining access, by means of information and communication technologies to child pornography) and Art. 248a of the Dutch Criminal Code.

<sup>20</sup> Criminalized as an attempt to facilitate that a child participates in a sexual posing or as attempted crime of child pornography regulated under Chapter 6, Section 8 and Section 15; Chapter 23, Section 1; Chapter 16, Section 17 and Chapter 23, Section 1 of the Swedish Penal Code.

Bulgaria, the Czech Republic, Estonia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, or the United Kingdom.

## 2.6. Grooming foreseen as an aggravating circumstance

Under **Art. 377ter**<sup>21</sup> of the Belgian Criminal Code, a harsher penalty is foreseen if sexual abuse was preceded by online or offline grooming. This measure can be regarded as the application of more favourable conditions compared to those enshrined under the Directive.

## 2.7. Extraterritorial jurisdiction

Although the transposition of Art. 17 (jurisdiction and coordination of prosecution) of the Directive did not fall under the scope of our survey on the transposition of Art. 6, the Irish rapporteur explicitly mentioned the criminalisation of grooming if committed outside Member State's territory by its nationals.<sup>22</sup>

## 2.8. Criminalisation of offline grooming (Recital 19 of the Directive)

Recital 19 of the Directive encourages Member States to criminalise offline grooming, but this is not reflected in the binding provisions of the Directive. On a positive note it can be observed that several Member States opted for the criminalisation of offline grooming as well (Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, Greece, Finland, Italy, Latvia, the Netherlands and Sweden), either regulated under the same Art. as online grooming or under a separate provision.

## 2.9. Other forms of online offences committed against children incriminated under national legislations

The United Kingdom passed a [new law](#) in addition to the law on grooming, introducing the offence of **sexting**, which states that it is now illegal for an adult **to communicate sexually** with a child under the legal age of consent (16) **in view of the sexual gratification of the adult**.

A similar offence is foreseen in the Irish [draft grooming law](#), whereby **"communicating with a child** by whatever means, including by means of information and communication technology, for the purposes of gaining the trust of that child and doing so for the purpose of doing anything that would constitute sexual exploitation of the child" would be subject to criminal liability.

Belgian law incriminates the offence of **cyberluring** (luring of minors on the internet with a view to committing a crime or a misdemeanour) under Art. 433bis/1<sup>23</sup> of the Belgian Criminal Code. According to [an expert's analysis](#) of the new provision, the communication through ICT between the perpetrator and the minor should not necessarily result in a proposition or meeting in order to be able to apply the new Art. 433bis/1, manipulating a child to send child pornography images (without intending to meet that child) could fall within the scope of the provision. Moreover, cyberluring encompasses other intentions aside from the commission of sexual offences, such as luring children to a sect. Finally, it was clarified that the four conditions mentioned in the Art. should not be considered cumulative.

The recently revised Austrian Penal Code, entering into force on 1 January 2016, introduces the new provision on cyber-grooming<sup>24</sup> entitled "Ongoing molestation/harassment through ICT". With response to

<sup>21</sup> **Art. 377ter of Belgian Penal Code** : « Dans les cas prévus par le présent chapitre ou par les chapitres VI et VII du présent titre, le minimum des peines portées par les Arts concernés est doublé s'il s'agit d'un emprisonnement, et augmenté de deux ans s'il s'agit de la réclusion, lorsque le crime ou le délit a été commis à l'encontre d'un mineur de moins de seize ans accomplis et que *préalablement à ce crime ou à ce délit, l'auteur avait sollicité ce mineur dans l'intention de commettre ultérieurement les faits visés au présent chapitre ou aux chapitres VI et VII du présent titre*. Dans les cas visés à l'Art. 377, alinéas 4 à 6, l'augmentation du minimum de la peine prévue à l'alinéa 1er est limitée de telle sorte que, combinée à l'augmentation des peines prévues à l'Art. 377bis, elle n'excède pas le maximum de la peine prévu. »

<sup>22</sup> **Head 7 (2) of Irish Sexual Offences Bill**: "Any person, being a citizen of the State or being ordinarily resident in the State, who outside the State – (a) intentionally meets, or travels with the intention of meeting, a child, or makes arrangements with the intention of meeting a child or for a child to travel, having communicated by any means with that child on at least one previous occasion, and (b) does so for the purpose of doing anything that would constitute sexual exploitation of the child, shall be guilty of an offence."

<sup>23</sup> **Art. 433bis/1 of BE Criminal Code**: "Adults that *communicate* by means of information and communication technologies with an apparent or probable minor to facilitate the commission of a crime or offence against that minor will be punished with a prison sentence between 3 months and 5 years, 1) if they have concealed or lied about their identity, age or capacity, 2) if they have emphasised the confidential nature of their conversations, 3) if they have offered or held up the prospect of a gift or other advantage, 4) if they have tricked the minor in any other way."

the Edathy case, in Germany the provision on cyber-grooming was recently modified including thereafter attempts by an adult to make contact with children on the internet under false pretences to coax them into performing sexual acts.

## 2.10. Grooming case law

Although the scope of our survey did not extend to the analysis of relevant case law in relation to grooming, some rapporteurs and contributors to our survey did provide us with some interesting examples on how the grooming legislation is put in practice in the Netherlands and Hungary.

We refer to a Dutch grooming case<sup>25</sup> whereby a teacher started to send sexual messages to a 15-year-old student. The court considered the attempted grooming proven (Art. 248e of Dutch Penal Code), since the teacher started the sexual messages about a meeting outside school hours. However, an attempt to groom under Dutch law is not punishable, as grooming itself is already considered as a specific preparatory offence. **The Dutch legislator criminalises grooming from the moment it materialises into a proposal for a meeting with the child, followed by “material acts leading to a meeting”.**

According to the information provided by the Hungarian National Office for the Judiciary, so far two non-appealable convictions on grooming were pronounced by the national courts in Hungary. The perpetrators were accused on the basis of Art. 198 (2) of the Hungarian Criminal Code for incitement of a child under 14 to meet in order to establish sexual contact.

In the first case the perpetrator orally suggested to the victim to meet in person. The non-appealable penalty imposed was 10-months’ imprisonment and suspension for three years.

In the second case the perpetrator suggested to the victim to meet on several occasions, both online (via Facebook) and offline. The non-appealable penalty imposed was 10-months’ imprisonment term suspended for two years on probation.

## 3. Difficulties identified and recommendations

**As grooming is perceived to be a preparatory offence, it is often difficult to prove the perpetrator’s intention** (purpose of commission of the act).

The minimum requirements of Art. 6 of Directive are that it be an offence for an adult to propose to meet a child by means of information and communication technology for the purposes of committing certain sexual offences against the child where the proposal is followed by concrete acts. However, as the explanatory note to the Irish [draft grooming law](#) emphasises, grooming does not necessarily require a meeting or the taking of the steps towards a meeting in order to be committed.

The majority of Member States do not require a **material meeting** to take place in order for the online grooming offence (Art. 6 (1)) to be committed, meaning that a proposal on behalf of the perpetrator for the child to meet is sufficient if material acts leading to the meeting were undertaken. This is in line with the initial idea behind introducing this offence, reflected in point 160<sup>26</sup> of the Explanatory Note to the Lanzarote Convention, namely to **prevent** the actual abuse to take place. Usually if a meeting between the child and the potential perpetrator already took place, it is likely that more serious offences (ex. sexual abuse) had already been committed. Furthermore, another aspect to consider is the fact that **sexual abuse can occur without a real-life meeting** (ex. when a child is groomed online to provide child abuse material depicting that child). In such cases, there is no need for material acts leading to a meeting to take place, as the sexual abuse itself is undertaken online. However, Art. 6 (1) requires expressly the presence of material acts leading to a meeting, referring therefore to primarily offline abuse. On the other hand, the concern arises that if a meeting or steps towards a meeting is required, it may be too late to avert the threat to the child in question, even though grooming has already occurred.

**The lack of criminalisation of grooming when a proposal is made by the child** (as a

<sup>24</sup> Art. 107c (1) of AT Criminal Code: Whoever uses communication technology or ICT

1 to set an act which is able to damage the honor of a person and is made public to a bigger number of other people

2 is making public facts or pictures/images from the intimate/very personal area of a person without permission of a wider audience is punished up to 1 year prison sentence or a fine up to 720 daily rates. If the crime results in a suicide or attempt to commit suicide, the punishment is prison sentence up to 3 years.

<sup>25</sup> Case number: 01/860054-13, Court of East Brabant, Court Date: 09-12-2014, available in Dutch: <http://www.rechtspraak.nl/Organisatie/Rechtbanken/Oost-Brabant/Nieuws/Pages/Docent-vrijgesproken-van-poging-verleiding-leerlinge-de-poging-tot-grooming-is-niet-straftbaar.aspx>

<sup>26</sup> Lanzarote Convention’s Explanatory Report, pt. 160: In addition to the elements specified above the offence is only complete if the proposal to meet “has been followed by material acts leading to such a meeting”. This requires concrete actions, such as the fact of the perpetrator arriving at the meeting place.

consequence of intense solicitation of the child) is also identified as a legal gap not covered under Art. 6 (1) of the Directive.

**The failure to penalise the mere sexual chatting (sexting) with a child (for the purpose of sexual exploitation of the child)** is also identified as a legal gap.

Sexual chatting with a child does not fall under Art. 6 of the Directive, nor under Art. 23 of the Lanzarote Convention,<sup>27</sup> however, in many cases it is considered as preparatory measures on behalf of the perpetrator in order to subsequently commit sexual abuse on the child. In this regard, a good practice can be identified in the United Kingdom: the new Art. 5A<sup>28</sup> of the recently [modified Sexual Offences Act](#) of 2003 criminalises the making of a sexual communication with a child.

Another challenge seems to be the incrimination of online grooming for the **purpose** of both 'engaging in sexual activities' with the child being groomed and 'the production of child pornography'. **Some Member States do not clearly cover both aspects.** However, we can note that some Member States (Luxembourg and France) opted for the implementation of more favourable provisions whereby the mere making of **sexual proposals** to children under the age of sexual consent suffices in order for online grooming to be committed. This means that the intention of the perpetrator does not have to cover engaging in sexual activities nor the production of child pornography.

As already mentioned above, difficulties seem to emerge when interpreting **Art. 6 (2) of the Directive**. Therefore, the possible clarification of the exact meaning of this provision would be beneficial. Since it is left to the Member States' discretion to define the **age of consent** in their respective national legislation, **great disparities** can be identified in terms of legal **age of consent** (ranging from 12 to 18) in relation to sexual activities. This constitutes a significant potential limitation for an efficient EU-wide fight against sexual exploitation and abuse, since

children are traveling more frequently and, above all, are very often in contact across borders (through the internet). This may lead to a negative practice whereby potential offenders travel to countries where less restrictive laws apply in order to commit online child abuses there.

Due to the **preventive** and preparatory nature of the offence of grooming, sting (undercover) operations are of crucial importance as they can prevent further abuse (ex. sexual assault, rape, etc.) from happening. Therefore, in order to efficiently combat online sexual exploitation of children, **undercover operations** should be allowed in all Member States. Furthermore in order for the groomer to be convicted, Member States need to be encouraged to adopt effective investigative tools under Article 15 (3) as clarified by recital 27 of the directive. This would enable exploring paedophile networks and convict the perpetrators.

**The fact that law enforcement agencies lack adequate human resources and infrastructure** to fight online child abuse, as well as the constant appearance of **new technologies** frequently used by perpetrators, constitute a challenge in the fight against sexual exploitation of children online.

**New IT technologies** such as the **Dark net**, which facilitates online child abuse, present new challenges that cannot be tackled through the existing European legal framework.

The **transnational nature of child sexual abuse** poses difficulties in prosecuting potential offenders. Only some Member States (ex. Ireland) have introduced measures that allow for the prosecution of child sex offenders when they commit a crime outside the Member State's territory (extraterritorial jurisdiction).

<sup>27</sup> Lanzarote Convention's Explanatory Report, pt. 157: The negotiators felt that simply sexual chatting with a child, albeit as part of the preparation of the child for sexual abuse, was insufficient in itself to incur criminal responsibility. A further element was needed."

<sup>28</sup> (1) A person aged 18 or over (A) commits an offence if—

(a) for the purpose of obtaining sexual gratification, A intentionally communicates with another person (B),

(b) the communication is sexual or is intended to encourage B to make (whether to A or to another) a communication that is sexual, and

(c) B is under 16 and A does not reasonably believe that B is 16 or over.

(2) For the purposes of this section, a communication is sexual if—

(a) any part of it relates to sexual activity, or

(b) a reasonable person would, in all the circumstances but regardless of any person's purpose, consider any part of the communication to be sexual; and in paragraph (a) "sexual activity" means an activity that a reasonable person would, in all the circumstances but regardless of any person's purpose, consider to be sexual.

(3) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years."

## Topic 3: Disqualification arising from convictions, screening and transmission of information (Art. 10 & Recitals 40-42)

### Francis Herbert, Legal counsel, Missing Children Europe

#### Article 10

##### Disqualification arising from convictions

1. In order to avoid the risk of repetition of offences, Member States shall take the necessary measures to ensure that a natural person who has been convicted of any of the offences referred to in Articles 3 to 7 may be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children.
2. Member States shall take the necessary measures to ensure that employers, when recruiting a person for professional or organised voluntary activities involving direct and regular contacts with children, are entitled to request information in accordance with national law by way of any appropriate means, such as access upon request or via the person concerned, of the existence of criminal convictions for any of the offences referred to in Articles 3 to 7 entered in the criminal record or of the existence of any disqualification from exercising activities involving direct and regular contacts with children arising from those criminal convictions.
3. Member States shall take the necessary measures to ensure that, for the application of paragraphs 1 and 2 of this Article, information concerning the existence of criminal convictions for any of the offences referred to in Articles 3 to 7, or of any disqualification from exercising activities involving direct and regular contacts with children arising from those criminal convictions, is transmitted

in accordance with the procedures set out in Council Framework Decision 2009/315 JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States when requested under Article 6 of that Framework Decision with the consent of the person concerned.

### A. General comments

If we consider that the protection of children against renewed offences is the fundamental object of Art. 10 of the Directive<sup>1</sup>, its setup raises a number of questions.

1. Such a preventive and protective effect will only operate at the moment the “employer”<sup>2</sup> or organiser of the activity is informed of the existence of the disqualification or conviction. This can be the case a) on the occasion of the recruitment of the convicted offender (as mentioned in the Directive under paragraph 2 of Art. 10), or b) during the activity, when the “employer” is confronted with the disqualification and its effect on the continuation of the offender’s employment or activity. The latter additional control during the activity is not envisaged by the Directive, but is explicitly foreseen under different forms in certain Member States (Belgium, Cyprus, Denmark, Ireland, Latvia, the Netherlands, Sweden and, for certain activities, Slovakia and the United Kingdom).

In other words, from the point of view of the protection of the children, Art. 10, paragraph 2 is central and critical as it provides for the “screening” of the existence of criminal convictions or of any “disqualification from exercising

<sup>1</sup>See Recital 40 of the Directive.

<sup>2</sup>On the ambiguity of the terminology used, see below under 2 c).

activities involving direct and regular contacts with children arising from those criminal convictions”.

The question then arises as to the value added of the obligation to provide for a system of disqualification, as organised in paragraph 1 of Art. 10, if anyway, as mentioned in paragraph 2, the Member States must take the necessary measures to enable employers to request information on the existence of the criminal convictions on which such disqualifications are based.

The following considerations, in our mind, justify the combination of the obligation to provide for disqualification on top of encouraging a screening mechanism including information on relevant disqualifications.

Firstly, and very fundamentally, there is the fact that the Directive’s object is to set minimal rules for harmonisation of existing sanctions, which, as will be exposed below, in a majority of Member States (20) include disqualification regimes.

The absence of a screening obligation imposed on the potential employer or provider of activity clearly also increases the importance of an efficient system of disqualification imposed on the offender (“efficient” implying that it is adequately monitored and sanctioned).

Moreover, the “disqualification” measure defined in paragraph 1 of Art. 10 is not limited to “judiciary” disqualification systems: reference can be made in this connection to the systems introduced in Finland, the Netherlands,

Sweden and the United Kingdom, where either the public authorities or independent agencies intervene to screen and filter access to and exercise of certain activities by persons who have been convicted of one of the offences concerned.

Finally, with regard to the added value of information on disqualifications, where the screening will anyway be based on the criminal record of the applicant, it is likely that, in comparison with information on convictions which may be of a technical legal nature focused on specific types of offences, the information on disqualification will a) be of more specific relevance to the activity considered, and b) better adapted to the specific profile of the offender thereby guaranteeing a better balance between efficient protection of children and protection of the individual rights of the convicted offender after serving his criminal sentence.<sup>3</sup>

2. In the light of the explicitly claimed preventive and protective aim of Art. 10, critical comments may certainly be formulated as to the efficiency or comprehensiveness of the mechanisms set up by the Directive.

a) Under Art. 10, paragraph 2, the Member States must only take the necessary measures to “entitle” employers to request the relevant information when they recruit a person for professional or voluntary activities involving direct and regular contacts with children. No mention is made in the Directive of any obligation to screen.<sup>4</sup> The survey conducted confirms that the mere allowing of screening

<sup>3</sup>An illustration of the importance of such considerations linked to the necessary balancing of, on the one hand, the interest of the convicted offender after serving his sentence, and, on the other hand, of the protection of children through the prevention of “direct and regular contacts” with convicted sex offenders is to be found in the German report. In relation to disqualification measures, the German report refers to a judgment of the Bundesgerichtshof (the Federal Supreme Court of Germany) of 25 April 2013, according to which the requirements for disqualification have to be interpreted in a strict way since any disqualification interferes with the principle of social rehabilitation and the offender’s fundamental right to a free choice of profession (Art. 12 of the Constitution). According to the German report, the consequence is that under German law a judge will only be able to order temporary or permanent disqualification if the offender has already worked in the environment concerned. Permanent disqualification for future professions or activities will not be possible if the offender was not working in this environment when committing the offences.

<sup>4</sup>This is contrary to the corresponding Art. 5, para. 3 of the Lanzarote Convention (Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007), “which sets an obligation for the parties to ensure that candidates are screened prior to the exercise of professions involving regular contacts with children to check that they have not been convicted of acts of sexual exploitation or sexual abuse of children” (Explanatory Memorandum, No. 57).

<sup>5</sup>General mandatory screening:

- i) Both for professional and voluntary activities: Estonia (any omission amounts to a criminal offence), Hungary, Italy and Latvia;
- ii) Only for professional activities: Finland and Portugal.

Mandatory screening for specific activities:

- i) Austria (federal service, state service, institutions providing care for children),
- ii) Belgium (education, psycho-medical-social guidance, youth aid, child protection, etc.)
- iii) Bulgaria (via license system for social services for children)
- iv) Germany (public authorities)
- v) France (State funded activities and voluntary work)
- vi) Greece (teaching staff in public schools run by the Ministry of Education)
- vii) Ireland (via vetting legislation for specific activities)
- viii) Latvia ( current law: teachers; draft law: education, teaching, supervising, ensuring safety of children)
- ix) the Netherlands (via specialised screening organisation Justis)
- x) Poland (education system-not yet into force)
- xi) Sweden (via permit system for operations involving care and support for children, education)
- xii) Slovakia (civil servants)
- xiii) Slovenia (Pedagogical employees, physical culture, support of youth work, including volunteer work)
- xiv) the United Kingdom (via barred list check; any omission amounts to a criminal offence)

No obligation to screen:

- i) Luxembourg, Poland and Romania

No obligation to screen for voluntary activities:

- i) Austria, Bulgaria, Greece, Finland and Slovakia.



does not offer the most efficient protection, as, at least regarding professional activities, a large number of Member States covered provide for a system of global or partial obligatory screening.<sup>5</sup>

b) In Art. 10, paragraph 2, the faculty to “screen”, which is to be given to the “employers”, is only related to the stage of recruitment. No mention is made of the possibility or obligation to screen during the exercise of the activity. Here again the survey shows that in a number of Member States the screening, quite logically, is not limited to the stage of recruitment.<sup>6</sup>

c) The terms ‘employers’ and ‘recruitment’ are somewhat ambiguous. If they are narrowly constructed, the “screening” faculty imposed by paragraph 2 of Art. 10 would only relate to employer-employee relationships and not to ‘self-employed activities’ involving direct and regular contacts with children. Recital 40 of the Directive only partially offers clarification in this respect where it states, “the term ‘employers’ should also cover persons running an organisation that is active in volunteer work related to the supervision and/or care of children involving direct and regular contact with children”. One may assume that this wide interpretation of the term ‘employers’ also extends to the above-mentioned organisers of professional self-employed activities. The survey again indicates that such wide interpretation prevails in a majority of Member States, where the screening is not limited to “employment” *stricto sensu* but extends to any assignment of activities<sup>7</sup>.

d) As indicated above, Art. 10, paragraph 2 only refers to the screening of (i) convictions or (ii) “any disqualification [...] arising from those criminal convictions”. This study indicates that some Member States also provide for screening on the existence of other information linked to the criminal proceeding but prior to it or linked to the criminal proceeding without leading to a conviction.<sup>8</sup>

## B. Need for formal transposition?

While according to the reports a large group of Member States considered they did not have to introduce new legislation in order to transpose Art. 10 into national law, another equally large group introduced specific legislation in order to transpose all or specific parts of Art. 10.

a) Austria introduced new legislation with regard to both the disqualification and the screening requirement.

- Regarding the disqualification requirement of Art. 10, paragraph 1, the existing work ban in Section 220 (b) of the Criminal Code has been extended beyond activities involving and limited to parenting, education and supervision of minors to cover all activities involving “intensive” contacts with minors, whether professional, commercial, activities for an organisation or any other voluntary management. The term ‘intensive’ refers to non-superficial, regular contacts.

- With regard to screening the Austrian legislator amended the criminal record law by adding the option of requesting the “Criminal Record Certificate Kinder-und Jugendfürsorge (Child and Youth Care)”. This certificate, which specifically informs about convictions against the sexual integrity and self-determination of minors, may be requested for professions or organised voluntary activities involving direct and regular contacts with children.

b) In Belgium, the law of 10 April 2014 on the criminalisation of online grooming includes a provision adding online grooming to the list of offences which may lead to judicial disqualification (amendment of the relevant Art. 382 bis of the Criminal Code on disqualifications).

A law of 14 December 2012 introduced a new Art. 382 quarter in the Criminal Code, enabling the judge to inform the employer, the legal person for whom the convicted

<sup>5</sup> Belgium (transmission of information on conviction to the employer or disciplinary authority at the initiative of the judge), Cyprus (imposed termination of contract), Germany (public and private youth welfare services must/may request criminal record “at regular intervals”), Ireland (New Act 2012: re-vetting + retrospective vetting), Finland (2012 proposal by Child ombudsman: two- to five-year regular checks), Latvia (yearly check), the Netherlands (continued screening for people working in daycare centres), Sweden (withholding or revocation of permit by National Board of Health and Welfare), Slovenia (suspension of contract in case of prosecution (pedagogical employees)).

<sup>7</sup> Austria, Belgium, Croatia, the Czech Republic, Germany, Estonia, Finland, France, Hungary, Ireland (proposed legislation), Lithuania, Latvia, Poland, Sweden and the United Kingdom.

<sup>8</sup> Ireland (convictions + completed prosecutions or “specified information”), the Netherlands (convictions + decisions of the public prosecutor), Slovenia and Slovakia (convictions + prosecution of certain categories of employees), the United Kingdom (convictions + “cautions”, information, reprimands, final warnings from the Police National computer + information held locally by the police forces+ barred list).

offender works or the disciplinary authority on the conviction pronounced against that person for one of the offences listed in the Directive. The decision to inform shall be duly reasoned by reference to the gravity of the offence, the possibility of re-insertion of the person concerned or the risk of recidivism.

c) In Croatia, the legislator enacted the Act on Criminal Consequences of Conviction on Criminal Record and Rehabilitation in order to transpose Art. 10 of the Directive.

d) Cyprus enacted the 2014 Law on the Prohibition and Combating of Sexual Abuse, Sexual Exploitation of Children and Child Pornography in order to transpose the Directive.

e) In Finland, the Parliament passed the Act on the Background Check of Voluntary Workers (148/2014) which entered into force as of 1 May 2014.

f) In Greece, Art. 10 (1) of the Directive was transposed through Law 4267/2014 on “combating sexual abuse and exploitation of children, child pornography and other provisions”, introducing an optional disqualification and ban on professional activities involving regular contacts with children for a period of time from one to five years after a first conviction and an obligatory and permanent ban after a second conviction.

g) In Italy, Legislative Decree No. 39 of 4 March 2014 gave force to a Presidential Decree No. 313 of 14 November 2012, introducing the obligation for an employer to request criminal records when recruiting for professional or voluntary organised activities entailing direct and regular contacts with children.

h) In Lithuania, the draft law supplementing the Law on Fundamentals of Protection of the Rights of the Child contains new provisions on automatic disqualification linked to convictions for child sexual abuse or exploitation.

i) In Luxembourg, new legislation was enacted with regard to disqualification in

order to also cover voluntary activities (law of 21 February 2013), and with regard to the screening by employers in order to also include disqualifications (law of 29 March 2013).

j) In Latvia, the scope of the law on the protection of children rights has been extended in order to apply the disqualification and screening provisions to voluntary activities.

k) In the Netherlands, new screening measures were introduced as of 1 March 2013, extending the screening beyond mere convictions or disqualifications in order to also cover decisions taken by the public prosecutor and introducing the possibility of “continued screening”.

l) In Poland, the transposition of Art. 10 of the Directive required an extension of the list of occupations which cannot be accessed by persons convicted of crimes against sexual freedom and decency against a minor in order to also cover persons in charge of children’s and youth’s leisure time.

m) In Sweden, the 2013 Act on Control of Individuals intending to Work with Children extends the screening possibilities with regard to all activities involving direct and regular contacts with children.

n) The national report for Slovakia refers to the Act No. 2014/2013 amending the Criminal Code in order to introduce the disqualification requirements of the Directive.

o) The report for Bulgaria refers to a discussion on a proposal for a new Criminal Code that includes a provision on disqualification. In reply to a question on the progress, the rapporteur reported that the proposed bill did not pass.

## C. Disqualification

### 1. The principle: obligation to ensure that disqualification is made possible

The Member States must take the necessary

measures to ensure that disqualification arising from convictions is available<sup>9</sup> as a tool to protect children against the “possible risk of repetition”<sup>10</sup>.

### a) Disqualification and screening?

It has been observed in the introductory general comments that, from the point of view of prevention and protection of children against contacts with convicted offenders, paragraph 2 of Art. 10 of the Directive is the central provision. This report further illustrates this notion.

In a number of Member States no provision is made for judiciary or regulatory disqualification, on the basis of the consideration that an adequate screening of access to and exercise of professional or voluntary activities involving direct and regular contacts with children offers an adequate protection. The object of the screening is the criminal record of the person concerned.

This seems to be the basis of the approach in Finland and Sweden. These two Member States make no provision for a separate ‘judiciary disqualification’ system based on the possibility or the obligation for the judge to add a disqualification order to the conviction.

This approach of course raises the question of its compatibility with Art. 10 of the Directive, more specifically as to the separate binding nature of paragraphs 1 and 2. The Swedish report expresses the opinion that there is no obligation to provide for a separate disqualification mechanism as long as the screening of convicted offenders regarding access to activities involving direct and regular contacts with children is efficient. An argument to support this may be found in the fact that Recital 40 of the Directive indeed addresses the two issues jointly. The fact that Art. 10 itself distinguishes two obligations in this respect is of course an argument to the contrary.

### b) Questioning or limiting the principle

Two reports refer to the fact that providing in the availability of a disqualification system in itself may give rise to questions.

In the national report on Ireland, reference is

made to on-going discussions regarding the possible interference of various mechanisms for disqualification with the privacy rights of the persons concerned. According to the report, the introduction of a barring list system, such as that in operation in the United Kingdom, was considered but finally abandoned based on previous advices from the Attorney General, who considered that such a system could not readily be adopted in Ireland given the constitutional right to a good name. A similar concern was apparently expressed by the Criminal Law Committee of the Irish Law Society (the CLC), regarding the introduction of a statutory vetting procedure.

Reference can also be made in this context to the narrow interpretation of the available disqualification procedures in Germany as a consequence of a recent judgment of the Federal High Court<sup>11</sup>.

## 2. Broad or narrow interpretation?

Art. 10, paragraph 1 of the Directive refers to “a natural person who has been convicted of any of the offences referred to in Arts. 3 to 7 of the Directive”. This refers to: a) offences concerning sexual abuse (Art. 3); b) offences concerning sexual exploitation (Art. 4); c) offences concerning child pornography (Art. 5); d) solicitation of children for sexual purposes (Art. 6); e) incitement, aiding and abetting to commit any of the aforementioned offences (Art. 7 (1)); and f) attempt to commit some of the offences (Art. 7 (2)).

The disqualification measure itself also has a wide scope where it refers to “at least professional activities involving direct and regular contacts with children”. The national reports submitted for this publication indicate that in some Member States this broadly defined scope of Art. 10, paragraph 1, both as to the nature of the offences considered and as to the activities concerned, is not always exactly reflected in the applicable legislation. In some Member States a restriction to the scope of the disqualification may follow from the link, which the law establishes, between the offence and the activity envisaged.

<sup>9</sup> Art. 10, para. 1: “may be”.

<sup>10</sup> See Recital 40.

<sup>11</sup> See below under C. 2.

This is the case in Austria, where Art. 220 (b) of the Criminal Code restricts the disqualification to punishable action against the sexual integrity and self-determination of a minor “committed when the offender at the action time exercised an employment or other activity in an association or another institution or intended to exercise an activity in the training or supervision of a minor or usually had intensive contacts with minors”. The object of the disqualification refers to the activity concerned “and comparable activities”.

This provision is intended to allow the courts to prohibit criminal offenders who exercise or engage in professional or voluntary work or activities in relation to education, training or supervision of minors to perform this activity/work or a segment thereof. These conditions are fulfilled if the perpetrator commits the crime during the exercise of his position in the position considered. They also apply if the act is itself not directly related to the activity (e.g. when the offence was committed to the detriment of the offender’s own children) or if the offender is still in a training on this activity, or otherwise intends to exercise it (e.g. as a student at a teacher training college). The court shall have the possibility to maintain a certain degree of flexibility in the definition of the prohibited activity.

A comparable restriction is to be found in Germany. Here, the offence must have been committed by an offender who abused his profession or violated his duties. Furthermore, a comprehensive evaluation of the offender and the offence must show that by further engagement in the profession, branch of profession, trade or branch of trade, there would be a danger that the offender could continue to commit serious unlawful acts of the kind indicated. Only when this prognosis indicates a ‘chronic delinquency’ linked to the profession may the disqualification be permanent. As already stated<sup>12</sup>, the Federal High Court insists on a rigorous implementation of these principles.

In the Czech Republic, Section 73 of the Criminal Code equally links the regulatory disqualification of an activity to the fact that the person has been convicted of a crime committed in connection with this activity. A specific reference is made to the Act on Pedagogy

workers, which precisely establishes a disqualification for any pedagogy profession, such as teacher, psychologist or coach on the basis of crimes committed in connection with pedagogy activities.

In the Netherlands, the judiciary disqualification provided for by Art. 251 (2) of the Criminal Code establishes a similar link with the offence committed in the framework of a professional activity. The optional disqualification will be limited to the same activity.

### 3. What type of disqualification measures?

The survey shows that basically the Member States apply two types of systems for determining a disqualification arising from a conviction or from some other type of measure linked to the finding of an offence as described in Arts. 3 to 7 of the Directive.

a) In the first type (the ‘judiciary’ disqualification) the disqualification directly arises from the conviction as it is an additional part of the sentence delivered by the criminal court.

Whether or not to impose it may be left to the appreciation of the court. This is the case in Belgium, Croatia, Cyprus, the Czech Republic, Germany (dependent on specific circumstances, see above), Spain, Greece (first conviction), Hungary, Ireland, Lithuania (current legislation), Luxemburg, Malta, Poland, Portugal, Romania and Slovakia.

In some other Member States the judiciary disqualification is automatically linked to the conviction. It is therefore not left to the discretion of the court. These Member States are: Austria, Estonia, France, Greece (second conviction), Italy, Lithuania (draft legislation) and Latvia.

b) In the second type (the ‘regulatory disqualification’) the disqualification is still linked to the conviction but it is established through a regulatory system administered by public authorities or agencies, eventually assisted by private bodies. This, according to the reports submitted for the survey, is the system applied in Estonia, Ireland, Slovenia, Sweden and the United Kingdom.

<sup>12</sup> See Footnote 3.

c) The Netherlands has a combined system of optional judiciary disqualification and regulatory screening through the Ministry of Justice assisted by a specialised organisation.

#### 4. Judiciary disqualification: Temporary or permanent?

Permanent judiciary disqualification is available in Austria, Croatia, Germany (if the offender was working in the same environment when committing the offence and if a comprehensive evaluation of the offender and the offence shows a high risk in further engagement), France, Greece (second conviction), Hungary, Italy, Luxemburg, Malta, Poland and Slovakia.

In most of these Member States temporary disqualification is also available.

In Italy and Poland, permanent disqualification is the only judicial disqualification term available.

In Italy, permanent disqualification is automatic as an additional judiciary sanction linked to the conviction for the types of offences referred to in Art. 10 of the Directive and concerns “perpetual disqualification from any role in schools of any type and grade, and from any office or service in institutions or public or private structures which are attended predominantly by minors”.

In Poland, it is optional and concerns “any or specific professions or activities connected with raising, educating or treating minors, or caring for them”.

Temporary disqualification is the only judiciary disqualification sanction available in Belgium (one to 20 years, with a possibility of extension in case of repeat offence), the Czech Republic (up to 10 years), Spain (three months to 20 years), Lithuania, Latvia, the Netherlands, Portugal (two to 15 years), and Romania (one to five years).

Because of the serious interference with the rights of the individual, the disqualification in Austria, as a rule, is limited to one to five years. Only in the most serious cases, where there is

a particularly high risk, may a ban for an indefinite period be imposed. This is the case when there is the danger that such acts with serious consequences will be done again or if the convicted person will take advantage of his employment or his honorary function despite the disqualification again.

Due to a number of circumstances, it might happen that an upright disqualification is no longer appropriate. This may be the case, especially if the person has successfully undergone therapy. In this case, the Court will set aside the disqualification, if the disqualification had not been pronounced in regard to the new circumstances.

When pronounced indefinitely, the Court shall review the disqualification every five years out of its own motion, and, if the requirements of such an indefinite disqualification are still met.

#### 5. Regulatory disqualification

Regulatory disqualification systems exist in Estonia, Ireland, the Netherlands, Sweden and the United Kingdom.

Croatia and France apply a judiciary disqualification system but also use specific sex offenders registers. Portugal recently introduced a sex offenders register. These will be considered in Section 6.

The most developed regulatory system exists in the United Kingdom. The legal framework for the disqualification system is to be found in the Safeguarding Vulnerable Groups Act 2006, as amended by the Protection of Freedoms Act 2012, which prevents persons convicted of certain offences from working with children.<sup>13</sup>

Upholding the safeguards of this act is the purpose of the Disclosure and Barring Service,<sup>14</sup> set up in December 2012, which regulates the database of persons barred from regulated activity relating to children. A person can be included on the list in two ways:

- 1) Persons convicted or cautioned for the most serious offences against children and who are deemed to always be a threat to children under any circumstance may be

<sup>13</sup> The Safeguarding Vulnerable Groups Act 2006 applies (for the most part) only in England and Wales, but equivalent provision is made for Northern Ireland by the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007.

A comparable system exists in Scotland. Under the Protection of Vulnerable Groups (Scotland) Act 2007, the Scottish Minister is required to maintain lists of persons barred from working with children. Where a court convicts a person of a relevant offence and where the court is satisfied that it may be appropriate for the person to be listed, the court must inform the minister accordingly.

<sup>14</sup> See also below under Section D 3 b.

automatically included on the Children's Barred List, without the person in question having the right to make representations as to why he or she should not be included on the list.

- 2) Persons convicted or cautioned for offences against children and who are deemed to pose a serious risk towards children, but not in every conceivable case, may be added to the list but are given the right to make representations as to why they should be removed from the list.

This form of disqualification covers both professional and voluntary activities, as the United Kingdom's barring list does not make this distinction when preventing persons from working with children.

Once a person is added to the Children's Barred List, that person is barred from working or volunteering in "regulated activities" (which are defined by a series of criteria relating amongst others to the fact that the activity gives the person concerned the opportunity to have contact with children), in relevant establishments and in certain positions.

In Estonia, Art. 51 of the Child Protection Act states that "a person who has been punished or is subject to involuntary treatment for the sexual exploitation or abuse of a child or children, is not allowed to work with children if the information concerning the punishment has not been deleted from the punishment register [...] or if the information concerning the punishment has been deleted from the punishment register and entered into the punishment archive". Hiring such a person or authorising the issue of an activity licence for such a person constitutes 'illegal enabling of work with children' and is sanctioned by fines.

In Ireland, where judiciary disqualification is possible,<sup>15</sup> the main mechanism for disqualification rests on the vetting legislation considered under the draft for the National Vetting Bureau (Children and Vulnerable Persons) Act 2012,<sup>16</sup> which provides for the establishment and maintenance of a National Vetting Bureau (Children and Vulnerable Persons) Database

System. This database system is to comprise (i) a register of relevant organisations, (ii) a register of specified information, and (iii) a register of vetted persons.

In addition to "vetting" of applicants with regard to any relevant work or activities relating to children, the act also provides for re-vetting of persons after the expiry of a specified period and for retrospective vetting.

The act makes it an offence for a relevant organisation to engage persons to do "relevant work or activities" related to children or vulnerable persons, unless the organisation has received a vetting disclosure from the National Vetting Bureau in respect of that person.

In the Netherlands, a regulatory disqualification system exists next to the possible judiciary disqualification.

Anyone applying for work with children needs a certificate of conduct based on Art. 28 of the Judicial Data and Criminal Records Act, in which the Dutch Minister of Security and Justice declares that the applicant did not commit any criminal offences that would harm his working activities. The certificate of conduct is obligatory for educators, owners of a children's centre, host parents, day care centres, employees of a children's centre, and a host parent agency or a day care centre (this also includes employees of the organisation who are not directly working with children but are doing for instance the administration of the organisation). Also included are volunteers, members of the board, trainees, temporary employees, etc.

From January 1, 2015, a free of charge certificate was issued to organisations, of which more than 70% consists of volunteers (e.g. sports clubs, scouting). Certificates of conducts may also be issued to Dutch volunteers working abroad, e.g. in orphanages.

Whether a certificate of conduct is given to the applicant depends on two variables:

- First variable: "the objective criteria".

The certificate of conduct will be refused in principle if the conditions for the objective criteria are satisfied, i.e. if the "judicial file" of

<sup>15</sup> See also below under Section D 3 b.

<sup>16</sup> The act was signed into law on 26 December 2012, but none of the provisions of the act have yet been commenced by the requisite ministerial order.

the applicant, in case of repetition (recidivism), would be an obstacle to a proper exercise of the function/task envisaged, because of the risks to society.

The "judicial file" will not only include convictions. Summons, notices (not only relating to communication of further prosecution, but also communication of non-prosecution), will also enter into consideration.

The assessment of the risk of recidivism is not linked to the person considered. What is under consideration is the degree of risk to society if the same offence is repeated by any person during the execution of the task or function considered.

The obstacle to a proper execution of the function, task or occupation is linked to the nature of the offence and the location of the activity. In the case of sex offenders, both the eventual position of trust or authority attached to the activity and the fact that the location of the activity involves contacts with vulnerable persons will always be considered as an obstacle to a proper execution of the function, tasks or activity.

- Second variable: "the subjective criteria"

The subjective criteria will lead to an assessment of whether the interest of the applicant in obtaining the certificate overrides the interest of protecting society on the basis of the objective criteria.

The subjective assessment takes into account the "circumstances of the case": the completion of a criminal lawsuit; the duration of time; the number of antecedents; and the age of the offender at the time of the offence. If this assessment is not conclusive, attention will be given to the "circumstances of the offence" themselves.

The "policy rules" published by the State Secretary for Safety and Justice specifically stress that in the case of sex offences, there will be little room left to award the certificate on the basis of the subjective criteria if either the function or activity envisaged involves a relation of trust or authority or if the objective criteria establishes an obstacle to the proper exercise

of the activity on the basis of the location).

The same goes for cases of established multi-recidivism or established conviction and punishment of varying degrees in the last 10 to 20 years before the assessment.

The certificate will only be delivered if its refusal would manifestly be disproportional.

In Sweden, a limited type of regulatory disqualification systems exists for certain activities. Public authorities can prevent convicted persons from exercising professional activities to some extent. In essence, certain professional operations involving professional activities require permits from public authorities and such permits are given pursuant to, inter alia, a control of information in the criminal records regarding the operator, or if the operator is a company, its representatives.

Such a system is in place in public health care and for certain public school services.

A permit is required, inter alia, when operating certain activities involving care of and support for children, as well as care and support measures for children with disabilities, which are financed by the Swedish municipals and are under the supervision of the National Board of Health and Welfare.

The National Board of Health and Welfare is entitled to request from the National Police Board an extract from the criminal records regarding a person operating the professional activities, or if the operator is a company, members of the Board of Directors, the Managing Director or other representatives with a managing position, as well as in certain cases, the owners. Such an extract shall include information contained in the criminal records regarding convictions of any child sex crime. The National Board of Health and Welfare may grant a permit only if the operations can be conducted with a high measure of quality and safety. According to the preparatory works, a permit may not be granted if the previous conduct of the operator, or if the operator is a company, of its representatives, shows that the person is not suitable to conduct the operations. Under Section 18 of the Criminal Records Regulation, the National Board of Health and Welfare is

entitled to request an extract from the criminal records also during the course of the supervision of such businesses as described above.

A permit is also required for a natural person or a company when operating schools, including high schools. According to the preparatory works, a permit may not be granted if the previous conduct of the operator, or if the operator is a company, of its representatives, shows that the person is not suitable to conduct the operations. However, the Swedish Schools Inspectorate is not entitled to request extracts from the criminal records regarding the operators or its representatives. Accordingly, the possibility to deny a permit on this ground is limited to such instances where the Swedish Schools Inspectorate receives confirmation that the person has been previously convicted by requesting actual judicial decisions directly from the court. This requires that the Swedish Schools Inspectorate has previously received confirmation that such decisions exist, for instance from private persons.

## 6. Sex offenders registers

Specific 'sex offenders' registers' exist in three Member States: Croatia (the "Paedophile sex offender registry", introduced in 2013), France (the "Sex Offenders Database", introduced in 2004) and the United Kingdom (the "Violent and Sex Offender Register", introduced in 2003).

On 12 March 2015, the Government of Portugal adopted a proposal for a law introducing a sex offenders' register in Portugal. The proposal refers to Art. 37 of the Council of Europe Lanzarote Convention ("Recording and storing of national data on convicted sexual offenders"). The proposal was adopted by Law n<sup>o</sup>103/2015 of 24 August 2015.

These registers are not properly speaking a disqualification instrument, their main function being the monitoring of the re-insertion of convicted sex offenders after having served their prison sentence. Access to the information and data contained in these registers is restricted to specific authorities and bodies. General or focused access by the public is not available.

The introduction of a comparable sex offenders' registry has been considered in Ireland. On 19 July 2012, the Oireachtas (national parliament) granted leave to an independent member of the parliament to introduce a bill called the Child Sex Offenders (Information and Monitoring) Bill 2012. The purpose of the bill is to establish a scheme known as the Information on Child Sex Offenders Scheme, which would enable parents and guardians to make enquiries with An Garda Síochána as to whether persons coming into contact with their child have been convicted of a sexual offence or otherwise pose a serious danger to children. It provides for a similar entitlement for persons in authority in schools or clubs. The bill is a private member's bill (i.e. it is not sponsored by the government) and as such, it is unlikely to ever be enacted into Irish law. Indeed, the bill has not progressed to the next stage in the legislative process since its introduction on 19 July 2012.

## 7. Sanctions?

What happens if a convicted sex offender subject of a disqualification order or instruction applies for the type of activity described?

A number of Member States treat and sanction this as a new criminal offence. This is the case in Austria, where the offender him/herself but also his/her "accomplishes" (an intermediary, the employer) may incur new criminal sanctions.

In Ireland the Sex Offenders Act 2001 makes it an offence for sex offenders not to disclose the existence of prior criminal convictions for sexual offences to an employer, or potential employer in certain circumstances.

The obligation refers to work or a service (including State work or a service) a necessary and regular part of which consists, mainly, of the person having unsupervised access to, or contact with, a child or children or a mentally impaired person or persons.

The notification requirements set out in the act extend in certain circumstances to sex offenders convicted abroad.

In this regard it is important to note that a



conviction for a sexual offence will always be excluded from the benefits of the legislation, allowing persons who have been convicted of certain offences to regard the convictions as “spent” after the elapse of a certain period of time and to therefore be exempted from the disclosure obligation (the Criminal Justice (Spent Convictions) Bill 2012).

In Luxembourg, every violation of the disqualification is punishable by a term of imprisonment of two months to two years.

## D. Screening

### 1. Obligation?

As already stated above under the general comments under Section A many Member States impose a screening obligation.

#### a. General

In Estonia,<sup>17</sup> Hungary, Italy and Latvia this obligation covers both professional and voluntary activities. In Ireland the new proposed legislation contained in the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 makes it an offence for “relevant organisations” to engage persons to do work or activities relating to children unless the organisation has received a vetting disclosure from the Bureau in respect of that person. In the United Kingdom the obligation exists via the checking of the barred list; any omission amounts to a criminal offence.

In Finland and Portugal the obligation only exists for professional activities.

#### b. Specific activities

The mandatory screening exists for specific activities in the following Member States: Austria (federal service, state service and institutions providing care for children), Belgium (education, psycho-medical-social guidance, youth aid and child protection), Bulgaria (via license system for social services for children), Germany (public authorities), France (state funded activities and voluntary work), Greece (public sector, social welfare and teaching

staff), Ireland (via vetting legislation for specific activities), Lithuania (current law: teachers; draft law: education, teaching, supervising, ensuring safety of children), the Netherlands (via specialised screening organisation Justis), Poland (for children’s and youth leisure activities -not yet into force), Sweden (via permit system for operations involving care and support for children, education), Slovenia (civil servants), and Slovakia (pedagogical employees, physical culture and support of youth work, including volunteer work).

### c. No obligation to screen

According to the reports, there is no mandatory screening in Luxembourg, Poland (currently) and Romania.

### d. Sanctions?

As already pointed out above, in certain Member States noncompliance with the obligation to screen applicants or persons employed constitutes an offence. This is the case in Estonia, Ireland and the United Kingdom.

## 2. The object of the screening

### a. Only for “employed” activities?

Paragraph 2 of Art.10 is somewhat ambiguous as to its material scope. It refers broadly, on the one hand, to the screening of persons for professional or voluntary “activities” involving direct and regular contacts with children, as does the provision in paragraph 1 of Art. 10 with regard to disqualification. On the other hand, as pointed out above (under Section A), the terms “employer” and “recruitment” could be narrowly constructed. The “screening” faculty imposed by Art. 10, para. 2 would then only relate to employer-employee relationships (employment contracts) and not to self-employed activities involving direct and regular contacts with children developed within a service agreement concluded with an organiser of such activities.

As indicated in the introductory general comments, in a majority of Member States the screening is not limited to “employment” *stricto sensu* but rather extends to any assignment of

<sup>17</sup> Any omission amounts to a criminal offence.

“activities”. This is the case in Austria, Belgium, Croatia, the Czech Republic, Germany, Estonia, Finland, France, Greece, Hungary, Ireland (proposed legislation), Lithuania, Latvia, Poland, Romania, Sweden and the United Kingdom.

In a number of other Member States (Cyprus, Spain, Greece, Italy, Luxembourg, Malta, the Netherlands, Slovenia and Slovakia), the situation is not entirely clear, given the use of the terminology (employer, recruitment, and employee). The national report concerning Romania refers only to the employer-employee relationship.

## **b. Object of the screening: disqualification, offences, other?**

The object of the screening, where it exists, is always related, as provided in the Directive, to the existence of relevant criminal convictions for the type of offences mentioned in the Directive.

Its object may also be wider.

- It may logically include disqualifications. This is the case in Austria (for certain care, education or teaching positions in state or federal institutions), Belgium, Luxembourg, Italy and Malta.
- In Ireland the current vetting disclosure provided by the police (“Garda vetting”) includes details of all convictions but also of all pending or completed prosecutions (whether successful or not) in Ireland or elsewhere. Under the proposed new legislation, the Vetting Bureau will undertake an examination of its own database and Garda records to establish whether any criminal records “or any specified information” is held in respect of the person who is the subject of the application. “Specified information” includes information other than a court determined criminal record, which is of such a nature as to reasonably give rise to a bona fide concern that the person may harm the child.
- In the Netherlands the screening activity performed by the screening authority Justis<sup>18</sup> will not only cover convictions but will also extend to information regarding

suspicion of a criminal offence or crime, and the decision of the prosecutor to prosecute, settle or dismiss.

- In the United Kingdom the “enhanced DBS check” will provide information on: convictions, cautions, reprimands and final warnings from the Police National Computer as well as information held locally by police forces. The “Enhanced with a Barred List Check” will in addition check against the children’s barred list.

## **c. When?**

Art. 10, para. 2 only refers to screening by employers “when recruiting a person for professional or voluntary activities involving direct and regular contacts with children”.

A number of Member States indeed limit the screening to this recruitment stage: Austria, Croatia, the Czech Republic, Estonia, Greece, Hungary, Italy, Lithuania, Malta, Poland, and Portugal.

Quite a large number of Member States provide for additional screening modalities.

In Belgium, screening during employment was introduced in 2012 in the Criminal Code. When an offender who is convicted for indecent assault, rape, inciting to moral decay or prostitution, does, at the time of his conviction, have contact with minors because of his/her status or profession and the employer, legal entity or authority that exercises the disciplinary control is known, the court may order the communication of the criminal section of the decision to the relevant employer, legal entity or authority. This measure may be taken ex officio by the court or at the request of the victim or the public prosecutor. However, the decision must be duly reasoned (by reference to the seriousness of the offences, the potential for probation and the risk of recidivism).

In Bulgaria, employees who are active in social services for children are subject on an annual basis to the verification of eventual “pre-court proceedings”.

In Finland a proposal made in 2012 by the Child Ombudsman to enable screening during

<sup>18</sup> Created in 2004 for all types of screening of persons and organisations regarding their integrity.

the course of employment at regular intervals (2–5 years) seems to still be under discussion.

In Germany, employers and youth welfare services are allowed to ask for a criminal record with regular time intervals.<sup>19</sup>

In Ireland the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 provides for re-vetting of persons after the expiry of a specified period (to be prescribed by the Minister for Justice and Equality), and retrospective vetting of persons who are currently in positions which would be subject to vetting under the act but who have not previously been vetted because they took up the position prior the availability of vetting in the Member State.

In Latvia, Art. 72 (4) of the Law on Protection of Children Rights provides that in addition to the recruitment check, the organiser of an event or the manager of a childcare, educational, health care or other institutions where children are found, has a mandatory duty to request information from the register in order to check this information at least once a year.

In Luxembourg, employers may, under the law on criminal records, request the relevant criminal record information when recruiting and “in the context of staff management”.

In the Netherlands the new rules on the “certificate of conduct”, effective from 1 March 2013, comprise a “continued screening” of persons active in childcare and child playing grounds. More details will be given below.

In Sweden the situation seems to be ambiguous.

For a number of professions within healthcare, a permit from the National Board of Health and Welfare is requested. Such permit may be withheld or revoked on account of the existence of convictions for Child Sex Crime. If an operator is informed of the existence of a conviction during the course of employment or assignment, he/she may terminate the employment or assignment.

Oddly, the situation is different under the recent Act on Control of Individuals Intending to Work with Children. Operators who are required

to review an extract when recruiting are not entitled to continuously review extracts from the criminal records concerning employees or assignees during the course of the employment or assignment. It is thus possible that an operator will not be informed if an employee or assignee is sentenced for a Child Sex Crime during the course of the employment and/or assignment, if the convicted person can successfully conceal the conviction from the operator.

### 3. General features

The survey basically reflects that, regarding the organisation of the screening by “employers”, as mentioned in Art. 10, para. 2 of the Directive, two approaches exist.

- In a majority of Member States the screening is left to the responsibility of the employer at the moment the latter envisages hiring a person for an activity involving regular and direct contacts with children.
- In some Member States the approach is based on active interaction between the employers and specialised public or private agencies to whom a specific responsibility has been entrusted in this respect.

#### a. Individual screening

In the Member States where the screening is the individual responsibility of the employer, it is only rarely based on direct access of the employer to the criminal record of the person concerned.

Direct access as the only screening method only exists in Latvia.

As a rule, the criminal record will have to be produced by the applicant or person concerned who will obtain it from the competent authority. This is the case in Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Germany, Greece, Estonia, Spain, Finland, France, Hungary, Ireland, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia and Sweden.

Such production by the job applicant is the

<sup>19</sup> § 72a of the Social Security Statutes VIII.

only screening channel in Cyprus, the Czech Republic, Hungary, Italy, Portugal, Romania and Slovakia.

In Austria and Germany, the person requesting a criminal record certificate will need a certificate by the employer to confirm the requirement of the criminal record certificate.

In all other Member States where production of the certificate by the applicant is the general system, additional screening possibilities exist.

In Belgium the employer may in certain cases be directly informed by the court of the existence of a conviction in relation to one of his employees.

In Croatia, Spain, Finland, France, Greece, Lithuania, Luxembourg, Malta and Poland, direct access by the employer will be possible, mainly for specific activities such as care, custody, upbringing of children and teaching.

In Ireland, screening is very much based on a vetting system. An additional individual screening mechanism has been introduced by the Sex Offenders Act 2001, which obliges sex offenders to disclose the existence of prior criminal convictions for sexual offences to an employer or potential employer in certain circumstances. It will be noted that the obligation is on the convicted sex offender to disclose the required information. The notification requirements set out in the act extend in certain circumstances to sex offenders convicted abroad.

In Sweden, the Act on Control of Individuals Intending to Work with Children was adopted on 18 December 2013. The aim was to complement the Criminal Records Act by expanding the range of individuals obligated to, upon request, provide an extract from the criminal records.

Individuals who have been offered any public employment, private employment or employment within a legal non-profit organisation that involves direct and regular contact with children shall, upon the employer's request, provide a Criminal Record Extract. The Swedish legislation no longer specifies the exact circumstances under which an employer is entitled to request an extract from the criminal records.

Instead the legislation has been broadened to encompass any employment that involves direct and regular contact with children.

The Criminal Records Extract shall also be provided when the employee is offered employment by an employer without actively having applied for it.

In addition to this new legislation on individual screening, the Swedish legal framework also set up a type of regulatory screening, but only with regard to some public healthcare and school activities.

## **b. Regulatory screening**

In a limited number of Member States, the screening involves the intervention of specified bodies or agencies.

In Bulgaria, natural persons and legal entities providing social services for children need a license, which is issued by the chairperson of the State Agency for Child Protection upon a proposal from a commission, including representatives of the competent authorities. Such license can only be obtained if the candidate has not been convicted of a crime. In the case of legal entities, the requirement refers to the members of the steering bodies of such entities.

In Ireland, a new act was signed on 26 December 2012 in order to reorganise the "Garda vetting" system currently in place but on a non-statutory basis. The act<sup>20</sup> provides for the establishment of the National Vetting Bureau of the Garda Síochána to consider and process applications for vetting disclosures and to establish and maintain a National Vetting Bureau (Children and Vulnerable Persons) Database System. The database system is to comprise the following registers: (i) the register of relevant organisations; (ii) the register of specified information; and (iii) the register of vetted persons.

In broad terms, the act makes it an offence for a relevant organisation to engage persons to do "relevant work or activities" relating to children or vulnerable persons, unless the organisation has received a vetting disclosure from the Bureau in respect of that person. A person guilty of such an offence is liable on

<sup>20</sup> National Vetting Bureau (Children and Vulnerable Persons) Act 2012, still not commenced.

summary conviction to a fine of up to €5,000 and/or to a term of imprisonment of up to 12 months; or on conviction on indictment to a fine of up to €10,000 and/or to a term of imprisonment of up to five years. The decision whether or not to employ a particular person is made by the employer after having received the vetting disclosure (not by the bureau).

Following the receipt of an application for a vetting disclosure, the bureau will undertake an examination of its own database and the Garda Síochána records to establish whether any criminal records or any “specified information” is held in respect of the person the subject of the application. A ‘criminal record’ includes a record of a person’s convictions and also a record of any pending criminal prosecutions against him. ‘Specified information’ is defined as information concerning a finding or allegation of harm to another person that is received by the bureau from (a) An Garda Síochána; or (b) a “scheduled organisation”, in respect of the person who is the subject of the application and which is of such a nature as to reasonably give rise to a bona fide concern that the person may harm a child. Thus ‘specified information’ includes information other than a court determined criminal record.

A schedule to the act lists the “scheduled organisations” responsible for providing “specified information” to the bureau. Such organisations include, but are not limited to, the Health Service Executive, the Teaching Council and the Medical Council. The disclosure of “specified information” is subject to certain safeguards. In particular, such information cannot be disclosed unless the Chief Bureau Officer (a) reasonably believes that the information is of such a nature as to give rise to a bona fide concern that the person may harm a child; and (b) he/she is satisfied that disclosure is necessary, proportionate and reasonable in the circumstances for the protection of children. Where such information is to be disclosed, the person who is the subject of the application must be notified and given an opportunity to challenge the decision to disclose. In this way, the act seeks to ensure that information such as vague rumours or innuendo or false allegations cannot form any part of the vetting process. The Act also ensures that the

constitutional right of all citizens to protect their good name, as provided for in Art. 40.3.2 of the Irish constitution, is protected.

The act also provides for the re-vetting of persons after the expiry of a specified period (to be prescribed by the Minister for Justice and Equality); and retrospective vetting of persons who are currently in positions which would be subject to vetting under the act but who have not previously been vetted because they took up the position prior the availability of vetting in the Member State.

The act further creates a number of offences, including employing a person in a position for which a vetting disclosure is required without obtaining such a disclosure and falsifying a vetting disclosure.

In addition to the organised vetting system, a direct screening mechanism results from the Sex Offenders Act 2001<sup>21</sup>, which makes it an offence for sex offenders not to disclose the existence of prior criminal convictions for sexual offences to an employer or potential employer in certain circumstances.

A very thorough regulatory disqualification and screening system is in use in the Netherlands. Its detailed analysis can be found above under Section C 5.

From the point of view of the screening mentioned in para. 2 of Art. 10 of the Directive, the Dutch system presents three important features.

- It is based on a very balanced analysis, integrating, as exposed above, “objective” and “subjective” criteria, of the potential risk presented by the employment of the convicted offender.
- It includes a “continuous” screening mechanism with regard to persons active in child care and supervision, child playground activities or “guest parenting”. Any relevant change in the “judicial information” kept and monitored on convicted persons will be immediately forwarded to the Judicial Information Service<sup>22</sup>. If it concerns persons active in child care and supervision, child playground activities or “guest parenting”, it will then be

<sup>21</sup> See Section C 7.

<sup>22</sup> “Justitiële Informatiedienst”.

communicated to Justis, the screening authority.

- It will then be the responsibility of Justis to decide whether the person concerned has to be screened again. If this is the case, the employer will be informed that the person concerned needs to apply for a new certificate of conduct. The examination of that application will be based on the entire file of that person, not exclusively on the most recent developments. The balancing of the interest of the person concerned and of the protection of society will again play a central role. It is important to note that the information to the employer that the person concerned needs a new certificate is in itself no sufficient ground to terminate that person's contract. The employer will, however, have to terminate the contract if the person concerned cannot produce a new certificate, either because it was refused or because the person concerned did not wish to apply.

In the United Kingdom the regulatory screening is based on a system of Disclosure and Barring Service (DBS) checks.

Employers can submit applications to the DBS to find out information regarding a successful job applicant. Some employers can register as a 'registered organisation' if they carry out more than 100 checks per year. If an employer is not a registered organisation, it cannot directly submit requests to the DBS, but must use an umbrella body.

Three levels of DBS check are available, of which two are of relevance with regard to the screening of sex offenders:

- i) Standard DBS Check<sup>23</sup>
- ii) Enhanced DBS Check

The enhanced check is available for specific duties, positions and licenses included in both the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and the Police Act 1997 (Criminal Records) regulations, among which regularly caring for, training, supervising or being solely in charge of children.

An enhanced level certificate contains the

same Police National Computer (PNC) information as the standard level certificate but also includes a check of information held locally by police forces.

- iii) Enhanced with a Barred List Check

The enhanced check with barred list check(s) is only available for those individuals carrying out regulated activity and a small number of positions listed in Police Act 1997 (Criminal Records) regulations, for example, prospective adoptive parents.

It contains the same PNC information and check of information held locally by police forces as an enhanced level check, but in addition will check against the children's and/or adult's barred lists.

Most types of employers are not statutorily obliged to carry out DBS checks, and most are ineligible to request an enhanced check including a check of the barred lists. Only regulated activity providers (see above under Section C 5) are able to request an enhanced check with barred list check. Regulated activity providers are defined by Section 6 of the Safeguarding Vulnerable Groups Act 2006. Section 11 of the Safeguarding Vulnerable Groups Act 2006 makes it an offence for a regulated activity provider to fail to check whether the person employed is barred from working with children or subject to monitoring. Knowingly employing someone who is barred from working with children is also an offence under Section 9 of the Safeguarding Vulnerable Groups Act 2006.

The United Kingdom thus has both general and specific frameworks for employers to find out information regarding previous convictions. The standard and enhanced checks are available on a voluntary basis for employers of all kinds and organisers of voluntary activities. However, for regulated activity providers, there is a specific regime, including a statutory obligation to check employees or volunteers who will be carrying out regulated activities.

<sup>23</sup> The standard check is available for court officers, employment within a prison, and Security Industry Authority (SIA) licenses. A standard level certificate contains details of all spent and unspent convictions, cautions, reprimands and final warnings from the Police National Computer (PNC) which have not been filtered in line with legislation.

## E. Exchange of information

Art. 10, paragraph 3 of the Directive provides that the Member States take the necessary measures to ensure that information concerning the existence of criminal convictions or disqualification in relation to any of the offences listed in paragraph 1 is transmitted in accordance with the procedures set out in Council Framework Decision 2009/315/JHA, when requested under Art. 6 of that Framework Decision with the consent of the person concerned.

Art. 6 and other relevant provisions of the Framework Decision specify the following:

- A central authority of a Member State may, in accordance with its national law, submit a request to a central authority of another Member State for information and related data to be extracted from the criminal record of the latter Member State, when such information is requested in the first Member State “for the purpose of criminal proceedings against a person” or “for any purposes other than that of criminal proceedings” (Art. 6, para. 1). Replies shall be submitted within 10 working days following reception of the request (Art. 8, para. 1 of the Framework Decision).
- A similar request may be made when a person who is or was a national or a resident of either the requesting or of the requested state asks for information on his own criminal record (Art. 6, para. 2). Replies shall be submitted within 20 working days following reception of such request. (Art. 8, para. 2).

Art. 7 of the Framework Decision specifies under which conditions the requested Member State has to transmit the information requested.

Art. 10, paragraph 3 of the Directive at any rate submits the obligation to transmit the information requested to the (additional) condition that the request was made “with the consent of the person concerned”.

## 1. Findings

### a. As to the implementation of the Framework Decision

A (worrying) preliminary observation relates to the fact that, according to the reports submitted, not all 27 EU Member States which have to transpose the Directive have yet taken the necessary measures to implement Council Framework Decision 2009/315/JHA, which is referred to in Art. 10, paragraph 3.

No reference to the implementation of the Framework Decision is to be found in the reports for Latvia, Lithuania, Malta, Portugal, Romania and Slovenia.

The reports for Greece, Ireland and Italy refer to draft legislation proposed for the implementation of the Framework Decision.

### b. As to the transposition of Art. 10, paragraph 3 of the Directive.

According to the reports, the following 16 Member States correctly transposed Art. 10, paragraph 3 of the Directive: Austria, Belgium, Croatia, Cyprus, the Czech Republic, Germany, Estonia, Finland, France, Hungary, Luxembourg, the Netherlands, Poland, Sweden, Slovakia and the United Kingdom.

According to information from other sources<sup>24</sup>, this is also the case for Bulgaria.

A reference to the condition of the necessary consent of the person concerned is however only mentioned in the reports for Germany, Finland and Luxembourg.

According to the report for Bulgaria, the reference to the consent of the person concerned does not exist under Bulgarian law.

The only reports referring to the deadlines for replying to the request, as mentioned in Art. 8, paras. 1 and 2 of the Framework Decision, are the reports for Austria (reference to both the 10-day and the 20-day deadline), Finland (reference to the 20-day deadline), France (according to the report, 75% of the replies come

<sup>24</sup> Reply from the Bulgarian authorities to the questionnaire sent out by the Lanzarote Committee of the Council of Europe which monitors the implementation of the Council of Europe Lanzarote Convention.

within 24 hours of the request) and Slovakia (reference to the 10-day deadline).

## F. Overall assessment – best practices

The suggestions and proposals made hereafter when assessing the quality of the transposition of Art. 10 of the Directive are based on a number of principles, which, as appears from the recitals of the Directive, are essential as to achieving its object. They are the following:

a. The need for a “comprehensive approach” covering (i) the prosecution of the offenders; (ii) the protection of the child victims; and (iii) the prevention of the offences<sup>25</sup>;

b. The child’s best interest must be a “primary consideration” when carrying out any measure to combat the offences<sup>26</sup>;

c. “Serious forms of sexual abuse and sexual exploitation”, which include, in particular, various forms of sexual abuse and sexual exploitation of children which are facilitated by the use of information and communication technology should be subject to (i) effective, (ii) proportionate and (iii) dissuasive penalties<sup>27</sup>;

d. Disqualification and screening are appropriate “when the danger posed by the offenders and the possible risk of repetition of the offences make it appropriate”<sup>28</sup>.

### 1. Disqualification-suggestions

- Both disqualification and screening, as defined in Art. 10 of the Directive, are indispensable preventive tools to protect children, be it that the disqualification mechanism may be of a “regulatory” nature rather than exclusively “judicial”.
- The disqualification should cover the type of activities linked to the specific offence covered by the conviction. It should, however, not be limited to them or exclude offences committed in a private or non professional sphere.

- Compliance with a judicial disqualification should be closely monitored and no compliance adequately sanctioned.

- The Dutch system for regulatory screening could constitute a “best practice” to the extent that:

- > It aims at ensuring an adequate and balanced assessment of the preventive object of the disqualification system. To this end, the evaluation of the risk of repetition is based on both “objective” and “subjective” factors;

- > It is not limited to pre-employment screening but rather extends to interval screening during the activity;

- > It aims at ensuring an adequate protection of children against potential sexual abuse or exploitation, while still protecting the privacy of the convicted offender.

### 2. Screening-suggestions

- Mandatory screening must be encouraged, at least for specific activities (e.g. education, care and support of children) or with regard to more vulnerable children.

- In such cases, the failure to effectuate an adequate screening should be made a serious criminal offence, or, in the case of legal persons, at least subject to civil or administrative sanctions.

- The preventive screening referred to in Art. 10, para. 2 of the Directive should extend to all types of activities involving direct and regular contacts with children, regardless of whether within a contract for employment or as self-employed provider of services.

- The preventive screening should not be limited to the screening of “applicants” but rather extend to regular “interval screening” of employees or service providers developing activities involving direct and regular contacts with children.

<sup>25</sup> Recital 6.

<sup>26</sup> Ibid.

<sup>27</sup> Recital 12.

<sup>28</sup> Recital 40.



### **3. Exchange of information-assessment**

- On the basis of the national reports submitted, it seems that overall the transposition of para. 3 of Art. 10 of the Directive is not very adequate. It would have been interesting to cross-check with the report the Commission is to submit to the European Parliament and the Council regarding the application of Framework Decision 2009/315/JHA<sup>29</sup>, but at the time of drafting this report (June–July 2015) the Commission report was not accessible.

<sup>29</sup>This report, accompanied, if necessary, by legislative proposals, was to be submitted by 27 April 2015 (Art. 13, para. 3, of the Framework Decision).

## Topic 4: Victim Identification (Art. 15, para. 4)

### Francis Herbert, Legal counsel, Missing Children Europe

#### Article 15

##### Investigation and prosecution

1. Member States shall take the necessary measures to ensure that investigations into or the prosecution of the offences referred to in Articles 3 to 7 are not dependent on a report or accusation being made by the victim or by his or her representative, and that criminal proceedings may continue even if that person has withdrawn his or her statements.
2. Member States shall take the necessary measures to enable the prosecution of any of the offences referred to in Article 3, Article 4(2), (3), (5), (6) and (7) and of any serious offences referred to in Article 5(6) when child pornography as referred to in Article 2(c)(i) and (ii) has been used, for a sufficient period of time after the victim has reached the age of majority and which is commensurate with the gravity of the offence concerned.
3. Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases are available to persons, units or services responsible for investigating or prosecuting offences referred to in Articles 3 to 7.
4. Member States shall take the necessary measures to enable investigative units or services to attempt to identify the victims of the offences referred to in Articles 3 to 7, in particular by analysing child pornography material, such as

photographs and audiovisual recordings transmitted or made available by means of information and communication technology.

It seems clear both from the general context of Art. 15 in its four paragraphs and from the terminology used in para. 4 (“[...] in particular by etc. [...]”) that para. 4 obliges the Member States to take measures aimed at specifically identifying children who appear as victims in child abuse material distributed online.

The Lanzarote Convention of the Council of Europe in its Art. 30, para. 5, second indent, contains an almost identical provision<sup>1</sup>. The specific nature of this obligation is indeed confirmed by the Explanatory Memorandum of the Lanzarote Convention, under No. 218: “[T]he second indent urges parties to develop techniques for examining material containing pornographic images in order to make it easier to identify victims. It is essential that every possible means be used to facilitate their identification, not least in the cooperation between states [...]”

It is, in this light, somewhat disappointing that the reports regarding certain Member States refer to the general provisions of their Criminal Code or Code of Criminal Procedure, which, among many other things, also cover the identification of crime victims, to conclude that Art. 15, para. 4 is correctly transposed into national law.

Ultimately, the problem seems to be that, as emphasised in the report for Malta, precisely because of its very specific formulation, Art. 15, paragraph 4 requires transposition at different

<sup>1</sup> The main difference is that the Directive formulates the objective as “to attempt to identify”, where the Convention used the words “to identify”.

levels: a) transposition at the level of substantive law (identification of child victims of online abuse must be given a sufficient priority as an objective of the criminal investigation); b) transposition at the level of procedural law (setting the procedural framework enabling investigators to specifically work on the identification of children who appear in online abuse material); and c) providing the necessary support (in technologies, manpower and financial means).

Another illustration for this is to be found in the Belgian report for the Global Alliance against Child Sexual Abuse Online (December 2013), which insists on the need for judicial guidelines in order to streamline the information flow as well as the cooperation with Europol and Interpol.

## A. Role of international cooperation

Given the cross-border nature on online abuse it is clear that, as underlined in the Explanatory Memorandum of the Lanzarote Convention (nr. 218) and in many reports<sup>2</sup> submitted for this survey, international cooperation plays a central role with regard to the effectiveness of the victim identification efforts.

Many EU Member States indeed actively take part in such international cooperation models.

The International Child Sexual Exploitation image database (ICSE DB), managed by Interpol, is the most frequently mentioned of these international instruments.

It is referred to by the reports on Austria, Belgium, Bulgaria, Croatia, Germany, Estonia, Finland, France, Ireland, Italy, the Netherlands, Portugal and the United Kingdom.

Interestingly, the national report for Finland states that “the present state of victim identification in Finland seems to rely too much on supranational organisations, such as Interpol and Europol” and pleads for the setting up of a national special investigative unit in charge of victim identification, as exists in Sweden, which would co-ordinate the investigation of crimes involving child abuse images. The absence of

specialised units is also a matter of concern in the report on Portugal.

On the subject of the use of the ICSE DB, the December 2013 Report of the Global Alliance against Child Sexual Abuse Online confirms that Bulgaria, Croatia, Malta, Slovakia, and Slovenia “plan to request access to the ICSE database or to expand their access and to contrite (additional) material”, while Ireland, Poland, Sweden and the United Kingdom “plan to provide additional or improved training on identification techniques and on how to use the database, or to promote the use of the database across law enforcement authorities”. According to the Global Alliance Report Croatia, Ireland, Sweden and the United Kingdom “have maintained a high level of contribution or even increased their contribution to the ICSE database”, while Estonia, Lithuania and Slovenia “have decided to further streamline their victim identification process, appointing a central contact person to manage access and contributions to the ICSE database and/or to serve as a central national victim identification point”. Hungary is reported to “increase the number of images and associated pieces of information they contribute to the ICSE”. Belgium, Germany, the Netherlands, Slovenia and the United Kingdom are reported as having a “plan to develop tools to facilitate the analysis and exchange of information with the ICSE database, including software to allow for the analysis of videos in ICSE”.

Experts from France, Germany, the Netherlands, Spain, Sweden and the United Kingdom, met at the recent Europol Victim Identification Taskforce (MIDTF), which took place from 3–14 November 2014.

## B. Need for formal transposition?

It seems that the only Member States that opted for a formal transposition are Cyprus and Greece.

In Cyprus, Art. 29 of the Law on Prohibition and Combating of Sexual Abuse, Sexual Exploitation of Children and Child Pornography of 2014 almost literally transcribes para. 4 of

<sup>2</sup>Quote from the report on Lithuania: “In our view the possibility for the fast exchange of information between the Member States (for e.g. forwarding the pictures and other collected material to the responsible institutions of the Member State where the respective internet site/server is located) would be the most effective way to investigate such crimes and identify the victims. Thus, if such matters are not covered by already existing mutual assistance and cooperation agreements or treaties, some guidelines or rules could be prepared and coordinated between the Member States on cooperation in investigating the offences set out in the Directive and exchange of information.”

Article 15 of the Directive.

In Greece, Law L4267/2014 on “combating sexual abuse and exploitation of children, child pornography and other provisions” specifically states in its Art. 14 that for the type of offences considered in the Directive, specific investigation tools such as the analysis of audio-visual material broadcasted or made available by means of information and communication technology is made possible.

In many Member States, identification of victims is not defined as a specific task for the investigators. With regard to the identification of child victims, as mentioned in para. 4 of Art. 15 of the Directive, the “support” measures envisaged by the Directive will eventually materialise through general investigation measures<sup>3</sup>, such as: the appointment of experts in information systems (Belgium); the interception of electronic communications (Bulgaria); surveillance activities (Estonia); and interception, undercover operations and confiscation of material (Finland, Italy and Portugal).

## C. Insufficient transposition?

Many reports, even those that refer to the transposition of Art. 15, para. 4, through the general rules of the code of criminal procedure, stress the absent or inadequate transposition.

The national report for Croatia mentions that, although the Croatian police changed its strategy and now directs its activities more toward the identification of victims and apprehension of “contact offenders”, the legal basis for initiating the procedure set out in Art. 15, para. 4 is still inadequate, as the relevant provisions in the Criminal Procedure Act only apply to pornographic material of victims already identified.

The report for France stresses that although French legislation provides a complete framework for identifying the type of offences mentioned in the Directive, victim identification and support does not really seem to be a priority in comparison to the identification of perpetrators and their prosecution and punishment.

According to the report for Hungary, public prosecutors and police are not strictly required to identify victims per se. They will do so in “threshold cases”, i.e. where the age of the child is close to eighteen or fourteen and identification is required to establish the age of the victim as part of the evidence regarding the offence.

The situation in Lithuania is very much comparable: the Criminal Procedure code and the Law on Criminal Intelligence establish only general rules for criminal investigations, but do not contain specific regulations regarding victim identification.

The report for Luxembourg also stresses the absence of specific provisions enabling Luxembourg Police to analyse child pornography material in order to identify child victims. The material will be analysed on the basis of the provisions relating to the fight against child pornography.

According to the reports for Latvia and Slovakia, there is no room in these Member States for the identification of victims.

## D. Transposition through policy rules

In a number of Member States, an operational system aimed at identification of child victims, as mentioned in Art. 15, para. 4 of the Directive, was set up through specific policy rules.

We refer to Germany, the Netherlands, Sweden and the United Kingdom.

In Germany the Federal Office of Criminal Investigation (BKA) was given the power to investigate the internet and, specifically, child abuse images in order to identify the victims and prosecute the offenders. Special investigative units were created and a special service centre for the collection of information and communication was established. A central role is played on the one hand by the Central Department for Child Pornography (Zentralstelle für Kinderpornografie), which represents the interface of national and international cooperation in this field, and, on

<sup>3</sup> Cf. the report for Finland, p. 32: “[T]here is neither actual law nor provisions that require victim identification [...]. The Criminal Investigation Act’s provision on investigating “the parties” should mean identifying both parties. Yet the government proposal to Parliament regarding the Act does not state this clearly. For that reason a specific act or provision is required to establish an apparent legal state in order to improve the victim’s status.”

the other, by the Zentralstelle für anlassunabhängige Recherche in Datennetzen (Central Department for Random Searches in Data Network). The latter department ensures an around-the-clock search for criminal content, which includes child abuse material. Findings are immediately forwarded to the competent departments.

In the Netherlands, Art. 15, para. 4 of the Directive is equally implemented in policy rules. Police officers have certain capacities that may lead to the confiscation of goods. This may help to identify the victims. Police officers are also allowed to take other materials that cannot be considered as child pornography but may lead to an earlier identification of victims.

This recourse to “traditional” investigation tools is complemented by digital investigations. The Dutch government has developed certain databases to make it easier to identify victims. The information in the database is also exchanged with other countries to make the identification process easier on a wider level.

“Digital investigation” comprises investigation into chats, emails and internet usage, in order to determine the participation of the suspect in a paedophilia network and/or determine the possibility of sexual abuse and the production of child pornography imagery. The Images and Internet Team (after this referred to as TBI) operates within the National Police Services Agency (KLPD) and one of the purposes is to identify victims. The team investigates reports of child abuse material on the internet and manages information regarding child pornography. This division also has access to the databases, as described before. Child abuse material is collected by the TBI. They receive material through different channels: a) requests from other countries, which give rise to new investigations; b) reports received through the Internet and from The Hotline Combating Child Pornography on the Internet, which is a privately-run initiative; c) own research into images and paedophilia networks, as well as information from for instance regional police teams; and d) reports send in by the Police Cyber Crime Reporting Website.

In Sweden, the National Criminal Investigation

Department has established a ‘Special Investigative Unit’ dedicated to co-ordinating the investigation of crimes involving child pornography. The team consists of nine policemen and one administrator. In addition, some 150 policemen in the local police authorities have been educated to identify material that could constitute child pornography. If and when material is identified by the local police authorities as child pornography, it is sent to the SIU for further investigation, including victim identification. The material is also included in a national reference library for the identification of victims, which is maintained by the SIU.

In 2011 an independent investigation commissioned by the National Police Board concluded that, despite the education of local policemen, there were still considerable deficiencies in the identification of victims, due to the fact that a large number of the local policemen actually involved in cases of child pornography had not been educated on the matter. The investigation also led to the digitalisation of the reference library. The investigation also proposed that the SIU have greater possibilities to coordinate the work on the local level for consistency.

The report refers to a statement by the national coordinator of identification of victims of child pornography, according to whom the work of identifying children in pornographic material is relatively successful once the SIU is provided with the material. However, due to lack of resources at the local police authorities and deficiencies as regards the internal communication between the local police authorities and the SIU, not all child pornographic material is transferred to the SIU for further investigation and registration in the national reference library.

The Swedish police authorities have initiated a project to review and develop methods, with regard, among others, to the crime of child pornography. A specific review currently examines how the Swedish police work with cases involving child pornography and victim identification and how this work can be improved. As regards victim identification, special focus points are how to ensure (i) that child pornography materials are reported by the local police authorities to the SIU and (ii) that

only policemen that have received education review child pornographic material.

The report concludes that improvements as regards the Swedish police's work with identifying children in pornographic material may be called for in order to ensure greater compliance with the Directive. Additional resources to the local police authorities, as well as a better co-operation between the SIU and the local police authorities could lead to a greater number of children in pornographic material being identified.

In the United Kingdom, there are currently several acts, policies and guidelines on the process of victim identification.

In general, local authorities, including investigative units such as the police, carry out victim identification. Guidance on identifying victims is established in the 'Practice advice on investigating indecent images of children on the internet' (2005), which is produced on behalf of the Association of Chief Police Officers (ACPO) by the National Centre for Policing Excellence (NCPE).

Moreover, in accordance with the ACPO Good Practice Guide for Computer Based Electronic Evidence, Version 3, High Tech Crime Unit Supports (HTCUS) also maintain links with similar facilities in other police forces, Force Intelligence Bureaus (FIBs) and the National Crime Squad Paedophile On Line Investigation Team (NCS POLIT). These links ensure that intelligence is quickly disseminated throughout the police service and those new techniques and technologies are shared.

Where indecent images of children are recovered from seized material, investigators from the HTCUS will try to establish the identity of victims, offenders and locations shown in them.

As a matter of routine, the HTCUS will assess any recovered images to establish if the victim, offender or location of the offence can be identified. In doing so, they will consult the ChildBase database maintained by POLIT, which holds previously recovered images and, where known, the identity of victims and offenders.

It is the responsibility of investigating officers to continually review incoming information to establish whether a victim, offender or location can be identified. Where an individual or location can be identified, appropriate action should be taken.

As offenders closely connected to the victim commit the majority of child abuse, a critical starting point in identifying potential victims is locations connected with a suspect. Investigators should pay close attention to the locations shown in images and compare them with those known to be associated with the suspect. Detailed analysis of the locations such as furnishing, decorations and light sources, for example, may also prove to be important evidential features in due course. The sharing of information in order to facilitate the identification of victims will obviously have to be in conformity with applicable legislation.

The British report concludes that whilst there has been no specific implementation of legislation with regards to complying with Art. 15(4), there are a number of policies that have been implemented to combat the sexual abuse and sexual exploitation of child pornography.

The United Kingdom is a participant in the Global Alliance against child sexual abuse online, which commits to take specific and concrete actions to implement four shared policy targets;

- (i) Enhancing efforts to identify victims, and ensuring that they receive the necessary assistance, support and protection;
- (ii) Advancing efforts to investigate and prosecute cases of child sexual abuse online;
- (iii) Increasing public awareness of the risks posed by children's activities online; and
- (iv) Reducing the vulnerability of child pornography online and re-victimization of children.

The first policy target is to enhance efforts to identify victims and ensure that they receive the necessary assistance, support and protection. The operational goal of the United Kingdom

is to increase the number of identified victims in the International Child Sexual Exploitation images database (ISCE database), managed by INTERPOL, by at least 10% yearly. The Child Exploitation and Online Protection Centre (CEOP) has an Image Analysis and Victim Identification Team consisting of specialist investigators experienced in identifying child victims of crime from digital intelligence products. The team are holders of the United Kingdom's identified victim library and feed data into Interpol's International Child Sexual Exploitation Database. They work within a standard operating procedure and have influenced forces in local police policy and victim identification.

CEOP has gained access to the Interpol Specialist Crime against Children network and has gained access to the ICSEDB. British law enforcement officers have access to the ICSEDB through the file sharing system set up by VID.

The report claims CEOP will deliver specialist training to police officers across the United Kingdom with regards to the free software supplied by Netclean Digital Investigator. Also, CEOP are discussing the creation of a National Image Library with law enforcement and private companies, most importantly to identify new images where children are at immediate risk.

## **E. National Victim database**

National Victim databases exist in Austria, Ireland, Portugal and the United Kingdom.

## **F. Overall assessment**

- (i) The reports submitted emphasise the indispensable two-tier approach towards an efficient transposition of Art. 15, paragraph 4.
- (ii) The first "pillar" relates to the fact that, given the cross-border nature of the information and communication technology, international cooperation plays a central

role. The reports submitted underline the importance of an active cooperation of all competent national authorities in the available international tools focusing on identification of the child victims of online abuse: cf. the Interpol ICSE database and the Europol VIDTF.

- (iii) Equally important is the "national" pillar. As noted in the report for Malta Art. 15, par. 4 requires an adequate and focused transposition at different levels: a) transposition at the level of substantive law (identification of child victims of online abuse must be given a sufficient priority as an objective of the criminal investigation); b) transposition at the level of procedural law (setting the procedural framework enabling investigators to specifically work on the identification of children who appear in online abuse material); and c) providing the necessary support (in technologies, manpower and financial means).
- (iv) The way in which identification of child victims is organised in Germany, the Netherlands, Sweden and the United Kingdom may serve as an example.

## Topic 5: The extraterritorial extension of jurisdiction (Art. 15, Art. 17)

**Ariane Couvreur, Project manager, ECPAT Belgium**

### Article 17

Jurisdiction and coordination of prosecution

1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:
  - (a) the offence is committed in whole or in part within their territory; or
  - (b) the offender is one of their nationals.
2. A Member State shall inform the Commission where it decides to establish further jurisdiction over an offence referred to in Articles 3 to 7 committed outside its territory, inter alia, where:
  - (a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;
  - (b) the offence is committed for the benefit of a legal person established in its territory; or
  - (c) the offender is an habitual resident in its territory.
3. Member States shall ensure that their jurisdiction includes situations where an offence referred to in Articles 5 and 6, and in so far as is relevant, in Articles 3 and 7, is committed by means of information and communication technology accessed from their territory, whether or not it is based on their territory.
4. For the prosecution of any of the offences referred to in Article 3(4), (5) and (6), Article 4(2), (3), (5), (6) and (7) and Article 5(6) committed outside the territory of

the Member State concerned, as regards paragraph 1(b) of this Article, each Member State shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the acts are a criminal offence at the place where they were performed.

5. For the prosecution of any of the offences referred to in Articles 3 to 7 committed outside the territory of the Member State concerned, as regards paragraph 1(b) of this Article, each Member State shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

## Findings

### Binding provisions (Arts. 17 (1), 17 (3), 17 (4) and 17 (5))

The reports submitted indicate that some of these binding provisions seem to have been included in most of the national legislations (Arts. 17 (1) (a), 17 (1) (b) and 17 (5)), whereas others have only been partially transposed (Arts. 17 (3) and 17 (4)). This partial transposition is linked to the existence of restrictive conditions, which limit the scope of the article.

1. The jurisdiction is established when the offence is committed in whole or in part within the territory of the Member State concerned



**or if the offender is one of their nationals (Arts. 17 (1) (a) and 17 (1) (b)).**

“Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7, where:

(a) the offence is committed in whole or in part within their territory;

(b) or the offender is one of their nationals.”

> In most of the Member States, there is a **legal provision** specifically regulating this aspect.

**2. The jurisdiction based on the nationality of the offender (Art 17 (1) (b) may not be subordinated to the condition that the prosecution can only be initiated following a report made by the victim, or a denunciation where the offence was committed (Art. 17 (5)).**

“For the prosecution of any of the offences referred to in Articles 3 to 7 committed outside the territory of the Member State concerned, each Member State shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.”

> In most of the Member States, **the initiation of prosecution of a national for an offence committed outside the territory of the Member State is not conditional to a report** made by the victim or a denunciation. However, the non-conditionality clause is applied in Croatia, France, Luxembourg and Portugal only for certain offences. In Belgium, extraterritorial jurisdiction is only applicable if the offender is apprehended in Belgium. Two Member States are not in line with Art. 17 (5), Spain and Poland, as both require a complaint by the victim to launch a procedure, when the crime has been committed outside of their territory.

**3. The jurisdiction is established when the offence is committed by means of information and communication technology (Art.17 (3)).**

“Member States shall ensure that their

jurisdiction includes situations where an offence referred to in Articles 5 and 6, and in so far as is relevant, in Articles 3 and 7, is committed by means of information and communication technology accessed from their territory, whether or not it is based on their territory.”

> In 13 Member States (Austria, Cyprus, Estonia, Finland, France, Hungary, Ireland, Luxembourg, Poland, Romania, Slovakia, Sweden and the United Kingdom), either the provision is not covering all aspects foreseen in the Directive or it is submitted to **restrictive conditions** (i.e. only possible in the European Union). In Latvia, Slovenia and Spain, there is **no legal provision** specifically regulating this aspect.

**3. The jurisdiction is not subordinated to the condition that the acts are a criminal offence at the place where they were performed (Art. 17 (4)).**

“For the prosecution of any of the offences referred to in Article 3(4), (5) and (6), Article 4(2), (3), (5), (6) and (7) and Article 5(6) committed outside the territory of the Member State concerned, each Member State shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the acts are a criminal offence at the place where they were performed.”

> In nine Member States (Austria, Estonia, France, Hungary, Ireland, Luxembourg, Poland, Spain and Sweden), this legal provision is submitted to **restrictive conditions** (limited to certain offences or to bilateral agreements). In Cyprus, Greece, Lithuania, Slovenia and Slovakia, there is **no legal provision** regulating specifically this aspect.

## Limits detected

### > Type of offence

In some Member States, extraterritorial jurisdiction applies to specific offences, not necessarily including all offences listed in Arts. 3–7 of the Directive. For instance, solicitation of children for sexual purposes can fall outside of the scope of extraterritorial laws, which, as emphasized above, is regrettable, given the increase of cases related to sexual exploitation of children by the means of new technologies and their transnational nature.

### > Offences committed by means of information and communication technology

A full transposition of this provision on jurisdiction is essential to safeguard the most efficient protection of children with regard to the offences listed in the Directive. These are the offence mentioned under Art. 5 (3) (“knowingly obtaining access by means of information and communication technology, to child pornography”), Art. 6 (1) (online grooming) and Art. 6 (2) (“attempting to obtain child pornography images from a child who has not reached the age of sexual consent, by means of information and communication technology”). As appears from Art. 25 and Recitals 46 and 47 of the Directive, very often the websites offering materials are located abroad within or outside the EU. Thus, a criminalisation of these offences pursuant to these provisions of the Directive, which would be limited to the cases where the material is located in the same Member State, would lack a considerable amount of efficiency.

### Optional provision (Art. 17 (2))

“A Member State shall inform the Commission where it decides to establish further jurisdiction over an offence referred to in Articles 3 to 7 committed outside its territory, inter alia, where:

- (a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;
- (b) the offence is committed for the benefit of a legal person established in its territory; or
- (c) the offender is an habitual resident in its territory.”

> According to the national reports, only a few Member States have completed full implementation of this provision:

Art. 17 (2) (a): Belgium, Croatia, Cyprus (but no reference given), Finland, the Netherlands, Romania and Spain

Art. 17 (2) (b): Belgium, Croatia, the Czech Republic, Cyprus, Estonia, France, Ireland,

Malta, the Netherlands, Portugal, Romania, Slovenia and Spain

Art. 17 (2) (c): Belgium, Croatia, Cyprus (but no reference given), Finland, France, Hungary, Italy, Malta, the Netherlands, Portugal, Romania, Slovakia, and Spain.

### Limits detected

The term ‘habitual resident’ is not clearly defined in the Directive, which made it more difficult for the national rapporteurs to evaluate whether the provision had been correctly transposed or not. Some Member States use ‘permanent resident’ or ‘ordinary resident’ as a synonym of ‘habitual resident’, whereas others don’t. A harmonisation of the terminology would help in order to effectively evaluate the implementation of the Directive.

Besides, it may look surprising that only seven of the 27 Member States reviewed opted for extending their jurisdiction on the basis of the nationality or habitual residence of the victim, who - must it be reminded ? - under this Directive is always is a child.

### Conclusions

Despite the efforts made by the Member States to include the necessary provisions on jurisdiction and coordination of prosecution, some points of attention remain. According to the national reports, not all Member States guarantee that the offence committed outside the territory will be prosecuted without a complaint of the victim or if the acts are not a criminal offence at the place where they were committed. In order to ensure access to justice for child victims of sexual crimes, it is important to monitor the implementation of these provisions in all EU Member States.

As mentioned before, not all offences listed in the Directive have been included in the national legislation of the Member States when it comes to extraterritorial jurisdiction. This leaves a gap in the protection of children, for instance when the offence is committed by the means of new technologies.

Another difficulty lies in the terminology used:

'habitual resident' has no proper definition in the Directive, which has created confusion among national rapporteurs. A clarification of the terms 'habitual', 'permanent' and 'ordinary resident' is consequently needed. In parallel, Member States should also consider extending their jurisdiction on the basis of nationality to habitual residence of the victim and the offender.

## **Topic 6: Assistance, support and protection measures for child victims (Art. 15, Art. 18-20)**

### **Camille Seccaud, Consultant, ECPAT Belgium**

#### **Article 18**

##### **General provisions on assistance, support and protection measures for child victims**

1. Child victims of the offences referred to in Articles 3 to 7 shall be provided assistance, support and protection in accordance with Articles 19 and 20, taking into account the best interests of the child.
2. Member States shall take the necessary measures to ensure that a child is provided with assistance and support as soon as the competent authorities have a reasonable grounds indication for believing that a child might have been subject to any of the offences referred to in Articles 3 to 7.
3. Member States shall ensure that, where the age of a person subject to any of the offences referred to in Articles 3 to 7 is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 19 and 20.

Decision 2001/220/JHA, and in this Directive. Member States shall, in particular, take the necessary steps to ensure protection for children who report cases of abuse within their family.

2. Member States shall take the necessary measures to ensure that assistance and support for a child victim are not made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution or trial.
3. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims in enjoying their rights under this Directive, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns.
4. Child victims of any of the offences referred to in Articles 3 to 7 shall be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA.
5. Member States shall take measures, where appropriate and possible, to provide assistance and support to the family of the child victim in enjoying the rights under this Directive when the family is in the territory of the Member States. In particular, Member States shall, where appropriate and possible, apply Article 4 of Framework Decision 2001/220/JHA to the family of the child victim.

#### **Article 19**

##### **Assistance and support to victims**

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework

## Article 20

### Protection of child victims in criminal investigations and proceedings

1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a special representative for the child victim where, under national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim, or where the child is unaccompanied or separated from the family.
2. Member States shall ensure that child victims have, without delay, access to legal counselling and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.
3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations relating to any of the offences referred to in Articles 3 to 7:
  - (a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;
  - (b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;
  - (c) interviews with the child victim are carried out by or through professionals trained for this purpose;
  - (d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;
  - (e) the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purpose of criminal investigations and proceedings;
4. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 3 to 7 all interviews with the child victim or, where appropriate, with a child witness, may be audio visually recorded and that such audio visually recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law.
5. Member States shall take the necessary measures to ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7, that it may be ordered that:
  - (a) the hearing take place without the presence of the public;
  - (b) the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies.
6. Member States shall take the necessary measures, where in the interest of child victims and taking into account other overriding interests, to protect the privacy, identity and image of child victims, and to prevent the public dissemination of any information that could lead to their identification.
  - (f) the child victim may be accompanied by his or her legal representative or, where appropriate, by an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.

## Introduction

### Content of the Directive

Directive 2011/93/EU (the Directive) has enacted a number of provisions for the assistance, support and protection of child victims (victims) of sexual offences. The Directive has been modelled on provisions drafted by the Council of Europe at the Lanzarote Convention. Some of the provisions are connected with Directive 2012/29/EU to provide a horizontal package of assistance, support and protection measures for child victims. In effect, the operation of these measures replaces the Council Framework Decision 2001/220/JHA.

Arts. 18, 19 and 20 of the Directive contain provisions related to assistance, support and protection for victims:

- Art. 18 sets out **general provisions** that Member States must respect in providing assistance, support and protection for victims. As soon as authorities have reasonable grounds to suspect that a child has been a victim of a sexual offence, they must provide immediate assistance that takes into account the best interests of the child.
- Art. 19 sets out **specific provisions** with which Member States must comply. In providing **assistance and support for child victims**, Member States must ensure that: 1) child victims who report cases of abuse within the family receive protection; 2) the assistance is not made conditional on the cooperation of the child victim; 3) an individual assessment is undertaken based on the needs, views, and concerns of each child victim; 4) child victims are considered as particularly vulnerable victims; and 5) the family of the child victim is provided with assistance and support.

Member States are at liberty to choose how they will comply with this article. It is recognised that this may pose a complex and challenging process to some Member States and that the provisions may be subject to diverging interpretations.

- Art. 20 sets out the **protection measures** which Member States must provide to victims of sexual exploitation and abuse **during criminal investigations and proceedings**. These measures are more precise and specific. They include: 1) an obligation to appoint a special representative for a victim without parental care; 2) an obligation to give access to free legal assistance and free representation, including claims for compensation; 3) special requirements for the conduct of interviews with victims; 4) the possibility to audio-visually record the pre-trial interview of the child victim; 5) a possibility to hear the victim in a 'closed court' without the presence of the public; and, if required, to hear the victim without being physically present in the court; and 6) an obligation to protect the image, identity and privacy of victims.

### Aim and challenges of the comparative study

This comparative study aims to paint a general picture of how Member States assist, support and protect victims in line with the Directive. It seeks to identify the good practices, problems and areas of potential improvement in meeting the purposes of the Directive.

The overall comprehensiveness of the study is subject to two important considerations:

- Arts. 18–20 of the Directive have substantial content and scope of operation. The sheer diversity between the national laws of Member States would require an extensive comparative study that falls outside of the scope of this paper. This places a limitation on the individual national measures that can be covered.
- The quality of the study is largely dependent upon the information provided by the rapporteurs. In the majority of reports, the information provided could not facilitate a comprehensive picture of the measures set forth by the Member States. Where possible, other sources have been used to complement the reports. Therefore, some

of the findings may be fragmented or wrongly interpreted.

Despite these limitations, many good practices, problems and areas of improvement were identified. The findings can be useful to a large range of stakeholders in both monitoring and improving the implementation process of the Directive among the EU Member States.

## Findings: country reviews

### General provisions on assistance, support and protection measures for child victims (Art. 18)

#### 1. Support and assistance as soon as there are reasonable grounds indication to believe that a child is a victim of sexual offences

“Member States shall take the necessary measures to ensure that a child is provided with assistance and support as soon as the competent authorities have a reasonable grounds indication for believing that a child might have been subject to any of the offences referred to in Articles 3 to 7.” (Art. 18 (2)) [Emphasis added]

Most of the reports state that an **obligation has been created on some categories of professionals to report suspicions** of sexual offence against a child to the competent authorities. For example, Austria, Croatia, Estonia, Finland, France, Lithuania, Portugal, Slovenia, Sweden and the United Kingdom have created laws to ensure compliance. There are some examples where no obligation to report has been put in place; Malta is one such case.

When an offence has been reported by a professional or the victim, some Member States have set out an obligation for competent authorities to provide assistance and support to child victims either **by directing the child victim to support services or by directly referring the case to the latter**. In Belgium

for example, police officers have a legal obligation to provide assistance when they first come into contact with a potential child victim by offering information on and support from specialised services. In Bulgaria, Finland, France and the United Kingdom, the referral to specialised support services is made after an assessment of the situation and the needs of the child victims.

In some Member States, there is an **obligation for municipal authorities to provide assistance and support after receiving a report** that a child might have been subject to sexual abuse or exploitation. However, there is no indication that they have referral mechanisms in place. In Cyprus for example, the Law on Prohibition and Combating of Sexual Abuse, Sexual Exploitation of Children and Child Pornography has almost literally transposed Art. 18 (2) of the Directive; however, no information on referral mechanisms has been provided. The same statutory obligation exists in Croatia, the Czech Republic, Greece, Ireland and Slovenia. In Portugal, the competent authorities have an obligation to provide assistance and protection any time a minor is considered to be in a situation of immediate or actual danger.

#### 2. Access to assistance, support and protection where the age of a victim is uncertain

“Member States shall ensure that, where the age of a person subject to any of the offences referred to in Articles 3 to 7 is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection.” (Art. 18 (3)) [Emphasis added]

► In most of the Member States, there is **no legal provision** expressly regulating this article: Austria, Belgium, France, Germany, Hungary, Italy (?), Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain<sup>1</sup> and Sweden.

According to some reports, even in the absence of a legal provision the practice is that an age assessment will be undertaken only in cases of serious doubts. Therefore, where there

<sup>1</sup> A draft law amending the system of protection of children and adolescents currently under adoption foresees that in case of doubt about the age of a person, that person is presumed to be a child until the result of the age assessment procedure.

are reasons to believe that the victim is a child, it will be presumed that the person is a child. In some countries, the victim shall be presumed to be a child until the age assessment results and will receive immediate assistance (ex. Luxembourg).

► Few Member States have a **legal provision** that regulates this aspect into their legislation: Bulgaria, Croatia, Cyprus, Estonia, Finland<sup>2</sup>, Greece, Latvia, Lithuania (?) and the United Kingdom.

The Criminal Procedure Act of Croatia states that “where the age of the victim is unknown, it shall be assumed that the victim is a child if there is a possibility that the victim has not reached the age of eighteen years”<sup>3</sup>. In Greece, Art. 5 of Presidential Decree 233/2003 stipulates that when it is uncertain whether a victim is a child but it can be credibly presumed he/she is under the age of 18, the victim is presumed to be a child and enjoys special protection until actual age is verified. In Bulgaria, the Child Protection Act provides assistance in situations where the age of the person is uncertain but the circumstances and sufficient evidence indicate that the victim is a child. In Latvia, under the Law on Social Services and Social Assistance, until the age of the victim is confirmed, social rehabilitation shall be ensured even where age is doubted. Moreover, a draft law currently under review proposes to supplement the legislation with a specific provision: “[I]f there is any doubt about a person’s minority, such a person, until clarification of his or her age, shall be considered as a minor and shall be ensured with appropriate assistance.”

### Potential issue: the practice of age assessment in EU Member States

Article 18 (3) refers to the uncertainty of the age of a victim. This may be of particular importance concerning foreign unaccompanied minors or separated minors who do not have identification or residence documents.

The compliance of Member States with this article should be linked with both informal practice and statutory rules. Age assessment is necessary to determine whether an individual

is an adult or a child when there are doubts about the claimed age. It should only be used where there are grounds for serious doubt of an individual’s age. Therefore, in order to assess how Member States ensure that a victim is a child, it may be necessary to determine whether the age assessment is undertaken as a routine practice in the Member States or only in case of serious doubts.

## Assistance and support to child victims (Art.19)

### 1. Protection of children who report cases of abuse within their family

“Member States shall take the necessary steps to ensure protection for children who report cases of abuse within their family.” (Article 19 (1)) [Emphasis added]

A large majority of Member States<sup>4</sup> have taken specific measures to ensure the protection of children who report cases of sexual abuse within their family:

► The legislation of some Member States gives the **option of removing either the alleged perpetrator or the victim** and, under certain circumstances, allowing the court to make an order for the parental care of the victim (ex. Belgium, Croatia, Finland, Greece, Italy, the Netherlands, Portugal and Slovenia). In Slovenia, the procedure is to first remove the perpetrator, as a temporary measure. However, a shelter may take away a child if the parents neglect the child’s upbringing and care. In Italy, only in serious cases of abuse will the judge order the removal of either the alleged perpetrator or victim from the family home. This last decision may be resorted to when there are suspicions of child prostitution, pornography, sexual abuse and corruption of a minor.

► In some Member States, only one of these possibilities is available. In most of these cases, the procedure is to **remove the victim from the family** (ex. Austria, Bulgaria, Estonia, France, Latvia, Luxembourg, Malta and Sweden). The length of time that a child is removed is

<sup>2</sup> A specific provision exists in the Criminal Code, Chapter 17, Section 18 but it refers only to the distribution of indecent pictures.

<sup>3</sup> Article 44 paragraph 3 of the Criminal Procedure Act

<sup>4</sup> The situation in Ireland, Lithuania, Poland, Romania and Spain could not be fully assessed due to a lack of information provided in the reports. According to the reports of Germany, Hungary and Slovakia, no specific steps have been undertaken regarding this aspect.



determined by the best interests of the child under the relevant circumstances of the case. In a minority of Member States, the practice is to remove the perpetrator. For example, in the Czech Republic, once a case of abuse is reported, the police may force the perpetrator to leave the house for 10 days. This is a temporary measure that may be followed by a preliminary restraining order decided by the court.

Almost all Member States provide for the **appointment of a special representative** (see next section "Protection of child victims in criminal investigations and proceedings") to protect the best interests of the victim. This is especially important where the abuse is perpetrated by the victim's parents.

### Main issues

In most of the Member States, protection measures for victims of abuse within the family are included in a broader legal framework of protection against domestic violence. The measures may be granted irrespective of the victim's age and the nature of the offence (ex. the removal of the perpetrator). However, without drafting specific legislation it can remain unclear under which circumstances the measures apply, and how they will be initiated. It is not specified whether the removal of the victim or the perpetrator occurs when the matter is first reported to police or after an assessment. Furthermore, where the order is temporary, it is not clear whether this is only during the investigation process or until a court decides on parental responsibility. Following investigations, there are no provisions that specifically deal with the on going protection or monitoring of the victim.

### The need for specific policy guidelines

The Directive obliges Member States to take the necessary steps to ensure the protection of children reporting cases of sexual abuses within the family. Member States are given the choice of the kind of protection measures to undertake, but without specific guidelines legislation can be vague. Guidelines may be needed to give at least an orientation of

good practices in this area and what is expected from Member States to comply with the Directive.

## 2. Assistance and support without condition of cooperation with authorities

"Member States shall take the necessary measures to ensure that assistance and support for victims are not made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution or trial." (Art. 19 (2)) [Emphasis added]

This article is important for victims who either fear or are subjected to threats, intimidation or reprisals from offenders, especially victims of trafficking and prostitution. A similar requirement is found in Directive 2011/36/EU on Preventing and Combating Trafficking of Human Beings and Protecting its Victims, as well under the Council of Europe Convention on Action against Trafficking of Human Beings. The latter requires that victim assistance not be made conditional on their willingness to act as a witness.

### Existence of an express provision?

The **majority of EU Member States fail to expressly codify into law** that assistance and support measures cannot be conditional on the cooperation of child victims in criminal procedures. While a number of reports indicate that assistance is granted to child victims regardless of their cooperation in the criminal investigation, prosecution or trial, they do not provide examples as to how this requirement is fulfilled by law. Moreover, some reports have concluded that their Member States fulfil this obligation simply because there is no legislation contrary to the article.

Only two respondents have enacted **a specific provision that allows unconditional access to assistance for child victims**. In **Croatia**, the Protocol for Acting in Case of Sexual Violence (non-statutory law) prescribes that victims receive maximum assistance and support, even where cooperation is refused. The new law adopted recently by **Cyprus** enacted a similar protocol.

### Indirect compliance?

Even in the absence of a specific legislation, it needs to be noted that in some Member States the investigations and prosecutions are not made conditional upon the obligation of child victim to make a formal complaint or to testify. In Finland, all the offences defined in the Directive can be investigated and prosecuted regardless of whether the victim has made a report or withdrawn his/her statement. In Italy, for all crimes linked to sexual exploitation and sexual abuse of children, prosecution is led *ex officio*, meaning that the authorities will pursue the case irrespective of the wishes of the victim.

Most reports indicate that access to support and assistance services is provided for child victims without any prerequisites. Access to these services is available upon a simple request and is voluntary. However, some doubts may be raised for some other Member States where the access to support and assistance seems to be dependent on the recognition of the status of victims (e.g. Hungary, Portugal and Romania).

### Potential issue of concern: the situation of child victims without residence permits

It is unclear whether the Member States offer unconditional assistance and support for child victims without a residence permit. For instance, in cases of child trafficking, the question remains whether child victims need to cooperate with authorities in order to be granted temporary residence. If such condition is in place, the victims will not receive adequate protection, assistance and opportunities for healing. As such, this is an important consideration that Member States ought to reflect in their national laws.

According to the European Union Agency for Fundamental Rights (FRA), a number of Member States require the cooperation of child victims during the temporary period (FRA (2009), *Child Trafficking in the EU-Challenges, Perspectives and Good Practices*). Similarly, GRETA (Group of Experts on Action against Trafficking in Human Beings) has reported that they “[...]are

concerned by indications that the provision of assistance to victims of trafficking hinges on their cooperation with law enforcement authorities, even though the link does not exist formally” (Council of Europe (2015), 4th General Report on GRETA’s activities, p. 44).

### 3. Individual needs assessment

“Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims in enjoying their rights under this Directive, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child’s views, needs and concerns.” (Art. 19 (3)) [Emphasis added]

Article 19 (3) of the Directive obliges Member States to take the necessary measures to ensure that the assistance provided reflects an individual assessment of the special circumstances of each particular child victim. The purpose of the individual needs assessment is to define which special support measures are in the best interests of the child.

Most respondents have stated that an individual needs assessment of child victims is undertaken. However, only a few have provided information on the **procedures of the individual needs assessment**. In Malta, every time an offence is reported, a meeting with different professionals is held to draw an individual welfare plan for the child victim. In Ireland, the Health Service Executive is required to assess the needs of the child to identify and offer appropriate support services based on a welfare plan. In Sweden, social services from each municipality shall establish an individual plan that meets the needs of the child victim. In Luxembourg, the “Enquête Sociale” aims at assessing the personality, mental condition and social environment of the child victim and to determine which measures are in their best interest. In the United Kingdom, the police and victims support services are required to undertake individual needs assessment for each victim and to adapt special measures to the needs identified. In Bulgaria, an assessment and a specific plan is made by a social worker. Their role through observation and consultation with the victim is to determine

the objectives, activities and protective measures to be undertaken. Finally in Finland, an individual welfare plan must be drawn up which identifies the needs of the victim and outlines the operation of appropriate support measures.

As the needs of victims may change over the time and the measures may become obsolete, it is necessary that procedures be put in place for a review of **individual assessments**. This procedure exists in a number of Member States. For example in Luxembourg, the law states that all socio-educative and psycho-social interventions shall be reviewed every 12 months. In Finland and in Malta, the care plan is to be reviewed every six months, and in the United Kingdom the assessment can be reviewed at time.

### Limits of the assessment: lack of information on internal assessment procedures

It has been difficult to identify in most Member States which authority, agency or organisation is responsible for performing assessments and what internal procedures are in place to process assessments. While victims are automatically given specific protection measures in most of the Member States, it remains unclear how the specific and individual needs are assessed.

Art. 22 of the Directive 2012/29/EU states that individual assessments are to be carried out with the close involvement of the victim and shall take into account their requests, including when they do not wish to benefit from special measures. In Finland and Sweden, the victim is given the opportunity to participate in the drafting of the plan. In the United Kingdom, individual assessment procedures are drafted in accordance with the views and concerns of child victims.

### Limits detected: inclusion of the views of the victim in the individual needs assessment

Some reports indicate that the views and concerns of victims are not always ascertained

in processing individual assessments. This is a serious concern, as victims should have the opportunity to express their opinions on the support they would like to receive and their concerns. In establishing guidelines for best practice, it may be necessary to include explicit directions that compel municipal authorities or social services to meet this requirement.

## Protection of child victims in criminal investigations and proceedings (Art. 20)

### 1. Appointment of a special representative for child victims

“Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a special representative for the child victim where, under national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim, or where the child is unaccompanied or separated from the family.” (Art. 20 (1)) [Emphasis added]

In most Member States, a special representative may be appointed to child victims.<sup>5</sup> However, some Member States either have no framework in place for the appointment of a special representative (Malta) or the framework in place is insufficient (ex. Latvia, Poland, Portugal and Slovenia). In Ireland, a special representative is only available in proceedings involving care and supervision orders or where the victim is under the care of the Child and Family Agency. A recommendation has been made to appoint a special representative in case of conflict of interests between the child and the holder of parental responsibility. In the United Kingdom, the Modern Slavery Act was enacted in March 2015 prescribing the appointment of independent child advocates to child victims of trafficking.

Among Member States where a framework is in place for the appointment of a special representative, the procedure varies in a number of key directions: the name and the function of these

<sup>5</sup>No information or not enough information has been provided in the following reports: Estonia, Greece, Spain, Hungary, Germany and Bulgaria.

special representatives, as well as the procedure and the reasons to appoint a special representative.

### Different names, different persons, different functions

The formal title for special representatives varies widely among Member States. Furthermore, they do not necessarily function the same. Very few Member States have enacted legislation that defines the title, role and process. Some of the titles are: 'guardian' (Belgium, the Czech Republic, Ireland, the Netherlands, Romania and Slovakia); 'special representative' (Sweden); 'special trustee' (Finland and Italy); and 'administrator ad hoc' (France and Luxembourg).

The people who can act as special representatives vary between Member States. For instance, in Sweden the special representative must be a lawyer, a legal associate or someone else with a suitable legal background. In France, the administrator ad hoc may be a close member or a friend of the family or a person whose name is provided on a special list. In Austria, when neither parents nor grandparents can be given the custody of the victim, the court has to appoint other family or friends. Where this is not possible the court will give the custody of the victim to the youth welfare authorities. In Latvia, the victim can be represented by a guardian, grandparent, brother or sister of legal age, and a representative of a municipal authority or NGO protecting the rights of children. In Portugal, the victim may be represented during criminal proceedings by a parent, grandparent, siblings or the sibling's descendants. In Cyprus, the Commissioner for Children's Rights (an independent institution dealing exclusively with the rights of the child) may be appointed to act as special representative.

### Procedure to appoint a special representative

According to the information that we received from Member States, the overall procedures to appoint a special representative vary considerably. However, in most Member States the appointment of a special representative is made **by the court**. In Belgium and Slovakia,

this can be either the Presiding Judge or the Investigating Judge; in the Czech Republic and Finland, the Presiding Judge or the Public Prosecutor; in France, Luxembourg and Romania either the Public Prosecutor or the Investigating Judge; in Cyprus, Germany and Italy the Investigating Judge; in the Netherlands, Poland and Sweden the Guardianship Court; in Austria, the Judge works in cooperation with the Youth Welfare Office; and in Croatia, the Court delegates it to a social welfare centre.

### Reasons for the appointment

#### - Conflict of interest between the child victim and his/her legal representatives

Many Member States ensure that a special representative is appointed where there is a conflict of interest between the child victim and the holders of parental responsibility; the legal representative is deprived of the custody; or, more generally, when the legal representative is not able to protect the child's interests. This is practiced in Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Italy,<sup>6</sup> Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia and Sweden.

#### - Unaccompanied or separated minors

In **Cyprus**, the new law on child sexual abuse, exploitation and pornography grant courts power to appoint the Commissioner for Children's Rights as legal representative for the criminal investigation or proceeding where the victim is unaccompanied or separated from their family. In other reports, **no information has been provided** regarding the appointment of a special representative where the child is unaccompanied or separated from the family. Therefore, it is difficult to get a complete picture of the real situation for unaccompanied and separated minors. To get a complete picture, we would need to know under what provisions and circumstances a special representative may be appointed; who is responsible for the appointment; who may be appointed; and the tasks of the special representative. However, according to the report from FRA on child trafficking in the EU, "[I]n a great number of Member States (Austria, Belgium, Czech

<sup>6</sup> A trustee may be appointed for child victims under 14 in case of conflict of interest with their legal representatives.

Republic, Estonia, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Romania and Sweden) a legal guardian is appointed to unaccompanied minor aliens that arrive or are found in the country's territory".<sup>7</sup>

### Limits detected: a wide range of guardianship systems and insufficient national laws

The role of a special representative does not seem to be uniformly defined among Member States. Moreover, the legal framework in some Member States only provides for the possibility to appoint a special representative. It does not indicate the circumstances this appointment may be decided, the functions of the special representative or the procedure for the appointment.

### To go further

The European Commission and FRA produced a handbook to reinforce guardianship systems in the EU and promote a shared understanding of the main features of a guardianship system.

See Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking (2014).

## 2. Access to legal assistance and/or legal representation, free of charge and including for the purpose of claiming compensation

"Member States shall ensure that child victims have, without delay, access to legal counselling and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources." (Art. 20 (2)) [Emphasis added]

### Access to free legal aid

According to the national reports, almost all Member States provide access to legal aid for

child victims. The criteria to access free legal aid varies across Member States:

► Following a means test, legal aid **may be provided free of charge for child victims without sufficient financial resources** (ex. Bulgaria, Cyprus, the Czech Republic, Estonia, France, Lithuania, Poland, Portugal and Slovakia). In France and Lithuania, only legal representation in court is subjected to a means test.

► In some Member States, legal aid is **granted for child victims of sexual offences regardless of their financial situation** (ex. Austria, Croatia, Finland, Germany, Italy, the Netherlands, Romania, Slovenia, Spain or Sweden). In Italy, legal aid is subjected to a means test, except in cases of child sexual abuse, exploitation and trafficking. In Latvia, child victims without a parent or guardian to look after their best interests have access to free legal aid regardless of child's financial situation.

► Only in a few Member States do child victims have **access to free legal aid automatically without a means or merit test**. In Belgium, it is granted automatically to all children on providing proof of their age. In Luxembourg, it is granted for all children involved in judicial proceedings regardless of their parents or guardians financial status. However, the state has the right to require the reimbursement of expenses against parents with sufficient resources. In Hungary, victims are eligible for legal aid regardless of their financial situation, unless they have already received the costs of representation through another support system.

### Promising practices and limits of the assessment

This picture shows that a high number of Member States have gone beyond the minimum standards provided by the Directive in providing access to free legal aid for victims, regardless of their financial situation. However, the extent of access to legal aid for all victims, in particular those without a residence permit, could not be fully examined due to the lack of information provided. More information is needed to get a comprehensive picture of their access to free legal aid.

<sup>7</sup> European Union Agency for Fundamental Rights, Child Trafficking in the European Union: Challenges, perspectives and good practices, 2009, p. 76.

## Free legal aid to claim compensation

All Member States recognise the right for victims to claim compensation for damages caused by sexual offences. In practice, the exercise of this right differs among countries. Some variations include: joining a civil compensation claim within the criminal proceedings; launching a compensation claim in civil proceedings in parallel to the judicial proceedings; or, by applying to a state compensation fund. In most of countries, victims may initiate a claim for compensation as a civil action within the criminal proceedings.

There are a number of issues that could not be assessed in this report due to a lack of information provided. It is unclear whether compensation is available to all child victims irrespective of their residence status or to where the crime was committed; whether a final conviction of perpetrators is required to claim compensation; and what level of assistance is provided to guide victims through the procedures for claiming compensation.

### 3. Interviews with child victims during criminal investigations

“Member states shall take the necessary measures to ensure that in criminal investigations: (a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities; (b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose; (c) interviews with the child victim are carried out by or through professionals trained for this purpose; (d) the same persons, if possible and where appropriate, conduct all interviews with the child victim; (e) the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purpose of criminal investigations and proceedings; (f) the child victim may be accompanied by his or her legal representative or, where appropriate, by an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.” (Art. 20 (3)) [Emphasis added]

#### A. Interviews with child victims take place without unjustified delay

Only a few Member States have **enacted a law** (Belgium, Cyprus, Greece and Portugal)<sup>8</sup> **or regulatory act or policy guidelines** (Estonia, Ireland, Lithuania, Poland and Sweden) that meet the requirements of this article.

Most Member States require that interviews with victims take place “as soon as possible” or “without unjustified delay” after the crime has been reported to authorities, but without specifying a specific timeframe. On in a few Member States are specific **details about the timeframe** established. In Sweden, according to the handbook “Processing cases of abuse against children”, interviews with child victims should be carried out within two weeks after the crime has been reported to the police<sup>9</sup>. In Lithuania, according to the “Recommendations on Interviewing Juvenile Witnesses and Victims”, a pre-trial investigation should not last longer than four months in cases of sexual offences against a child. However, if the child victim is experiencing immense trauma, an appropriate time to interview can be determined on the advice of professionals in the field.

Some Member States **apply the provision indirectly** through the general principle of acceleration of criminal proceedings for child victims (Germany, Hungary and Latvia) or under a general provision to avoid undue delay in criminal proceedings applicable to both children and adults (Austria and Finland). The national reports of several Member States did not mention any legal or regulatory act related to this article (ex. France, Luxembourg, Malta, the Netherlands, Romania, Slovakia, Slovenia and Spain).

#### B. Interviews take place, where necessary, in premises designed or adapted for this purpose

Most Member States require that the interviews with victims, particularly of sexual offences, take place in premises designed or adapted for this purpose.

#### Where?

According to the respondents, in most **Member**

<sup>8</sup> In Belgium, the requirement applies for interviews audio-visually recorded.

<sup>9</sup> Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Replies to the general overview questionnaire – Sweden, 1st Monitoring Round, February 2014, p. 37.

**States, police stations and courts have rooms designed or adapted for interviewing children** (Belgium, Croatia, the Czech Republic<sup>10</sup>, Estonia, Finland<sup>11</sup>, France, Germany<sup>12</sup>, Hungary<sup>13</sup>, Ireland, Lithuania, Luxembourg<sup>14</sup>, the Netherlands<sup>15</sup>, Poland and Slovenia<sup>16</sup>).

### Lack of details on how premises are designed or adapted

Only a few respondents have provided some details about how the interview rooms have been designed or adapted. Therefore, it is difficult to get a complete picture of the situation. Despite the existence of legal provisions, premises may not be necessarily adapted or furnished for child victims and may not always be suitable for different age groups of victims (child or teen-friendly).

In some Member States, the interview **may take place at the child's residence** (Croatia, Greece, Ireland and Italy). For example, in Croatia the interview may be conducted in the child's home or in some other premises where the child lives, under certain circumstances (ex. disabled children). In Italy, when the child has been victim of sexual abuse, exploitation, slavery or trafficking, the judge establishes the place, time and the particular modalities to hear the child.

In a few Member States, the interviews **may also be conducted in another place**. In France and in Finland, the interview with child victims may be conducted in forensic units within some hospitals where health professionals and judicial authorities closely cooperate. In Ireland, the interviews can be conducted either in a suitable room at a Garda station, the home of the victim or a relative, a private area in a hospital, a special victim interview suite or any other carefully selected locations where the victim feels comfortable.

### Measures undertaken to establish adapted premises

The need of premises adapted for the interviews children is recognised in almost all countries. However, **only a few reports disclose the measures that have been taken by governments to establish child-friendly**

**premises or modify existing rooms**. In Croatia, fifteen new premises were created in 2011, and police have been given access to an additional forty-five existing premises. In the Czech Republic, thirty-two child-friendly interview rooms have been established in police stations throughout the territory. In Hungary, child-friendly hearing rooms were established under the Ministerial Decree 32/2011 of the Ministry of Public Administration and Justice. In Ireland, seven dedicated interview suites have been designed to provide appropriate facilities for interviewing victims including children under the age of 14.

### Promising practices

In Poland, the Ministry of Justice, in cooperation with the NGO Nobody's Children Foundation, has established special "blue rooms" victim interviews and has set up a system for certifying the child-friendly rooms.

In France, new rooms for child victims have been created within some hospitals. Law enforcement authorities and medical experts work closely to combine the requirements of the investigation with the medical, psychological and social support of victims. Moreover, adapted interview rooms have been established in some police stations of the South-West on the initiative of the NGO "La Mouette".

### Issues and problems detected

According to the reports, in some Member States victims are interviewed in special premises without any legal obligation to do so (Austria, the Czech Republic, Finland, Germany, Luxembourg, Malta, Romania<sup>17</sup>, Slovakia, Slovenia, Spain, Sweden). In Bulgaria, the authorities are only required to provide an appropriate environment consistent with the age of the child, but the requirement lacks precision.

In some Member states there is an age limit on the requirement to carry out interviews with victims in specific premises designed or adapted for children. For example, in Croatia, the age limit is 16; in Finland, 15; in Hungary, 14 and in the Netherlands, 12. In Hungary, victims between the ages of 14 and 18 are

<sup>10</sup> According to the Czech report, there is however no legal provision.

<sup>11</sup> It applies only for children under the age of 15.

<sup>12</sup> Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2014), Replies to the general overview questionnaire – Germany, 1st Monitoring Round, p. 57.

<sup>13</sup> It applies only for child victims under the age of 14.

<sup>14</sup> According to the Luxembourgish report, there is, however, no legal provision.

<sup>15</sup> If the minor is under 12, the hearing shall be conducted in a child-friendly studio.

<sup>16</sup> According to the Slovenian report, there is, however, no legal provision.

<sup>17</sup> Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Replies to the general overview questionnaire – Romania, 1st Monitoring Round, January 2014, p. 115.

not interviewed in specific child-friendly rooms, but upon request they may be interviewed via a closed-circuit communication system.<sup>18</sup>

Even when Member States require or recommend that interviews with child victims take place in designed or adapted premises, they may only be available in certain regions. This concern was directly addressed in some reports. For example, the Finnish report stressed that a specific room for hearing child victims who are under the age of 15 exists only at some police stations. A similar situation was also disclosed in the Austrian and Sweden report. The report for Sweden stated that “according to contacts with the National Police Board most, but not all, local police authorities have rooms adapted for interviews with children”. In Slovenia, a concern was raised about the discretionary use of the premises by the police or the judge. Finally, according to the respondents from Malta, police stations have **no child-friendly rooms**. Consequently, the interviews with child victims in Malta take place in the same room as adults.

### **C. Interviews are carried out by or through professionals trained for this purpose**

Member States have established different core standards and procedures for conforming to this directive.

#### **► Interviews are conducted by **trained officials (police officers or judges)**.**

This requirement exists in the following states: Belgium, Croatia, Estonia, Finland, France, Ireland<sup>19</sup>, Lithuania, the Netherlands, Poland, Portugal, Sweden and the United Kingdom. In France, the Public Prosecutor or investigating judge should systematically request that youth brigades specifically trained for this purpose conduct interviews with victims. In Belgium, interviews are carried out by a police officer having received a specific training in dealing with child victims. A similar requirement exists in Finland; all investigative measures directed at persons under the age of 18 shall be assigned trained investigators. In Estonia, interviews with victims shall be conducted by police officers who work in child protection units and who have received appropriate training and regularly

update their training. In the United Kingdom, a police officer and a social worker who have been adequately trained for this purpose are requested to conduct the interview.

#### **► Interviews are conducted **by or through specialised professionals/experts****

Member States that conform to this standard use a variety of different professionals. For example, Italy and Greece use experts in child psychology; the Czech Republic use experts in juvenile education; Poland and Latvia use experts in psychology; and Slovakia can use a pedagogical employee, a social worker or a psychologist. In Bulgaria, a psychologist must be present when a child victim below the age of 14 testifies; for child victims of 14-year-old or above the presence of psychologists remains at the discretion of the investigating official or the Court.<sup>20</sup>

#### **► **Specialised professional may be invited** to take part to the interviews**

This is the case in Austria, Belgium, Finland, France and Lithuania<sup>21</sup>. The invitation is optional, usually at the discretion of the police officer or the judge in charge of the investigation, and decided upon the case or the best interests of the victim. This option is available in Belgium and France, where a psychiatrist or a psychologist can assist the child during the interviews conducted by police officers. In Finland, the police and an expert can agree that a very young child will be interviewed by an expert. In Lithuania, the need for a psychologist is assessed on a case-by-case basis, taking into account the social and psychological condition of the child victim.

In some Member States, this aspect is not sufficiently regulated either because:

- **It is only an option** - In Austria, an expert may be commissioned to conduct the interview, especially if the witness is younger than the age of 14. In Slovenia, a pedagogue or some other expert should be called to assist in the examination of a minor only where it is necessary.
- **The requirement can be lifted under special circumstances** - In the Czech

<sup>18</sup> European Union Agency for Fundamental Rights (FRA) (2013), Study on children’s involvement in judicial proceedings: Contextual overview for the criminal justice phase – Hungary, p. 12.

<sup>19</sup> A specific requirement is made for interviewing children under 14.

<sup>20</sup> FRA (2013), Study on children’s involvement in judicial proceedings: Contextual overview for the criminal justice phase – Bulgaria, p. 16.

<sup>21</sup> Only for child victims under 14.



Republic, a victim must be interviewed by a person qualified unless such person is not available and the interview cannot be postponed.

- **There is no legislation** - In Malta, there is no legal provision regarding this aspect. However, the Child Protection Bill, which is expected to come into force soon, will give a judge power to appoint police officers who have received appropriate training for this purpose. In Luxembourg, there is no legal basis requiring that interviews with victims be conducted by or through trained professionals. However, all members of the Youth Protection Police Department, in charge of dealing with child victims, have been trained on interviewing techniques with a child victim<sup>22</sup>. In Germany, only the presiding judge interviews child victims and witnesses. The judge is expected to be trained specifically on how to communicate with children. However, this is not a legal requirement<sup>23</sup>.

### Promising practice

In Finland, Estonia, Poland, Sweden and the United Kingdom, specific guidelines have been developed on how to interview child victims and apply special measures during criminal proceedings.

### Limits detected and remarks

According to a few reports, some Member States have introduced trainings programs for professionals dealing with child victims particularly for professionals responsible for interviewing child victims. For example, in Austria the treatment of victims during the judicial procedure is part of the annual education program of judges and prosecutors. In Ireland, specialist victim interviewers are required to undergo intensive training to be competent to interview child victims of sexual offences. However, rarely information has been given in the reports on this aspect, which is of particular importance. Even if the laws of Member States establish that interviews with child victims should be conducted by or through professionals trained for this purpose, there is **no guarantee that in practice professionals have**

**received training.** The content and nature of these trainings programs should be assessed as well as the implementation of continuous training program. For example, according to the Maltese report, there is no opportunity available for professionals, including police officers and judges, to receive a continuous training on how to deal with child victims of sexual offences.

The **availability of specialised trained officers in all parts of the country has still not been sufficiently disclosed.** However, the Finnish report stressed the absence of trained police officers throughout the state's territory: "In large cities, the letter of the law is more likely to materialize. In Helsinki Police Department, for example, there are various police officers specialized in hearing a child victim and majority of hearings are conducted by such an officer. But unfortunately the situation is not as good at every Police Department in the country." A similar concern has been expressed in the Swedish report.

### D. The same persons, if possible and where appropriate, conduct all interviews

- Only in a few Member States does the **law** state that the same person(s) should conduct all interviews with the victim.

In the Czech Republic, Section 20 (3) of the Act on Victims in Criminal Proceedings stipulates that in the event of another interrogation before the same authority, the interrogator usually is the same person, unless serious reasons prevent it. Similarly in Cyprus, the new Law on Child Sexual abuse and Exploitation and Child Pornography provides that all interviews with child victims are performed by the same person wherever it is possible. In Germany, the presiding judge solely conducts the examination of child victims, which excludes another person to conduct other interviews.

- In some Member States, this aspect is **regulated by non-binding rules** (ex. policy guidelines)

In Estonia, the Guidelines for the Special Treatment of Minors in Criminal Proceedings states that "once trust has been gained and a child has started to communicate with one

<sup>22</sup> Information collected in the national report, in the website of the Luxembourgish police, and as well in the Reply from the Luxembourgish authorities to the questionnaire sent out by the Lanzarote Committee of the Council of Europe. See Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Replies to the general overview questionnaire – Luxembourg, 1st Monitoring Round, July 2014, p.39 (only in French).

<sup>23</sup> See FRA (2013), Study on children's involvement in judicial proceedings: Contextual overview for the criminal justice phase – Germany, p. 12.

person, that person shall continue interacting with the child until the end of proceedings". In Sweden, interviews with a child victim shall be held by the same person. Exceptions from this rule may be granted if the child and the person interviewing did not relate well to the child during the first interview. In Lithuania, the Recommendations on Interviewing Juvenile Witnesses and Victims provides that in case it is necessary to additionally interview the child victim, the same persons who participated in the initial interview should conduct the additional interview. The same requirement is in place in **Poland** under the Standards for Interviewing Minor Witnesses.

► In most Member States, it seems that there are **no laws or guidelines** that recommend all interviews to be conducted by the same person.

In the following reports, respondents either commented that the aspect is not regulated in their Member State or did not mention any reference regarding this matter: Belgium (only indirectly under the "same procedure than the first interview"); Luxembourg ("the practice complies with the requirement but it is not exercised on the basis of a normative measure"); Finland ("the aim of the interviews is to create a confidential relationship with the child victim, for this reason in practice the same officer hears the child"); Bulgaria; Greece; Hungary; Italy; Latvia<sup>24</sup>; Malta; the Netherlands; Portugal; Slovakia; Slovenia; Spain; and the United Kingdom.

#### **E. The number of interviews is as limited as possible and interviews are conducted only where strictly necessary**

► Most Member States have regulations limiting the number of interviews, unless special circumstances require more. This was reported in Belgium, Bulgaria<sup>25</sup>, Croatia, Cyprus, the Czech Republic, Estonia, Germany<sup>26</sup>, Italy, Lithuania, Luxembourg, Poland, Portugal, Slovakia and Sweden.

In some cases, the law mandates that **only one interview** can be carried out. This is the case, for example, in Lithuania where the Criminal Procedure Code and the "Recommendations

on Interviewing Juvenile Witnesses and Victims" prescribe that the victim should be interviewed only once. Additional interviewing should be carried out only if it is essential for the purpose of collecting information that cannot be collected by other means. In Poland, a victim of domestic of sexual violence should be interviewed only once; another interview should be conducted only when necessary for the criminal proceedings (ex. important circumstances are disclosed or by request of the accused). In Belgium, an additional interview can only be allowed by Court Order when it is strictly necessary to continue or to complete the interview process.

Other Member States refer to broader legal provisions that express the **need to avoid unnecessary interviews**. For example, in Portugal the Criminal Code of Procedure requires interviews to be conducted in a way that prevents multiple and unnecessary interviews. In Sweden, the number of interviews may not exceed what is necessary with regard to the nature of the investigation and the best interests of the child. In Greece, the law limits as much as possible the number of interviews without however mentioning the circumstances in which additional interviews may be conducted.

► In a few Member States, legally there are no limits on how many interviews can be conducted (Austria, Finland, Hungary, Ireland, Luxembourg, Malta and Slovenia). However, for most of these countries, the reports state that the number of interviews is **limited in practice**. Moreover, many Member States record interviews in order to avoid repetition.

#### **General remark on the limitation of the number of interviews**

Other interviews may be beneficial for victims giving them another chance to tell their story. A balance should be found between the prohibition of unnecessary interviews (ex. repeating the same information) and the possibility to conduct other interviews that may be beneficial.

#### **Limits detected**

In some Member States, the limit of the number of interviews **applies only to victims under a**

<sup>24</sup> According to the Latvian report, a proposal has been made to adopt an express provision to ensure interviews being conducted by the same person.

<sup>25</sup> There is a specific provision preventing the examination of a child victim (or witness) under 14 years of age more than once in criminal proceedings. See FRA (2013), Study on children's involvement in judicial proceedings: Contextual overview for the criminal justice phase – Bulgaria, p. 15.

<sup>26</sup> Under the Guidelines for Criminal Proceedings and Proceedings to Impose a Regulatory Fine.

**certain age.** For example, in Poland the limit applies to child victims under 15. For victims under 18, the judge makes a decision on a case-by-case basis. In Italy, a further examination for child victims under 16 is possible only if it is related to facts or circumstances not covered previously. Some measures are in place in Hungary to avoid the interview of children under 14 or, if necessary, to interview them only once. No such measures seem to be applicable for children above 14.<sup>27</sup>

#### **F. The child is accompanied by a legal representative or, where appropriate, by an adult of their choice**

In **most Member States**, victims are entitled to be accompanied by their legal representative or an adult of their choice during the interviews (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia and the United Kingdom).

#### **Limits detected**

Some Member States apply this right differently **according to the age of the child.** In Poland, a legal representative or a guardian may be present during the interview of child victims of sexual offences under 15 years old. Where the child victim is over 15, the court must issue an order to allow their presence. In Romania, victims under 14 must have accompaniment; however, no specific provision exists for children aged 14 and older.

In some Member States, there is **no statutory provision that allows victims to be accompanied by an adult of their choice.** In Estonia, the presence of the parents or legal guardian is an exception rather than the rule and there is no provision regulating the possibility for children to be accompanied by an adult of their choice. In Greece, Hungary Slovakia and Sweden, the law mentions only the right of the child victim to be accompanied by his/her legal representative, without making reference to another person of trust.

## **4. Audio-visual recording of the interview of the child victim**

Article 20 (4) of the Directive obliges Member states to “take the necessary measures to ensure that in criminal investigations (...) all interviews with the child victim (...) may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law”. [Emphasis added]

### **A. Obligation or option in EU Member States?**

► Required: Belgium, Croatia<sup>28</sup>, Cyprus, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Poland, Slovakia and the United Kingdom

In Belgium, the audio-visual recording of interviews with child victims of certain sexual offences was made mandatory in 2013. For child victims under 12 years old, consent is not necessary as it is sufficient to inform the victim that the interview will be recorded. However, consent is necessary when the child is over 12. In France, the audio-visual recording of interviews is mandatory when the alleged crime is of a sexual nature. In Poland, the interview must be recorded, unless it is not possible for technical reasons.<sup>29</sup>

► Optional: Austria, Bulgaria, the Czech Republic, Greece, Hungary, Latvia, Lithuania, Malta?, Portugal, Romania and Spain<sup>30</sup>

In Lithuania, the Criminal Procedure Code establishes that interviews with child victims and witnesses may be recorded. However, the Recommendations on Interviewing Juvenile Witnesses and Victims urge pre-trial officers and prosecutors to arrange audio-visual recording of the interview in all cases. In Austria, the interview may be audio-visually recorded if the victim and their legal representative consent. In Romania, the victim hearing is recorded by audio-visual technical means when the prosecuting authority considers it as a necessity or when the injured person has requested this explicitly and the recording is possible. In Greece, Article 226A of the Penal Code stipulates that “the testimony of the child

<sup>27</sup> See FRA (2013), Study on children’s involvement in judicial proceedings Contextual overview for the criminal justice phase – Hungary, p. 11.

<sup>28</sup> This is mandatory for children up to 16 years old and recommended for children older than 16.

<sup>29</sup> FRA (2013), Study on children’s involvement in judicial proceedings Contextual overview for the criminal justice phase – Poland, p. 12.

<sup>30</sup> Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2014), Replies to the general overview questionnaire – Spain, 1st Monitoring Round, p. 27. However, there is no explanation in which circumstances the interview may be video-recorded.

witness is given in writing and is filed also in electronic audio-visual form where this is possible". However, according to Greek authorities, the necessary Presidential Decree that would provide for its exact application procedures has not yet been issued.<sup>31</sup>

### Limits detected

- Limits based on the age of the child victim: In Finland and in Sweden, the requirement applies only to child victims under 15 and, in the Netherlands, to child victims under 16. In Malta, the audio-visual recording of the interview is possible only for child victims under 16 and, in Ireland, for child victims under 14.
- Some potential limits that could not be fully assessed: the lack of video recording equipment and the reluctance of police and judge to audio-visually record interviews.

### B. Recorded interviews as evidence in court

According to information given in the reports,<sup>32</sup> in **almost all Member States** the record of the interview may be used as evidence in the court. In Belgium, the summary of the child's interview is accepted as evidence to the same extent as any other evidence. In France, in the absence of conclusive evidence, the recording is the key element. In Austria, a recorded interview can be used as evidence in criminal court proceedings but the victim has to be informed about it.

## 5. Measures of protection of child victims in criminal court proceedings

"Member States shall take the necessary measures to ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7, it may be ordered that: (a) the hearing take place without the presence of the public; (b) the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies." (Art. 20 (5)) [Emphasis added]

### A. Hearing of the child victim in court without

### the presence of the public

In **almost all Member States**, the possibility exists to hear the child victim in closed court without the presence of the public or in the judge's chambers. In Italy, there is an obligation of holding child hearings in cases of sexual abuse, sexual exploitation and pornography, behind closed doors. In other Member States there is no obligation, rather the decision is made based upon the age of the victim and nature of the crime:

► In 12 Member States, the Court is given the power by legislation to decide if a **closed court session for the hearing of children is required**.

This is the case in Bulgaria, Croatia, Cyprus, Estonia, Finland<sup>33</sup>, Germany, Hungary, Ireland, Luxembourg, the Netherlands, Slovenia and Sweden. In Croatia, children involved in criminal proceedings have a specific right to exclusion of the public from the trial. In Germany, the court may exclude the public from a hearing or from part of it if a person under the age of 18 is examined. In Estonia, a court may declare that a session or a part thereof be held in camera where it is in the best interests of a child witness or victim.

► In eight Member States, a provision foresees the **possibility for the court to order a closed court session in cases of sexual offences**.

This is the case in Belgium, France, Greece, Latvia, Lithuania, Portugal, Sweden and the United Kingdom. In Greece, the court may order that part of the court proceedings are closed to the public "when publicity in cases of crimes against sexual freedom or commercial sexual exploitation results in exceptional psychological strain and vilification of the reputation of the victim, especially of a child victim". In Portugal, proceedings for crimes of human trafficking or crimes against sexual freedom and self-determination occur, as a rule, without public's attendance. In the United Kingdom, all children involved in cases involving sexual offences and intimidations are eligible for hearings held in private with the public and the press excluded from the courtroom.

► For other Member States, a **general provision** allows the possibility to order a closed

<sup>31</sup> Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2014), Replies to the general overview questionnaire – Greece, 1st Monitoring Round, p.15.

<sup>32</sup> No information on this aspect has been provided in the reports for Italy, Spain and Lithuania.

<sup>33</sup> The provision applies only for children under 15. For older children, a closed court session may be decided if the hearing concerns sensitive information about a person's private life, health condition, and social service.

court session **to protect victim's interests or privacy**: Austria, the Czech Republic, Finland, France, Luxembourg, Malta, Romania<sup>34</sup> and Slovakia.

### **B. Hearing of the child victim in court without being present**

During the trial phase, national laws differ regarding the child's capacity to testify in court or the age at which a child is to be heard. However, when victims are to be heard in court, the possibility to conduct the hearing in a separate room via audio-visual facilities (ex. videoconference) is provided in the majority of the Member States.

In Belgium, only by a special reasoned decision can a judge request the personal appearance of the child. If such a decision is made, the Code of Criminal Procedure states that the appearance of the child must be arranged by means of videoconference, unless the minor explicitly expresses a desire to give testimony at the court session in person. In the United Kingdom, child victims are heard via live video, which enables the child to give evidence during the trial from outside the courtroom. In Italy, the President of the Court carries out the examination of victims of sexual violence. The legal representatives of the victim and defendant should remain in a room separated by a one-way glass from the room where a child witness or the victim is to give testimony. The communication between the judge and lawyers takes place through an intercom system. A similar procedure exists in Croatia, Cyprus, Finland, Hungary, Ireland, Malta, and, and under a general provision in Austria, the Czech Republic, Estonia, France, Germany, Latvia, the Netherlands, Portugal, Romania and Sweden.

Member States that do not give the option for videoconference **use audiovisual recordings of pre-trial interview as a substitute** (ex. Bulgaria, Greece, Luxembourg, Lithuania, Slovakia and Slovenia).

### **Limits detected**

- Limits based on the age of the child victims: According to the report for Finland, if the interview of a victim under 15 years

old has been recorded during the criminal investigation, it is not, in general, obligatory for the child victim to go to court to be heard in person. If the victim turns 15 during the criminal procedure, he/she will be called to court to recount the events in person, even if a visual recording exists. In Poland, the hearing may be conducted via videoconference for child victims of sexual abuse or violence who are under 15 at the time of the hearing.

- Some potential limits that could not been fully assessed: the lack of technical and digital equipment in courts and the discretionary power of the judge to not use the equipment available.

## **6. Protection of privacy, identity and image of child victims**

"Member States shall take the necessary measures, where in the interest of child victims and taking into account other overriding interests, to protect the privacy, identity and image of child victims, and to prevent the public dissemination of any information that could lead to their identification." (Art. 20 (6)) [Emphasis added]

All Member States have set up a range of measures to protect the privacy, identity, and image of a victim; however, some emphasise certain protections more than others. Most Member States protect privacy of victims heard in court through either the exclusion of the public from the courtroom, by using video-conference systems or by substituting the court testimony to an audio-video recording of the pre-trial interview. Additional measures exist to ensure the protection of privacy, identity and image of victims. These include:

### **► the prohibition to publish or disclose personal data and image of child victims:**

In many Member States, legislation protects the privacy and identity of victims by prohibiting the disclosure of personal data about child victims (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Finland, France, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal and Slovenia). In Austria, judicial authorities, media,

<sup>34</sup> There is a specific right for 'protected witnesses'.

the defendant and his/her legal representatives are prohibited from publishing personal data about victims. In Malta and Cyprus, media are expressly forbidden to publish all elements of the identity of the child victim. In France, Greece and Luxembourg, a specific offence has been created in the case of revealing the identity of child victims or elements that could lead to their identification. In Poland, it is prohibited to disseminate the personal information of victims, including images without the express consent of the child and the person directing the proceedings. In Bulgaria, there is a prohibition on publishing any information about victims, but it mainly concerns victims under special protection. Similarly in Slovenia, the prohibition to disclose concerns only cases of family violence.

► **the possibility to exclude personal data from files or from the final decision:**

In Austria, personal data may be excluded from files as a preventive measure. In the Netherlands, Poland, Germany, Slovakia and Finland, victims are allowed to conceal their real address. In Estonia, the name of victims shall be replaced by initials and no personal data shall be contained in the final decision. In Hungary, documents and files cannot contain personal data about victims. In the Czech Republic, the judgment may be published but without mentioning any personal data about victims.

► **the concealment of images and distortion of voices of child victims:**

In Croatia, image and voices must be altered to disseminate recordings of children. Similarly in Portugal and Slovakia, if a hearing takes place via videoconferencing, the image can be concealed and voice distorted in order to prevent the witness from being recognized.

### Some gaps detected

In Bulgaria, Greece, Italy and Malta, judges have discretionary power to decide the disclosure of some information. Contrastingly, in Sweden and the United Kingdom all information is publicly accessible. However, in the United Kingdom, the judge has a **discretionary power to forbid the disclosure of pictures or**

**information** that could reveal the identity of victims. In Sweden, according to the Internal Guidelines, the public prosecutor should always specifically petition the court to order the confidentiality of information.

## General observations

### Good practices

This study shows that change is occurring across EU Member States to recognise the need to implement measures of protection and support for victims of sexual abuse and exploitation. Substantial efforts have been made by EU Member States to ratify the Directive into their national legal frameworks. A small group of Member States was not required to do this as they already had legislation that conformed to the Directive. Most Member States introduced specific legislation to conform with all or specific parts of Arts. 18, 19 and 20. New legislative steps reflecting EU-level developments have been introduced in most of the Member States, either by amending existing laws or by adopting new and comprehensive legal instruments.

National legislations on measures of assistance, support and protection for child victims of sexual abuse and exploitation are not always consolidated and remain sectorial, dispersed and sometimes fragmented. This may have direct consequences on the real protection and support for child victims, as the understanding and access to measures are difficult for all stakeholders involved. However, most of the Member States have made recent efforts to place victims, especially vulnerable victims like child victims, in the centre of the criminal procedure.

Some Member States have started to develop more comprehensive victims-related policies. In the United Kingdom, the Code of Practice for Victims' of Crime was adopted in 2013 and provides a minimum level of service that victims should get from law enforcement agencies, including being informed of their rights. Moreover, some Member States have developed specific guidelines and national concrete action plans to complement existing national legal frameworks. This is a good

practice as it clarifies duties of each actor responsible for the assistance, support and protection of child victims. For example, Estonia has developed a wide range of guidelines to complement the legal framework in place. These are the Guidelines on the Special Treatment of Children on Criminal Proceedings, Guidelines for Development of Criminal Policy until 2018 and Guidelines on Child and Family Assessment.

With regard to specific provisions, a number of good practices have been detected throughout this study and should be continued in the future. Art. 20 of the Directive has caught more attention and has been at the heart of new amendments made by Member States.

### **Most regulated provisions of the Directive regarding the Topic 6 are:**

- Art. 19 (1) aims at guaranteeing protection for children who report cases of abuse within their family.
- Art. 20 (1) regarding the appointment of a special representative for the child victim when there is a conflict of interests between the child and the holders of parental responsibility.
- Art. 20 (2) relates to the access to free legal aid for child victims
- Art. 20 (3) (f) relates to the possibility for the child victim to be accompanied by his/her legal representative or an adult of his/ her choice during the interview.

## **Key issues**

### **Less regulated provisions of the Directive regarding the Topic 6 are:**

- Art. 18 (3) aims at guaranteeing that a person whose age is uncertain receives immediate access to assistance, support and protection granted to child victims

- Art. 19 (2) aims at ensuring that assistance and support is not conditional on the willingness of children to cooperate in criminal investigation and proceedings
- Art. 20 (3) (d) requires that the same person(s) conduct all interviews with the child victim

### **Most problematic provisions to be implemented:**

- Art. 19 (3) requires that the measures of assistance and support for child victims are provided following an individual assessment of the special circumstances of each particular child victim.
- Art. 20 (3) (b) and (c) aims at ensuring that interviews with child victims take place, where necessary, in premises designed or adapted for this purpose and are carried out by or through professionals trained for this purpose.

Common problems that affect the effectiveness of the measures of assistance and protection provided for victims include:

#### **► difference between child victims regarding their age**

The most striking outcome resulting from the survey is that many Member States provide specific measures of assistance and protection only to victims up to a certain age. Where restrictions with regard to the age of the child are established, it remains unclear if specific measures may be granted to victims above the age limit stated. Age should not be the only factor taken into account to apply specific measures of assistance and protection to victims of sexual abuse and exploitation. It is not an adequate measure for limiting the access to support – the needs, concerns and wishes of the victims should be assessed on a case-by-case basis.

#### **► difference between child victims regarding the sexual offence**

It is not clear for which specific offence referred to in Arts. 3–7 the measures of assistance and protection set out by EU Member States apply.

In some cases, specific measures are in place with regard to only one or a limited number of the offences covered in the Directive. In other cases, the vagueness of provisions in place does not allow an effective assessment of the scope of the measures. Therefore, despite legislation aiming at reducing secondary victimisation of child victims during criminal proceedings, it remains unclear whether measures set forth by Member States are specialised enough to meet the specific needs of child victims according to the type or nature of the sexual offence.

#### ► Sufficient measures?

The Directive requires Member States to take the necessary measures, which includes investing further in staff, equipment and the quality of support service and/or facilities. In a number of countries, the lack of financial resources impedes the use of properly equipped child-friendly rooms and trained personnel to carry out child interviews throughout the state's territory. This concern is mentioned in several of the national reports reviewed.

## Recommendations for EU Member States

### Training and guidelines

All professionals coming into contact with child victims of sexual offences referred to in the Directive should receive appropriate training as to how to handle these cases. Training should include education on the legal framework that protects a vulnerable child's access to justice, child-friendly interviewing techniques, how to communicate with and support child victims of sexual abuse and exploitation as well as the specific needs of vulnerable children (ex. unaccompanied minors, pregnant girls and disabled children). Professionals involved in this should be police officers, judges, legal guardian/special representatives, lawyers, staff of social and support services, or any other relevant professionals. All professionals dealing with child victims, including police officers, should have the opportunity to undertake continuous training programs and to renew or develop their skills.

The development of national guidelines, strategies and protocols should be seen as important tools to determine practices and procedures and coordinate actions of relevant actors in the area of assistance and protection to child victims.

### Primacy of the best interests of the child and needs-based intervention

An individual assessment is needed to ensure that the views of the child are taken into account and that the best interests of the child victim are a primary consideration before providing assistance and protection. The development of protocols and mechanisms based on the assessment of their special needs is absolutely necessary.

"When considering the best interests of the child, particular attention also needs to be given to balancing the right to be protected with the right to express views and the right to participate." (UNODC (2009), Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime, p. 10)

### Assessment of special measures for child victims

All measures, either legal or procedural, shall be regularly assessed and monitored at the national level. Professionals should be able to evaluate their role as well as the methods used to assist and protect victims. More exchange between professionals and multidisciplinary cooperation would allow for a fair assessment of practices and procedures and their impact on children.

As far as possible, the measures in place should be assessed with due regard for their impact on different group of child victims, especially vulnerable child victims. Feedback mechanisms for both professionals and victims are of particular importance to ensure that rights set out in the Directive are respected in the everyday practice.



## **Recommendations to the European Commission**

### **Specific attention on vulnerable groups of child victims**

Vulnerable groups of child victims are not always protected by measures of assistance and protection. At the national level, particular attention should be paid to the situation of unaccompanied or separated minors and those of an ethnic minority. More information is needed regarding their access to measures of assistance and protection during criminal investigations and proceedings, particularly in the following aspects: access without delay to legal aid free of charge, appointment of a special representative to protect their interests as well as access to measures of assistance, support and protection not conditional to their willingness to cooperate (or upon other administrative conditions).

Special attention should be paid to their situation when assessing the transposition of the Directive into national legislations and when developing guidelines or other documents to guide Member States in this implementation.

### **Promotion of non-legislative measures**

Arts. 18, 19 and 20 of the Directive urge Member States to take necessary measures of assistance, support and protection for child victims. This may be achieved by various means: including and combining legislative and administrative and practical measures. Administrative measures alone are not sufficient, however. To achieve the objectives of the Directive, appropriate non-legislative measures might be needed to ensure practical and technical implementation of these articles (ex. adapted or designed premises, trained professionals, audio-video recordings, etc.). Therefore, it remains important to pay particular attention to the non-legislative measures

provided by Member States in order to ensure an effective implementation.

### **Development of strategic guidelines and exchange of good practices**

Exchange of good practices related to the assistance and protection of child victims of sexual abuse and sexual exploitation may be an important tool to help Member States to fulfill the objectives of the Directive. The development of strategic guidelines should be also envisaged for an effective and coherent application of Arts. 18, 19 and 20, especially considering that most provisions of the Directive leave room for national policy choices and some concepts used still need clarification.

The guidance documents prepared to aid Member States in transposing the Directive into national law can be beneficial. The guidance document prepared in order to transpose the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime is one such example. They can help Member States to understand the main goals of each article, to clarify some terms and concepts and to set indicators for assessing results and progress. Similar tools should be developed with regard to Directive 2011/93/EU.

## Topic 7: Take down and blocking measures (Art. 25 & recitals 46-47)

### Boglárka Jánoskúti, External Advisor, eNACSO (European NGO Alliance for Child Safety Online)

#### Article 25

1. Member States shall take the necessary measures to ensure that the following intentional conduct is punishable:

the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Article 3(4) and Article 5(6), where that proposal was followed by material acts leading to such a meeting, shall be punishable by a maximum term of imprisonment of at least 1 year.

2. Member States shall take the necessary measures to ensure that an attempt, by means of information and communication technology, to commit the offences provided for in Article 5(2) and (3) by an adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child is punishable.

## 1. Introduction

Article 25 of the Directive provides that the Member States:

- i) Shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory
- ii) Endeavour to obtain the removal of such pages hosted outside of their territory

- iii) May take measures to block access to such web pages, provided these measures are set by transparent procedures and provide adequate safeguards, including judicial redress, in particular to ensure that the restriction is limited to what is necessary and proportionate and that users are informed of the reasons for the restriction.

When looking into the **travaux préparatoires**<sup>1</sup> of the Directive, it can be observed that the European Commission originally intended to impose a mandatory blocking obligation on Member States in case takedown (removal) measures are not efficient as the child abuse image is not located within EU territory. However, in the course of the negotiations within the Council and the Parliament and during the trialogue phase of the ordinary legislative procedure, various concerns were raised in relation to the introduction of obligatory blocking access, referring a.o. to potential breach of the right to freedom of expression, lack of adequate legal remedies against blocking measures, inefficiency of blocking techniques considered easy to circumvent, potential censorship, “overblocking” (blocking of legal content), etc. As a result, a compromise was reached whereby blocking is set out in the Directive as an **“optional measure”** in case immediate removal at source of illegal child abuse material is not possible to undertake. The final wording of the Directive envisages the introduction of strict legal guarantees<sup>2</sup> in case a Member State decides to transpose blocking access measures into its national legislation.

<sup>1</sup> COM proposal, Art. 21, Recital 19: However as, despite such efforts, **the removal of child pornography content at its source proves to be difficult where the original materials are not located within the EU**, mechanisms should also be put in place to block access from the Union's territory to internet pages identified as containing or disseminating child pornography. For that purpose, different mechanisms can be used as appropriate, including facilitating the competent judicial or police authorities to order such blocking, or supporting and stimulating Internet Service Providers on a voluntary basis to develop codes of conduct and guidelines for blocking access to such Internet pages.

COM Impact Assessment, p. 22: An obligation on Member States to put in place a mechanism to block access by Internet users to Internet pages containing or disseminating child pornography, through, for instance, legally binding measures or voluntary agreements with Internet Service Providers.

EP draft report: Blocking mechanisms are not an effective means of combating such depictions. They are of limited efficiency, imprecise and easily bypassed. Blocking does not lead to the elimination of the content, only to their relative non-availability, which does not put an end to the infringement involved in their being ‘made available’.

<sup>2</sup> Article 25 (2) foresees transparent procedures and adequate safeguards, including judicial redress, in particular to ensure that the restriction is limited to what is necessary and proportionate and that users are informed of the reasons for the restriction.

The Directive leaves up to the Member States' discretion **the means** by which the transposition of takedown and blocking measures can be implemented. Recital 47 contains a non-exhaustive list of **types of public action**, including legislative, non-legislative, judicial or other (ex. voluntary action taken by the internet industry). The obligation incumbent upon Member States is that an adequate level of legal certainty and predictability to users and service providers be guaranteed.

According to the analysis of the national reports submitted and additional information provided by other sources<sup>3</sup>, **the following observations** can be made:

## 2. Takedown (removal) measures inside the territory of the Member State (Art. 25 (1))

The Directive sets out an **obligation** upon Member States to provide for **prompt** removal of child abuse images at source when possible. According to the reports and further research made, it can be concluded that the vast majority of Member States (Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Sweden, Slovenia, Spain and the United Kingdom) provide for some kind of removal mechanisms within their legislative or self-regulatory framework. The case of Romania and Slovakia remains unclear.

### 2.1. Removal measures regulated under E-Commerce Act

According to the findings Austria, Belgium, Bulgaria, the Czech Republic, Cyprus, Estonia, Finland, France, Hungary, Latvia, Lithuania, Malta, Sweden, Slovenia and the United Kingdom have introduced legal provisions regulating take down measures under their respective **E-Commerce** Acts. [The Commission Staff working document of the E-Commerce](#)

[Directive](#) states that the liability regime of the E-Commerce Directive applies to **all illegal activity** or information and it provides for both removing and disabling access (blocking). Art. 14 of the E-commerce Directive includes **exemptions from liability for online intermediary service providers**. In particular, it provides that online service providers may not be held liable for illegal content that they host on condition that:

- i) the provider does not have actual knowledge of illegal content and is not aware of facts or circumstances from which the illegal content is apparent; or
- ii) the provider, upon obtaining such knowledge or awareness acts expeditiously to remove or disable access to the content.

The E-Commerce Directive does not foresee a compulsory monitoring obligation for ISPs to filter illegal content.

The Austrian and Belgian E-Commerce Act imposes a duty on ISPs to immediately delete or block the information whenever the ISP is informed of the illegal activity or information.

The Bulgarian legal framework foresees an exemption from ISP's liability only in case it has learned or has been informed about the unlawful character of the information or has been informed by a competent state authority about the unlawful character of the activities of the recipient.

In Cyprus, Law 91(II)/2014 has recently created a legal obligation for ISPs to restrict access to websites containing child pornography, even without a Court Order, if they are duly informed by a competent authority or otherwise gain knowledge<sup>4</sup>.

In the Czech Republic, according to the law on Certain Services of Information Society, a provider of hosting services is, under certain circumstances, liable for the content of information stored upon the user's request. These circumstances include the following situations: i) given the subject matter of the provider's activity and circumstances and nature of the matter the provider could know that the content of the information or the conduct of the user are

<sup>3</sup> Contribution of Council of Europe Lanzarote Committee's State representatives, Kinderhilfe Germany, e-Enfance, Save the Children Romania, ECPAT Austria, ECPAT Netherlands and relevant literature.

<sup>4</sup> European Social Charter 12th National Report of Cyprus on the implementation of the European Social Charter, 2015, p. 11, available at: [http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Cyprus12\\_fr.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Reporting/StateReports/Cyprus12_fr.pdf).

illegal; ii) the provider has proven knowledge about the illegal nature of the content of the information or about the illegal conduct of the user and without delay has not taken any measure that can be reasonably requested from him/her to remove the information or make it inaccessible; or iii) the provider directly or indirectly controls the user's activity.

According to the Finnish Act on Provision of Information Society Services, the service provider is not liable for the information stored or transmitted at the request of a recipient of the service, if it acts expeditiously to disable access to the information stored upon obtaining actual knowledge of the fact that the stored information is clearly illegal. In addition, a court may order the service provider to disable access to the information stored by it if the information is clearly such that keeping its content available to the public or its transmission is prescribed punishable. At the moment, there are no law-based obligations for ISPs to monitor the contents of a website hosted on their servers. Furthermore, the Finnish Act on the Exercise of Freedom of Expression in Mass Media provides another takedown measure: the court may order a publisher, broadcaster or keeper of a server or other such device to cease the distribution of a published network message, if it is evident on the basis of the contents of the message that providing it to the public is a criminal offence. Deleting the message or otherwise effectively restricting access (blocking) to it are both sufficient measures. The request for such measure must be made by the public prosecutor, the head of pre-trial investigator or the injured party. As regards legal safeguards, the Court shall deal with the request as a matter of urgency and the Court shall reserve the intended addressee of the order and the sender of the network message an opportunity to be heard, unless the matter is extremely urgent. According to the rapporteur in Finland, some argue that original offenders should carry the liability for the criminal acts, not the service providers or other intermediaries and thus the main efforts should be directed towards capturing the actual criminals who, for example, maintain secret networks or in other ways disseminate or produce child pornography.

In Estonia, the Information Society Services Act foresees that the provision of services is subject to restriction to the extent justified for the protection of morality.

When looking into the [European Commission's study from 2007 on the liability of Internet Intermediaries](#) (on the transposition of Art. 14 of the E-Commerce Directive) a number of observations in relation to the transposition of Art. 14 of E-Commerce Directive can be made. In relation to the interpretation of actual knowledge as set out in Art. 14, some Member States only consider notifications by competent authorities as sufficient to assume actual knowledge. In other Member States, courts refer to general legal standards of obtaining knowledge of illicit content.

## **2.2. Removal measures foreseen under Criminal Law**

Removal measures are foreseen under the general instruments of criminal law in: Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Slovenia, Spain and Sweden.

In the majority of Member States, removal is regulated within the framework of a criminal court procedure whereby the court may order the seizure of a server (website) where child abuse content is hosted.

According to the Croatian report, takedown measures will only take place after judgment with final force and effect. This raises concerns on whether the introduced measures to remove child abuse images are efficient (and prompt) enough. In Cyprus, according to Law 91(I)/2014, the Court may order the restriction of access, notice and taking down of websites containing illegal material at any stage of the court proceedings. Under Czech Criminal Law, a person possessing an object relevant for criminal proceedings must, when requested, provide it to bodies active in criminal proceedings. If the object is not provided, it may be seized for the purposes of criminal proceedings. Under the Finnish criminal framework, if a private entity (not an ISP) operates a server

(and thus possibly a website) that allegedly or verifiably contains child pornography or there are reasons to believe that it can be used as evidence in a criminal case, the server may be seized, or ordered forfeit to the state if it has been used for the commission of an intentional offence. In the Netherlands, the ISP can be addressed and forced by the Public Prosecutor (pursuant to approval of the examining judge) to give the name and address of the suspect or even to take down the identified child abuse image.

### 2.3. Removal measures foreseen under a self/co-regulatory framework

According to the German report, ISPs and the police cooperate on a voluntary level in taking down websites containing or disseminating child pornography within a maximum of seven days. Moreover, there is an obligation to monitor the success of the measures taken. Statistics are to be provided about the number of websites taken down, distinguished by the time needed for taking down (one week or several months).

In Ireland, there is a self-regulatory framework in place for internet service providers. The “Hotline” where child abuse content can be reported is run by the Internet Service Providers Association of Ireland (ISPAI) and is supervised by the Office of Internet Safety, an executive office of the Department of Justice and Equality, in cooperation with the Irish police. Once a report is received, the material is assessed by members of the Hotline to determine if it is “probably illegal” under Irish law. Specially trained Hotline analysts then try to locate the material. If the reported material is traced to a server located in Ireland, or is found to have originated from an internet user account provided by an Irish ISP, the ISP of that customer is identified. The Hotline then issues a notification to the Irish Police and simultaneously a “take down” notice is issued to the ISP, where it is a member of the ISPAI. The ISP is responsible for the timely removal of the specified “probably illegal” material from its servers to ensure that other Internet users cannot access the material.

The decision to initiate a criminal investigation is a matter for the Irish Police and the Irish Director of Public Prosecutions.

In the United Kingdom, takedown measures are conducted by a coordinated work of the National Crime Agency (NCA), the Child Exploitation and Online Protection Centre (CEOP), both law enforcement actors, and the Internet Watch Foundation (IWF). The IWF is a British-based and self-regulatory organisation that seeks to minimise worldwide child sexual abuse content on the internet and that operates as a hotline for members of the public to report online child abuse material. The role of the IWF is fundamental. It works to disrupt the availability of child sexual abuse content on websites by notifying CEOP of this hosted content and sending a notice to the ISPs, making them aware of the unlawful material so they can take it down. This coordinated system was implemented for taking down material hosted within the United Kingdom through a ‘report process’. Once the report is received, the IWF will assess the information within the existing law. If the content is considered child abuse material, the IWF will remit the information to the relevant hosting company and law enforcement bodies, which are responsible for taking down illegal content, and shall initiate an investigation of the offence respectively.

The above information gathered from the reports thus establishes that, when looking into the transposition of removal measures, on a positive note it can be observed that some Member States introduced provisions both under **their E-Commerce Acts and their Criminal Codes** in order to efficiently tackle removal of child sexual abuse images.

In general, however, the reports submitted failed to mention the **timeframe** within which removal has to be undertaken and also the **legal safeguards** surrounding it. Therefore within the framework of this publication, it was not possible to analyse whether the obligation of **prompt** removal enshrined in the Directive was efficiently transposed in national legislations.

## 3. Take down (removal) measures of webpages

## hosted outside the Member State's territory: (Art. 25 (1))

According to Art. 25 (1), Member States should **endeavour** to obtain the **removal** of child abuse pages hosted **outside their territory**.

All 27 Member States subject to our survey operate internet hotlines where child sexual abuse content can be reported. These **hotlines** are members of the International Association of Internet Hotlines (INHOPE), which aims at ensuring cooperation at international level between hotline members of different countries in order to remove/block child sexual abuse contents.

According to the responses provided by the rapporteurs, efforts made to remove child sexual abuse images hosted outside national territory are foreseen in: Austria, Belgium, Croatia, France, Finland, Greece, Hungary, Sweden and the United Kingdom.

The situation in Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia and Spain is not clear.

In Austria, the Internet Hotline, where child abuse images shall be reported (Stoplevel), is connected to a global network with more than 37 online registration offices. This allows national authorities to ensure a removal of child pornographic web pages even outside their territory. Statistics show the global networks' success by stating that 90% of illegal contents located all over Europe have been removed within 72 hours.

Belgian authorities cooperate with Interpol to communicate with the relevant country that hosts child abuse content for the purpose of removal. In practice, however, foreign websites are often only blocked on the Belgian servers.

In Croatia, in cases where the perpetrator is not a Croatian citizen and/or the website is not hosted in the territory of Croatia, the Ministry of the Interior is entitled to forward gathered information to the police of the perpetrator's country, which then can initiate proceedings.

In France, cooperation with Member States in third countries was developed (the United States and others) for the removal of internet pages that are not hosted in the territory of the EU.

In Greece, if the webpage is not hosted in Greece and if it cannot be determined where it is hosted and its web space – “domain name” – ends in “.gr.” or belongs to another space managed by the National Council of Telecommunications and Post Offices, the discontinuation or removal of the web page can be done by discontinuation or removal of the web space (domain name).

Similarly, Hungarian authorities may seek the assistance of foreign authorities in case the website hosting service is operated by and from a foreign country and request that the electronic data be rendered irreversibly inaccessible.

Ireland provides for **self-regulatory measures** for the removal of CAM hosted outside its territory. If the reported material is traced to another country, the members of the Hotline: (i) forward a report to the INHOPE hotline in the source country; or (ii) provide details to the police for transmission to the source country through international law enforcement channels. In a recently published report entitled “Report on Effective Strategies to Tackle Online Child Abuse Material” (September 2013), Senator Jillian Van Turnhout, who has vigorously lobbied the government to introduce legislation in this area, identified the following gap in the current self-regulatory system: if the material in question is hosted in a foreign jurisdiction which does not subscribe to the INHOPE network, the police have to address the material through international law enforcement channels. However, there is no specific way to do so and the material will remain available in Ireland unless and until the law enforcement agency in the country of origin take steps to deal with it.

In Luxembourg, if the websites containing or diffusing child pornography are located outside the Luxembourg territory, the Luxembourgish judicial authorities will address an international commission to the judicial authorities legally

empowered in this other state, in order to proceed with investigatory measures or initiate other legal actions allowing the removal of these websites.

Slovenian police and Slovenian INHOPE Point (Spletno oko) work closely together and solve these cases in close cooperation. People may find the illegal CAM on websites, and they can inform the INHOPE Point about it, afterwards the Notice & Take Down (TDN) is taken as a necessary step. If the website is hosted by a server in a foreign country, the relevant INHOPE Point would be informed to perform TDN. If the police are informed about the controversial website (containing CAM), relevant law enforcement agency is informed via police channel.

In the United Kingdom, when the IWF has information about pornographic child material hosted outside, they need to contact the hotlines and law enforcement agencies of the specific country, particularly through INHOPE. Later, the IWF will be able to notify the national hotline of the respective hosting country. For the removal of the content, the national hotline in that country will need to work to request it, and its success and time frame will depend on the legal and procedures the country has implemented.

## 4. Transposition of Art. 25 (2): Optional Blocking measures

**Overall assessment:** From the point of view of access blocking as an additional optional protective measure pending the removal of webpages offering child abuse images, the survey provides a positive result. **The majority of the Member States subject to our survey (19/27 Member States) put in place some form of access blocking.**

### 4.1. Blocking provided within the legislative framework: Belgium, Cyprus, France, Greece, Hungary, Italy,

### Lithuania, Luxembourg, Poland, Portugal, Romania, Spain<sup>5</sup> and Sweden.

In Belgium, in case of seizure of data stored in an IT-system, the public prosecutor and the investigating judge are entitled to use all necessary technical means (including blocking) to make data unavailable when such data constitutes the subject matter of the crime, or results from the crime and is contrary to public policy or morality.

In Cyprus, the court may order the restriction of access and notice and taking down of websites containing illegal material at any stage of the proceedings<sup>6</sup>.

In France, the French Office against Cybercrime (OCLCTIC) defines the blacklist of illegal websites and forwards this list to the ISPs for the purpose of blocking/removal. In parallel, the blacklist is also transmitted to a “qualified person” from the French Data Protection Authority (CNIL), who will control it and check if the websites that are listed there are indeed illegal. If they are not, the qualified person at the CNIL can ask the OCLCTIC to remove a website from that blacklist. If the OCLCTIC refuses to do so, the person may go before the administrative Court. In order to prevent censorship, the OCLCTIC forwards the illegal websites to content owners or hosting providers to make the content removed. If the illegal content is not removed within 24 hours, the OCLCTIC may forward the blacklist to the Internet Service Providers<sup>7</sup>. Furthermore, an application decree published on 4 March 2015 specifically targets search engines and foresees delisting of links containing child pornography.

In Hungary, temporary inaccessibility of a website may be ordered by the court in cases where it is necessary to prevent the continuation of the criminalised activity until the offender has been prosecuted. In Italy, the public prosecutor in charge of the investigations can proceed with the sequestration of the website containing child pornography. Following the seizure the site is obscured (i.e. blacked out, albeit not removed). The methods of obscuration are characterized by the use of public notice

<sup>5</sup> New provision entering into force in July 2015, Art. 189 of Spanish Penal Code.

<sup>6</sup> Global Alliance report on Cyprus 2014, p. 3.

<sup>7</sup> [Application decree](#) (Décret n° 2015-125 du 5 février 2015 relatif au blocage des sites provoquant à des actes de terrorisme ou en faisant l'apologie et des sites diffusant des images et représentations de mineurs à caractère pornographique).

forms. The notice is constituted by a special “stop page” that brings back the following message: “Your internet browser is trying to contact an internet site that is used in connection with distribution of photos depicting sexual abuse of children, which is a criminal offence in accordance with the Italian criminal code. No information about your IP address or any other information that can be used to identify you will be stored when you displayed this page. The purpose of blocking access to these pages is only to prevent the commission of criminal dissemination of documented sexual abuse and to prevent the further exploitation of children who have already been abused and photographed.” The ISP is obliged to block access to the website within six hours<sup>8</sup> upon notified by the Italian National Centre to Fight Online Child Pornography. This is contrary to the Finnish practice, where ISPs are not compelled by law to block access and may decide to act on a voluntary basis. Furthermore, the Italian legal framework also obliges **ISPs** to use **filtering systems** in order to prevent access to websites indicated by the National Centre to Fight Online Child Pornography.

In Lithuania, providers of internet hosting and network services are obliged to block access to information stored within their servers in the following cases: i) on the basis of a court request; or ii) if they found out that a prohibited information is stored within the said servers and it is technically possible to block access to such information.

In Luxembourg, as soon as an ISP acquires actual knowledge that the activity or the information is illegal, it has the obligation to immediately remove it or make access to it impossible.

In Poland, a hosting services provider is obliged to block access to web pages containing or disseminating illegal content, including child pornography, provided that it is properly notified. If a hosting services provider does not fulfil that obligation, it will be subject to legal liability (both civil and criminal). Nevertheless, to ensure effective blocking of access to web pages containing or disseminating child pornography, the rapporteur is of the view that a relevant administrative procedure or criminal

procedure should be introduced.

Art. 16, paragraph 1 of the Portuguese Cybercrime Law states that the apprehension of computer data can be made, when justifiable through various ways. There is the possibility of rendering inaccessible specific computer data. Therefore, the Portuguese legal framework provides for measures concerning blocking of access to web pages containing or disseminating child pornography towards internet users within its territory.

According to the Romanian report, the National Regulatory Authority for Communications and Information Technology is the competent authority for receiving and resolving complaints about the content of websites. If after verifying the content it is considered to be child abusive material, the National Regulatory Authority for Communications and Information Technology can require internet providers to block access to the website in question. In case the internet provider fails to block access within 48 hours of receipt, it is subject to a fine.

In Spain, according to the new legislation entering into force in July 2015, courts may take measures to order the removal of websites offering child abuse images or, where appropriate, block access.

## 4.2. Self/co-regulatory framework for blocking

It follows from Recital 47 of the Directive that **self-regulatory measures** for either take down or access blocking are both an **acceptable way** for transposing Art. 25 of the Directive.

In Bulgaria, according to the agreement concluded with the Ministry of Interior, GLOBUL regularly receives an updated blacklist of domains by the relevant department within the Ministry of Interior. This blacklist is prepared by INTERPOL and the Bulgarian Ministry of Interior based on a predefined set of criteria and contains websites with images or movies depicting sexual exploitation, harassment or misuse of children. Under Finnish legislation, the police is authorised to draft and maintain a list of foreign websites that contain or disseminate

<sup>8</sup>Wei, W., Nominet Trust (2010), Online child sexual abuse content: The development of a comprehensive, transferable international notice and takedown system, p. 80. [Online Child Sexual Abuse Content: The Development of a Comprehensive, Transferable International Internet Notice and Takedown System Dr. Weixiao Wei, 2010, p. 80.](#)



child pornography. The information about such websites is acquired from international child welfare organisations (ex. Save the Children Finland), individuals and from similar lists of other countries. The non-disclosed list is sent to telecommunication companies after unfortunately rather infrequent updates, thus the list might contain a large amount of sites that have already gone down, never actually contained or no longer contain child pornography. Thus, the telecommunications companies perform the actual blocking. One of the main problems identified by the rapporteur seems to be that blocking is still optional for the telecommunications companies and the police merely maintains the list and submits it to telecom operators. Thus there might be service providers that do not take part in this endeavour to fight the dissemination of child pornography. According to the extensive interpretation of the Finnish Supreme Administrative Court, not only foreign websites but also domestic websites may be added to the blocking list.

According to a voluntary agreement brokered by the European Commission with GSM Alliance Europe, the association representing European mobile phone operators, all mobile phone operators in Ireland implement a form of blocking on their mobile Internet service, which prevents access to websites identified as containing child pornography content.

In Slovakia, some ISPs cooperate with the Internet Watch Foundation in order to block illegal content.

In Sweden, the National Criminal Investigation Department runs a project on a **voluntary basis** with the aim of blocking web pages containing child pornography. When the National Criminal Investigation Department (SIU) is informed of the existence of web pages containing child pornography, it reviews the web pages to determine whether they contain child pornography or not. If the material is deemed to be child pornography, the SIU tries to establish the location of the server and, if it is located outside Sweden, it informs the authorities in the country concerned. Furthermore, the SIU informs the internet service providers that provide internet access to users in Sweden and that are part of the blocking project of the web pages. These

internet service providers undertake the technical measures necessary to block the access to the web pages for their users. Users who try to access a blocked page are informed that the page is blocked because it contains child pornography. They are invited to contact the National Criminal Investigation Department if they have any questions. According to the Swedish Justice Department, some 85–90% of all Internet service providers active in Sweden are part of the project.

In the United Kingdom, the blocking URL list is managed by the IWF, distributed and incorporated into blocking systems at the ISPs and search engines so people cannot have access to those sites, including the pathways of these images or videos. This mechanism is especially helpful when the illegal content has been hosted abroad, particularly outside the EU. As explained previously, when child sexual abuse content is hosted in a third country, the IWF needs to notify the national hotline of that country asking them to remove the illegal content. The time for the removal will depend of the national laws and judicial system of each country, but in the meantime the IWF will seek the blocking of the URL within the England and Wales's territory (and the United Kingdom in general). The reports show that relatively few Member States introduced **safeguards** in relation to blocking measures:

In Belgium, legal safeguards are guaranteed with regards to blocking: users are informed, when visiting a blocked website, that the website contains illegal content and constitutes an infringement of the Belgian laws. A fax number is indicated where the website owner and the user are provided the opportunity to challenge a blocking measure.

In Finland, an administrative **complaint** might be addressed to the highest police authority, the Parliamentary Ombudsman or the Chancellor of Justice. However, this **cannot be considered a judicial safeguard**. The decision of including a website to the blacklist is not an appealable decision. Denying a request to remove a website from the blacklist was considered an appealable decision according to the Supreme Administrative Court.

In Greece, the owner of the web page can make an appeal to the prosecutor, within a period of two months subsequently to blocking. The respective prosecutor decides within this period. The prosecutor's orders must be specific and fully justified and communicated to the owner of the web page, if it has been located, and to the National Council of Telecommunications and Post Offices (EETT).

The Swedish report states that with regard to the current self-regulatory system for blocking, the introduction of safeguards may be problematic.

In the United Kingdom, there is a possibility to challenge the decision by the Internet Watch foundation (IWF) to remove content or block access.

**As regards blocking techniques, the** Croatian rapporteur reported that IP address blocking, DNS blocking and redirecting, URL blocking, packet filtering and restarting internet connection are foreseen. In practice, Belgian websites are blocked by requesting the ISP to change the script of the Domain Name System (DNS). DNS-blocking thus consists of a change in the link between the IP address of the website and the domain name of the website at DNS level. This is not an automated system, compared to the IP blocking system, where all websites behind the IP address will be blocked, even the websites without illegal content.

### **4.3. Blocking measures are not available in Austria, Croatia, Estonia, Germany, Latvia, Malta and the Netherlands.**

**Political discussion is ongoing** regarding the introduction of access to blocking in Ireland and Latvia. According to the rapporteur, Latvia refuses to resort to access blocking as it is considered ineffective. Given the investment required for implementation and maintenance of blocking measures, and taking into account that there are easily accessible tools to circumvent such blocking measures, the competent bodies currently do not support introduction of

web site blocking, believing that it will be inefficient. However, according to Global Alliance Commitments of 2014<sup>9</sup>, Latvia is examining the possibilities to ensure blocking of sites containing child pornography. According to Latvia's Global Alliance report of 2014<sup>10</sup>, the Ministry of Transport and Communications organised dedicated working parties to prepare proposals for the necessary activities that, inter alia, would enhance child protection online. As a result, a draft report to the Cabinet of Ministers was elaborated, exploring the current situation and proposing an initial voluntary approach (invitation to) the internet service providers to filter the content automatically (pornography as one of the potentially harmful groups of audio-visual information among others), unless requested otherwise by the end-user.

**Political controversies lead** to the refusal of access to blocking in Germany and Croatia:

On 18 June 2009, the Federal Parliament (German Bundestag) adopted a law to combat child pornography in communication networks. Following public controversies and elections, this law has not yet come into force. The law required internet access providers to block websites containing child pornography, at least at the level of fully qualified domain names. According to the provisions of the European E-Commerce Directive (Dir. 2000/31/EC, Art. 15) the access providers must not be forced to search for such websites themselves. Thus a blocking list was to be provided by the German Federal Criminal Police Office (Bundeskriminalamt). The law provided safeguards with regard to privacy protection, telecommunication secrecy and freedom of information. However, the law was formally repealed in December 2011.

Blocking is perceived as infringement to the freedom of using the internet in Estonia.

There was **no information** provided on blocking measures with regards to Slovenia.

## **5. Conclusion and recommendations**

According to the results of the survey, it can

<sup>9</sup> available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/global-alliance-against-child-abuse/docs/commitments/ga\\_commitment\\_latvia\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/global-alliance-against-child-abuse/docs/commitments/ga_commitment_latvia_en.pdf), p. 9.

<sup>10</sup> available at: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/global-alliance-against-child-abuse/docs/reports-2014/ga\\_report\\_2014\\_latvia\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/global-alliance-against-child-abuse/docs/reports-2014/ga_report_2014_latvia_en.pdf), p. 7.

be stated that an overwhelming majority of Member States (Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Sweden, Slovenia, Spain, and the United Kingdom) provide for some kind of **removal mechanisms** within their legislative or self-regulatory framework.

In the majority of Member States, **removal** is regulated within the **E-Commerce Act** regulating the liability of the Internet Service Providers or within the framework of a criminal **court procedure** whereby the court may order the seizure of a server (website) where child abuse content is hosted. Member States have differing interpretations of the 'actual knowledge' of the ISP on the illegal content. Some consider 'actual knowledge' fulfilled only in case the formal notification by a competent state authority about the unlawful activities was made to the ISP. In some Member States, takedown measures only take place after a court judgment with final force and effect. This raises concerns on whether the introduced measures to remove child abuse images are efficient (and prompt) enough. **Self-regulatory measures** are also foreseen in a few Member States.

As regards **removal measures implemented outside** the Member States' territory, it can be noted that all 27 Member States subject to the survey operate internet hotlines where child sexual abuse content can be reported. These **hotlines** are members of INHOPE, which aims at ensuring cooperation at international level between hotline members of different countries in order to remove/block child sexual abuse contents.

The reports show that relatively few Member States introduced **safeguards** in relation to blocking and takedown measures.

As regards the transposition of optional blocking measures as an additional protective measure pending the removal of webpages offering child abuse images, the survey provides a positive result. The majority of the Member States subject to our survey (19/27 Member States) put in place **some form of**

#### **access blocking.**

Some Member States reported that blocking measures are **not efficient** means to eradicate child sexual abuse material on the internet, as they can be **circumvented easily**. **Access blocking may affect legal services as a result of a mistake by the blocking authority**. The issue of "overblocking" (blocking of legal content) can be identified as a potential concern as well, when access blocking might be subject to affect legal content as well as a result of a mistake by the blocking authority.

According to some Member States, where blocking is not regulated, the right to **freedom of expression** (laid down under Art. 10 of the European Convention of Human Rights (ECHR) and under Art. 11 of the EU Charter of Fundamental Rights) seems to be interfering with the **right of a child to be protected from illegal content**. However, as stated in the Commission's accompanying document<sup>11</sup>, as interpreted by the European Court of Human Rights (ECtHR) in Strasbourg, to respect fundamental rights such interference is possible if be prescribed by law and necessary in a democratic society for the protection of important interests, such as the prevention of crime. The proportionality of the measure would be ensured, as the blocking would only apply to specific websites identified by public authorities as containing such material.

In some Member States, **temporary inaccessibility of a website** containing child pornography may be ordered by the court in cases where it is necessary to prevent the continuation of the criminalised activity **until the offender has been prosecuted**. This practice can be seen as a good example on how blocking measures could serve – temporarily – as preventive tools, avoiding further abuse to be committed online against children.

As regards **blocking practices**, the Domain Name System (DNS) blocking was identified as good practice by the Belgian rapporteur, consisting of a change in the link between the IP address of the website and the domain name of the website at the DNS level. This is not an automated system, compared to the IP blocking system, where all websites behind the

<sup>11</sup> Accompanying document (COM Impact Assessment SEC(2009) 355) to the Proposal for Council Framework decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, available at: [http://www.europarl.europa.eu/meet-docs/2009\\_2014/documents/sec/com\\_sec%282009%290356\\_/com\\_sec%282009%290356\\_en.pdf](http://www.europarl.europa.eu/meet-docs/2009_2014/documents/sec/com_sec%282009%290356_/com_sec%282009%290356_en.pdf)

IP address will be blocked, even the websites without illegal content.

The rather **infrequent updates of blocking lists** was raised as a concern by some rapporteurs suggesting that blocking lists might contain a large amount of sites that have already gone down or never actually contained or no longer contain child pornography.

**New technologies and child abuses committed on the Dark net** present new challenges that cannot be tackled through the existing European legal framework.

As internet content regulation and the liability of service providers for illicit content is foreseen under several (current and future) EU legislative acts (such as the E-Commerce Act, Directive 2011/93/EU, [European Commission's Proposal on Net Neutrality](#)<sup>12</sup>), a harmonised and coordinated approach is essential and should be guaranteed by the European legislators.

<sup>12</sup> **Net Neutrality:** This proposal will end discriminatory blocking and throttling and deliver effective net neutrality. It goes wider than the measures in the US (which does not prevent blocking or throttling of services such as VOIP on mobile). It sets out clear rules for traffic management which has to be non-discriminatory, proportionate and transparent.

See also: [Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations \(EC No 1211/2009 and EU No 531/2012](#)

[/\\* COM/2013/0627 final - 2013/0309 \(COD\) \\*/](#), submitted by EC on 11 September 2013.

Art. 23 (5): Within the limits of any contractually agreed data volumes or speeds for internet access services, providers of internet access services shall not restrict the freedoms provided for in paragraph 1 by blocking, slowing down, degrading or discriminating against specific content, applications or services, or specific classes thereof, except in cases where it is necessary to apply reasonable traffic management measures. Reasonable traffic management measures shall be transparent, non-discriminatory, proportionate and necessary [...].

Recital 47: Providers of electronic communications to the public should, [...] **not block**, slow down, degrade or discriminate against specific content, applications or services or specific classes thereof except for a limited number of **reasonable traffic management measures**. Such measures should be **transparent, proportionate and non-discriminatory**. Reasonable traffic management encompasses prevention or impediment of serious crimes, including voluntary actions of providers to **prevent access to and distribution of child pornography**.



## **Executive Summary on Austria's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography**

### **Introduction**

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Austrian national law.

### **Topic 1: Obligation to make the act of knowingly obtaining access, by means of information and communication technology, to child pornography punishable**

Article 5 (1), (3) and Recital 18 of the Directive correspond with Section 207a of the Austrian Criminal Code. Paragraphs 1-2 punishes the production, offering, loaning, presenting, importing, transporting, exporting or distributing child pornographic material. Paragraph 3-3a criminalizes the obtaining of possession of child pornography on the World Wide Web and also distinguishes sanctions based on the child victim's age, for example, material depicting minors under the age of 14 is punishable with imprisonment of up to 2 years, whereas the sentence period is only up to 1 year for minors under the age of 18 years old. It should be noted that within this provision the actual 'consumption' of child pornography is not punishable, but only the obtaining or possession of the material. Moreover, general framework stipulates that a person can only be punished for intentional and recurring access to child pornography but that access

must also be made directly; therefore, it is not punishable to access material through indirect links. Paragraph 4 outlines the different forms of realistic presentations of minors in child pornography as computer generated images of minor or of their genitals is criminalised; however, it is not constituted as a crime if a person who is 18 years or over acts or poses as a child. Additionally, material that has been produced or possessed with a consenting minor of 14 years or older cannot be punished if it is for personal use. The Austrian report maintains that national framework goes further than the Directive in some areas but that it also fails, specifically in the vague and contradictory area of 'protective-age-limit' of mature minors.

### **Topic 2: Online grooming (solicitation by means of information and communication technology of children for sexual purposes)**

According to the Austrian report, national framework complies with the Directive, as Section 208a of the Criminal Code covers the solicitation of children for sexual purposes. Therefore, '...by means of telecommunication, using a computer system or in any other way under deception about his intention, proposes to a minor a meeting or agrees with him/her on a meeting and takes concrete preparatory actions to undertake the meeting, with the intent to sexually abuse the child and to commit an offence under Sections 201-207a....' This offence is punishable by a maximum term of imprisonment of up to 2 years. Additionally, a person shall be punished of up to 1 year

imprisonment if they are held liable of the offence of communicating with a minor via telecommunication means in order to solicit the minor to provide child pornographic material. Austrian framework does not specifically provide for Recital 19 in regards to offline grooming; however, the definition provided in Section 208a (1) vaguely outlines that soliciting through other means other than telecommunication which refers to face-to-face contact, letters, etc. can be criminalised due to the aspect of deception as it highlights the perpetrators intent on committing an offence to their victim. This provision aimed for the catchall element for all kinds of solicitation; however, Section 208a (2) also outlines that an offender shall not be punished if they voluntarily confess their actions to the police. Additionally, there are no existing provisions that criminalize the preparatory measures taken by perpetrators for attempting to solicit minors. Furthermore, victims according to Austrian framework, can only be minors 14 years old or younger, as it is considered that they do not have the ability of sexual self-determination. Sections 206 (4) and 207 (4) outline an 'age-tolerance' clause which stipulates that underaged peers cannot be held criminally liable for soliciting both online and offline.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information concerning criminal records**

The Austrian report indicates that national framework complies with the Directive. We may however observe that the judicial disqualification provided by Section 220 b of the Criminal Code has a narrow scope: a) it is limited to offences committed in connection with professional, commercial or voluntary activities involving "intensive" contacts with minors, b) it is limited to "comparable" activities, c) its duration of minimum 5 years is linked to the risk that the offender would commit further comparable crimes "entailing more than slight damages". This work ban is to be imposed for an indefinite time period when the case is more serious (e.g.

recidivism of the offender during the time of the ban); however, this has to be reviewed every 5 years by the courts. If the persons concerned violate their work ban, according to Section 220b (6), they can be sentenced to imprisonment of up to 6 months and/or with a fine.

In regards to Article 10 (2) of the Directive, Austria does not provide a general legal framework for screening with the exception of Section 9 of the Criminal Register Code. According to the report there is no obligation for employers to demand information on prior criminal convictions for the offences listed in Articles 3-7 of the Directive. We observe however that the Austrian official reply to the Council of Europe Lanzarote questionnaire refers to the obligatory screening of teaching staff for positions in the federal service and the state service as well as, more generally, when recruiting for positions "in institutions providing care for children or young people or education or teaching of children or young people". There are in addition provisions in place that give employers the right to demand information concerning convictions when recruiting for professional activities as Section 9a (2) of the Criminal Records Code outlines that police have to '...transmit information about convictions on criminal offences against the sexual integrity and self-determination that are registered in the criminal record to the public youth welfare organisations, school authorities...in connection with the employment of person in facilities for parenting, educating and teaching of children and teenagers...'. It is worth noting that offences against sexual integrity and self-determination will not be removed from the relevant criminal record. The report indicates that there exists no legal framework in relation to giving employers organizing voluntary activities the right to demand information. There is however the possibility for an applicant to a profession or voluntary work that covers the supervision, support, parenting, care or education of minors, to obtain a specific criminal record Certificate "Kinder-und Jugendfürsorge". A wide range of professional or voluntary activities enter into consideration, ranging from activities in kindergartens to sports clubs afternoon childcare, facilities for juvenile perpetrators or rehabilitation centres.

As to the transposition of Article 10 (par. 3) of the Directive Austria duly implemented Council Framework Decision 2009/315/JHA. No reference is however made in the report to the necessary “consent of the person” concerned, mentioned in Article 10, par. 3.

#### **Topic 4: Victim Identification**

The Austrian Registration Office against Child Pornography is an investigative department that uses information from national and foreign authorities, as well as reports given by internet users in order to identify both perpetrators and victims. Since 2010, Austria uses the Interpol’s International Child Sexual Exploitation Image Database (ICSE DB), which enables for sophisticated comparisons to be made between the connections of victims, perpetrators and places. The ICSE DB also enables certified users to access the database directly and in real time, thereby providing immediate responses to queries related to child sexual exploitation investigations.

#### **Topic 5: Jurisdiction (extraterritorial)**

Austria has transposed most of the provisions outlined in Article 17 of the Directive. The principle of territoriality in Section 62 of the Criminal Code states that the Austrian criminal law will apply for those acts that have been committed within or partly within its territory. Section 64 of the Criminal Code lists a number of offences which are punishable regardless of whether they are criminalised in the place where they were committed. Therefore, sexual offences are punishable under Austrian law if the offender or the victim is a national or a habitual resident and if the other party is of foreign nationality. In addition, even though there is no specific provision concerning Article 17 (3) of the Directive in Austrian law, offences committed through information and communication technology can be applied under the general provisions of Articles 62-65, thus enabling the judiciary to establish jurisdiction even if the online offence is not based within their territory. However, concerning Article 17 (2) (b) of the Directive, Austria has no corresponding provisions that enable

for jurisdiction to be applied for offences committed by legal persons within its territory.

#### **Topic 6: Assistance, support and protection measures for child victims**

Austria’s compliance in regards to topic 6 is limited, especially in regards to Article 18 and 20 of the Directive. The report indicates that in Section 78 of the Criminal Code Procedure that authorities are obliged to take immediate action to provide assistance and support once a report has been made. In regards to Article 18 (3) of the Directive, the report failed to provide a clear answer of whether or not a child victim whose age is uncertain is still entitled to assistance and support until their age is proven. However, concerning Article 19, it is outlined that assistance and support is not made conditional upon the child’s willingness to cooperate and that they are entitled to these services before, during and after the criminal proceedings. This support operates on a dual basis of psychological and legal assistance. It is mandatory for child victims under 14 to receive psychological support whilst it is optional for those above 14 years of age. In addition, children of sexual abuse are considered to be particularly vulnerable victims. Moreover, families of child victims are also provided with support from specialized organisations or governmental departments and are also provided with information regarding the criminal proceedings.

Article 20 (1) ensures that legal representation is provided to child victims which could be appointed organisations, relatives or by the justice system and is free of charge. It is also made possible under section 67 of the Criminal Code Procedure for child victims to claim compensation. Furthermore, in regards to interviewing child victims, Austria ensures that interviews take place in a timely manner within specially designed premises within the courts (not within police stations) and are also carried out by judges and prosecutors with specialized knowledge, along with psychologists. However, there is no limitation concerning the number of individuals conducting the interviews

as well as the number of interviews that take place, although this aspect is subject to a proportionality clause. Despite this though, according to section 250 (3) of the Criminal Code Procedure, child victims under the age of 14 can refuse to give further testimony when they have already been interviewed. Interviews with the child victim can be audio-video recorded with the permission of the child and their legal representative. In addition, in order to protect that dignity, privacy and identity of the child, the court hearing can take place without the public or the accused when the child testimonial is being presented. The 'contradictory interview' can also be used as a means to interview the child as they can be interviewed in a separate room whilst audiovisual systems present the interview in the courtroom. This kind of interview is mandatory for victims under 14 whilst those above 14 years old have to apply for it.

### **Topic 7: Measures against websites containing or disseminating child pornography**

At the present time, Austria has not established regulations regarding the removal of websites containing child pornographic material; however, there is an online registration office called the 'Stopline' which allows for the reporting of child pornographic material by the public. The reports are retransmitted to the Interior Minister who forwards the request of removal to the relevant foreign authorities. If the website reported is domestic, it would be immediately removed. Stopline also acts as a global network that corroborates with over 37 other online registration offices and it is estimated 90% of the content reported is removed within 72 hours of being reported. In addition, in regards to blocking measures, there currently does not exist such a practice within Austria; however, internet service providers can be requested to delete illegal content from their servers and failure to do so is sanctioned.





## Executive Summary on Belgium's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

Member State: Belgium – Contact person: Céline Masschelein (Celine.masschelein@alle-novery.com)

### **Topic 1. Obligation to make the following conduct punishable when intentional and committed without right: Knowingly obtaining access, by means of information and communication technology, to child pornography (Article 5 (1) and (3) & Recital 18) [pp. 2-5 report]**

Description of the national legal framework/ steps taken to transpose Article 5 (1) and (3): The Act of 30 November 2011 to improve the handling of sexual abuse and child exploitation in power relationships creates the offence of knowingly accessing child pornography through information systems or any other technical means. This is in line with a previous ruling of the Belgian Supreme Court. Article 383bis, §2 of the Belgian Criminal Code (BCC) now states that the offence is punishable by imprisonment (one month to one year) and a fine (EUR 100,00 to EUR 1000,00; to be multiplied by 6). [pp. 2-3 report]

Does the legal framework comply with Article 5 (1) and (3): Yes. [p. 3 report]

Status in Belgium with regard to the option to limit the scope of the prohibition of the conduct: Criminalising the depiction of (i) a person appearing to be a child engaged in sexually

explicit conduct or (ii) the sexual organs of a person appearing to be a child, where the person appearing to be a child was in fact 18 years of age or older, is controversial in Belgium. However, on the basis of the text of Article 383bis §2 BCC, it could be argued that it also applies to the situation where the depicted person is in fact 18 years of age or older. [p. 3-4 report]

### **Topic 2. Online grooming (solicitation by means of information and communication technology of children for sexual purposes) (Article 6 & Recital 19) [pp. 5-8 report]**

Description of the national legal framework/ steps taken to transpose Article 6: The Act of 10 April 2014 regarding the protection of minors against being approached with the objective of committing offences of a sexual nature inserts two new provisions into the BCC, creating the specific offence of online grooming and providing for an increase of penalty in case a sexual offence was preceded by grooming. [pp. 5-6 report]

Belgian position with regard to offline grooming: The BCC now provides for a harsher sentence if the technique of "grooming" has been used prior to committing an offence of a sexual nature. However, off-line grooming as such does not constitute a separate offence, but would be punishable via the offences of inciting moral decay and breach of public

decency, according to the parliamentary discussion. [p. 6 report]

Does this legal framework comply with Article 6? Yes. [p. 7 report]

### **Topic 3. Disqualification arising from convictions, screening and transmission of information concerning criminal records (Article 10 & Recitals 40-42) [pp. 8-13 report]**

Description of the national legal framework with regard to disqualification arising from conviction (Article 10 (1)): Article 382bis of the BCC provides for a possibility to disqualify the offender of specific offenses (including online grooming) from certain professional and voluntary activities involving direct and regular contact with children for a period of one to twenty years. Moreover, a judge can communicate the conviction to the employer, legal entity or authority exercising control over the offender who has contact with minors because of his/her status or profession. [p. 8-9 report]

Description of the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Article 10 (2)):

The **general** legal framework for screening is laid down in Collective Bargaining Agreement n° 38 (CBA 38). Further, the Belgian Data Protection Act in principle prohibits the processing of judicial data relating to job applicants. However, it lists a number of exceptions. [p. 9 report] Belgium does not provide **a specific** legal framework. [p. 9 report]

Employers in Belgium have **no obligation** to demand information on the existence of prior criminal convictions for the offences listed in Articles 3-7 of the Directive when recruiting a person for professional or organised voluntary activities involving direct and regular contact with children. [p. 9 report]

They only have the **right** to demand such information in exceptional cases established by or pursuant to a law. For conducting activities in the areas of (i) education, (ii) psycho-medical-social guidance, (iii) youth aid, (iv) child protection, (v) animation or (vi) guidance to children, the relevant legislation often requires “irreproachable behaviour”, indicated on a Model 2 extract of a criminal record. Nevertheless, only the person to whom that extract relates can order the extract and he/she can refuse to provide an extract of their criminal record to third parties, according to the Council of State. [p. 10 report]

Situation in Belgium with regard to the transmission of information on criminal convictions: [p. 11 report]

The transfer of information by police authorities is permitted under the conditions set out in the Belgian Data Protection Act. Article 597 BCC allows an extract from a criminal record to be transferred to foreign authorities in the situations prescribed by international conventions.

Does this legal framework comply with Article 10? No. An express legal ground should be developed allowing employers to obtain and process the information on criminal convictions when recruiting for activities involving direct and regular contact with children. [p. 11 report]

### **Topic 4. Victim identification (Article 15 (4)) [pp. 13-14 report]**

Description of national legal framework: The research measures concerning child pornography are carried out by the Federal Computer Crime Unit (FCCU), the Regional Computer Crime Units (RCCUs) and the Human Trafficking Central Service. Victim identification takes place through (i) pro-active research and (ii) reactive research by the federal investigative authorities. Though the identification of victims is not specifically covered by the Belgian Code of Criminal Procedure (**BCCP**), the Code does contain a number of measures that are specifically designed to aid the investigation of cybercrime and consequently facilitate victim identification (eg Article 46bis and Article 88quater BCCP). [pp. 13-14 report]

Does the current legal framework comply with Article 15 (4)? Yes. [p. 14 report]

## Topic 5. (Extraterritorial) jurisdiction (Article 17 & Recital 29) [pp. 15-19 report]

Description of the national legal framework: [pp. 15-16 report]

- According to Article 3 BCC, Belgian criminal law applies to all offences committed on the Belgian territory, ie if one of the constitutive elements of the offence is committed on Belgian territory.

According to Article 10ter of the Preliminary Title to the BCCP, any person may be prosecuted in Belgium for indecent assault, rape, genital mutilation, moral decay of the youth, prostitution and pornography involving minors for an act committed outside of Belgium on the condition that the offender is apprehended in Belgium. This provision applies irrespective of the offender's or the victim's nationality or place of residence. However, if the offence is committed by means of information and communication technology located outside of Belgium, this may limit the possibilities of investigating and establishing the offence.

Does the current legal framework comply with Article 17? Yes. [p. 16 report]

## Topic 6. Assistance, support and protection measures for child victims (Articles 18, 19, 20 & Recitals 30, 31, 32) [pp. 20-32 report]

Description of the national legal framework: [pp. 20-24]

1) General framework of protection (Article 18): [p. 20]

- The Belgian legislator has already adopted a number of important legal provisions as regards victims in the Act of 12 March 1998 (Franchimont Act).

- The authorities are obliged to implement assistance and support measures when they first come into contact with a potential child victim.

- Under Belgian criminal law, no distinction is made on the basis of the age of the victim, except for interviews and testimonies.

2) Specific assistance and support measures (Article 19): [pp. 21-22]

- The Belgian legal framework enables child victims to exercise the rights set out in Framework Decision 2001/220/JHA and the Directive (Article 19 (1)).

- The public prosecutor may request protection measures for children who report cases of abuse within their family from the youth judge, which may e.g. decide to (temporarily) have the minor placed in a foster home or a youth institution.

- Child victims of any of the offences referred to in Articles 3 to 7 of the Directive are considered as particularly vulnerable victims according to Article 311 BCCP that contains specific rules for witness statements given by minors.

- Information rights for victims are based on Articles 3bis and 5bis of the Preliminary Title to the BCCP. Article 3bis of the Preliminary Title to the BCCP expressly refers to "victims and their relatives". This is irrespective of the nationality or residence of the victim.

3) Specific protection measures in criminal investigations and proceedings (Article 20): [pp. 22-24]

- According to Article 378 §2 of the Belgian Civil Code, **an ad hoc guardian** may be appointed by the judge before whom the case is pending, if there are conflicting interests between the child and its parents, at the request of any interested party or official.

- According to Article 5bis BCCP, those who claim to have suffered damage from a crime are, by a simple declaration, recognised as an "injured party" and have the right to be counselled or represented by a **lawyer**. Children have the right to free legal representation.

- There is no specific rule that **interviews** with the

child victims are carried out without unjustified delay after the facts have been reported to the competent authorities. Such interviews are, depending on the stage of the proceedings, conducted by a magistrate of the public prosecutor's office, by the investigating judge or by a policeman appointed "by name" by one of them (Article 93 BCCP). The number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purpose of criminal investigations and proceedings, since Article 98 BCCP implies that one interview should suffice, but states that when it is deemed indispensable to interview the child again or to complement the initial interview, a specially reasoned decision to organize a new interview needs to be taken.

- The child victim may be accompanied by his or her **legal representative** or, where appropriate, by an adult of his or her choice, according to Article 914bis BCCP, but there are two exceptions: (i) in the interests of the minor or (ii) in order to reveal the "truth".

- Article 92 BCCP provides that the **audio-visual recording** of interviews with child victims and witnesses is now obligatory. The recording tapes must be submitted to the court registry as evidence (Article 97 BCCP).

- In criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, may it be ordered that:

(a) the hearing take place without the presence of the **public** when the publicity would endanger public policy or morality (Article 148 of the Belgian Constitution). A specific provision applies to cases of indecent assault and rape where the parties to the case may request a hearing behind closed doors for reasons of privacy (Article 190 BCCP).

(b) the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies (Article 100 BCCP). However, it is possible for the court to rule by a specially reasoned decision that the child victim's presence is necessary for "revealing of the truth". Moreover, the child has the right to insist on a live appearance in court.

- Article 378bis BCC prohibits any type of **publication or dissemination** of information that could lead to the identification of child victims of the relevant offences, unless the victim gives written permission or the authorities allow this for reasons of the investigative or judiciary proceedings.

Does the current legal framework comply with Articles 18, 19, 20? Most of the legal framework is compliant. The following elements should be expressly provided: (i) individual assessment of the specific circumstances of each particular child victim; (ii) interviews with the child victim to take place without unjustified delay after the facts have been reported; (iii) interviews with the child victim to be carried out by the same persons. [p. 25 report]

## **Topic 7. Measures against websites containing or disseminating child pornography (Article 25 & Recitals 46 & 47) [pp. 32-36 report]**

Description of the national legal framework:

1) Obligatory take down measures (Article 25 (1)): [p. 33 report]

- Article 39bis §3 BCCP regarding the seizure of data stored in an IT-system, entitles the public prosecutor and the investigating judge to use all necessary technical means to make data unavailable when such data (i) constitutes the subject matter of the crime, or results from the crime and (ii) is contrary to public policy or morality. These technical means include taking down or deleting the web pages. The Belgian E-Commerce Act of 11/03/2003 imposes a duty on the ISPs to (i) report the activity or information to the public prosecutor in order to enable the public prosecutor to take the necessary measures in accordance with Article 39bis BCCP and (ii) immediately delete or block the information whenever the ISP is informed of the illegal activity or information.

- When web pages containing or disseminating child pornography are of a foreign origin,

the Belgian authorities cooperate with Interpol to communicate with the relevant country. In practice, foreign websites are often only blocked on the Belgian servers.

2) Optional blocking measures (Article 25 (2)):  
[pp. 33-34 report]

- Article 39bis §3 of the BCCP entitles the public prosecutor and the investigating judge to use all necessary technical means to make data unavailable (see point 1)). In practice Belgian websites are blocked by requesting the ISP to change the script of the Domain Name System (**DNS**). The system of DNS blocking is a more proportionate and less expensive system than the system of IP-blocking.

Does the current legal system comply with Article 25? Yes, nationally. A more comprehensive and effective framework should be developed for websites hosted abroad. [p. 34 report]



# Executive Summary on Bulgaria's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Bulgarian national law.

## Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

According to recent amendments to the Penal Code adopted in 2015, published in the State Gazette on 26 September 2015 it is punishable to knowingly access pornographic material via information and communication technology.<sup>1</sup>

## Topic 2: Online grooming

The Bulgarian report indicates that Article 155a (1) and (2) of Section 8 of the Criminal Code is in compliance with Article 6 and Recital 19 of the Directive. The framework generalizes online and offline grooming within Article 155a as it outlines '...anyone, who for the purpose of establishing a contact with a person who is under 18 years of age, in order to perform fornication, copulation, sexual intercourse or prostitution, provides on the internet or in another manner, information about him/her, shall be punished by deprivation of liberty of 1-6 years and by a fine from BGN 5 thousand to 10 thousand. The same punishment shall be imposed also on the person, who for the

purpose of performing a fornication, copulation or sexual intercourse, establishes a contact with a person who is under 14 years of age, by using information provided on the internet or in another manner'. The framework provides a wide scope for possible actions which includes all types of establishing contact with children. Article 18 (1) of the Criminal Code regulates the 'attempt' which is defined as an act that has been commenced but has not yet been completed; thus, it is punishable under paragraph 2 of the provision.

## Topic 3: Disqualification arising from convictions, screening and transmission of information

In regards to topic 3, Bulgarian national framework fails to fully comply with Article 10 (1) and (2) of the Directive as it falls short of fulfilling essential requirements and leaves much to interpretation. General provisions are in place that provide disqualification measures from convictions for any offence. Article 37, 49 and 50 of the Criminal Code stipulate that offenders could be deprived of the right to exercise a certain vocation or activity which could be combined with another punishment or pronounced separately. This deprivation can also be carried out if the nature of the crimes committed is incompatible with the respective vocation or activity. However, Article 160 of the Criminal Code does not include sexual offences against children in the list of crimes which are punished with these forms of disqualification. A bill for a new criminal code providing for a rule on disqualification from professional activities involving direct and regular contacts

<sup>1</sup> Update provided by Bulgarian Council of Europe Lanzarote Committee's representative in October 2015.

with children has been discussed in 2014. It was not passed. A more general provision exists in Article 69 (1) of the Criminal Procedure Code which states that ‘...where the charge is for a malicious crime of a general nature committed in connection with the office and there are sufficient grounds to deem that the official position of the defendant will put obstructions to objective, thorough and complete clarification of circumstances under the case, the court may remove the defendant from office’. However, it is worth noting that these provisions which might apply to the offence listed in the Directive are only concerned with professional activities, and as the report indicates, there are no provisions that reference disqualification procedures for voluntary activities.

In relation to paragraph 2 of the Article 10, Bulgarian national framework provides for the regulation for the access of information to employers concerning previous convictions. General provisions exist in Article 1 (1) of the Ordinance No. 4/11.05.1993, which obliges the requirement of a Certificate of Convictions to be produced before a Labour Agreement is made between the employer and the respective person. Moreover, Article 43c of the Regulation on the Application of the Child Protection Act stipulates that in order to obtain a license for providing services to children, legal and natural persons must also produce a Certificate of Convictions to the State Agency for Child Protection. Article 125 of the Regulation on the Application of the Public Education Act states that positions of teachers and counselors cannot be obtained by persons who have been convicted for intentional crimes or have been deprived of the right to practice their profession. However, these general and specific provisions only provide screening measures for professional activities whilst there are no existing measures for voluntary activities.

Concerning the transmission of information on convictions between member state authorities, the Ordinance No. 8/28.02.2008 enables the Ministry of Justice to regulate this matter. Chapter 5 of the Ordinance outlines that the Central Office of Convictions is the main body for the bilateral and multilateral contracts of the transmission of information to other EU states.

## **Topic 4: Victim Identification**

According to the report, Bulgarian legislation provides for the general provisions for investigation and prosecution for the offences listed in Articles 3-7 of the Directive, therefore, it is in compliance. Article 7 (1) of the Child Protection Act states that ‘...persons who become aware of the existence of a child in need of protection shall immediately report the case to the Social Assistance Directorate, the State Agency for Child Protection or the Ministry of Internal Affairs’. The State Agency for Child Protection has a database of files of children who have been victims of violence, which enables for the analysis of child pornographic material in order to help identify victims. In 2011, Bulgaria had ratified the Lanzarote Convention which enabled ‘...units or investigative services to identify the victims of the offences established in accordance with Article 20, in particular by analyzing child pornography material, such as photographs and audiovisual recordings transmitted or made available through the use of information and communication technologies’. Furthermore, the Special Surveillance Means Law enables for the use of special surveillance methods when used to prevent or uncover serious intentional crime, including child pornography, which is used in accordance with Chapter 19 of the Law on Electronic Communication.

## **Topic 5: The extraterritorial extension of jurisdiction**

Bulgarian national framework mostly complies with Article 17 of the Directive, although much of it provisions are subject to interpretation. Article 3 (1) of the Criminal Code states that it shall apply to all crimes committed on the territory of the Republic of Bulgaria, whilst Article 4 (1) of the code states that ‘...criminal proceedings initiated by a body of another country, or the effective judgment passed by a court of another country, entered into force and not recognized under the Criminal Procedure Code shall not be an obstacle to the institution or proceedings by the authorities of the Republic of Bulgaria of the same crime and regarding the same person’. However,

this provision will not apply if stipulated in an international treaty which Bulgaria is subject to. In regards to crimes committed by means of information and communication technology, the provisions of Article 155a and 159 of the Criminal Code outlined above in regards to grooming and child pornography distribution are interpreted for the means of applying jurisdiction. Moreover, offences under Chapter 2, Section 8 'Debauchery' are in general initiated by authorities; thus, criminal proceedings are not subordinate to the requirement of a complaint or victim. Furthermore, the Criminal Code applies to Bulgarian citizens who have committed crimes abroad and to foreign citizens who have committed crimes of a general nature abroad, whereby the interests of Bulgaria and its citizens have been affected; thus, establishing jurisdiction over victims who are citizens. Therefore, in order to apply jurisdiction, the action must be criminalised by Bulgarian national law whether or not it is considered an offence in the place it took place. Jurisdiction is also established over legal persons as they can held liable for civil damages: however, only their representatives can be subject to criminal prosecution. The report indicates that there are no provisions concerning jurisdiction over offenders or victims who are habitual residents; however, it could be interpreted that Bulgarian 'citizens' can apply to both nationals and habitual residents.

### **Topic 6: Assistance, support and protection measures for child victims**

The Bulgarian report's scope for analysis in regards to topic 6 is limited; thus, making it difficult to establish its level of compliance. It does indicate that through national legislation, it has the legitimate right and duty to provide assistance and support to children at risk through the use of competent authorities in the situation where the child's health, safety and well-being is at risk. The situations referred as being 'at risk' are outlined in the Additional Provisions (1), item 11. Article 10 (2) of the Child Protection Act outlines that where the age of the child is in doubt, the law provides assistance and support regardless of this doubt if there is reasonable

grounds to assume that the victim is indeed a child. Article 4 of the Child Protection Act obliges the state to provide legal assistance to a child victim free of charge. Moreover, Article 15 of the same act outlines the importance of judicial authorities in providing an appropriate environment for the child victim's hearing, which must be consistent with their age. Additionally, all hearings with child victims must take place in the presence of a social worker as well as a specialist if necessary. Furthermore, interviews and hearings can be recorded using audio/video devices.

However, the Bulgarian report fails to provide any clear information on numerous questions, for example, there is no further information concerning interviews with children concerning that interviews take place without delay, the same person conducts the interview and whether they are limited to as few as possible. The report additionally fails to mention whether assistance and support measures are provided regardless of the child victim's willingness to cooperate, as well as failing to state whether they are individually assessed, can be provided with the status of being 'particularly vulnerable' or are entitled to legal compensation.

### **Topic 7: Take down and blocking measures**

The Bulgarian report indicates that there are no current legal measures existing for complying with Article 25 (1) and (2) of the Directive. Therefore, the obligatory 'take down' measures of topic 7 have not been transposed even though there are numerous pieces of EU and international legislation providing the basis to do so. In 2014, the Ministry of Interior had initiated a filtering procedure for blocking access to child pornographic sites; however, it is essential to note that these measures also do not have a legal basis.





# Executive Summary on Croatia's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Croatian national law.

## Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

Croatian national framework complies with Article 5 (1) and (3) of the Directive in relation to topic 1, as the Criminal Code criminalizes on two separate basis for the offences listed in Articles 3-7 of the Directive. Child pornography within the Criminal Code is defined as '...any material that visually or otherwise depicts a real child or a realistic image of a non-existent child or a person appearing to be a child, involved or engaged in real or simulated sexually explicit conduct, or any depiction of a child's sexual organs for sexual purposes'. Therefore, a sentence of imprisonment of between 1-8 years will be imposed on '...whoever takes child pornography pictures or produces, offers, makes available, distributes, transmits, imports, exports or possess child pornography or knowingly obtains access, through information and communication technologies, to child pornography'. Croatian framework also makes the distinctions between knowingly obtaining access to child pornography and 'unintentional' access, as perpetrators must be aware of the element of criminal offence and continues

to access child pornography. Thus, the Criminal Code had developed from only incriminating the storage of pornographic materials, to also making it offence to temporally accessing such materials.

## Topic 2: Online grooming

Article 6 of the Directive has been transposed into Croatia's national framework. Article 161 (1) of the Criminal Code incriminates online grooming as '...an adult who, with the intention that he/she or a third party commit the criminal offence referred to in Article 158 of this Act against a person under the age of fifteen, proposes to this person, through information and communication technologies or in some other way, to meet up with him/her or a third party, where this proposal is followed by material leading to such a meeting, shall be sentenced to imprisonment for a term of up to three years'. Offline grooming in relation to Recital 19 is somewhat vaguely incriminated under Article 161 of the Criminal Code, as it outlines preparatory measures are punishable through the means of online grooming. Therefore, in order to fully comply with the Directive, transposing Recital 19 into national framework through clear and individual means would enhance the overall protection of children from offline grooming.

## Topic 3: Disqualification arising from convictions, screening and transmission of information

Croatian national framework complies with

Article 10 (1), (2) and (3) of the Directive; however, it does so with shortcomings.

In regards to disqualification measures, the Criminal Code states that '...the court may impose upon a perpetrator of certain criminal offences in carrying out the duties of his/her office, a safety measure of prohibition from holding the same office or engaging in the same activity'. This principle is also applied to offences involving sexual exploitation and abuse of children in which case the court may impose a prohibition from holding an office or engaging in an activity that involves regular contact with children, also when the offences were not committed in carrying out the duties of the office or activity involved and can be imposed to the duration of a lifetime.

In addition to this safety measure the court may impose special obligations or prohibitions with respect to presence at specific locations, events, and/or contacts with certain groups of persons that might be conducive to the commission of a new criminal offence.

Croatian national framework outlines that criminal records on natural and legal persons convicted for criminal offences committed within the territory, which includes the offences listed in Article 3-7 of the Directive are kept by the Ministry of Justice.

Article 13 (4) on the Act on Legal Consequences of Conviction, on Criminal Records and Rehabilitation of the Republic of Croatia states that courts and other relevant institutions may in the interest of the child, submit data on offenders who has been convicted of crimes of sexual abuse and exploitation of children. Such data may be submitted to the bodies in charge of the procedures for the protection of rights and interests of children as well as the procedures delegating certain tasks and duties in working with children. Moreover, Article 13 (4) of the Act also indicates that employers from both professional and voluntary capacities have the right to demand information concerning a potential employee, whilst employers only from schools and so forth are obliged to request such information. However, it should be noted that in Croatia, after a period of 'rehabilitation', offenders are removed

from the Paedophile-sex Offender registry, thus there ceases to exist any legal barriers for them to gain employment in working with children.

In relation to Article 10 (3) of the Directive the Report indicates that as of 1st July 2013 Croatia implements the Framework Decision and is part of the ECRIS system. No information is given on the condition of consent of the person concerned mentioned in Article 10 (par. 3) of the Directive.

#### **Topic 4: Victim Identification**

Croatian national framework currently does not provide for provisions that would correspond with Article 15 (4) of the Directive in relation to victim identification.

The Ministry of Interior has launched an application named the 'Red Button' which is designed to register any inappropriate content that involves violence against children. The application is adjusted for children and teaches them basic legal rules whilst on the internet and also how to seek for help.

The Croatian Criminal Procedure Act outlines the procedure which national police have to follow in order to identify victims of child pornography.

Croatian police is indeed developing a strategy ore directed towards the identification of the victims and the apprehension of offenders who record and produce child pornography material.

In addition, the national police have merged into Interpol's international database for child pornography, with the purpose of identifying child victims.

#### **Topic 5: The extraterritorial extension of jurisdiction**

In relation to Article 17 and Recital 29 of the Directive, Croatian national framework has not fully transposed these provisions. The Croatian Criminal Code territoriality principle states that '...criminal legislation will apply to everyone who commits an offence in its territory, regardless of who is the perpetrator, who is the victim

or whether the offence is committed in a whole or part of its territory'. Article 14 of the Criminal Code applies to a Croatian citizen who commits a criminal offence outside of the territory, providing that the criminal offence in question is also punishable under the law of the country in which it was committed. Exceptions to this rule are offences of sexual abuse and exploitation of children, as jurisdiction will be applied to the person at the time of the offence. This concept also involves the use of communication technology of whether it is accessed from its territory or not. Active personality jurisdiction is limited in Croatia in that criminal legislation shall not be initiated if the 'ne bis in dem' principle is applied; however, criminal legislation will be applied to '...an alien outside of its territory who commits a criminal offence for which a sentence of imprisonment is 5 years or more, provided that the offence is also punishable under the law of the country in which it was committed'. As it stands; national framework applies jurisdiction over legal persons and entities who commit an offence, whereas there is no specific provision that allows for jurisdiction to be applied to victims who are national or habitual residents. Therefore, in order to comply with the Directive, Croatian framework should include provisions for applying jurisdiction over victims who are nationals or habitual residents in order to apply full maximum protection.

### **Topic 6: Assistance, support and protection measures for child victims**

Articles 18, 19 and 20 of the Directive, have been transposed into national framework. National police officers are obliged to take immediate action when a complaint has been made and the social welfare centre is also to be notified. The Criminal Procedure Act outlines that if the age of a victim has not been determined to be a minor, under the proceeding circumstances, it should be assumed that the victim is indeed a minor and is entitled to the relevant support and assistance. Moreover, child victims are also ensured support and assistance before, during and after the criminal proceedings, and that they are entitled to a legal representative at the expense of budget

funds. Competent authorities also ensure that the child victims is aware of their rights and how to exercise these rights. As it currently stands, there is no specific provision that makes it conditional for assistance and support in regards to the child's willingness to cooperate; however, the best interest of the child is usually the guiding principle in such matters, and factors such as the child's age and maturity will also be taken into consideration. Each particular case of a child victims is assessed and treated accordingly as they are considered to be particularly vulnerable; thus, receive special treatment in order to avoid 'secondary victimization'. Families of the victim are also provided with support through the use of county courts, support offices for victims and witnesses, etc. Article 4 in the Juvenile Courts Act maintains that criminal proceedings involving children are to be considered urgent; thus interviews with child victims should be a priority, be held in specially designed premises, and conducted by the same expert. In addition, interviews involving child victims should be video/audio recorded to be presented as evidence, court hearings of the child to be presented without the public or be communicated through technological means. All images and voices of the child are altered in order to protect the dignity and privacy of the child.

### **Topic 7: Take down and blocking measures**

Croatian national framework does not fully comply with the Directive in regards to Article 25 and Recital 46-47 in relation to topic 7, as there are numerous shortcomings. Article 163 (4) and (5) of the Criminal Code obliges take down measures against websites containing or disseminating child pornography that is hosted in the state of Croatia. These measures will take place after a judgment with a final force and effect; thus, take down measures are subjected to interpretation in relation to what can be seized or destroyed. Currently there is no legal framework that can provide for blocking measures to be created. There are various other measures to allow for the reporting of illegal content found on the internet which depicts, describes, encourages or is in any way

connected with sexual abuse over children. Operators conduct checks on reported pages, which determines the necessary actions needed to remove content e.g. contacting servers national or internationally. In addition, IP address blocking, URL blocking and so forth are also commonly used in Croatia. However, it should be noted that none of the measures of removing and blocking are not regulated by law; thus, in order to comply with the Directive, further development in this area is needed, for example, transposing the minimum standards of the Directive and creating a national block-list that would corroborate with other member states.



# Executive Summary on Cyprus's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Cyprian national law.

## Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The report indicates that Article 5 (1) and (3) of the Directive has been transposed into national Cypriot law. Article 8 (2) of the Law on the Prohibition and Combating of Sexual Abuse, Sexual Exploitation of Children and Child Pornography 2014 (the Law) outlines that '... whoever, knowingly obtains access, by means of information and communication technology, to child pornography shall be guilty of a felony and in case of conviction shall be punished by a term of imprisonment which shall not exceed 10 years...' In regards to convictions, the Directive stipulates the term 'minimum' imprisonment rather than 'maximum' imprisonment which the Cypriot law outlines. Moreover, Article 8 (6) of the Law imposes a mandatory life sentence if any of the offences set out in Article 8 relate to a child which is under the age of 13 years. However, the Cypriot law also provides exceptions of when it will not be considered as child sexual abuse, for example, consensual sexual acts between two children who have not reached the age of consent but have similar age, psychological and physical

maturity. Another exception outlined in Article 12 is that consensual sexual acts between an adult and a child who has not reached the age of consent will not be criminalised, provided that the age difference between them does not exceed 3 years difference.

## Topic 2: Online grooming

In regards to Article 6 of the Directive, Cyprus has transposed its provisions into Article 9 of the Law on the Prohibition and Combating of Sexual Abuse, Sexual Exploitation of Children and Child Pornography 2014 (the Law). Paragraph 1 outlines that the proposal '... by means of information and communication technology, to meet a child who has not reached the age of sexual consent, for the purpose of committing any sexual acts with the child or the production of any child pornography material or the sexual exploitation of the child, where that proposal was followed by material acts leading to such a meeting, shall be guilty of a felony and if convicted shall be punished by a term of imprisonment not exceeding the period of 10 years'. Paragraph 2 of the provision stipulates that through information and communication technology, if an offender approaches a child, and '...attempts to acquire or attempts to have access or to acquire or acquires access to child pornography material....' shall be punished by a term of imprisonment not exceeding the period of 10 years. The report fails to mention the current situation of Cypriot national framework in regards to Recital 19's offline grooming.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

The new Law on the Prohibition and Combating of Sexual Abuse, Sexual Exploitation of Children and Child Pornography 2014 contains provisions transposing Article 10 of the Directive. Article 14 of the 2014 Law outlines that the Court may impose an additional penalty upon the conviction of sexual child abuse to a natural or legal person by prohibiting them from being employed in places where there are children or frequented by children. The provision does not distinguish between professional and voluntary activities. It does however extend to the termination of the employment of the convicted person. It includes the possibility for the court to prohibit the convicted persons from residing in a place where children reside or in places which are near to places frequented by children.

As to “screening” Article 22 (6) of the 2014 law provides that any person who intends to employ a person for professional, organized or voluntary activities that involve working with children may not proceed to such an employment unless the person concerned provides a certificate of good conduct.

With regard to the “exchange of information” under Article 10 (3) of the Directive Moreover, Article 28 of national framework expressly allows such transmission of information on criminal convictions pursuant to Council Framework Decision 2009/315/JHA.

### **Topic 4: Victim Identification**

The Cypriot report provides little information concerning topic 4; however, it does indicate that Article 29 of the 2014 Law outlines that the Attorney General or the Republic, the Chief of Police and the Court dealing with the offences covered by the 2014 Law, shall ensure that investigative units are given the opportunity to attempt to identify victims of the offences referred to in Article 6-10 of the 2014 Law in particular by analysing child pornographic

material such as photographs and audiovisual recordings that have been transmitted or made available by means of information and communication technology.

### **Topic 5: The extraterritorial extension of jurisdiction**

In relation to Article 17, Cypriot national law fails to fully comply with the Directive when concerning topic 5 of the study. The report does indicate that jurisdiction is applied to offences committed within its territory as well as being applied to offences committed in a foreign country by one of its national or habitual residents. However, this is subjected to the clauses outlined in Article 5 (1) (d) of the Criminal Code which outlines that ‘...in any foreign country by a citizen of the Republic (and not by any other national), provided such an offence by a term of imprisonment exceeding two years and the act or omission which constitutes the offence is also a criminal act in accordance with the law of the country in which it was committed’. Moreover, the report highlights that Article 17 of the Law provides for optional extension of jurisdiction of offences on behalf of a legal person established within Cyprus or have been committed by electronic means and accessed within its territory, irrespective of whether the electronic system is situated in Cyprus. Furthermore, the report indicates that jurisdiction is applied to victims who are nationals or habitual residents when offences are committed against them in foreign countries, however; given the context of the exception clause in Article 5 (1) (d) of the Criminal Code, this aspect is very limited.

### **Topic 6: Assistance, support and protection measures for child victims**

As indicated by the Cypriot report, national framework in relation to topic 6 fully complies with the Directive. Article 31 (2) of the Law provides that Social Services shall ensure that support and assistance shall be provided once the authorities have reasonable grounds for believing that a child might have been

subject to any of the offences referred to in Articles 6-10 and 15. Additionally, paragraph 3 of the article ensures that support and assistance is also provided even when the age of the victim is uncertain that they are a child. Furthermore, numerous provisions throughout national legislation stipulate the principle that assistance and support measures will be provided regardless of the child victim's willingness to cooperate within the investigation or the criminal proceedings. The report notes that individual assessments are made of each child victim and national framework also provides that the child victim be awarded the status of being 'particularly vulnerable'. Article 45 (1) states that '...services concerned take all appropriate measures....to assist and support children who are victims, for short and long term, in their physical and psycho-social recovery, after the individual assessment of the child's condition, taking due regard of the opinion of the child, depending on the age, mental and cognitive status, needs and concerns with a view to findings a lasting to the child'.

Article 42 (1) of the Law indicates that the Court may appoint a special representative, such as the Commissioner for the Protection of Children's Rights. Article 39 (1) states that the '...victim has an institutional right to claim damages against all the persons concerned, for the criminal offences committed against it as per the provisions of the Law and for the infringements of its human rights, such a person shall have a civil law duty to pay special and general damages to its victims'. Paragraph 3 ensures that victim have '...directive access to legal advice at each stage of the proceedings in accordance with the provisions of the Advocates Law...and in case of inadequate resources of the victim, he or she has the right for free legal assistance...'. Moreover, Article 42 (2) outlines that interviews with child victims take place without delay, as well as being limited to one interview if possible. The interviews take place within specially designed premises and are carried out by the same trained professional. The report notes that interviews and hearings of the child victim are recorded, whilst cross-examinations with the child are obliged to use telecommunication technology. National framework is also in place to protect

the identity and privacy of the child victim, as court hearings can take place without the public being present and it is prohibited to publish information concerning the child's identity.

## **Topic 7: Take down and blocking measures**

The Cypriot report provides little information concerning topic 7; however, it appears that national framework does comply with the Directive in regards to Article 25 (1) and (2). Article 11 of the Law stipulates that the '...court may at any stage of the proceedings order the following: a) the termination of the prohibition of the access by any users to any websites containing or disseminating child pornography; b) the blockage of access to any websites containing or disseminating child pornography for the users residing in the Republic. The report further explains that internet service providers are obligated within Cyprus to take the necessary measures to terminate the access to the material, once notified by the relevant authorities. Failure to do so is an offence that is punishable by a term of imprisonment which does not exceed 3 years or/with a fine which does not exceed €170,000. The report fails to specifically mention the national procedures for the removal of online child pornographic material hosted outside of its territory.



## Executive Summary on the Czech Republic's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Czech national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The offence of knowingly obtaining access to child pornography was introduced in 2014 by the amendment of the Criminal Code num. 141/2014 under Article 192 (2bis)<sup>1</sup>. Furthermore Article 192 (1) states that knowingly obtaining access to child pornography applies in cases where the person appearing to be a minor is in fact 18 years of age or older at the time of depiction.

### Topic 2: Online grooming

The offence of online grooming was introduced in 2014 by the amendment of the Criminal Code num. 141/2014 under Article 193b. According to the provision it is punishable with imprisonment of up to two years to suggest a meeting to a child younger than 15 years with the intention of committing a crime enshrined under art. 187 (1), art. 192, art. 193, art. 202 (2) or other sexually motivated crime.

### Topic 3: Disqualification arising from convictions, screening and transmission of information

Legislation in the Czech Republic contains a general provision on disqualification, complemented by specific legislation covering "pedagogy workers" and "social workers".

Section 73 of the Criminal Code highlights that in general, an offender can be prohibited from performing an activity that is connected to the crime he/she committed. The disqualification period can last up to 10 years.

Act No. 563/2004 Coll., of the Act on Pedagogy Workers stipulates that any person convicted for an intentional crime or a crime committed negligently in connection with pedagogy activities cannot perform pedagogy professions such as teachers, psychologists, medical care, etc.

A similar prohibition preventing offenders from being authorized to exercise professions involving social and legal protection of children exists under Act No. 359/1999 Coll., the Act on Social and Legal Protection of Children.

Similarly according to Act No 108/2006 Coll., the Act on Social services, one cannot work as a social worker, unless he/she proves his/her impeccability in the last three years.

In regards to voluntary activities, the Act on Volunteer Service outlines that a person performing a voluntary activity for an organisation with a special authorization must provide the organisation with an extract from the Register

<sup>1</sup> Source: Council of Europe Lanzarote Committee's Czech representative



of Convictions; however, the provision does not provide any restrictions of voluntary activities if the person has a record in the Register of Convictions. Moreover, the report notes that not all organized voluntary activities are within the scope of the Act on Volunteer Service.

The legal framework in relation to general screening measures is quite limited according to the report. Section 30 of Act No. 262/2006 Coll., of the Labour Code maintains that employers can require their future employees to present information on their conduct; however, Section 316 (4) of the Labour Code stipulates that an employer may not require such information unless it is stated within the Labour Code to do so or if the nature of the work performed requires it. Meanwhile, as indicated above, specific legislation pieces are more numerous and maintain that persons intending to perform pedagogy work, social work or persons involved in the social and legal protection of children, must provide an extract from the Register of Convictions not more than 3 months old in order to prove that they have never been convicted for an intentional crime or a crime committed negligently in connection with their line of work. The Act on Volunteer Service covers a range of voluntary activities that are obligated to be screened by employers; however, for those that are not outlined within the act, employers do not have the right to demand information unless it is one of the exceptions stipulated within Section 316 (4) of the Labour Code.

With regard to the paragraph 3 of Article 10 of the Directive, Act No. 269/1994 Coll., the Act on the Register of Convictions, provides measures for the transmission of information in convictions and disqualifications between Member States.

#### **Topic 4: Victim Identification**

According to the report, no specific legislative steps were initiated to transpose Article 15 (4) of the Directive into Czech law. Reference is made to the general provisions of the Criminal Code which refer to the identification of victims as part of the duty to collect evidence and procure evidence.

#### **Topic 5: The extraterritorial extension of jurisdiction**

In regards to Article 17 of the Directive, Section 4 (1) of the Czech Criminal Code establishes jurisdiction for any offence committed in Czech territory. The Territoriality Rule also establishes jurisdiction over 'distant offences', for example, the offence was committed abroad but the consequences of the act occurred within Czech territory, which can include those committed by the means of information and communication technology. Section 6 of the Criminal Code extends its jurisdiction for any offence committed by a national or a permanent resident, whilst Section 8 (2) applied jurisdiction over offences which are committed to benefit a legal person registered to their territory. Moreover, Czech jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim nor is it subordinated to the condition that the acts are a criminal offence at the place where they are performed. Furthermore, Section 7 (2) of the Criminal Code establishes jurisdiction when an offence was committed abroad against a '...a Czech national or a person without a nationality to whom permanent residence in the territory of the Czech Republic was granted if an act if punishable in the place of its commission and if the place where such an act was committed is not subject to any criminal capacity'.

#### **Topic 6: Assistance, support and protection measures for child victims**

According to the Czech report, national framework mostly complies with Articles 18, 19 and 20 of the Directive; however, there are some shortcomings that inhibit full compliance. Section 3 (1) of the Act on Victims in Criminal Proceedings notes that each persons who feels to be a victim of a criminal offence must be treated as a victim unless proven otherwise. Additionally, Section 4 (1) of the same act provides assistance and support measures for as long as it is needed, whilst in Section 5 (1) ensures that assistance and support is given without delay at the request of the victim. Under the Act on Victims in Criminal Proceedings

there is no distinction between victim and 'particularly vulnerable victim' as all provisions apply the same regardless of a person's age. The report also indicates that assistance and support measures are provided regardless of the child victim's willingness to cooperate. Moreover, Section 3 (2) of the Act on Victims in Criminal Proceedings outlines that an individual assessment of the child victim must be made in relation to their physical and mental health, maturity and cultural identity.

Section 45 (1) and (2) of the Criminal Procedure Code stipulates that the child victim can be represented by a parent or in the case of a conflict of interest, a guardian appointed by a judge. The child victim can access legal counselling or a legal representative for the purposes of claiming compensation. Meanwhile, Sections 51a (1) and (3) of the Criminal Procedure Code claims that '...if a victim who has claimed compensation for damages or non-pecuniary loss in accordance with the law proves that he/she does not have sufficient financial resources to pay the costs incurred by the appointment of a representative, a judge at the victim's application will decide that the victim is entitled to legal aid provided by a representative free of charge or for reduced fee'.

In relation to interviewing child victims, Section 158 (9) of the Criminal Procedure Code allows for interviews to take place without delay without the initiation of criminal proceedings. Interviews are carried out by trained professional and can be overseen by an education specialist who has the power to intervene in the interview if the proper conduct is not followed. Section 20 (3) of the Act on Victims in Criminal Proceedings stipulates that interviews must be carried out in a way where there is no reason for it to be provided. The Czech report notes that there is no current legal framework in place requiring that interviews take place within specially designed child-friendly premises; however, the Program for the Establishment of Special Interrogation Rooms for Child Victims/Witnesses of the Ministry of Interior has created 32 interview rooms specifically adapted to children. Furthermore, the report highlights that within Section 20 (4) of the Act on Victims in Criminal Proceedings, interviews with child victims can be audio-visually recorded which can

be presented as evidence in court according to Article 55a (1) of the Criminal Procedure Code. Moreover, Section 200 (1) of the same code indicates that the court hearing of the child can take place without the presence of the public, whilst Section 111a (1) and (3) provides the facilities for a video conference with the child victim. Section 8b of the Criminal Procedure Code protects the identity of the victim from being disclosed to the public which ensures their privacy.

## **Topic 7: Take down and blocking measures**

The Czech report indicates that national framework in relation to Article 25 (1) of the Directive does not comply as there are currently no provisions outlining take-down measures for child pornographic material found online. Therefore, for sites hosted within the territory, there are no specific provisions which would provide for take-down measures to be adopted by public authorities in case that web pages with illegal content are hosted in the territory of the Czech Republic. However, there are certain powers that can be used by public authorities which indirectly derive from the Criminal Procedure Code. Moreover, in regards to the optional paragraph 2 of Article 25, there are no specific obligatory measures concerning blocking access to web pages on a national level; however, the current practice of blocking is only ensured via the self-regulation of internet connection providers. In accordance with Act No. 480/2004 Coll., a provider of hosting services is, under certain circumstances, liable for the content of information stored upon the user's request. This is usually the case when '... 1) the provider could have known that the content of the information or the conduct of the user are illegal, 2) the provider has proven knowledge about the illegal nature of the content/conduct of the information and has not taken measures that could be reasonably requested from him to remove the information or make it inaccessible, or 3) the provider directly or indirectly controls the user's activity'.



## Executive Summary on Estonia's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Estonian national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The Estonian report indicates that national framework is in compliance with topic 1 in relation to the Directive. Article 178 of the Penal Code, outlines that all offences listed in paragraphs 2, 4, 5 and 6 of Article 5 of the Directive, are punishable with up to 3 years of imprisonment. Article 5 (3) has been transposed into Article 175 of the Penal Code, as '... knowingly requesting access to child pornography or knowingly watching a pornographic performance involving a person younger than 18 years of age or of a pornographic or erotic performance involving a person younger than 14 years of age is punishable by a pecuniary punishment or up to one year imprisonment'. The report further highlights that 'intent' is assumed as a person who visits web pages containing child pornographic material on several occasion or has delivered payments to access such web pages. Therefore, after transposing the provisions of the Directive in regards to topic 1, the mere accessing of child pornography online is punishable without the condition of the material having to be stored

on a device. It is also worth noting that paragraph 7 of Article 5 has not been transposed into national framework.

### Topic 2: Online grooming

The national framework of Estonia somewhat complies with Article 6 and Recital 19 of the Directive; however, it fails to legally specify the difference between the two. Article 178 of the Penal Code generalizes the offence of grooming as '...making a proposal for meeting a person of less than 18 years of age who was not capable of comprehending the situation, or a person of less than 14 years of age, or concluding an agreement to meet him or her, and performance of an act preparing the meeting, if the aim of the meeting is to commit an offence of a sexual nature....'. Therefore, the Penal Code provides a pecuniary punishment or up to 3 years imprisonment for grooming offences.

### Topic 3: Disqualification arising from convictions, screening and transmission of information

According to the Estonian report, the national framework fully complies with Article 10 (1), (2) and (3) of the Directive.

Disqualification measures have been transposed into Article 51 of the Child Protection Act, which stipulates that a '...person who has been punished or who is a subject to involuntary treatment for sexual exploitation or abuse of a child or children, is not allowed to work

with children....' The report indicates that this disqualification is maintained even after the punishment is deleted from the punishment register and inserted to the archive. The information covers both professional and voluntary activities involving direct and regular contact with children. The disqualification is maintained as long as the information concerning the punishment has not been deleted from the punishment register or if the information concerning punishment has been deleted from the punishment register and entered into the punishment register archive, where it will be preserved for 50 years as of the date of transfer to the archives.

Moreover, Article 179 of Penal Code (Illegal enabling of Working with Children) corresponds with Article 10 (2) of the Directive. It provides employers to have access to the Punishment Register Archive when hiring for both professional and voluntary activities with children. Furthermore, employers are obligated to carry out this process and failure to do so is punishable for both legal and natural persons when hiring a person who is forbidden to work with children. In regards to paragraph 3 of Article 10, Article 29 of the Punishment Register Act enables for the use of the European Criminal Records Information System within Estonia. The Centre of Register and Information Systems immediately transmits information concerning criminal convictions of a citizen of a member state to another member state, of which the citizen is a national or a resident.

#### **Topic 4: Victim Identification**

Estonian national framework mostly complies with Article 15 (4) of the Directive, as provisions have been transposed into Articles 6, 32, 126 (1) and (2) of the Criminal Procedure Code. The report indicates that national authorities are required to conduct criminal proceedings when facts referring to a criminal offence becomes evident. Victim identification is an important aspect of the process. In order to do this, the Criminal Procedure Code allows for the use of surveillance for data collection for investigating sexual crimes against children; thus, an expert analysis on the material is conducted during criminal proceedings, depending on the age

of the child. Moreover, national authorities also cooperate with Europol and Interpol, using the specialized NetClean software for victim identification. Additionally, national authorities can also make use of third party reports, including INHOPE and NCMEC to help find distributors of the material in order to aid the identification process.

#### **Topic 5: The extraterritorial extension of jurisdiction**

The Estonian report highlights that national framework complies with Article 17 of the Directive. Although Article 7 of the Penal Code establishes jurisdiction over victims and offenders who are nationals when the offence was committed outside of Estonia's territory, the provision states that it is still subject to Estonian penal law but must also be punishable in the place the act was commissioned. However, Article 8 of the Code then states '...regardless of the law of the place of commission of the act, the penal law of Estonia shall apply to any acts committed outside the territory of Estonia if the punishability of the act arises from an international obligations binding on Estonia'. The penal code is ambiguous in this area and leaves much to interpretation. Moreover, the report further indicates that jurisdiction is applied to victims who are habitual residents; however, it does not apply to offenders who are habitual residents. Article 3 of the Information Society Services Act applies jurisdiction over offences committed by information and communication technology, whether the server is hosted within or outside of its territory. Furthermore, Article 7 (1) of the Penal Code establishes jurisdiction over legal persons as '...an act committed outside of the territory of Estonia, is such an act constitutes a criminal offence pursuant to the penal law of Estonia and is punishable at the place of commission of the act...'

#### **Topic 6: Assistance, support and protection measures for child victims**

The Estonian report indicates that national framework complies with Articles 18, 19 and

20 of the Directive. Article 6 of the Criminal Procedure Code obliges competent authorities to take assistance and support measures to child victim subjected to the offences listed in Article 3-7 of the Directive, as soon as there are reasonable grounds to do so. Article 3 (13) of the Victim Support Act outlines that a person must be treated as a minor if their age is unknown and must receive the supports and assistance provided to child victim until their age is proven. Moreover, the report indicates that support and assistance measures are not made conditional upon the child's willingness to cooperate as Article 32 (2) of the Child Protection Act notes '...a child who is in danger shall be placed safely immediately until such a time as the danger passes or a decision regarding the care of the child is made, without the request of the consent of the child's parents or caregivers'. Furthermore, in regards to individual assessments for child victims, Article 29 of the Welfare Act stipulates in paragraph 2 that the '...provision of assistance based on the principle of case management includes: evaluation of a person's case; formulation of objectives and planning activities....counselling and guidance of a person upon implementation of an activity plan....evaluation of results and, if necessary, amendment of the case plan and the activity plan belonging thereto'. The report highlights that a special representative is obligated to be appointed if the child victim is under the age of 14 years old; however, this is not mandatory for those above 14 years old. Article 20 has been fully transposed into national framework, as state compensation is awarded to victims of violence and abuse within and outside of Estonian territory as long as they hold a permanent residence there. Additionally, Article 41 of the Criminal Procedure Code outlines that legal aid will be provided for victims for free or partially charged, depending on the financial situation of the victim. Paragraph 2 of Article 20 has also been transposed into national framework as the report indicates that interview must take place without unjustified delay, as well as take place in a specially designed premises with a trained professional. In addition, interviews are carried out if possible by the same person and are limited to as few possible. Court hearing with the child victim can take place without the

presence of the public or can be heard through the use of telecommunication technology, or with video recorded statements. Article 408 (2) of the Criminal Procedure Code ensures that the privacy and identity of the child victim are protected.

## **Topic 7: Take down and blocking measures**

In regards to Article 25 of the Directive, Estonia's compliance is reaches the minimum requirements; however, it could be extended. Take-down measures for webpages containing or disseminating child pornography are carried out by the police and Boarder Guard Board in cooperation with child protection organisations. Moreover, national authorities are said to be launching a virtual project that will enhance the public's awareness in how to report child pornographic material online. The report highlights that national authorities will contact competent authorities when the related material is found on a server in their domain. However, there is currently no legal framework for these measures. In addition, the optional blocking measures of paragraph 2 of Article 20 have not been transposed into national framework as it is considered to be an infringement on the freedom to use the internet.



## **Executive Summary on Finland's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography**

### **Introduction**

On 30 April 2014, Roschier prepared a report for Missing Children Europe examining whether and how Finland has implemented the provisions of Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography (the "Directive"). Below is a short summary of Roschier's findings as regards Finland's compliance with the Directive.

### **Topic 1: Responsibility to make the act of knowingly obtaining access, by means of information and communication technology, to child pornography punishable**

It is our conclusion that Finland has successfully implemented the articles and recitals of the Directive covered by topic 1 (Articles 5(1), 5(3) and recital 18). This has been accomplished through chapter 17, Section 19 of the Finnish Criminal Code under which it is punishable to unlawfully both have in one's possession, and obtain access to a picture or visual recording depicting a child in a sexually offensive manner ("Offensive Material"). The offence is punishable by a fine or imprisonment of up to one year. Furthermore, the Finnish legislation seems to go further than Article 5(1) and (3) requires, as it does not specifically mention ICT as the means of obtaining access, but instead refers generally to obtaining access to Offensive Material so that it is available on a computer or another technical device.

### **Topic 2: Online grooming**

It is our conclusion that Finland has partly implemented the articles and recitals of the Directive covered by topic 2 (Articles 6(1) and 6(2) and recital 19). This has been accomplished through chapter 20, Section 8 b of the Finnish Criminal Code under which it is (a) punishable to suggest a meeting or other contact with a child with an intention to prepare sexually offensive pictures or visual recordings of the child, or (b) to subject the child to intercourse or in other sexual act or to perform in a sexually offensive performance. The offence is punishable by a fine or imprisonment of up to one year, unless a more severe sentence is provided in law for the act. Attempt of the offence (b) is punishable. However, it should be noted that the conduct criminalized as an (b) "attempted solicitation" in the Finnish legislation differs from the conduct criminalized as an "attempted solicitation" under Article 6(2), which refers to an attempt to acquire, possess or knowingly obtain access to child pornography. How we understand the concept of a sexual act has a major relevance to this matter. Therefore it may be said that Article 6(2) could have been implemented more explicitly.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

It is our conclusion that Finland has partly implemented the articles and recitals of the Directive covered by topic 3 (Articles 10(1), 10(2), 10(3) and recitals 40-42). Finnish law

does not provide a legal framework enabling a court to order that a person convicted of the Finnish equivalents to the offences listed in Articles 3-7 shall be prohibited from exercising professional activities involving direct and regular contacts with children.

In regard to Article 10(2), it is worth noting that employers are actually required to request an extract from the criminal records when the person is employed or appointed for the first time to a position which includes work as referred to in Section 2 of the Act on Checking the Criminal Background of Persons Working with Children, or when such work is assigned to that person for the first time when the work performed involves, **on a permanent basis** and to **a material degree** and **in the guardian's absence**, raising, teaching or caring for or looking after a child or other work performed in personal contact with a child. The person concerned is the only one who can request a criminal register extract and these extracts are subject to a charge (EUR 15). However, Section 2 of the Act on Background check of Professionals does not apply to work which lasts less than three months within one year. Also organizers of voluntary activities have the right request a criminal record extract before accepting a person into the operations. In regard to Article 10(3), European Criminal Records System has been implemented by the Act on Transferring Information.

#### Topic 4: Victim identification

Although the Finnish Police and the National Bureau of Investigation work to identify the victims of child pornography and children that are victims of sexual abuse, it is our conclusion that Finland has only partly implemented the article of the Directive covered by topic 4 (Article 15(4)). According to Chapter 1, Section 2 of the Criminal Investigation Act, the police shall make a preliminary investigation if there is a reason to doubt that a crime has been committed, including child sex crimes. The act states that the investigative unit shall investigate and find out the suspected offence, the circumstances, damages and **parties** to the crime, which should mean identifying both parties. However, this is not clear enough. Therefore it

may be concluded that there is neither actual law nor provisions that require the victim identification.

#### Topic 5: (Extraterritorial) jurisdiction

It is our conclusion that Finland has partly implemented the article and recital of the Directive covered by topic 5 (Article 17 and recital 29). In regard to Article 17(1); pursuant to Chapter 1, Section 1 Subsection 1 of the Criminal Code, Finnish law applies to an offence committed in Finland. In accordance with Article 17(2); pursuant to Chapter 1, Section 6 of the Criminal Code, Finnish law is applied to an offence committed outside of Finland by a Finnish citizen. If the offence was committed in territory not belonging to any State, a precondition for the imposition of punishment is that, under Finnish law, the act is punishable by imprisonment for more than six months. Corporate criminal liability is regulated in Chapter 9 of the Criminal Code. A legal person is to be held liable if an offence has been committed on the behalf or for the benefit of the corporation. The legal person shall be sentenced to a corporate fine if such a sanction is provided for the offence in the Criminal Code. Pursuant to Chapter 9, Section 2 of the Criminal Code, it is a prerequisite for corporate liability that a person who has been an accomplice in the offence is part of the company's statutory organ or other management or exercises actual decision-making authority in the company. Corporate criminal liability does not apply to all crimes listed in Articles 3-7. Only the crimes defined in Article 4(2, 3, 5 and 6); Article 5 and Article 6(1) provide for corporate fines as a sanction. In our opinion, there is no reason not to extend corporate liability in accordance with Article 17 of the Directive.

#### Topic 6: Assistance, support and protection measures for child victims

It is our conclusion that Finland has partly implemented the articles and recitals of the Directive covered by topic 6 (articles 18, 19,

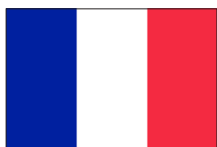
20 and recitals 30, 31 and 32). According to Chapter 5, Section 25 of the Child Welfare Act, notwithstanding confidentiality provisions, the child welfare authorities are obliged to notify the police of any actions punishable under Chapter 20 of the Penal Code that a child has been subject to. The notification leads to an investigation of the need for child welfare services and, when the concern is valid, a client plan. In regard to Article 19, the Act on Organizing the Investigation of Sexual Offences towards Children applies to child victims under the age of 16, unless the child's health or development provides specific reason for the Act to apply to children under the age of 18. In our view, the scope of implementation of the aforementioned Act could be modified to always concern children under the age of 18. In regard to Article 20; according to Criminal Investigation Act, investigation measures directed at persons under the age of 18 years shall, **to the extent possible**, be assigned to investigators particularly trained to this function. In our view Finland should, however, ensure that specialized officers conduct the hearings in all cases, not only to the extent possible and that the hearings/interviews are conducted by the same officer/person every time and that the interviews take place at premises designed or adapted for that purpose.

### **Topic 7: Measures against websites containing or disseminating child pornography**

It is our conclusion that Finland has successfully implemented the article and recital of the Directive covered by topic 7 (article 25 and recital 47). Pursuant to Section 15 of the Act on Provision of Information Society Services, a court may order the service provider to **disable access** to the information stored by it if the information is clearly such that keeping its content available to the public or its transmission is prescribed punishable. Pursuant to Chapter 10, Section 4(2)(1) of the Criminal Code an item (e.g. a server) may be ordered forfeit to state if it has been used in the commission of an intentional offence. Pursuant to Chapter 7, Section 1 of the Coercive Measures Act a server or other

object may be seized if there are reasons to believe that it can be used as evidence in a criminal case or it has been ordered to be confiscated. The Act on Measures to Prevent the Distribution of Child Pornography authorizes the Finnish Police to draft and maintain a list of foreign websites that contain or disseminate child welfare organizations, individuals and from similar lists of other countries. However, the Act must be interpreted so that a website being hosted in Finland may be added to the list and blocked if it provides access to a foreign website containing or disseminating child pornography. The Supreme Administrative Court interpreted the law in such a way that it also provides means to block access to such websites are containing child pornography and are also hosted in Finland.





# Executive Summary on France's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into French national law.

## Topic 1: Knowingly obtaining access via information and communication

**technologies to child pornography** The French report indicates that national framework complies with Article 5 (1), (3) and (7) in regards to the Directive. The principal piece of legislation on child pornography is Article 227-23 of the Penal Code. This provision relates to taking, recording, distributing and transmitting of child pornography for the purpose of distributing it. The offenders may receive a five year imprisonment and/or a fine of up to 75,000 Euros. When a child is under the age of 15 the law also punishes the mere fact of possessing child pornography without any intention of distribution. In addition, Article 2 of the Decree 2003-372 of the Optional Protocol to the Convention on the Rights of the Child clearly specifies that it is forbidden to show a naked child for pornographic purposes. Thus, a child can appear naked in a film, as long as the intention is not pornographic. French national framework also stipulates that only those that 'intentionally' access child pornography are criminalized through the use of habitual or payment consultation. Article 227-23 of the Penal Code

also provides a punishment of up to 3 years imprisonment and fine up to 75,000 euros when a telecommunications network has been used to distribute child pornography.

## Topic 2: Online grooming

Under French law the offence of online grooming involves a request addressed by an adult to a child under 15 or a child allegedly under 15 for sexual purposes whilst using information technologies. Article 226-22-1 of the Penal Code sanctions grooming with up to 2 years imprisonment and/or a fine of up to 30,000 Euros for attempting to meet a child through grooming. The punishment for online grooming can rise to 5 year imprisonment and/or a fine of up to 75,000 Euros when grooming leads to a meeting. Moreover, Article 227-22 of the Penal Code punishes the facilitation or attempt to facilitate the corruption of a minor with up to a 7 year of imprisonment and/or a fine of 100,000 Euros when the minor was put in contact with the perpetrator through the use of an electronic communications network. Even though French law complies with Article 6 of the Directive, it fails to provide any provisions for Recital 19 in relation to offline grooming as it was contended that such a provision would cause difficulties.

## Topic 3: Disqualification arising from convictions, screening and transmission of information

In regards to Article 10 (1), (2) and (3), French national framework fully complies with the

Directive in relation to topic 3, as Article 131 (27-29) of the Penal Code provides for the general basis for disqualification arising from convictions for the offences listed in Articles 3-7 of the Directive. The disqualification measure is either indefinite or for a period of up to ten years. The relevant articles of the penal Code also provide that the court can order the convicted person to undergo legal and social supervision after serving the prison sentence.

In regards to screening, whilst French legislation does not allow for direct and unconditional access to information on the criminal records, the law does provide some exceptions. These criminal records come in three forms, called certificates and each type of certificate can only be accessed by designated persons. The first certificate is the most comprehensive as it includes most convictions and decisions against the person and can only be consulted by police and judicial authorities. The second and third certificates can be used for screening purposes. The second certificate is available to certain administrative authorities and private organisations responsible for activities with minors. The third certificate can only be obtained by the person concerned who may be asked to produce it by when applying for a job. Moreover, France also has a national Sex Offenders Database that aims to reduce reoffending, as well as identify and localise sex offenders who have already been convicted of an offence. The database can be accessed by high ranking civil servants and state services as listed in Article 706-53-12 of the Penal Code. Removal from the database can only happen after the death of the person or after 30 years in relation to an offence punishable by ten years imprisonment. Neither amnesty, rehabilitation nor regulations leading to the erasure of criminal convictions shall lead to the erasure of the records.

Article 10 (3) is also provided for in French legislation as other member states can request information about the convicted person to the National Criminal Records. It has been noted that the process is very efficient as 72% of the requests handled within 24 hours.

## **Topic 4: Victim Identification**

No specific steps have been taken by the French legislator to transpose Article 15 (4) of the Directive into national framework. Even though French law does provide a complete framework that has the objective of identifying sexual exploitation and sexual abuse of children, it does lack a specific focus on legislation concerning victim identification. The national framework tends to focus on perpetrators' identification and punishment rather than on victim identification and support. For example, the Cyber Patrols outlined in Article 706-35-1 of the Code of Penal Procedure are aimed at ascertaining infractions rather than identifying victims; however, it is viewed that through this process it enables for the same purpose to be achieved. Two Central Offices are active in the fight against crimes connected with Information Technology and Communication. One of them, the Central Office for Repression of Violence against persons has a section responsible for minor victims which closely cooperates with Interpol in the management and use of the Interpol database. This has led to the identification of 99 child victims so far in France. In order to strengthen the protection of children, the report recommends that the Ministry of Interior to include a victim-based approach provision so as to enable Cyber Patrols and other relevant authorities to better identify potential victims.

A very positive development in the light of the comments made in the report regarding the apparent lack of interest for victim identification is the fact that French experts were among the national experts from EU Member States (together with experts from Denmark, Germany, the Netherlands, Spain, Sweden and the UKE who participated to the Europol Victim Identification Taskforce (VIDTF) meeting on 3-14/11/14.

## **Topic 5: The extraterritorial extension of jurisdiction**

France mostly complies with Article 17 of the Directive in relation to topic 5. Article 113-2 of the French Penal Code states that the criminal law applies to all offences committed within

the territory of the French Republic, as well as establishes jurisdiction over the whole or part of the offence when it is committed in the country that involved the use of information technology. Furthermore, the Article 113-6 states that French criminal law applies to all felonies and misdemeanors committed by French nationals and habitual residents outside of its territory if the conduct is punishable under the legislation of the country in which it was committed. French criminal law is made applicable to any felony, as well as to any misdemeanor punished by imprisonment, committed by a national or habitual resident outside of its territory if the victim is a national/resident at the time the offence took place. The report outlines that the French law has numerous articles about the responsibility of legal persons, if the crime happens outside its territory it will establish jurisdiction for offences committed for the benefit of a legal person established within its territory. However, France has failed to comply with paragraphs 4 and 5 of Article 17 as they have not made any provisions that would prevent their jurisdictions being subordinated to certain conditions for most of the offences established in the Directive.

### **Topic 6: Assistance, support and protection measures for child victims**

On an overall basis, France fails to comply with the Directive in regards to topic 6; however, it should be noted that efforts have been made by the state regarding the protection of victims which includes providing a special status as being 'particularly vulnerable'. The French legislator estimates that the particular vulnerability of children is linked to their age and therefore provides for a strengthened protection of children and therefore vulnerability is an aggravating circumstance. National framework states that a child victim, must receive support and assistance before, during and after criminal proceedings. However, French legislation does not contain any provisions that relates to the obligation to providing support for child victims when the age of the child is not certain. In addition, national framework also contains no provision regarding 'conditionality' on assistance and support provided to the child

victim; thus a particular emphasis has been placed on exchanges with the child in order to establish a solid and trusting relationship. The French legislation contains no measures providing assistance and support to the family of the child victim. However, it does maintain that all professionals who are involved in the case of the child, must provide assistance based on the individual needs to the child and the case situation. It is also outlined within national framework that child victims are entitled to a special representative free of charge. Moreover, France has created specific structures in hospitals that are child friendly to interview child victims, these interviews will begin as soon as an investigation has been launched, as well as being carried out by trained professionals who conduct all interviews if possible. A third person may also be present during the interview as long as that person is not involved in the abuses, he also cannot be questioned by investigators. The recording of these interviews is also mandatory under French law (audio+ video at the same time) and it is aimed to limit the number of interviews to as little as possible. Moreover, it is also possible for the interviews to be only audio recorded which is decided by the judiciary or public prosecutor as they may see it to be in the best interest of the child. During criminal proceedings, the child victim is not obliged to be present during the hearings and the special representative can also request for hearing to take place without the public. Furthermore, measures have been put in place in order to secure the privacy and identity of the child victim, as it is a criminal offence for anyone to reveal the identity of the child. The report indicates that France should finalize the transposition of the Directive in order to ensure maximum support and protection from victimization.

### **Topic 7: Take down and blocking measures**

In relation to Article 25 of the Directive, France fully complies in regards to topic 7 as the provisions have been transposed into national framework which enables for the prompt removal of websites or internet pages containing or disseminating child pornography hosted

within France. Furthermore, cooperation with other member states, as well as third party countries has been developed in order to remove websites and internet pages that contain child pornography. However, this cooperation very much relies on the cooperation of the country of which the servers are based or the procedure with the country would be too difficult and long. Therefore, the French authorities can block the access to such content by using Law no. 2011-267 which made it possible to force Internet Service Providers (ISP) to block access to websites containing child pornographic content. Moreover, Law no. 2007-297 had introduced the principle of responsibility for hosting websites by setting up a self-regulating computer, as well as preventive measures to the responsibility of industry professionals.



# Executive Summary on Germany's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into German national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

Possession of child pornography is considered a criminal offense under Article 184 of the German Criminal Code, and is punishable with an imprisonment of up to five years. Possession means «the holding of actual physical control» over child pornography material. In case of digital images it includes saving on the hard disk or other media. Images stored in the internet browser's 'cache' may also fall under 'possession'. The same applies to e-mail attachments. The commission of the offence requires intent. The perpetrator must know what s/he is doing and intend to cause the result. Therefore, according to the German legal framework, no one commits an offense when s/he accidentally opens an unappropriated page on the Internet or an e-mail with child pornography attachments.

### Topic 2: Online grooming

Online and offline grooming are regulated under Article 176 para. 4 no.3 of the German Criminal Code. According to the provision,

inducing a child to engage in sexual activity with or in the presence of the offender (or a third person) with written publication or via information and communication technologies constitutes an offence and is punishable of three months to five years imprisonment.

### Topic 3: Disqualification arising from convictions, screening and transmission of information

Germany provides a general legal framework on disqualification arising from criminal convictions. It is however subject to certain restrictions. The crimes listed in Articles 3 to 7 of the Directive may lead to a disqualification if committed by an offender who abuses his profession or violates his duties to obtain access to children and to pursue his criminal actions. Moreover a prognosis of his further development must show that even after serving time there would be a high risk for him to backslide. As the Federal High Court of Justice stated recently, the requirements are to be interpreted rigorously since any disqualification interferes with the principle of social rehabilitation and the offender's fundamental right to a free choice of profession (Art. 12 of the German Constitution). The requirements are even higher when a first offender is concerned.

The German "Bundeszentralregistergesetz" (BZRG; law concerning the Federal Central Criminal Register) provides a general legal framework for screening. The Federal Central Criminal Register contains the criminal convictions of a person for a certain amount of time

(3, 5 or 10 years, article 34 BZRG).

With regard to the specific screening envisaged by Article 10 (2) of the Directive several amendments have been made over the past years in order to provide a higher and more effective protection for children. In 2010, article 30a BZRG came into force, according to which a person whose profession or voluntary activity involves direct and regular contact with children can request an extended criminal record certificate (article 30a (1) Nr. 2 BZRG) which also contains convictions for sexual offences, that are not listed in the “normal” criminal record certificate. Which professions or activities are included in article 30a (1) is subject to a broad interpretation in order to ensure an efficient protection of children.

Private employers do not have the obligation, but the right to ask for an extended criminal record certificate, in order to improve child protection. Public authorities working with children like the Child and Youth Services on the other hand have the statutory duty of making sure all their employees do not have a criminal record concerning the crimes listed in articles 3 to 7 of the Directive.

Concerning the third obligation of Article 10 of the Directive (transmission of information on criminal convictions) a law passed in 2011 modified the seventh chapter of the BZRG to implement the requirements made in the Framework Decision 2009/315/JHA.

#### **Topic 4: Victim Identification**

With regard to victim identification and investigative units, the current German legal framework fully complies with Art. 15 (4) of the Directive. The German Federal Office of Criminal Investigation (BKA) is the national central evaluation and coordination body that commands large investigative units whose one and only function it is to identify child victims of cybercrime and prosecute those crimes.

#### **Topic 5: The extraterritorial extension of jurisdiction**

#### **Topic 6: Assistance, support and protection measures for child victims**

#### **Topic 7: Take down and blocking measures**

The German law allowing for blocking child pornography was abrogated in 2011, therefore currently there is no possibility of blocking child pornography under German legal framework. With regard to take down measures, according to the report there are voluntary cooperation agreements in place between service providers, the Internet hotlines (INHOPE) and the police.



## Executive Summary on Greece's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Greek national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

Article 5 (1) and (3) of the Directive is criminalized under Article 348A paragraph 5 of the Penal Code under Greek law. Anyone who knowingly acquires access to child pornography material by means of information and communication technology is punished with an imprisonment for at least 1 year. The Penal Code also foresees certain aggravating circumstances resulting in harsher penalties. Paragraph 7 of article 5 of the Directive (optional provision) was not transposed into Greek law, therefore the offence can only be committed in case the victim is a minor. According to the report, paragraphs 1 and 3 of article 5 of the Directive were fully transposed into Greek national law with article 348B of the P.C.

### Topic 2: Online grooming

Article 6 paragraph 1 of the Directive was transposed into Greek law under Article 348B of the Greek Penal Code.

The report notes that online grooming is

criminalized not only when the adult proposes to the minor to meet himself, but also when he suggests to the minor to meet with a third person. Furthermore online grooming may not only be committed for the purpose of engaging in sexual activity with the child or to access child pornography, but also for committing other offences that abuse the sexual freedom of the minor. Article 6 paragraph 2 of the Directive was also transposed into Greek law. Therefore the attempt to acquire or possess material of child pornography, as well as the attempt to acquire access to material of child pornography by means of information and communication technology, when this is done by an adult with the purpose to produce material of child pornography by means of these acts, is punishable.

Under Greek law there is no provision specifically criminalizing offline grooming, however, committing the crime of solicitation of minors for sexual purposes without the use of means of information and communication technology might fall under the provisions of article 337 of the Greek Penal Code. The report suggests that it would be advisable that the solicitation of minors for sexual purposes without the use of means of information and communication technology, as set out in recital 19 of the Directive's preamble, be fully transposed into Greek Law.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

Article 10 (1) of the Directive was transposed into Greek Law with the amendment of Article 67 of the Penal Code, on the disqualification on professional activities or even permanent disqualification in case of conviction for sexual offenses against minors by the Law 4267/2014 on "Combating sexual abuse and exploitation of children, child pornography and other provisions". The court can impose a disqualification and a ban on professional activities, when these activities involve regular contact with minors, for a period of time from 1 to five years. In case of a second conviction for any of the criminal offences of the previous subparagraph, the court imposes an obligatory permanent disqualification/ban on the professional activities mentioned.

As to the screening modalities envisaged under Article 10 (2) of the Directive in many professions employers are required to ask from an applicant to provide a criminal record certificate. This requirement does not explicitly refer to professions in direct and regular contact with children. It is however, foreseen, for many professions, of which several are directly related to children.

The criminal records "certificates for court use", which list all convictions have to be requested by certain type of employers with regard for instance to the recruitment of teachers in the public sector.

However for a number of professions such as doctors, dentists, and nurses etc. the obligation no longer exists. The applicant is required to submit a statutory declaration stating that he/she has not been convicted in the past for specific offences. A sample testing of 5% is foreseen in these cases, in order to verify statements or deter false ones.

The other type of criminal record certificate, the "certificate for general use" is of limited interest to the extent that some penalties incurred may be omitted.

There is moreover no legal provision specifically addressing the issue of screening for voluntary activities.

In view of these defects the report concludes that there is a need for an appropriate legal framework on the rights and obligations of employers, in cases where the recruitment for professional or organised voluntary activities involves regular contacts with children.

With regard to Article 10 (3) a bill for the transposition of Framework Decision 2009/315/JHA and Framework Decision 2009/316/JHA on the establishment of a European Criminal Records System (ECRIS) is to be submitted to Parliament.

### **Topic 4: Victim Identification**

According to the report Greek national law fully complies with Article 15 paragraph 4 of the Directive, facilitating the investigative units or services attempting to identify the victims of the offences referred to in Articles 3 to 7, with a wide range of tools, in particular with respect to the analysis of child pornography material such as: photographs and broadcasted audio-visual recordings or made available by means of information and communication technology.

Law 4267/2014 on "combating the sexual abuse and sexual exploitation of children and child pornography and other provisions" introduced the necessary amendments to Article 353A of the Penal Code extending the powers of the investigators with regard a) to a confidentiality waiver, b) the possibility of using special technical means or devices for recording activities or events and c) combining information relating to personal data.

### **Topic 5: The extraterritorial extension of jurisdiction**

According to the national reports Greece has partly implemented the article and recital of the Directive covered by topic 5 (article 17 and recital 29). In regard of Art. 17 (1) a), the Article 5 §1 of the P.C stipulates that Greek courts have jurisdiction and that Greek law applies if the offence is committed within its



territory. In accordance with Article 17 (1) b), Greek jurisdiction applies in cases where one of the offences of Articles 3 to 7 of the Directive, has been committed by a national, outside of the Greek territory. Nevertheless, Greek law is not established in cases when the victim has his habitual residence in its territory; when the offence is committed for the benefit of a legal person established in its territory; when the offender concerned has his habitual residence in its territory (Article 17(2)). Following amendments made on the 12 of June 2014, Greek jurisdiction is applicable in cases where one of the offences of Articles 3 to 7 of the Directive has been committed via the Internet or other means of information and communication technology, as far as access to such means is available on its territory. Contrary to the Article 17 (4), in order for Greek jurisdiction to be established in case of an offence committed outside its territory by one of its nationals; the double incrimination is needed. In line of the Article 17(5), there is no need for complaint in order to prosecute one of the offences of Articles 3 to 7 of the Directive.

### **Topic 6: Assistance, support and protection measures for child victims**

According to the national reports Greece has successfully implemented the articles and recitals of the Directive covered by topic 6, even though there is room for improvement. In relation to the Art. 18 (2), the competent authorities offer protection to victims only after prosecution or in case the victim has approached the Services and Units of Protection and Assistance. In accordance with the Article 18(3), the Article 5 of Presidential Decree 233/2003 stipulates that when it is uncertain whether a victim is a child but it can be presumed that he/she is under the age of 18, the victim is presumed to be a child and benefits from a special protection until his/her actual age is verified. In regard of the Article 19, protection is provided for child victims, for the duration of time that is deemed necessary. The prosecution or trial is not dependent on the willingness of the victim to cooperate with the authorities. There is no specific provision, which expressly foresees that

the child victim's views, needs and concerns are taken into consideration and that they shall be considered as particularly vulnerable. Concerning offences within the family, Greek legislation gives the option of removing either the alleged perpetrator or the victim and allows the Court to make an order for the parental care of the victim. The Article 20 (1) and (2) are applied through the Paragraph 2 of the Article 226 of P.C and Article 12 of L.3064.2002. The child can be accompanied by his/her legal representative unless there is a conflict of interest or the person is involved in the case under investigation. Nevertheless, the law doesn't mention another person of trust. Additionally, child victims are provided with assistance for housing, nutrition, medical care and psychological support as well as legal representation and interpretation services, for the length of time deemed necessary. Concerning Article 20 (3), interviews of child victims are conducted by child psychologist or psychiatrist, take place in specially designed premises without unjustified delays and for a limited number of interviews. However, it is not specifically foreseen that the same person carries out all the interviews. The recording of interviews in electronic audio-visual format is optional and it can be used as evidence in court (Art 226A P.C.). Therefore, a child victim may be 'heard' in the courtroom without being physically present. Furthermore, the court sessions can be carried out without the presence of the public (Art 226A et 330§1 P.C.) Through L. 2472/1997, Greek legislation protects the privacy and identity of victims by prohibiting the disclosure of personal data about child victims. Thence, we can say that the Article 20 (4), (5) and (6) are well implemented.

### **Topic 7: Take down and blocking measures**

Removal of web pages containing or disseminating child pornography hosted inside Greek territory is foreseen under Article 18, paragraphs 1 and 2 of L.4267/2014. The provision stipulates that when the case is still pending on appeal, web pages hosted in Greece containing or disseminating child pornography shall be removed upon prosecutor's order.

This provision, that needs to be specifically and fully justifiable, is promptly communicated to the hosting provider and the removal is implemented immediately. If the webpage is not hosted in Greece and if it cannot be determined where it is hosted and its web space – “domain name” – ends with “.gr.” or belongs to another space managed by the National Council of Telecommunications and Post Offices, the discontinuation or removal of the web page can be done by discontinuation or removal of the web space.

Blocking of web pages containing or disseminating child pornography is foreseen under Article 18 paragraph 3 of L. 4267/2014 stipulates that “When the case is still pending on appeal, the competent authority or prosecutor can order the blocking of access to web pages containing or disseminating child pornography, which are not hosted in Greece and are not hosted in a web space which has been issued in Greece. The owner of the web page can file an appeal against this order to the head attorney or the head prosecutor respectively, within a period of two months.



## Executive Summary on Hungary's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Hungarian national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The Hungarian report provides little information concerning the full transposition of Article 5 of the Directive into national framework. However it does state that Section 204 of the Criminal Code criminalizes '...any person who obtains or possesses pornographic images of a person under the age of 18 is punishable for felony by imprisonment not exceeding 3 years'. Although the provision corresponds with most of paragraphs 2 and 3 of Article 5, it is inconsistent with the wording for the minimum sentencing requirement of at least 1 year imprisonment. The report further indicates that the optional provisions of paragraph 7 of Article 5 have not been transposed nor are there any corresponding legal framework to criminalize the act of 'appearing' to be a child in pornography when in fact that person was above 18 years old.

### Topic 2: Online grooming

Although the report states that Hungarian national law complies with Article 6 and Recital

19 of the Directive, it also states that Article 6 cannot be fully transposed in its original form on a national level due to controversial issues. The existing national framework is vague and leaves much to interpretation in regards to online and offline grooming as neither of them are specified within the provisions. Section 198 (2) of the Criminal Code states that '...any person over the age of 18 trying to persuade a person under the age of 14 to engage in sexual activity with him or another person is punishable by imprisonment not exceeding 3 years'. Paragraph 4 of the same provision criminalizes abuse when it is committed by misusing authority or influence over a victim of above 14 years of age with imprisonment not exceeding 3 years'. Section 204 (4)(a) of the Criminal Code outlines that '...any person who invites a person under the age of 18 to participate in a pornographic production is punishable by imprisonment not exceeding 3 years'. In addition, paragraph 4b states that '...any person who gives the role to a person under the age of 18 in a pornographic production is punishable by imprisonment from 1-5 years'. Even with the lack of specific references concerning online and offline grooming or solicitation of minors, most of the provision remain inconsistent with the minimum sentencing requirements of at least 1 year imprisonment.

### Topic 3: Disqualification arising from convictions, screening and transmission of information

In regards to Article 10, Hungarian national framework mostly complies with the Directive.

Disqualification measures are outlined in Section 52 (3) of the Criminal Code which provides for ‘...the possibility to prohibit a person from conducting any professional activities involving education, care, custody or medical treatment in relation to a person under the age of 18, or involves trust, authority or influence over the victim’. However, the provision fails to specify disqualification measures concerning voluntary activities. Moreover, the report indicates that there are no general or specific provisions for screening procedures in regards activities involving direct and regular access with children; however, it does outline that in the Act CLIV of 1997 on Healthcare and Act CXC of 2011 on Public Education, a clean criminal record is required in order to obtain a position in these sectors. Section 71 of the Act XLVII of 2009 further provides the possibility for employers to request for a criminal record if the position requires a clean record; however, it should be noted that this procedure very much relies upon the discretion of the employer. Article 10 (3) of the Directive corresponds with the transmission of information procedure set out in the Council Framework Decision 2009/315/JHA which was implemented as the Criminal Records ACT and Act XXXVIII on Legal Aid concerning International Criminal Records.

#### **Topic 4: Victim Identification**

According to the report, Hungarian national framework does comply with Article 15 (4) of the Directive as even though there are no specific provisions for victim identification procedures, national authorities have the right to obtain evidence to do so, which is stipulated in Act XIX of 1998 of the Criminal Procedure Code. The report highlights that victim identification is mainly used for the purposes of fact-finding and accusation, as well as being significantly important to threshold cases e.g. establishing the age category of the child. However, as the report indicates, it is essential to note that authorities are not obliged to identify victims when conducting investigations.

#### **Topic 5: The extraterritorial extension of jurisdiction**

For the most part of topic 5, Hungary does comply with the Directive in relation to Article 17. Section 3 (1)(a) of the Criminal Code establishes jurisdiction over the whole or part of the offence if it was committed within its territory, which also applies to offences committed by the means of information and communication technology. Section 1 (c) of the Criminal Code further establishes jurisdiction over Hungarian citizens who have committed criminal acts abroad. Moreover, the report indicates that Hungarian jurisdiction over cases are not subordinate to the condition that the acts must be also be criminalised in the country in which they took place. Furthermore, jurisdiction in relation to victims is also established for Hungarian nationals; however, this is subject to the discretion of the Public Prosecutor to initiate a criminal proceeding. Also, the Hungarian authorities fail to establish jurisdiction over legal persons. In addition, Section 3 of the Criminal Code provides conditions on which it will establish jurisdiction upon a habitual resident who committed an offence, for example, the offence is punishable under both Hungarian law and the law of the country in which the act took place.

#### **Topic 6: Assistance, support and protection measures for child victims**

As noted within the report, Hungary does not fully comply with Articles 18, 19 and 20 of the Directive as most assistance and support measures for victims are not child-specific. The report indicates that there are no legislative regulations concerning the ‘assumption of age’ even though there are practices in place that provide assistance and support without prior confirmation of age. Moreover, assistance and support measures are provided irrespective of the child’s willingness to cooperate. The report further highlights that the Victim Support Act provides specific psychological, financial and physical assessments for each individual child. In addition, child victims are also given special treatment but this is subject to the age and development level of the child. Section 56 (2)

of the Criminal Procedure Code outlines that child victims must be represented by their legal guardians; thus, the report does not mention if a special representative can be appointed by the court.

The report does note that under Section 19 (3) of the Legal Aid Act that child victims are eligible for legal aid regardless of their income, whilst Section 6 of the Victim Support Act provides State compensation for those who are victims of violent and intentional crime. However, legal aid may not be granted to those who have already received it for a particular case within the framework of another state system. In regards to interviewing child victims, Section 64/A of the Criminal Procedure Code states that criminal proceedings that involve a child victim, must be conducted within a fast enough timeframe. The Ministerial Decree 32/2011 (XI.18.) of the Ministry of Public Administration and Justice outlines that special child-friendly interview rooms have to be established within police station and that the environments have to suit the age and development of the child. Interviews with the child victim are limited to the possible extent; however, there is no national framework in place to obligate that interviews be carried out by train specialists or that the interviews be carried out by the same person. Section 213 (4) of the Criminal Procedure Code indicates that a judge may order that hearings and interviews with the child victims be recorded by audio-visual means. The Criminal Procedure Code also provides that the court hearing of the child can take place without the presence of the public or can be conducted through the use of telecommunication technology. However, there are no specific legal measures to ensure the protection of the identity and privacy of the child victim, as the report indicated, the only applicable measures for this are those mentioned above.

## **Topic 7: Take down and blocking measures**

In regards to topic 7, Hungarian national framework complies with Article 25 (1) and (2) of the Directive. Section 77 of the Criminal Code states that '...data disclosed through an electronic communication network shall be

rendered irreversibly inaccessible if a) its publication or disclosure constitutes as a criminal offence; b) it is actually used as an instrument for committing a criminal offence; or c) it is created by way of a criminal act'. Therefore, the 'irreversible inaccessibility' is a mandatory measure if any of the above criteria is achieved in Section 204 of the Criminal Code. Moreover, Section 4 (1)(e) of the International Legal Assistance Act sets out that '...the execution of rendering data disclosed through an electronic communications network irreversibly inaccessible or measure having an equivalent effect may be taken over or delegated'. Chapter 7 and 8 of the Act outlines that Hungarian authorities may seek the assistance of foreign authorities in cases where the website is hosted in their country to remove the website or render is inaccessible. The Hungarian national framework have transposed the Directives optional paragraph 2 of Article 25, as Section 158/B of the Criminal Procedure Code provides measure for the temporary restriction on electronic data in regards to access. However, in order for this process to be carried out, the crime in question must be eligible for public prosecution and the application for the sanction of electronic data to be made irreversibly inaccessible must be made simultaneously.



# Executive Summary on Ireland's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Irish national law.

## Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The new Sexual Offences Bill entered into force in 2014 introducing the offence of knowingly obtaining access via information and communication technologies to child pornography, under Section 6 of the Sexual Offences Act.<sup>1</sup>

## Topic 2: Online grooming

Offline and online grooming are regulated under the same provision under Irish law. A new provision on grooming was introduced under Part 2, Head 7 of the new Sexual Offences Bill which entered into force in November 2014. According to this, it is an offence for a person (within or outside the State) to intentionally meet or travel with the intention of meeting a child, or make arrangements with the intention of meeting a child or for a child to travel, having communicated by any means with that child on at least one previous occasion,, for the purpose of doing anything that would constitute sexual exploitation of a child'. A person guilty of the offence is liable on conviction on indictment to imprisonment for a term of up to

14 years. However, it should be noted that this offence is limited to the travel of the offender to meet the child but not were the child travels to meet the offender.

## Topic 3: Disqualification arising from convictions, screening and transmission of information

According to the report, Ireland's national framework in regards to topic 3, is not completely in compliance with Article 10 of the Directive.

Part 3 of the Sex Offenders Act 2001 enables the court to impose a form of disqualification, as authorities can apply for a 'sex offenders order', which prohibits a person from carrying out one or more activities specified in the order. Any prohibition imposed must e necessary for the purpose of "protecting the public from serious harm from the offender". Therefore, there are technically no restrictions on what can be prohibited; thus, it is open to disqualification from exercising both professional and voluntary activities involving direct and regular contact with children. It was discussed as part of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 that the introduction of a possible 'Barring List' system could not be viable as it might conflict with the constitutional obligation to protect and vindicate the good name of its citizens.

In regards to Article 10 (2) of the Directive, the current national measures of the 'Garda Vetting' are the only means of screening as under a number of Acts and Regulations, the

<sup>1</sup> Source: [http://www.justice.ie/en/JELR/General+Scheme+of+the+Criminal+Law+\(Sexual+Offences+Bill\)+2014.pdf/Files/General+Scheme+of+the+Criminal+Law+\(Sexual+Offences+Bill\)+2014.pdf](http://www.justice.ie/en/JELR/General+Scheme+of+the+Criminal+Law+(Sexual+Offences+Bill)+2014.pdf/Files/General+Scheme+of+the+Criminal+Law+(Sexual+Offences+Bill)+2014.pdf)

Garda Vetting Unit has the responsibility for vetting on behalf of organisations employing personnel for professional and voluntary activities involving children and vulnerable adults. The reports include details of all convictions and/or pending or completed prosecutions (whether successful or not) in Ireland or elsewhere. However, it is worth noting that the decision of employing a suitable candidate lies with the employer. The impending National Vetting Bureau (Children and Vulnerable Persons) Act 2012 which has not commenced yet, hopes to establish a specified legal basis for vetting procedures as well as creating a Database System for the relevant registers, relevant organisations, specified information, and for vetted persons. The Act will also create a number of new offences, including the employment of a person in a position without carrying or falsifying out a vetting procedure.

With regard to the transmission of information on criminal convictions Section 28 of the Garda Síochána Act 2005 as it allows for the developments of police agreements with other member states with prior consent of the government. Additionally, Section 9 of the Criminal Justice (Mutual Assistance) Act 2008 allows for the spontaneous exchange of information and assistance in certain circumstances without having to prior permission.

The report also refers to the Criminal Records Information System Bill being prepared to give effect to Framework Decision 2009/315/JHA.

#### **Topic 4: Victim Identification**

The Irish report highlights that only general provisions exist, which relate to the Paedophile Investigation Unit from the Garda (national police) which also is linked to the Computer Crime Investigation Unit. It is through these units that the Garda are able to cooperate with Interpol using the International Child Sexual Exploitation Database. Moreover, it is estimated that in late 2014 the impending Criminal Law (Sexual Offences) Act 2012 will be ratified which will enable the state to comply with the minimum standards of the Directive in regards to Article 15 (4).

#### **Topic 5: The extraterritorial extension of jurisdiction**

In relation to topic 5, Ireland does have provisions in place that somewhat correspond with Article 17 of the Directive, although there are shortcomings. The report indicates that any person who has committed an offence within the territory of Ireland, may be subjected to the jurisdiction of its judiciary. Additionally, Section 2 (1) of the Sexual Offences (Jurisdiction) Act 1996 states that ‘...where a person, being a citizen of the State or being ordinarily resident within the State, does an act, in a place other than the State against or involving a child – (a) constitutes an offence under the place, and (b) if done within the State would constitute an offence under, or referred to in; an enactment specified in the Schedule of this Act...he or she shall be guilty of the second-mentioned offence’.

The 1996 Act defines a child as someone under the age of 17 years, whilst an ordinarily resident of the State is someone whose principal residence is in Ireland for a period of 12 months during the time of the offence. In addition, Section 18 (c) of the Interpretation Act 2005 defines the word ‘person’ as including legal bodies. Section 7 of the Criminal Law (Human Trafficking) Act 2008 provides jurisdiction over offences committed against and Irish resident in a place other than Ireland. Moreover, although there is no specific legislation in place that covers offences made by means of information and communication technology, it is assumed that other pieces of legislation have to be interpreted for the offence to be made applicable e.g. the Child Trafficking and Pornography Act 1998. Even though it is stipulated in Section 2 of the 2008 Act that offences criminalised in Ireland are not conditioned upon whether they are criminalised in the country they were committed, under Section 2 of the 1996 Act it is made a condition that it must be an offence in both Ireland and the foreign country.

## **Topic 6: Assistance, support and protection measures for child victims**

The report indicates that Ireland does not largely comply with Articles 18, 19 and 20 in regards to the Directive. Section 3 of the Child Care Act 1991 indicates that the Health Service Executive has a statutory obligation to promote the welfare of children who are not receiving adequate care and protection; however, it should be noted that the basis of this falls under the non-statutory Children First Guidelines. In addition, concerning the 'presumption of age' within Article 18 (3) of the Directive, Irish national framework only applies this principal to offenders rather than victims; thus delaying the immediate access to assistance and support for child victims. Moreover, national framework also outlines that the child's willingness to cooperate is not made conditional upon assistance and support received. There are currently no provisions concerning the procedures of individual assessments for child victims in Ireland; however, the Children First Guidelines enables for a preliminary assessment of the child welfare concerns in order to assess the needs of the child and to identify appropriate services. In regards to child victims being 'particularly vulnerable', there is no provision to enable this other than the fact they are given the status for court proceedings, as well as during the investigation process as the Garda Policy provides special training for interviewing child victims of sexual abuse.

Moreover, victim support and support for families of victims is provided largely through the NGO sector, such as Barnardos, Children at Risk Ireland, etc. who receive funding from the Commission for the Support of Victims of Crime. The report also highlights that a guardian may be appointed by the courts to represent the child; however, it has been suggested by the Special Rapporteur for Child Protection that provisions should be made to provide independent representation for a child victim of serious crimes. As Ireland is a common law State, the victim is not a party to the criminal proceedings and is not usually represented in court. The Civil Legal Aid Act 1995 provides

that legal advice to be provided for victims of human trafficking and rape, whilst the Criminal Law (Rape) Act 1981, further provides for separate legal representation for complainants in rape free of charge (which is not means-tested). Furthermore, there are no legal provisions concerning the interviewing of child victims, although there are the Children First Guidelines for the Health Service Executive and the Garda Policy for the police. The Garda Policy outlines that interviews with '...complainants of rape or sexual assault should be interviewed as soon as possible after the occurrence'. The Garda Policy provides that interviews be conducted in a suitable location whether in a specific room in the Garda station, the home of the victim, a private room in the hospital or a specially designed premises. It is detailed that a child victim should be interviewed in a suspect interview room. Additionally, it is also outlined that children under the age of 14 years will be interviewed by a trained specialist and all interviews with persons under the age of 18 must be recorded; however, the Garda Policy fails to address whether the interviews will be carried out by the same person or will be limited to one interview. Furthermore, the court can also exclude the public from court hearings or use a live television link when concerning persons under the age of 18 years, whilst Section 252 of the Children Act 2001 ensures the protection of the privacy and identity of the child. It is indicated by the report that the new Criminal Law (Sexual Offences) Bill and the Criminal Justice (Victims' Rights) Bill will transpose the provisions of the Directive.

## **Topic 7: Take down and blocking measures**

In regards to topic 7, there are currently no legislative provisions in place concerning Article 25 of the Directive; however, there is a self-regulatory framework for internet service providers (ISP). Members of the public can report online child abuse material to the Hotline, which is ran by the Internet Service Providers Association of Ireland and is supervised by Office of Online safety, an executive office of the Department of Justice and Equality, in coordination with the Garda Síochána. When a report has been



received, it is assessed and located to an internet server within Ireland, the Hotline issues a notification to the Garda and simultaneously a 'take down' notice is issued to the ISP who is responsible for the timely removal. Moreover, if the reported material is traced to another country, the member of the Hotline will forward the report to the INHOPE hotline in the source country, as well as provide details to the Garda for transmission to the source country through international law enforcement channels. There are currently no provisions or practices in place concerning the optional blocking measures of Article 25 (2) of the Directive; however, the report highlights that the Minister for Justice and Equality has indicated his department is currently considering how best to transpose this provision.



## Executive Summary on Italy's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Italian national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The report indicates that Italian national framework does not comply with Article 5 (1) and (3) of the Directive as the Italian Criminal Code states that the conduct of knowingly obtaining access by using information and communication technology to watch child pornography is not a crime; however, the conduct of downloading and/or possessing child pornographic material is criminalised under Article 600 of the Criminal Code and is punishable with a prison sentence of up to 3 years and a fine. In addition, what is classed as child pornography in Italy limits the scope of protection for minors and the ability to prosecute offenders, for example, the sexual organs of minors must be seen for sexual arousal and images must be of real children. Thus, computer generated images and cartoons depicting children in a sexual nature cannot be deemed as pornographic. In order to enhance its level of compliance to the Directive in regards to topic 1, the Italian legislator should criminalize the mere viewing of child pornography online as well as enhance the scope of what can be deemed as child

pornographic material. It should be noted that the Italian state are currently debating this issue in order to determine if changes are needed.

### Topic 2: Online grooming

Italian framework has not formally transposed Article 6 of the Directive as it currently still operating under the provisions of the Lanzarote Convention. Article 609 of the Criminal Code has criminalized both online and offline grooming when the victim is 16 years of age and younger and the perpetrator is an adult. The report fails to elaborate on further information in regards to offline grooming; however, it does outline that '...solicitation would indicate any act aiming at obtaining the trust out of a child through ploys, flatteries or threats perpetrated also through the use of the internet or other networks or communication methods'. The punishment for online grooming offences when a meeting did not occur in the real world is imprisonment from a period of 1-3 years. Law no. 39 of 4 March 2014 outlines in Article 609 in the Criminal Code that '...whoever uses techniques to be anonymous on the internet shall be punished with the same penalty set out by Article 609, increased by no more than a half. This article only applies when there are no other serious offences to be charged with; however, if other serious offences do exist they will be prosecuted. Furthermore, Article 56 of the Criminal Code highlights that '...whoever acts in a way suitable and unequivocally direct to commit an offence, shall be punished for attempted offence, if the action is not completed or the event does not occur. The culprit of attempted offence is punished: with imprisonment of not less than twelve years...'

However, it is also outlined within Article 56 that if a culprit voluntarily desists from their actions, they will only be punished for the acts that were accomplished if they are classed as a different offence.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

The Italian framework in regards to disqualification operates from two main articles within the Criminal Code concerning persons who have been convicted for the offences listed in Article 3-7 of the Directive.

Article 600 septies.2 and Article 609 nonies of the Criminal code provide the '...perpetual disqualification from any office related to ward, trusteeship or support service... as well as '... the perpetual disqualification from any job in schools of any type and grade, and from any office or service in institutions or public or private structures habitually attended by minors' or 'any office or service in institutions or public or private structures which are attended predominantly by minors'.

Article 609 of the Criminal Code in addition provides for the application, after the enforcement of the sentence and up to one year after it, of the following security measures: 1) the possible restriction to the freedom of movement and the prohibition to approach places habitually attended by minors; 2) the prohibition to carry out jobs which imply a strict and habitual contact with minors; 3) the obligation to inform the police of the residence and of possible movements from it. These measures are relevant to both professional and voluntary activities, and any violation of these measures is punishable with imprisonment up to a maximum of 3 years.

In regards to Article 10 (2) of the Directive, there are general provisions that prevent private employers from requesting/gathering any information relating to the existence of criminal convictions if the nature of the information will not have any impact on the specific role

carried out. However, certain public sectors do have the right to obtain certificates concerning general, civil and criminal information related to individuals 18 years and older if such certificates are necessary to carry out their functions. Moreover and importantly Legislative Decree n° 39 of 4 March 2014, transposing the Directive, extended the scope of existing regulations thus providing that criminal records must be requested by an employer recruiting individuals to carry out both professional and voluntary organised activities entailing direct and regular contact with children and the failure to do so is sanctioned with a penalty ranging between 10,000 and 15,000 Euro.

Although, according to the report, Italy fully complies with Article 10 (1) and (2) of the Directive, only a limited amount of measures have been taken in order to comply with paragraph 3 of Article 10. Therefore, in order to fully comply, the national legislator should implement the Council Framework Decision 2009/315/JHA of 26 February 2009 (exchange of information from criminal records) and Framework Decision 2009/316/JHA establishing the ECRIS system.. The Legislative Office has drawn up a draft decree which after approval and steps taken by the Ministry of Justice should lead to a prompt functioning of the ECRIS system. Until these Framework Decisions have been implemented, Italy can only exchange information regarding criminal proceedings with foreign judicial authorities.

### **Topic 4: Victim Identification**

According to the report, current national framework complies with Article 15 (4) of the Directive.

In coordination with the National Centre against Child Pornography the Postal and Communication Police Service focuses on confiscated material, with the aim of identifying and put under protection the victims found on the images or on the recordings. The methodology used to examine the material benefits from the connection in real time between the Postal and Communications Police and the C.N.C.P.O.

The National Centre against Child Pornography

on Internet coordinates all investigative activities and the Observatory to fight paedophilia and child pornography acquires and monitors data and information connected to the preventive and repressive actions against sexual abuse and sexual exploitation of children.

Since 2011 the C.N.C.P.O. is directly connected with the Interpol ICSE data base.

## **Topic 5: The extraterritorial extension of jurisdiction**

Italian national framework in regards to Article 17 of the Directive is in compliance with the exception of optional provisions. According to Article 6 of the Italian Criminal Code, the judiciary can establish jurisdiction over offences that are wholly or partly committed within the Italian territory. This also includes offences committed by means of information and communication technology accessed from its territory which are qualified criminal offences according to Italian law. Article 604 of the Criminal Code also establishes that the judiciary has jurisdiction where the offence is committed outside national territory by an Italian national. In regards to Article 17 (5) of the Directive, the report indicates that jurisdiction of a national is not subordinate to the acts committed are also criminalised in the place where it was performed. Moreover, Article 604 outlines that the judiciary has jurisdiction only where the victim is a national; however, it does not have jurisdiction over habitual residents who are victims or offender, as well as offending legal persons, thus, they are excluded from the scope of the provisions.

## **Topic 6: Assistance, support and protection measures for child victims**

The Italian legal basis in regards to topic 6 is in compliance with a number of exceptions. The report indicates that national authorities are obliged to provide child victims with support and assistance during the initial stages of the criminal investigation; however, these services can also be provided if the age of the victim is confirmed to be a minor. Article 609 of the

Criminal Code ensures that during all stages of the criminal proceedings that the relevant support and psychological assistance for child victims of sexual related offences and are not made conditional upon the child's willingness to cooperate. Italian legal framework does not include a specific provision linking assistance and support to be individually assessed according to the needs and concerns of the child; however, there are general provisions that enable for on-going psychological support to be made for victims during criminal proceedings. In addition, child victims are also provided with the status of being particularly vulnerable; therefore, throughout the investigation and criminal proceedings, child victims are accommodated to their special circumstances.

Although Article 4 of the Framework Decision 2001/220/JHA has not been transposed nationally, Article 90 of the Criminal Code Procedure (CCP) stipulates that parents and responsible people for the child victim are entitled to exercise the rights of the child on their behalf, thus they do receive certain information. Moreover, Article 338 of the CCP outlines that the appointment of a special representative can be made by a judge or by care institutions on the immediate basis to ensure adequate procedural representation. Article 76 (4) of the Presidential Decree 115/2002, provides that the child victim of the criminal offences indicated by Articles 600 and 609 of the Criminal Code are entitled to receive legal representation free of charge beyond the income limits established by Italian law. Under the CCP, it is indicated that interview with child victims have to be carried out without delay within specially designed premises and are carried out by a trained professional; however, it fails to highlight whether the same trained professional carries out all interviews and the number of interviews are not necessarily limited. Article 398 (5) of the CCP ensures that all interviews are documented through audio-visual devices whilst Article 472 and 398 gives the judge discretionary powers to make the court hearing non-public or to allow the use of communication technology to hear the child without them being present in court. The CCP also ensures that the privacy, identity and image of the child victim is protected from public exposure.

## **Topic 7: Take down and blocking measures**

Italian national legal framework does not comply with Article 25 (1) as it is not possible to delete or remove websites containing child pornographic material outside the territory of Italy. The only national tool that can be used is 'dimming' via the Database Source Name; however, it should be noted that this is not legally regulated. On a national level, the public prosecutor can have websites containing illegal content 'blacked out' but not officially removed. In order to do this a court order of online blocking has to be issued to service providers; therefore, according to Article 14 of the Law 269/1998, the National Centre to Fight Online Child Pornography filters websites to the service providers to block websites and failure to do so can result in a fine of between 50,000-250,000 Euro. National procedures of access blocking is in compliance with the optional Article 25 (2) of the Directive as this seems to be the main means of dealing with child pornographic material.



# Executive Summary on Latvia's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Latvian national law.

## Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The Latvian report indicates that national framework is not in full compliance with Article 5 (1) of the Directive. Article 166 (2) of the Criminal Code only outlines the sanctions for downloading, acquisition, importation, production, public demonstration, advertising or other distribution of pornographic or erotic materials that portrays the sexual abuse of children. Therefore, it fails to criminalize the act of obtaining access to child pornographic material. The offences listed in the Article 166 (2) of the Criminal Code are punishable by imprisonment for a term not exceeding 3 years; however, short-term imprisonment, community service, a fine or confiscation of property are also seen as viable sanctions for these offences. The Law on Pornography Restriction has been amended so that it complies with paragraph 3 of Article 5 of the Directive; thus, criminalizing the circulation and distribution of child pornographic material through electronic means. Furthermore, the report notes upon pending draft legislation that will enhance the Latvian criminal law's compliance with the

Directive. One of the amendments proposes to criminalize the act of 'pretending' to be under 18 years old in pornographic material when in fact they are 18 years or older; thus, the material will still be classed as child pornographic and will fall under the jurisdiction of relevant legislation.

## Topic 2: Online grooming

According to the Latvian report, Article 162 of the Criminal Code defines grooming as '...for a person, who encourages a person, who has not attained the age of 16, to involve in sexual acts, or encourages such person to meet with the aim to commit sexual acts, or enter into a sexual relationship regardless of the method in which the encouraging is expressed...if such have been committed by a person who has attained adult age, the applicable punishment is short-term imprisonment or community service, or a fine, with or without probation supervision period up to three years'. Therefore, the provision fails to comply with Article 6 of the Directive as it does not specify the difference between online and offline grooming nor does it protect minors between the ages of 16-18 years. The law also fails to comply with the Directive in regards to sentencing punishments, as the minimum requirements are not met. However, the pending draft legislation will also enhance Latvia's compliance in regards to grooming provisions, as it proposes to specify and criminalize offline and online grooming as separate offences, as well as sanction them with a maximum term of imprisonment of at least 1 year.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

In regards to Article 10 (1) of the Directive, following recent amendments on the Law on Protection of Children Rights a conviction for any one of the offences listed in Articles 3-7 of the Directive now entails a disqualification both for professional and organised voluntary activities involving direct and regular contacts with children.

Paragraph 2 of Article 10 of the Directive has now equally been fully transposed, as screening measure for employers include professional and voluntary activities involving direct and regular contact with children. Employers are both obliged and have the right to demand for information on the existence of prior criminal convictions for the offences listed in Articles 3-7 of the Directive. The managers or employers of childcare, educational, health care and other institutions dealing with children as well as the organisers of events, entrepreneurs, company managers, organisers of voluntary activities who are under an obligation to ensure that any person involved in the activity is screened have to check the relevant information at least once a year.

With regard to the transposition of Article 10 (3) of the Directive, Article 19 (8) of the Punishment Register Law provides for the transmission of information of convictions to other EU member states.

### **Topic 4: Victim Identification**

The Latvian report highlights that no steps have been taken to transpose Article 15 of the Directive into national framework. Moreover, concerning topic 4 in general, the report provides limited information on the matter. It does outline that investigations during criminal proceedings can only be initiated at the request from the person to whom the harm was inflicted; however, the criminal proceedings can also be carried out without the request of the person to whom the harm was inflicted,

as he/she may not be able to exercise their rights due to a physical or mental deficiency. Additionally, in order to be recognized as a 'victim', a written consent from the victim or a representative must be received; thus, without this consent, the victim shall only obtain the status of a witness.

### **Topic 5: The extraterritorial extension of jurisdiction**

In accordance with the Article 4 (1) of the Latvian Criminal Code, jurisdiction shall be applied to the criminal offences committed within the territory of Latvia, or in some cases, applied to offences committed outside of Latvian territory. However, national framework does not expressly refer to the offences that are in part committed within their territory nor does it extend the jurisdiction for offences committed for the benefit of a legal person established within its territory. The report indicates to an extension of jurisdiction regarding offences committed outside of its territory against the 'interests of inhabitants' of Latvia. Jurisdiction is applied to nationals and non-national who reside within Latvian territory; thus, they shall be liable within the territory of Latvia for an offence committed in another state or outside the territory of any state regardless of whether offence is recognized as criminal and punishable in the territory where it is committed. However, when concerning offences committed by means of information and communication technology as there is no reference made within national framework.

### **Topic 6: Assistance, support and protection measures for child victims**

The Latvian report fails to fully comply with 19 and 20 of the Directive; however, it complies with most of the provisions of Article 18. The Cabinet of Ministers Regulations No. 1613 of 22 December 2009 makes the obligation to provide assistance and support for child victims as soon as suspicion arises that the child might be subjected to unlawful acts. Article 13 (1.2) of the Law on Social Services and Social

Awareness outlines that social rehabilitation will be provided for child victims until the age of the person is proved. Additionally, assistance and support is provided to child victims regardless of their willingness to cooperate within the criminal proceedings. National framework provides that individual assessments of child victims be made and although the Criminal Procedure Law sets provides a special status for child victims, it does not cover all the offences listed on Articles 3-7 of the Directive. Article 104 of the Criminal Procedure Law indicates that the child victim can be represented by a parent or relative, or a representative from the authorities or an NGO that can perform such a function. Additionally, the report highlights that legal representation can be provided to child victims free of charge for the duration of the criminal proceedings; however, national framework does not enable for the claiming of compensation.

With reference to the interviewing on child victims, the current legislation fails to expressively outline the provisions of Article 20. The report indicates that there is no specific framework in place to ensure interviews take place without unjustified delay, although it could be argued that the Cabinet of Ministers Regulations No. 1613 of 22 December 2009 can apply. Article 153 of the Criminal Procedure Code outlines that interviews with child victims must take place within specially designed premises, whilst Article 152 (2) outlines that interviews with children 14 years and young must be carried out by a specially trained professional. However, the current framework fails to specifically outline that all interviews must be conducted by the same person, as well as be limited to as few as possible. Furthermore, the reports use of the 'interrogation' rather than interview with the child victim is worthy of note. Moreover, the Criminal Procedure Law stipulates that child victims testimonials must be read or played during court proceedings, or the hearing can take place without the presence of the public, as well as be heard over telecommunication technology. Article 309 of the Criminal Procedure Code ensures the protection of the identity and privacy of the child victim. The report notes that the pending draft amendments for the Criminal Procedure Code will enhance the compliance

of national law to Article 20 of the Directive, especially in relation to paragraphs (d) and (e).

## **Topic 7: Take down and blocking measures**

In regards to topic 7, the report indicates that there is a supervisory body that can order internet service providers to remove websites that are in violation of the law within a timely manner, and must also report the process of removal to the body. However, legislation only provides that child pornography that operates within the territory of Latvia can be removed; therefore, content from webpages hosted in another State cannot be removed. Furthermore, the report indicates that Latvia has not transposed the optional provision for blocking access to web pages containing child pornographic material. The report further states '...given the investment required for the implementation and maintenance of such blocking measures, as well as being aware of the existence of easily accessible tools to circumvent such blocking measures, the competent bodies currently do not support the introduction of website blocking, believing that it will be inefficient...'





## Executive Summary on Lithuania's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography (the “**Directive**”) was adopted by the European Parliament and the Council on 13 December 2011. The Directive requires the Member States to adapt their legislation by 18 December 2013. The summary below presents the main findings regarding implementation of the Directive in Lithuania.

Article 5(1) of the Directive states that the Member States shall take the necessary measures to ensure that the intentional conduct, when committed without right, referred to in paragraphs 2 to 6 is punishable. Article 5(3) provides for that the Member States need to ensure that those who knowingly obtain access, by means of information and communication technology, to child pornography shall be punishable by a maximum term of imprisonment of at least 1 year. In relation to this, on 13 March 2014 the Lithuanian Parliament passed new Draft Amendments. Pursuant to the Draft Amendments, Article 309(2) of the Lithuanian Criminal Code will be amended to state that: “a person who produces, acquires, stores, demonstrates, advertises, offers or distributes pornographic material displaying a child or presenting a person as a child or by means of information and communication technology obtained access to pornographic material displaying a child or presenting a person as a child, shall be punished by a fine or by imprisonment for a term of up to three years”. Once these amendments will come into force the legal framework of Lithuania will fully comply with the provisions of the Directive.

Member States ought to prevent solicitation of children for sexual purposes. As it is referred in

the Article 6 of the Directive, the Member States are obliged to take the necessary measures to ensure that the following intentional conduct is punishable: the proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Article 3(4) and Article 5(6), shall be punishable by maximum term of imprisonment of at least 1 year and to ensure that an attempt, by means of information and communication technology, to commit the offences provided for in Article 5(2) and (3) by an adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child is punishable. The Lithuanian laws do not correspond with this provision yet. However according to the new Draft Amendments: “an adult, which proposed the person younger than 16 year-old to meet, with the aim to have sexual intercourse or otherwise satisfy his sexual desires with such person or to use such person for production of pornography material, if after such proposal the person who proposed undertook concrete actions in order for the meeting to occur, shall be punished”. Should the Draft Amendments are passed and come into force, the Lithuanian laws will comply with the Directive.

Article 10 of the Directive establishes three obligations on the Member States ensuring disqualification, screening, transmission of information on criminal convictions. The provisions of Lithuanian laws do not fully correspond with the provisions of the Directive. Even though it is forbidden for people who committed such offences to work with children, there are some difficulties for the employers to check if a person

who applies for a job has no previous records on such offences.

According to Article 15(4), the Member States are obliged take the necessary measures to enable investigative units or services to attempt to identify the victims of the offences referred therein, in particular by analysing child pornography material, such as photographs and audio-visual recordings transmitted or made available by means of information and communication technology. The Lithuanian Criminal Procedure Code and the Lithuanian Law on Criminal Intelligence establish general rules for criminal investigations, application of procedural coercive measures (such as search, seizure, control, capture and seizure of information transmitted via electronic communications network and etc.), right of the prosecutor to get access to various information, research and analyses of various objects that could have information needed for the criminal investigation and etc. These rules ensure the right of the persons that execute the criminal investigations to get access to various materials (documents and other sources) that could have information related to the crime, its circumstances, participants, victims and etc. However, in practice if only the photographs of the victims are obtained and there is no other information that would enable the investigator to establish the identity of the victim, it is impossible to identify the victim.

Article 17 of the Directive establishes rules regarding extraterritorial jurisdiction. Basically, current Lithuanian legal framework complies with Article 17 of the Directive, with exception to Article 17(4). Pursuant to the Draft Amendments, it is proposed to supplement the Criminal Code with a provision establishing that Lithuania's jurisdiction based on the nationality of the offender for crimes related to children sexual abuse and pornography (specific articles listed) committed outside the territory of Lithuania would not be subordinated to the condition that the acts are criminal offences at the place where they were performed. Once the Draft Amendments are adopted, the legal framework will fully correspond with the Article 17.

Articles 18, 19, 20 of the Directive establish the rights of a child who is a victim and ensure

its protection. It is necessary for a Member State to provide children with the support and protection that enables them to feel secure. Member States need to make sure that investigations which involve children are regulated explicitly with the regard to prevent harming a child. In Lithuania, the privacy of those who are under 18 years old is protected during the investigation and the Lithuanian Criminal Procedure Code ensures that the witness or victim under 18 years old is to be interviewed only once. However these provisions are only a fragmental implementation of the respective provisions of the Directive.



## **Executive Summary on Luxembourg's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography**

### **Introduction**

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Luxembourgish national law.

### **Topic 1: Knowingly obtaining access via information and communication technologies to child pornography**

Luxembourgish national framework does comply with Article 5 (1) and (3) of the Directive as Article 384 of the Penal Code outlines that '...anyone who has knowingly acquired, possessed or viewed print-outs, images or photographs, films or any other pornographic materials involving or depicting minors will be punished by a term of imprisonment of one month to three years and a fine of 251 to 50,000 Euros'. The criminalisation of access to child pornography is conditioned upon the circumstance that this access was intentional. Additionally, the report indicates that Bill no. 6046 refers to the 'consultation' on the internet as printing out images and registering for materials implies their intention and falls under the scope of 'possession' of Article 5 (2) of the Directive. However, even though national framework complies with topic 1, Article 384 of the Penal Code does not explicitly establish a constitutive element of the circumstance that the access to pornographic materials has been obtained by means of information and communicative technology.

### **Topic 2: Online grooming**

In regards to topic 2, Article 385-2 of the Penal Code outlines that adults who make sexual proposals by means of an electronic communication, directed to a minor under the age of 16 or towards a person presenting themselves as such, is sanctioned with a term of imprisonment from one month to three years and with a fine between 251 to 50,000 Euros. This sentencing limit increases to the imprisonment of up to 5 years and a fine of up to 75,000 Euros if the actual meeting is carried out which further exceeds the minimal sentencing requirements of the Directive. There are currently no existing provisions that correspond with Recital 19 of the Directive in regards to offline grooming in Luxembourg as other provisions explicitly outline the means of grooming using information and communication technology. However, compared to the Directive, Article 385-2 (1) of the Penal Code does not require for 'material acts leading up to a meeting' to consider the infraction to be made; therefore, the fact that an adult has made sexual proposal to a minor constitutes as an offence itself. Another major difference is the exclusivity of the term 'sexual proposals' in Article 385-2 (1) as it limits the scope to incriminating only proposals that of a sexual nature, whereas the Directive provides for a much wider scope as proposed meetings can be of any nature. Even though Luxembourg technically complies with the Directive in regards to online grooming, their national framework has many shortfalls that hinder the prospect of increased prosecutions and further protection of children.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

According to the report Luxembourg national framework complies with Article 10 of the Directive.

Articles 378 (2), 381 (3) and 386 (2) of the Penal Code establish disqualification as an optional accessory punishment arising from convictions for the offences listed in Articles 3-7 of the Directive. The judiciary can impose a lifetime prohibition or for the maximum term of 10 years for the exercise of a professional, voluntary or social activity involving habitual contact with minors. Any transgression of this prohibition can be punished by a term of imprisonment of up to 2 years. Article 10 (1) of the Directive uses the phrase 'direct and regular' contacts, whereas the Luxembourg framework uses the term 'habitual' which provides a wider scope to include indirect contact.

Luxembourg also has measures in place for screening procedures within both general and specific frameworks. Article 8 (2) of the Law of 29th March 2013 outlines the two kinds of screening, based on the production of two types of criminal records ( "Bulletins"). "Bulletin No.1" is reserved for authorities. "Bulletin No. 2" gives employers the right to demand a record of the person concerned. Article 9 of the Law of 29th March 2013 states that '... every physical or moral person considering to recruit a person for professional or voluntary activities involving regular contact with minors receives, under condition of the consent of the concerned person, the statement of all convictions for charges committed against minors or involving minors... Therefore, this specific framework gives employers direct access to information, on condition of the consent of the person concerned. There is however no obligation to screen on convictions or disqualifications.

The obligations under Article 10 (3) of the Directive have been transposed by the Luxembourg law of 29 March which indeed provides that the consent of the Luxembourg

citizen concerned is requested when information on his criminal record is transmitted in reply to a request related to the exercise or wish to exercise a professional or voluntary activity involving "regular" contacts with children.

### **Topic 4: Victim Identification**

The Luxembourg report states that the national framework does not comply with the Directive as Article 15 (4) was not even partially transposed. Despite this though, there are national measures in place which do enhance its compliance, for example, the online initiative 'BEE SECURE' which is a joint effort from the police, National Youth Service, the Ministry of Economy and Foreign Trade and the Ministry of Family Affaires and Integration. It enables for the general public to submit reports of illegal content on the Internet.

Articles 383 and 384 of the Penal Code provides the general framework for investigations on child pornography; however, there is no specific provision that empowers national police to analyze child pornographic material in order to help identify child victims.

### **Topic 5: The extraterritorial extension of jurisdiction**

Luxembourgish national framework partially complies with the Directive in regards to Article 17 and Recital 29; however, it does comply with most of the provisions. Article 3 of the Penal Code established jurisdiction on nationals and foreigners who commit an offence within its territory. Article 7-2 of the Penal Code also establishes jurisdiction when an offence is committed partially within its territory. In addition, Article 5 (1) of the Code maintains that '...every Luxembourger and every person who has its habitual residence in the Grand-Duchy of Luxembourg, as well as the foreigner found in the Grand-Duchy of Luxembourg, who have committed abroad one of the offences referred to in the Articles 368 to 384 of the Penal Code, could be prosecuted and judged in the Grand-Duchy, although the act is not punishable by legislation of the country where it has been committed...' At the present

time, there is no corresponding framework to Article 17 (3) to jurisdiction over offences made through information and communication technology; however, Article 7-2 of the Penal Code does not preclude offences covered in Articles 5 (1), (2) and 6 (1) of the Directive, as every time a constitutive element of an offence has been accomplished by means of information and communication technology accessed from Luxembourg territory, Article 7-2 applies. Moreover, Article 7-3 of the Penal Code also establishes jurisdiction over victims who are national or residents; therefore, asserting jurisdiction over the offender as well. Luxembourg also establishes jurisdictional competence over legal persons in Article 23 of the Penal Code. Even though national framework includes provisions on jurisdiction for offender, victims, nationals and habitual residents, the scope of these provisions is limited as they exclude or partially exclude the offences listed in Articles 3-7 of the Directive.

### **Topic 6: Assistance, support and protection measures for child victims**

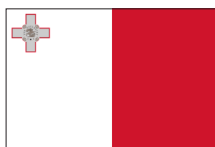
The report indicates that Luxembourg complies with the Directive for the most part of topic 6 as they have taken a number of measures in support and assistance for child victims. Article 23 of the Law of 10th August 1992 enables the judiciary to request social authorities to conduct an investigation into background of the child victim which will help determine the relevant assistance and support needed for that child. This support includes physical or mental health assistance, as well as moral or social education and development. However, there are currently no specific provisions in national framework that refers to a situation when the age of the victim is uncertain; therefore, authorities must rely upon Article 35 (3) of the Luxembourg Convention to provide support and assistance measures to children without verification of their age. Child victims are also awarded free legal assistance that is not limited to any duration of time and can be extended to the victim to the age of 21 years. Moreover, support and assistance is not made conditional on the child's willingness to

cooperate, although psychological support is not mandatory for all victims. In regards to Article 20 (2) of the Directive, Luxembourg enables for minors to have the right to access legal representative from the very beginning of the criminal proceedings; however, they have to make a request for such as it is not automatically given. Furthermore, there are also no provisions that ensures that interviews with child victims takes place without delay and there are also no provisions to ensure that interviews are carried out in special premises; however, national practices do exist in police units. This situation is also applied to the training of interviewers and that interviews are carried out by the same person, as there is no formal legal basis to ensure these are carried out, although it is done in practice. In order to avoid numerous interviews being carried out, a video/audio recording is obligated. Additionally, Article 190 (2) of the Penal Code sets the general rule that a court hearing can take place without a public audience. Furthermore, Article 38 of the Law of the 10th August 1992 forbids the publishing or distribution of any information that would harm the child's identity or privacy and to do so is punishable.

### **Topic 7: Take down and blocking measures**

Luxembourgish national framework complies with the minimum standards of the Directive in regards to Article 25 and Recitals 46 and 47. Bill No. 6408 outlines that Articles 31 (3) of the Code of Criminal Procedure and paragraph 66 (1) of the same Code indicates that national authorities are '...responsible for research and pursuit of the offences linked to child pornography already have the possibility to implement necessary measures in order to remove illegal content when it is stored within the Luxembourgish territory'. Additionally, authorities are obliged to address the international rogatory commission to authorities in other states concerning the removal of websites concerning child pornography. However, the optional blocking measures of the Directive are somewhat loosely complied by national framework, as even though Article 60 of the modified Law of the 14th August 2000 allow

authorities to request internet service providers to block or remove illegal content online; however, they are not liable to block or modify information.



# Executive Summary on Malta's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the implementation of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Maltese national law. The summary will highlight below the extent of Malta's compliance with the Directive.

## Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

Maltese national framework has fully complied by implementing the articles of the Directive in relation to topic 1. Article 5 (1) and (3) of the Directive have been transposed into Article 208A (1B) of the Criminal Code as 'any person who acquires, knowingly obtains access through information and communication technologies to, or is in possession of, any indecent material which shows, depicts or represents a person under age' is punishable by a maximum capped sentence of 3 years. The opted term 'indecent material which shows, depicts, or represents a person under age' provides a wider meaning for indecent acts that are not necessarily sexual or pornographic to be within the scope of Article 208(1B) of the Criminal Code.

## Topic 2: Online grooming

Maltese national framework has fully complied by implementing the articles of the Directive

in relation to topic 2. Article 6 (1) and (2) of the Directive have been transposed into the Criminal Code under Articles 41 (1) which makes it punishable for failed criminal offences where the perpetrator intends to commit crimes by overt acts which are followed by a commencement of the execution of crimes. These crimes are described in Articles 208A (1B) of the Criminal Code irrespective of whether the 'overt act' was an act of solicitation or otherwise. Article 208AA (1) of the Criminal Code establishes a term imprisonment of between 2 and 5 years. Although there is no specific provision on 'offline grooming' within the Criminal Code in relation to Recital 19 of the Directive as the Criminal Code is limited by the emphasis on information and communication technology. However, there are other provisions within the Criminal Code that could be within the scope of offline grooming, for example, if the proposal is accompanied with violence or deceit.

## Topic 3: Disqualification arising from convictions, screening and transmission of information

Malta provides a legal framework in regards to disqualification arising from convictions of sexual offences involving minors. It is transposed into Article 208B (2) of the Criminal Code which states that '...in addition to the punishment established for the offence, the court may order that the offender be temporarily or permanently prevented from exercising activities related to the supervision of children'. No distinction is made between professional and voluntary

activities when working with children. Reference may also be made to the functioning of the Protection of Minors registration, mentioned by the report in reply to the question on screening which amounts to a system of non-judiciary disqualification.

In relation to Article 10 (2) of the Directive, Malta provides both a general and a specific framework for the process of screening. The general framework is based on the Conduct Certificates Ordinance which allows employers to request of prospective employees to produce a copy of their conduct certificate. However, employers do not have the right to access information by themselves. The specific framework relates to the Protection of Minors (Registration) Act (Chapter 518 of the Laws of Malta) which establishes a register where details of offenders are registered. Any person whose name is registered becomes ‘...ineligible for membership of, or any employment or other position with any institution, establishment or organisation providing or organising any service or activity which involves the education, care, custody, welfare or upbringing of minors’. Any “entity” (including any institution, establishment or organisation) which provides or organises any service or activity involving the education, care, custody, welfare or upbringing of minors is obliged to request information on any prospective employee or volunteer.

Article 10 (3) in relation to transmission of information has not been transposed into national framework; however, transmissions of information is of the competency of the Attorney General’s office. Therefore, Malta should incorporate the Council Framework Decision into national framework as it would facilitate the role of the judiciary and enhance information exchange on sexual offenders.

#### **Topic 4: Victim Identification**

According to the report the substantive aspects of Article 15(4) have been transposed in the Criminal Code as the Cyber Crime Unit investigates matters relating to the Internet which is authorized to monitor the Internet and investigate child pornography, child safety and “e-stalking”. The necessary procedural aspects

have not been adequately transposed as there is no comprehensive set of police powers specifically tackling the investigation of computer crimes and sexual crimes involving children over the Internet obliging the Police to rely on a “contemporary” interpretation of general provisions of the criminal code.

#### **Topic 5: The extraterritorial extension of jurisdiction**

In regards to Article 208B (5) (a) of the Maltese Criminal Code, Article 17 (1) (a) of the Directive has been fully transposed into national framework. Therefore, Maltese courts according to the provision, shall have jurisdiction over the said offence where only part of the action giving the execution of the offence took place in Malta. Article 208B (5) (b) of the Criminal Code also gives Maltese court’s jurisdiction over their own nationals even if the said offence did not take any part in Malta. In addition, Article 208B (5) (c) of the Criminal Code also gives jurisdiction over the said offence which was committed by means of computer technology accessed from Malta. Article 17 (2) (a) of the Directive has not been transposed into national framework as there is no specific grounds for jurisdiction over victims who are nationals or residents. However, Article 17 (2) (b) has been transposed into Article 208B (5) (b) of the Criminal Code as the courts will have jurisdiction over the said offence where the offence was committed for the benefit of a body corporate registered in Malta. Furthermore, in regards to Article 17 (5) (c) of the Directive, it is not clear within Article 5 (1) (d) of the Criminal Code if jurisdiction only applies to ‘permanent residence’ as there is a notable difference in the choice of word ‘habitual’ and ‘permanent’ Therefore, Malta fully complies with the Directive on a minimal basis but has also included optional framework on jurisdiction into national law.

#### **Topic 6: Assistance, support and protection measures for child victims**

Overall the Maltese national framework does comply with Articles 18, 19 and 20 of the



Directive, however, there are shortcomings in their implementation. For example, provisionally there is no specific moment of intervention in the best interests of the child that is mandatory for the state and there is also no obligation under Maltese law to report child abuse. The Maltese Criminal Code uses the term 'underage' for the majority of its provisions when transposing articles from the Directive which includes someone under 18 years of age. In regards to Article 19 of the Directive, paragraph 1 has been transposed in the Children and Young Persons (Orders) Act a child victims 'care order' can be issued immediately and measures of support and assistance are then decided upon within a given time period. However, there is no condition made in regards to a child's willingness to cooperate within the criminal investigation. Moreover, there are in provisions that enable the creation of a 'Persons Advisory Board' were a group of different professionals discuss and form a care plan for each individual child. In addition, there are currently no specific provisions that obliges the appointment of a 'special representative' for child victims; however, the judge or family can appoint a child's advocate which is not usually free of charge. Furthermore, Maltese law does not cover how child victims are interviewed as interviews are usually carried out by the police inspector, then early on in the court process. The aim is to only interview the child once, which is then video recorded and presented as evidence. There are no special premises that have been designed for the purpose of interviewing children, nor is there any special training provided for those that carry out the interview. Therefore, in order to fully comply with Articles 18, 19 and 20, it would be necessary to ensure legal representation for the child, possibly through a specific NGO where a child-friendly environment could be adopted for interviews to take place by trained specialists.

the police as well as internet service providers in Malta have jointly introduced a 'child abuse internet filter' which is aimed at preventing access to websites containing child pornography. If a specific provision is made which complies with Article 25, it would give the police the power to promptly remove or to temporarily/permanently block access to websites that contain 'indecent material'. This power may well be curbed by obtaining a warrant from a Magistrate which is customary when exercising special powers under the Criminal Code, which will ensure proportionality and transparency.

## **Topic 7: Take down and blocking measures**

At present, Malta does not comply with Article 25 (1) and (2) of the Directive, as there is no current national framework in place that covers topic 7. However, the Cyber Crime Unit within



## Executive Summary on the Netherlands's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Dutch national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The Dutch report indicates that Dutch national framework complies with Article 5 (1), (3) and (7) in regards to the Directive. However, Dutch national law has no clear definition of child pornography as mentioned in Article 2 of the Directive. Article 240b of national framework outlines a 'sexual act' as a '...depiction of a minor that expresses a sexual pose or a depiction where a minor interacts in a sexual environment'. Thus, what exactly constitutes as a sexual pose of a minor is not decisive; therefore, an image that does not contain a lot of sexual elements can still be regarded as a sexual act due to the conditions or context of the depiction which can still be susceptible for sexual arousal. Decisive is when the depiction has an obvious sexual connotation e.g. sexual organs are depicted, etc. The definition in Article 240b provides a wider meaning than that in Article 2 of the Directive and provides within its scope to cover a range of conducts; however, its lack of specification can cause problems in clarifying exact conducts. Article 5 (3) has been transposed into Article 240b

of the Dutch Criminal Code in the context that '...an automated work or communication service' is a device that can store and process information on the internet. Recital 18 of the Directive states that a person who intends to enter a website containing child pornography should be held liable; therefore, it is possible to prosecute a person for whom it could not be proven that they actually possessed child pornography e.g. gained access without downloading it, viewing 'real time' child pornography, etc. However, it should be noted that solely watching child pornography cannot be held punishable under Dutch law as it conflicts with 'unintentional' visits to a website. Intentional conduct can be assessed by factors such as payment, recurrent visits, and so forth. Article 240b of the Dutch Criminal Code provides a term of imprisonment for this offence for up to 4 years or a fine of a maximum of €78,000 to be imposed.

### Topic 2: Online grooming

Dutch national law has not formally transposed Article 6 of the Directive as it currently operates from the legal basis of the 2007 Lanzarote Convention which has been transposed into Article 248 (a) and (e) of the Dutch Criminal Code. Topic 2 'online grooming' is outlined as a person who '...actively approaches and seduces minors on the internet (in particular social media) with the ultimate purpose of committing sexual abuse or producing child pornographic material with the minor'. In order to be criminally liable, the perpetrator must have proposed for a meeting with the child, followed by 'material acts leading to a meeting'. Therefore, the perpetrator can only be held liable if they do

more than just communicate on the internet and using sexual innuendo. This form of online grooming is punishable under Dutch law by the maximum term of imprisonment of up to 2 years or by a fine of up to €20,250 being imposed. Article 248a provides examples of online grooming which can be punished, such as seduction through gifts, money or goods, abuse of dominance arising from relationships, or deceit from suggesting sexual poses or indecent acts and so forth, all by using the internet. Behaviour that does not result in the commission of a sexual act or the beginning of execution of such an act, falls outside the scope of Article 248a of the Criminal Code. Recital 19 of the Directive in relation to offline grooming, is claimed to have amounted to the offences of seduction in Articles 248a of the Criminal Code; however, given that the definition in this article phrases these seductions by the use of the internet, it cannot be qualified as 'offline' grooming.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

Article 10 (1), (2) and (3) of the Directive have been transposed into Dutch national framework.

Firstly, as to the "disqualification" of convicted offenders with regard to future activities involving direct and regular contacts with children, Article 251 (2) of the Criminal Code in connection with Article 28 determines that persons who have been convicted of a crime corresponding to the offences listed in Article 10(1) of the Directive may be disqualified for any professional or voluntary activity involving work with children.

IN addition to such optional judicial disqualification, the regulatory system on the "certificates of conduct" needed for accessing to or exercising certain types of activity, establishes a wider mechanism of "administrative" disqualification.

. Whether a certificate of conduct is issued, depends on two kinds of variables, the first

being the judicial documentation, the second, which will only be considered is the first is met, relates to the "subjective" elements linked to the person of the offender at the time of the offence. The first variable will "objectively" evaluate the interest of society when considering the consequences of the offence committed. It is based on i) the judicial information, ii) the risk of repeat offences, iii) the risk for society, iv) the risk related to the execution of the function/job.

Since 1st March 2013 a new system of screening was set up with regard to working with children.

It relates both to the screening of applicants for a job at the time of "recruitment" but also to a form of "continued screening".

In both cases the screening is "indirect": it will be done by an organisation named "Justis" that has access to a wide range of sources, i.e. not only the convictions or disqualifications mentioned in the criminal record, but also all decisions of the public prosecutor regarding a person suspected of an offence (i.e. not only the decisions to sue before the criminal court but equally the decision to settle or to dismiss the case). Justis will evaluate the risks attached to the exercise of the activity considered by the person considered.

- The screening before recruitment is not done by the employer. It is the applicant who has to apply to the local authority for a certificate of conduct. The employer will be informed by Justis whether the certificate of conduct has been granted.

- The "continued screening" is the responsibility of Justis. Justis systematically screens the organisations working with children and the people involved in their activities. When Justis receives information regarding specific persons working with children it decides whether the person has to be screened again. If this is the case the employer receives a warning and has to ask the employee to accept a new screening.

Article 10 (3) has been transposed into Article 35 Judicial Data and Criminal Records Decision which makes it possible for member states to exchange information which can relate not only to convictions, but to any judicial information regarding non-convictions.

## Topic 4: Victim Identification

Dutch national law has transposed Article 15 (4) of the Directive into policy rules regarding 'child pornography and victim identification. Reference is made to confiscation procedures and to the construction of an (inter)national database linking pieces to each other in order to better identify victims. The "Image and Internet Team" which operates within the National Police Services Agency (KLPD) has identification of the victims as one of its specific tasks.

## Topic 5: The extraterritorial extension of jurisdiction

Article 17 of the Directive has been transposed into Dutch national framework in regards to topic 5, as Article 2 of the Dutch Criminal Code outlines that principle of territoriality, thus the Criminal Code is applicable to everyone who committed an offence within the Netherlands. Jurisdiction is also applied to Dutch nationals who have committed crimes outside of their territory. Therefore, the offences listed in to the Directive enjoy a broadened jurisdiction within Dutch law. Moreover, Article 5a (1) of the Dutch Criminal Code also establishes jurisdiction when the offender is not a natural or habitual resident of the Netherlands, which is also applied for victims under Article 5b (2) of the Criminal Code. Article 51 of the Criminal Code also provides for legal persons to be equally suitable to be an offender of any crimes that would be committed by a national person. Article 17 (3) of the Directive also provides the basis for jurisdiction for information and communication technology, whether it has been accessed in the territory of the Netherlands or is based on its territory, there is no jurisdictional distinction between the two aspects.

## Topic 6: Assistance, support and protection measures for child victims

The Netherlands national framework operates on the legal basis of the 2007 Lanzarote Convention in relation to topic 6 in that it aims to prevent 'secondary victimization'. This

responsibility of the correct treatment of child victim lies with the prosecutor or judge in that they are able to provide a hearing without the presence of the suspect. Additionally, assistance and support measures can be found in Victim Support the Netherlands, which is an organisation that provides emotional, practical and legal support free of charge. Police are also obliged to provide assistance and support measures after receiving a complaint and when the age of the victim is uncertain the police must operate under the assumption that the victim is a child and provide the means of support to the until verification. There also exists specific protection mechanisms for child victims who have made a complaint of abuse within their family setting. Moreover, assistance and support measures are not made conditional on the child's willingness to cooperate within the criminal investigation. Each individual case regarding a child will be assessed in regards to their particular circumstances and family support of the child victim can also be provided. However, it should be noted that there is no specific 'vulnerable' status quoted to child victims within Dutch national law. Furthermore, it is obligated to appoint a special representative for child victims under Article 1:250 Dutch Civil Code. The Dutch Criminal Code also highlights the procedures when dealing with child victims, for example, interviews to take place immediately, the number of interviews to be limited to as little as possible, and interviews to take place in specially designed premises, to be conducted by trained specialists and to be continuously conducted by the same person. Article 20 (6) also provides for identity protection of child victims by concealing information from the public.

## Topic 7: Take down and blocking measures

Article 25 (1) of the Directive corresponds with Article 125o of the Dutch Criminal Procedure Code, as it states that '...an automated work is searched and data regarding the criminal offence is found, the Public Prosecutor or the Examining Judge can decide to make this data inaccessible as far as it is necessary to end the criminal offence or to prevent new

offences'. Thus an automated work is defined as a device that can store, process and submit data by electronic/digital/communicative means. Possessing and publicly displaying child pornography on the internet is criminalised in Article 240b of the Criminal Code and can be made inaccessible according to Article 125o of the Criminal Procedure Code by Public Prosecutors or Examining Judge. Article 54a of the Dutch Criminal Code also stipulates that a 'middleman' can be forced to provide details of the content as well as forced to take down the website. A Bill was proposed in 2013 that will enable for 'take down' procedures to be more effective and less cumbersome, as Public Prosecutors will be able to act without the need for permission from an Examining Judge. Dutch national framework has not transposed the optional blocking measures as internet providers will block websites containing child pornography on the basis of a 'black list'. However, research has showed that this has not been very effective as child pornography often seeps through the net.



# Executive Summary on Poland's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Polish national law.

## Topic 1: Knowingly obtaining access via information and communication

technologies to child pornographyAt the time the Polish report was produced, the Polish parliament had passed a Bill in February 2014 and was waiting final approval. The law would specifically criminalize the accessing of child pornography as well as continue to penalize the storage and possession of child pornographic material with a sentence of imprisonment of between 3-5 years. The Bill has also raises the age of protection of minors in pornographic material from 15 to 18 years old. The report does not provide further information other than this.

## Topic 2: Online grooming

Polish national framework mostly fulfills the requirements of Article 6 of the Directive as Article 200a (2) of the Criminal Code outlines that '... anyone who, through information system or telecommunication network, makes an offer to a minor under the age of 15 of sexual intercourse, submission or performance to another sexual act, or participation in the production or preservation of pornographic material and

intends to carry through this offer, is liable to a fine, the restriction of liberty or imprisonment for up to 2 years'. It is important to note that the attempt to solicit is also punishable, regardless of whether a meeting was achieved. Offline grooming in relation to Recital 19 of the Directive, does not constitute as a separate criminal under national framework; however, it can be interpreted as 'direct' solicitation of minors for sexual purposes which is punishable by a maximum penalty of 12 years imprisonment.

## Topic 3: Disqualification arising from convictions, screening and transmission of information

In regards to Article 10, Poland mostly complies with the Directive although there are shortcomings in the corresponding framework.

The transposition of Article 10 (1) of the Directive is based on Article 39 (2a) of the Penal Code as it outlines that offenders can be disqualified from activities involving raising, treating and educating minors. Furthermore, Article 41 (1a) of the Penal Code highlights that offenders convicted for the offences against sexual freedom and decency of minors, can be permanently disqualified by the Courts from performing any professions or activities connected with children.

General provisions enable employers active in professions that require having a clean criminal record as a statutory requirement for a position, to have access to information concerning the existence of criminal convictions on the

National Crime Register. However, this does not apply to the voluntary sector as organisers are not obliged or do not have the right to access information for screening clearance.

With regard to Article 10 (3) of the Directive, Poland has joined the European Criminal Records Information System which enables them to partake in the transmission of information exchange on criminal convictions with other member states.

#### **Topic 4: Victim Identification**

At the time of the publication of the report, the Act of the Police outlined only two types of crimes against sexual freedom and decency, the sexual abuse of minors and online grooming. For these offences, the police are able to make preliminary investigations without notice. However, the report indicates that a Bill has been passed in Parliament that will extend the list of crimes within the Act of Police that will entitle the police to make preliminary investigations, particularly those against sexual freedom and decency, and will include offences involving child pornography.

#### **Topic 5: The extraterritorial extension of jurisdiction**

The Polish report provides a limited amount of information on topic 5; however, it does indicate that most of national provisions correspond with the Directive, with the exception of Article 17 (4) as Polish framework is subjected to the dual criminality clause; thus, offences committed abroad must also be considered as criminal in the place that they took place. Despite this though, Article 5 of the Penal Code establishes jurisdiction over offences committed within or partly within its territory, as well as establishing jurisdiction of offences committed outside of its territory by Polish nationals. The report indicates that Poland establishes jurisdiction over offences committed by the means of information and communication technology, as they are obligated to prosecute crimes against nationals, as well as prosecute offences committed within their territory. Article 110 (1) of the Penal Code applies to foreigners '...

who have committed a prohibited act abroad that is against the interests of the Republic of Poland, a Polish citizen, a Polish legal entity or a Polish organizational unit without the status of legal entity/.

#### **Topic 6: Assistance, support and protection measures for child victims**

Polish national framework in regards to Articles 18, 19 and 20 mostly complies with the Directive but also has shortcomings. The report highlights that authorities are able to intervene to provide assistance and support once they have reasonable ground to do so, and legal framework also enables the child to exercise their rights. However, it is essential to note that there exists no legal practice of the 'presumption of age' stipulated in Article 18 (3) of the Directive. Additionally, there is no legal definition of the status of 'particularly vulnerable' for child victims although they do receive special treatment. National framework provides measures that enable child victims to report cases of abuse from family member and since 1998, the 'blue card' system is applied to problematic families, which monitors their activities. Moreover, the report also indicates that assistance and support measures are provided regardless of the child's willingness to cooperate. Legal framework also ensures that each child receives an individual assessment and families of child victims can also be provided with assistance and support. Furthermore, the report outlines that special representative can be appointed for the child and that they are also entitled to free legal representation, as well as state compensation. In regards to Article 20 of the Directive, the report shows that interviews with the child victim are not obligated to take place without delay and they are also not restricted in that it has to be the same person that carries them out. However, interviews are carried out and recorded audio/visually within a specially designed premises by trained professionals and if the child victim is under the age of 15, they can only be interviewed once. Court hearings for the child victim can take place without the public or they can be transmitted using telecommunication devices.

## **Topic 7: Take down and blocking measures**

From the report it is evident that Poland does not comply with Article 25 of the Directive due to the fact that there are no measures in place to remove websites that contain child pornographic material. The only process that exists under Article 217 (1) of the Criminal Procedure Code relate to the confiscation of tools to commit a crime with a court order. However, there are general mechanisms in place to oblige service provider to block illegal content online and failure to do so is legally liable.





# Executive Summary on Portugal's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Portuguese national law.

## Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The Portuguese report indicates that national framework fails to comply with Recital 18 of the Directive given the fact that knowingly obtaining access to child pornographic material is not legally stipulated. However, national framework does correspond with Article 5 (1) and (3) of the Directive as Article 176 of the Criminal Code criminalizes the use of minors under the age of 18 in pornographic material, regardless of their support. The physical presence of a child 14 years or younger as a passive actor with an active actor(s) in a sexual nature can constitute as sexual abuse rather than child pornographic participation. Moreover, Article 176 (4) further outlines that the '...production, distributing, importation, exportation, dissemination, exhibition or transfer, of pornographic material, at any title, for any reason and by any means, and acquisition or possession of pornographic materials with intent to distribute, import, export, disseminate, exhibit or transfer pornographic materials with virtual and realistic representations of a minor' is punishable. Paragraph 5 indicates that the acquisition and possession of pornographic

material with no intent to distribute, import, export, disseminate, exhibit or transfer is also punishable; however, this does not apply to material that is a virtual representation of a minor.

## Topic 2: Online grooming

A recent amendment to the penal code (by Bill 305/XII), adopted in 2015 introduces the offence of online grooming into Portuguese legal framework under Article 176-A.<sup>1</sup>

## Topic 3: Disqualification arising from convictions, screening and transmission of information

Although Portugal has not formally transposed the Directive into national framework, some aspects of Article 10 can be found in national provisions. Article 179 of the Criminal Code outlines that depending on the gravity of the act and its connection with the function exercised by the offender, the latter can be prohibited or suspended from further exercise of his/her parental rights, guardianship or curatorship, as well as prohibited/suspended from exercising a profession, function or activity that implies having minors under his/her responsibility, education or treatment. This covers the offences listed in Article 3-7 of the Directive, and covers both voluntary and professional activities stated in Article 10 (1) of the Directive.

The specific screening provision in the Law no. 113/2009 of the 17th September 2009, taken for the implementation of Article 5 of the Lanzarote Convention, refer to preventive and

<sup>1</sup> Source: Lanzarote Committee's Portuguese representative, July 2015.

protection measures for minors in relation to the ‘...recruitment for professions, employments, positions or activities, public or private, even if unpaid, whose exercise involves regular contact with minors’.

According to the report judges are however not likely to use Article 179 of the CC to impose the disqualification sanctions and that criminal records are erased after 23 years of the sanction imposed, as long as no other conviction occurs meanwhile.

Article 2 of Law no. 113/2009 complies with Article 10 (2) of the Directive, as it establishes an obligation for employers to request for criminal records of persons who are seeking employment, a position or activity, either public or private, even if unpaid, that involves regular contact with minors. Failure to request a criminal record is punishable with a fine.

Article 10(3) of the Directive does somewhat correspond with national framework, as the main legal basis for the transmission of information on criminal conviction between member states can be found under the European Convention on Mutual Legal Assistance in Criminal Matters (1959). Article 7 (h) of the CIM provides access to third parties from entities from other member states to access such information. However Portugal has not implemented Framework Decision 2009/315/JHA.

#### **Topic 4: Victim Identification**

Given that crimes against sexual freedom have a “public nature” under Portuguese law, an inquiry to start a criminal investigation will be started as soon as there is a notice that a crime has been committed. The Judiciary Police are responsible to conduct the investigation but there is no specialised unit. Thus the investigation will be conducted by the locally competent department. Articles 175-177 of the Criminal Procedural Code, as well as Article 15-17 of the Law no. 109/2009 – The Cybercrime Law, enables the Judiciary Police to seize objects used to commit the crime, as well as those that are a result of the crime, all in order to aid the investigation. The objects that have been analysed are then forwarded to the Interpol ICSE database which facilitates victim identification.

For the future reference is made to the distinctive legal status of undercover operations which are legal but only as long as the investigator does not induce or instigate the commitment of a crime. The report insists of the possibilities offered by the use of such undercover investigations in identifying online offences.

#### **Topic 5: The extraterritorial extension of jurisdiction**

The report indicates that Portugal does not fully comply with Article 17 of the Directive as national framework is open to interpretations. The Portuguese system follows the principal of territoriality which applies criminal law to all offences which has occurred in their territory, regardless of who committed or against whom the offence was committed. Article 7 (1) of the Criminal Code outlines that a crime may be investigated and prosecuted if the conduct or the outcome of the offence occurred in its territory which is also applied to attempts to commit an offence. The Criminal Code provides the principle of active and passive nationality in Article 5 (1) (b) which establishes jurisdiction over both offenders and victims who are nationals or habitual residents in Portugal. Article 6 (3) establishes the possibility to apply jurisdiction over an offence if carried out by or against a national in a foreign country, even if the offence is not punishable in that state. Furthermore, Article 27 of Law no. 109/2009 – Cybercrime Law maintains jurisdiction over offences that are practiced using information and communication technology that were carried out within or outside of its territory if carried out by a national legal person. Moreover, Article 178 of the Criminal Code maintains that sexual crimes against minors are considered to be public offences; therefore, the Public Prosecutor inherently promotes the prosecution on their own initiative once the crime has been brought to their attention. However, Article 5 (1) (e) stipulates conditions that could limit the ability to prosecute nationals in a foreign country, for example, the perpetrator must be found in Portugal, the offence must be punishable where it was performed and the offence itself must constitute as a crime where extradition is admissible. Despite this though, subparagraphs (a), (b), (c) and (d) of the same Article, aim to

protect the specific interests, whilst subparagraph (e) is only made applicable if the offence committed falls out of their scope. It should be noted that the crime of child prostitution is not explicitly included in Article 5 (1) (c) or (d) of the Criminal Code, thus can only be punished within Portuguese criminal law.

## **Topic 6: Assistance, support and protection measures for child victims**

In regards to topic 6, Portuguese national framework in does not comply with Article 18 or 19; however, it does somewhat correspond with some of the requirements of Article 20 of the Directive, although this is limited. The report indicates that under Law no. 31/2003 of 22nd August, the Law for the Protection of Children and Youth in Danger, the competent authorities may act in a situation to promote the rights and protect a minor at risk who is 18 years old or younger. When a minor is a victim of sexual abuse, they are entitled to support, assistance and protection. The provision of 'presumption of age' in Article 18 (3) of the Directive is not found in Portuguese law as being awarded the status of a particularly vulnerable victim is not determined by age but by the extent of physical and mental damage, thus, the status is subject to proportionality. Furthermore, assistance and support can be provided till the age of 18-21 if the victim was under the age of 18 during the time of the criminal proceedings. Moreover, the report highlights a distinction between cases brought against family members compared to strangers, as victims aged 14-16 have to make a formal complaint the abuse to the competent authorities concerning a family member. In addition, Article 171-172 of the Criminal Code outlines that sexual abuse committed by a family member constitutes as a crime if the victim is at least 18 years old, whereas if the abuse was carried out by a stranger, it is only a considered a crime if the victim is under 14 years old.

In relation to Article 20 of the Directive, the report indicates that the state is not obliged to ensure a special representative for the victim is in place; however, they are obliged to provide legal representation, as well as cover the total

or partial cost of the fees. Also, it is essential to note that victims of sexual violence are entitled to compensation by the state. The report also highlights that during the court proceedings, it is possible for the defendant to not be present within the premises if the victim is under 16 years of age. Additionally, interviews with the victim must always be recorded by audio-visual means, although this is not mandatory; furthermore, there is no regulations concerning the limiting of interviews to one, as well as interviews being carried out by the same trained specialist within a specially designed premises. Crimes that are against sexual-determination can also be closed to the public in court proceedings or the child can present their statements to the court through telecommunications and have their image/voice distorted to protect their identity. It is also forbidden for the publication of the identification of the victims of sexual crimes.

## **Topic 7: Take down and blocking measures**

The Portuguese report indicates that concerning Article 25 of the Directive, the corresponding national framework depends very much on interpretation to function in the relevant capacity. Law no. 109/2009 of the 15th September – Cybercrime Law, does not provide a specific provision relating to child pornography; therefore, general provisions concerning data must be used. Law no. 7/2004 of 7th January outlines that service providers are not obligated to monitor or seek facts concerning illegal activities online; however, they are obligated to inform the authorities of alleged illegal activities undertaken by consumers of their service. Additionally, the competent authorities can request the service providers to promptly remove specific content online. Article 20 of the Cybercrime Law provides relevant authorities the ability to cooperate with foreign authorities concerning illegal online content as well as request for it to be removed. Article 16 (1) of the Law stipulates that authorities can adjust illegal data in various ways, thus providing legal measures for access blocking of webpages containing child pornography.



## Executive Summary on Romania's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Romanian national law. The summary will highlight below the extent of Romania's compliance with the Directive.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

Romanian national framework fully complies with Article 5 (1) and (3) of the Directive in regards to topic 1, as it has transposed the provisions into Article 51 Legislative Act (161/2003) which '...incriminates the production of child pornography materials with the aim to sell them or the transmission of such materials as well as obtaining them for personal use or for someone else's use or obtaining access to them without right by using information systems or a device used to store informatics data'. Article 35 (1) (i) of the same act also defines child pornography as '...any material that depicts a minor having sexually explicit behaviour or an adult presented as a minor and having sexually explicit behaviour or images that, although do not depict a real person, simulate in a credible manner a minor having sexually explicit behaviour'. Article 374 (1) of the New Criminal Code (2013) also indicates that '... production, owning with intention of distributing child pornography materials, buying

stocking, exposing promoting, distributing and giving access in any way to such materials is punishable from 1-5 years'. In addition, the second paragraph of the article adds that if any information storing device that was used with the intent of distributing the materials is punishable the imprisonment sentence would be 2-7 years. Therefore, Romanian national framework in regards to producing and distributing child pornography goes further than the Directive, as it extends the definition so that more offences fall into the scope of the law, as well as providing a greater sentencing period for offenders. However, obtaining access to child pornography through information and communication devices is punishable with imprisonment from 3 months to 3 years or with a fine. This sentencing period and 'fine' is smaller than the one indicated in the Directive, thus in order to fully comply with the Directive, this sanction would need to be increased in line with the Directive, and punishment by fine should also be eliminated.

### Topic 2: Online grooming

Although Romania has not formally transposed Article 6 and Recital 19 of the Directive into national framework, they do have prescriptions related to the provisions of the Directive already installed into national law since 2001. Article 222 of the New Criminal Code states that '...proposals made by an adult to a child under 13 years old to meet with the purpose to commit one of the acts established by Articles 220-221 of this Code, inclusively when the of communication at distance is punished from one month to one year in prison or fine'. Thus, the definition here offers high protection as it

extend the scope to not only 'virtual' forms of communication but also other that take place from a 'distance'. Moreover, offline grooming has also been criminalised in Romania as Article 13 Law.no 168/2001 provides the scope to punish some acts that in the end will lead to child trafficking and child sexual exploitation by either recruiting, transferring, transporting, hosting or receiving a child for purposes of exploitation. The New Criminal Code (2013) also establishes a provision under Article 222 named 'Child Recruitment for Sexual Purposes' in regards to offline grooming.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

According to the report the Romanian national framework fully complies with Article 10 (1), (2) and (3) of the Directive.

As to the disqualification requirement of Article 10 (1) of the Directive reference is made firstly to the possibility afforded to the judge by Article 66 of the Criminal code to restrict '...a person who has been convicted for a crime of a certain nature ... to undertake certain activities that are linked to the nature of the crime'. The period of disqualification ranges from one to five years.

An additional provision referred to in the report is Article 97 of Law no. 272/2004 which states that '...it is forbidden to employ a person who has been convicted for an intentionally committed crime in a public or private institution which provides services for children'. It may however be observed that this seems to be a broadly defined disqualification, directed to employers and not specifically linked to a conviction for an offence of sexual abuse or exploitation of children. The report moreover points out that it relates to persons who have not entirely served their term in prison.

There is no distinction made between professional and voluntary activities; thus the report considers, that the judicial disqualification covers both. In order to fully comply with

paragraph 1 of Article 10 of the Directive, the distinction between professional and voluntary activities should however be made clearer.

Article 10 (2) has also been transposed into national framework as Law no. 290/2004 establishes that employers have the right to access to information regarding a potential employee by requesting a criminal record from the potential employee for a range of activities (although not specified).

Like Article 10 (1) and (2), paragraph 3 has, according to the report, also been transposed in relation to transmission of information as Law no. 302/2004 refers to the transfer or procedures in criminal matters, expands the applicability of the law, as well as providing information on a person who has committed an infraction to another state. No reference however is made to the implementation of Framework Decision 2009/315/JHA and the provision in Article 10 paragraph 3 of the Directive that the obligation to transmit the information is subject to the condition that the request for information on the criminal record must have the consent of the person concerned.

### **Topic 4: Victim Identification**

Romania does not comply Article 15 (4) in relation to topic 4 as it has not transposed this part of the Directive into national framework. There are extensive provisions within the Criminal Procedure Code in regards to victim identification; however, none of them relates specifically to identifying children who are victims of sexual exploitation using information and communication technology. Article 138 (i) of the Criminal Procedure Code indicates that police can obtain '...data generated or processed by providers of public electronic communications or by providers of electronic communications available to the audience...' thus they can intercept data through a range of communication devices through access, monitoring, etc. as well as penetrate computer storage devices. Paragraph 10 of Article 138 highlights that the police can participate in certain authorised activities for the means of committing similar acts to that of the objective criminal offence in order to identify a victim of human trafficking or kidnapping.

## **Topic 5: The extraterritorial extension of jurisdiction**

Romanian national framework fully complies with Article 17 of the Directive in relation to topic 5 as Article of the Criminal Code states that 'the infraction is considered committed in Romania's territory when, on its territory or on a ship under Romanian flag or on a ship registered in Romania, it had occurred an act of execution, instigation or complicity, or, even in part, the result of the action'.

In addition, to offences committed outside of Romania's territory, Article 9 contends that 'Romanian criminal law shall be applied to offences perpetrated outside Romania border, by a Romanian citizen or by a legal entity, if the penalty established by Romanian law if life imprisonment or imprisonment of 10 years or more'. Therefore, even though the national framework fails to establish direct jurisdiction over offences committed by means of information and communication technology; however, Article 374 (2) regulates punishments from 2-7 years, thus as child pornography is committed by means of information and communication technology, the general principle is still applicable. Moreover, Article 10 (1) of the New Criminal Code states that '...criminal law will be applied to offences outside of Romanian territory by a foreign citizen or by a person without citizenship which resides in Romania, against national security or the security of the Romanian state, against a Romanian citizen or against a Romanian entity'. This same provision is also applies to victims who have Romanian citizenship who have been made victims of an offence by another citizen or non-citizen; however, the situation of 'habitual' residency is not regulated.

## **Topic 6: Assistance, support and protection measures for child victims**

Romania fully complies with Articles 18, 19 and 20 of the Directive in regards to topic 6, as it provides both general and specific framework on assistance and support for child victims. Articles 89-90 Law no. 272/2004

provides child protection for those that have been abused, neglected, exploited and has suffered other forms of violence that children are entitled to protection against. Article 86 of the same act maintains that the parent, legal representative, guardian or state are obliged to ensure the necessary conditions for the child victims physical and psychological rehabilitation. Article 10 Law no. 300/2006 complies with the Council of Europe Convention on Action against Trafficking in Human Beings in that any uncertainty about the victims age exists, the state will presume that the child is a child and will benefit from special protection and support. Furthermore, Article 19 of the Directive can be seen in Articles 86 Law no. 272/2004 as granting assistance and support to a child victim can take place before, during and after the criminal proceedings. The nature of the support will be determined by the age of the victim and Article 8 Law no. 211/2004 also provides support and counseling to family of the victim upon request. Article 20 (1) of the Directive has been transposed into Article 124 of the New Criminal Code Procedure states that hearings of minors up to 14 years old can only occur in the presence of a parent, guardian, legal representative or entrusted institution. In addition, Article 35 Law no. 885/2010 outlines that interviews with a child victim must take place promptly after the competent authorities have been notified, the interview must take place in a child-friendly zone that has been adapted for these special purposes, interviews are conducted by trained specialists, interviews carried out should be the same person if possible and the number of interviews should be limited to a little as possible. Article 111 of the New Criminal Code Procedure stipulates that interviews with the child victim should be recorded by audio or visual to be presented as evidence and Articles 126-7 maintain that the child victim's identity and privacy is to be protected by image distortion and so forth. However, it should be noted that not every child victim is able to access assistance and support as they are not readily available in remote locations.

## Topic 7: Take down and blocking measures

Romanian national framework complies with Article 25 of the Directive in regards to topic 7 as child pornography is regulated under Article 374 in the New Penal Code, as well as other provisions in Law no. 678/2001 and Law no. 196/2003. Article 374 (1) of the New Penal Code states that '...production, possession for display or distribution, purchase, storage, display, promotion, distribution and provision, in any manner, of child pornography is punishable by imprisonment from 1-5 years'. Paragraph 2 outlines that deeds committed from paragraph 1 through an information systems and storage devices is punished by imprisonment from 2-7 years. Accessing child pornography through computer systems or other electronic communicative devices shall be punished with imprisonment from 3 months to 3 years or with a fine. The 2003 'Convention of Cybercrime' provides outlines the sanctions for criminal offences relating to child pornography, as it is defined as '...including pornography (obscene, against moral values) that visually depicts a minor engaged in sexually explicit, realistic images representing a minor engaged in sexual activity'. Article 51 of the New Penal Code also incriminates the production, making available, spreading, transmitting, procurement or possession of child pornography punishable with imprisonment from 3-12 years. Therefore, the mere act of purchasing child pornography is punishable, however, Article 18 of the New Penal Code extends the incrimination to making it an offence to even 'attempt' the production, transmitting, etc. of child pornography. The National Regulatory Authority for Communication and Information Technology is the competent authority for assessing content on websites, who then request internet providers to block access to the website in question. Noncompliance of a site removal from the service providers can lead to a fine. However, this method of blocking is seen to be only partially effective as many barriers can be overcome.



## Executive Summary on Slovakia's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Slovak national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The Slovakian report indicates that national framework in is compliance with Article 5 (1) and (3) of the Directive. Section 370 of the Criminal Code states that '...possession of child pornography and participation in a child pornographic performance – any person who is in possession of child pornography or who acts with the intent to obtain access to child pornography by means of electronic communication technology shall be punishable by a term of imprisonment of up to two years'. Although the wording of the definition is clear and concise, the phrasing of the imprisonment sentence is inconsistent with those of the Directive as it should set a minimum requirement. Moreover, Section 132 (4) of the Criminal Code covers paragraph 7 of Article 5 by defining child pornography as '...visual materials depicting real or pretend sexual intercourse, any other type of sexual intercourse or any other conduct similar to sexual intercourse with a child or the person appearing as a child or images of naked parts of the child's body or the person appearing to be a child that are

designed to gratify sexual desire in another person'.

### Topic 2: Online grooming

In regards to Article 6 and Recital 19, Slovak national framework mostly complies with the Directive, although there are some short comes in its transposition. Section 201a of the Criminal Code stipulates that '...the conduct such as a proposal for personal meeting, by means of electronic communication technology; with a child younger than 15, in order to commit the offences of sexual abuse or the offences of child pornography production by an adult offender, is punishable by a term of imprisonment of 6 months to 3 years'. The sentencing period outlined within this provision is inconsistent with the Directives minimum requirement of at least 1 year's imprisonment. In addition, as the report further notes, there are currently no national provisions providing for the criminalization of offline grooming activities; therefore, in such cases of grooming, they are judged as a preparation for the offences of sexual abuse in relation to Section 201 of the Criminal Code.

### Topic 3: Disqualification arising from convictions, screening and transmission of information

According to the report, the Slovak national framework to a large extent correctly transposes Article 10 of the Directive; however, it fails to be in full compliance.

Paragraph 1 of Article 10 has been transposed



though an amendment by Act n° 2014/2013 of Section 61 (4) of the Criminal Code which enables the court to impose a permanent disqualification from exercising activities involving direct and regular contact with children if a person is convicted for the offences of human trafficking, rape, sexual violence, sexual abuse, or child pornography production, dissemination, possession or participation. Although, as noted below the existing provisions on screening do not apply to voluntary activities, the report notes that Section 82 of the Criminal Procedure Code still seems to offer the possibility of a disqualification for volunteers but related to “the activity in the exercise of which the crime was committed.

In relation to screening measures, there are a number of provisions that concern specific professions, such as health care providers, physicians, pedagogical employees and specialist employees, performance of work in the public interest (which includes kindergartens, primary and secondary schools). The screening is based on the submission of a clean criminal record which may not be older than 3 months. Moreover the Labour Code provides for immediate termination of employment if the employee has been convicted of an intentional offence.

Act No. 578/2004 Coll., on Healthcare Providers, Section 31 of the Act stipulates the condition that to exercise a healthcare profession, the individual must have a clean record, whilst Act No. 317/2009 Coll., on Pedagogical Employees and Specialist Employees, Section 9 of the Act, also indicates that a clean criminal record is required. To exercise a profession in either of these sectors, an employer is obliged to request an extract of a person’s record from the register and is to be no older than 3 months. In regards to voluntary activities, there appears to be no provisions providing for screening measures; however, the head of the voluntary activity can by analogy apply the measure under Section 41 (6c) of the Labour Code if it is determined by the nature of the work, such as working with children.

Paragraph 3 of Article 10 has been transposed in Act No. 330/2007 Coll., on the Register of Criminal Records, Section 17, 17a, and 17b,

which enables for the cooperation of member states in the exchange of information of criminal convictions.

#### **Topic 4: Victim Identification**

The Slovak report provides very little information concerning topic 4; however, it does indicate that there are currently no provisions in place to enable national law enforcement agencies to help identify child victims through the analysis of child pornographic material.

#### **Topic 5: The extraterritorial extension of jurisdiction**

According to the Slovakian report, most of the national framework concerning Article 17 of the Directive is very general and some of the most important elements of the provision have not been transposed. Section 3 of the Criminal Code applies to criminal activities that have been committed within the territory of Slovakia, whilst Section 2 of the Criminal Code outlines that ‘...the offence is deemed committed at the territory of the Slovakian Republic (SR), even if the offender committed the offence at least partially at the territory of the SR, if the breach of or threat to the interests protected by this act occurred or should have occurred completely or partially outside the territory of the SR, should it result in the breach of or a threat to the interests protected by this act or if such consequence should have occurred at least partially’. In addition, Section 4 applies jurisdiction to offences committed outside of its territory by a national or a resident of Slovakia. However, when concerning offences committed by the means of information and communication technology, there are currently no specific provisions in place and thus must rely on Section 2 or 3 of the Criminal Code. Moreover, the report indicates that under Section 5 of the Criminal Code, it is conditioned that a serious offence committed against a Slovak national must also punishable under the national legislation of the place the offence was committed. In regards to offences committed by legal persons, the report indicates that there are no existing provisions in place to establish jurisdiction.

## **Topic 6: Assistance, support and protection measures for child victims**

The Slovakian report indicates that current national framework concerning assistance and support for child victims in relation to the Directive, is quite limited in compliance. The report highlights that law enforcement authorities are obliged to provide support and assistance measures from the moment they learn of the offence. The report further notes that at the present time, there are no provisions in place on a national level to secure assistance and support for child victims for when their age is uncertain. Moreover, Section 49 (1) of the Criminal Procedure Code stipulates that law enforcement authorities are ‘...obliged at the first contact with the aggrieved party to provide such persons with the information, in writing, on their rights in the criminal proceedings and organisations that help the victims and the services of such organisations’. The Slovak report notes that criminal proceedings, as well as the services for assistance and support, would continue to carry on ‘without the aggrieved party; however, the report further highlights that there are no provisions in place that makes support and assistance conditional on the willingness of the child victim to cooperate. In addition, in regards to individual assessments being carried out for child victims, there are currently no provisions in place in national law; however, the report assumes that they are done through the use of specialized organisations such as UNICEF. Furthermore, no provisions have been found to assess whether or not child victims receive the status of being ‘particularly vulnerable’. Section 48 (2) of the Criminal Procedure Code outlines that a special representative can be appointed by the state authority, whilst Section 47 (6) indicates that ‘...in the pre-trial proceedings, after the charges were brought, upon the proposal of the prosecutor, the judge for the pre-trial proceedings and in the trial before the court, even without the proposal, the presiding judge may appoint, if it is deemed necessary to protect the interests of the aggrieved, a representative, from ranks of lawyers, for the aggrieved who claims compensation and does not have

sufficient means to pay for the related costs’.

In relation to interviews with the child victim, the report highlights that there are no provisions in place to ensure that interviews take place without unjustified delay, to make certain that they take place in a specially designed premises or to ensure that they are carried out by the same trained professional. Section 135 (1) of the Criminal Procedure Code stipulates that ‘...if a person younger 18 years of age is questioned as a witness about the facts, reviving which, considering the age of such a person, could have a negative impact on the mental and moral development of such, the questioning shall be carried out again in further proceedings’. Such questioning is usually accompanied by a trained specialist such as a social worker, psychologist, etc. Additionally, Section 135 (1) dictates that interviews are to be carried out in a considerate manner in order to ensure that the interview does not have to be done again unless there is insinuating circumstances. Section 135 (3) notes that if a person younger than the age of 18 is to be interviewed, in order to avoid a repeat of the questioning, all interviews with the child victim should be audio-visually recorded and should be used as a court testimony. Moreover, Section 249 (3) maintains that the court hearing can take place without the presence of the public at the request of the public prosecutor or the aggrieved person, whilst Section 135 (3) and (4) provides the capacity in exceptional cases to use telecommunication technology to hear a victim’s testimony. Section 138 (2) of the Criminal Procedure Code ensures that safety and protection of the victim’s identity and privacy.

## **Topic 7: Take down and blocking measures**

At the present time, Slovakian national framework fails to comply with Article 25 of the Directive as there are no provisions in place that has transposed the obligatory paragraph 1 of ‘take down’ measures and the same applies to the optional ‘blocking’ measures. However, as the report highlights there are informal mechanisms in place where internet service providers and the Internet Watch Foundation

cooperate in order to block reported child pornographic material through the use of specialized websites, such as stoponline.sk or orange.sk. Despite this though, measures in place are not unified and cooperation does not include national authorities.



## Executive Summary on Slovenia's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Slovene national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The Slovene report indicates that national framework in regards to Article 5 (1) and (3) mostly complies with the Directive. Article 176 (3) of the Criminal Code states that '...whoever for themselves or for anyone else obtains, produces, distributes, sells, imports, exports pornographic or other sexual material depicting minors or their realistic images, supplies it in any other way, or possesses such material, or obtains access to such material by means of information and communication technology, or discloses the identity of a minor in such material...' shall be subjected to a sentencing period of imprisonment of between 6 months to 8 years. Therefore, as noted within the report, the current sentencing framework for these offences are inconsistent with the minimum requirement of at least 1 year imprisonment outlined within the Directive.

### Topic 2: Online grooming

In relation to topic 2, the report indicates that Slovenia's national framework is not in full

compliance with Article 6 and Recital 19 of the Directive. Article 173a of the Criminal Code states that '...whoever solicits a person under 15 years of age to a meeting through information and communication technology in order to commit an offence under Article 173 (1) of this Code (has sexual intercourse or performs any lewd act with a person under the age of 15 years)...or to produce pictures, audio-visual or other items of a pornographic or other sexual nature and the soliciting has been followed by concrete actions for realization of the meeting, shall be punished with imprisonment of up to 1 years'. It is evident that the outlined sentencing period of 'up to 1 year' is inconsistent with the minimum requirement of at least 1 year imprisonment outlined within the Directive. Moreover, concerning Recital 19, Slovene national framework has made a distinction between the purposes of offline grooming. For example, Article 176 (2) of the Criminal Code criminalizes the solicitation of persons under 15 years for the production of pornographic material with a sentencing period of between 6 months to 8 years, whilst Article 173 (1) of the Criminal Code criminalizes those that participate in sexual activities with a person under 15 years with a sentencing period of between 3-8 years imprisonment. The report highlights Article 34 of the Criminal Code in relation to the criminalization of the attempt to commit a crime; however, this provision can only come into effect for those crimes with a sentence period of 3 years or more; thus, it can be limited to the offences outlined above.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

The report does not clearly indicate whether and how a system of disqualification as referred to in Article 10 (1) of the Directive is applicable in Slovenia.

As to the screening Article 250a of the Enforcement of Criminal Sanctions Act contains general provisions that entitle employers from private organisations to request information on convictions “if they have a legitimate interest with a legal basis.

Article 88 (2) of the Civil Service Act obliges employers to do so for public office positions, whilst Article 18 (3) of the Volunteering Act gives employers the right to request information concerning convictions.

Article 250a (9) of the Enforcement of Criminal Sanctions Act (3) of the Directive as it provides for the transmission of information on criminal convictions to state bodies, legal entities as well as private employers to European Union member states.

### **Topic 4: Victim Identification**

The report provides lists a series of legislative and regulatory sources on which the work of law enforcement regarding victim identification can be based.

Reference is made to the fact that Slovenian National Police has specialised units dedicated to the area of child sexual exploitation and which also cooperates with law enforcement in other Member States. Furthermore, the report notes that Slovene national authorities cooperate closely with Europol and use the Interpol child abuse image database for victim identification.

### **Topic 5: The extraterritorial extension of jurisdiction**

According to the report, Slovenia’s compliance

to the Directive in relation to Article 17 is limited. Article 10 of the Criminal Code establishes jurisdiction over offences that have been committed in the whole or part of their territory, as well as establishing jurisdiction in Article 12 of the Criminal Code over offences committed by one of their nationals outside of their territory. Article 10 of the Criminal Code also applies to offences committed by the means of information and communication technology. Moreover, Slovenian jurisdiction based on the nationality of the offender for offences committed outside of its territory is subordinate to the condition that the acts are criminal offences at the place where they were performed. However, if the offence is not punishable in the country in where it was committed, the offender can still be prosecuted if the offence in question was indeed a criminal act at the time it took place, then under international standards, it constitutes as a crime; therefore, can be prosecuted by the Minister of Justice. In regards to the optional extensions of the Directive, the report indicates that Article 13 of the Criminal Code establishes jurisdiction over victims who are nationals and foreign citizens when offences have been committed against them abroad. The same rules apply to offenders who are foreign citizens. Jurisdiction is also applied to legal persons through Article 3 of the Liability of Legal Persons for Criminal Offences Act.

### **Topic 6: Assistance, support and protection measures for child victims**

The Slovenian report indicates that national framework partially complies with the Directive in regards to Articles 18, 19 and 20; however, it further notes that in practice the measures provided are not always used or provide adequate services. Article 65 (3) and (4) of the Criminal Procedure Code outline that during criminal proceedings at the initiation period, the child victim must be assisted by an authorized person to take care of his/her rights, such as an attorney. The report further notes that the Directive’s Article 18 (3) has no corresponding provisions on a national level in regards to the presumption of age; however,

the report indicates that assistance and support measures are not made conditional upon the child's willingness to cooperate. Individual assessments of child victims are provided within Article 15 of the Family Violence Prevention Act which stipulates that individual assessments are to be carried out by Social Work Centers in multidisciplinary terms by a group of expert's e.g. police, NGOs, healthcare professionals, etc. It should be noted that this provision only applies to cases to where violence is carried out within the family and that it does not apply to criminal proceedings. Article 4 of the Family Violence Prevention Act vaguely indicates that child victims subject to family violence are considered to be particularly vulnerable victims; thus, there are no provisions issuing this status for specific circumstances outside of the family.

Moreover, the report outlines that Article 65 (3) of the Criminal Procedure Code provides a special representative, which is usually an attorney free of charge. The legal representative is only available for criminal proceedings; therefore, if compensation is to be claimed, it has to be done through the civil courts which the attorney is no longer available for unless legal aid is provided. In regards to interviews with child victims, there is no legal framework to state that they must take place without delay; however, the report indicates that interviews with child victims must be recorded and take place within child-friendly environments. In addition, interviews are carried out by trained specialists who can also live stream the interview. However, questions from a number of different parties can be asked to the child victim; thus, interviews are not limited to only one person carrying them out. Furthermore, the report fails to highlight whether interviews with child victims in general are limited to as few as possible. Article 295 of the Criminal Procedure Code allows for the court hearing of the child victim to take place without the public, whilst Article 316 (2) provides measures to protect the privacy and identity of the child.

## **Topic 7: Take down and blocking measures**

In regards to topic 7, Slovene national framework complies with the obligatory measures

of Article 25 (1); however, it could go further and transpose the optional blocking measures of the provision. Article 176 (5) of the Criminal Code stipulates '...that a pornographic or other sexual material from paragraphs 2, 3 or 4 of this article, shall be seized and it use appropriately disabled'. Article 38 of the Police Tasks and Powers Act enables national authorities to use a 'warning' system for removal to websites which contain child pornographic material, whether they are hosted by natural and legal persons, or by public authorities. Failure to comply with the notice may constitute as an offence in providing further dissemination of child abuse material. Furthermore, the report highlights the Slovenian police and the national INHOPE Point work closely together to remove child abuse material from the web, especially in relation to content found in servers outside of their territory. Both the police and INHOPE Point can contact their counterparts in the respective country to request that the material be removed.



# Executive Summary on Spain's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

## Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into Spanish national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

Amendment to Article 189 of the Penal Code that entered into force in July 2015, introduces the offence of knowingly obtaining access, by means of information and communication technology, to child pornography into Spanish legal framework.<sup>1</sup>

### Topic 2: Online grooming

Amendment to Article 183 ter of the Penal Code that entered into force in July 2015, introduces the offence of online grooming into Spanish legal framework.<sup>2</sup>

### Topic 3: Disqualification arising from convictions, screening and transmission of information

At the present time, Spain's only form of disqualification exists in Article 39 of the Criminal Code which provides for disqualification measures from public office, trade, industry or

business for a minimum period of 3 months and the maximum of 20 years. However, these measures cannot be applied to the sexual offences listed in Articles 3-7 of the Directive; thus, offenders are not prevented from taking part in professional or voluntary activities dealing with children. The Draft Law on Child Protection which is currently awaiting to be approved by the national parliament,<sup>3</sup> outlines that '...it will be a requirement for access to the professions that entail regular contact with children, have not been convicted by final judgment for crimes against sexual freedom, trafficking and exploitation of children'. However, as the report indicates, this proposed provision is vague and lacks clarity in regards to how these measures will be carried out or who will have the right or obligation to use them. Furthermore, the pending provision fails to specify activities of a voluntary nature that involve regular contact with children; therefore, even with the pending provisions that are designed to comply with Article 10 of the Directive, it is evident that national framework will continue to fail in its compliance. Moreover, the report fails to mention any information in regards to paragraphs 2 and 3 of Article 10 of the Directive.

### Topic 4: Victim Identification

In regards to Article 15 (4) of the Directive, the Spanish report provides very little information in relation to victim identification measures among national authorities or the legal framework to facilitate it. The report does outline that the Judicial Police under the control of the Judiciary or Prosecutors Office, is responsible for the investigation and analysis of child pornographic material in relation to victim identification.

<sup>1</sup> Source: Council of Europe Lanzarote Committee's Spanish representative, August 2015.

<sup>2</sup> Source: Council of Europe Lanzarote Committee's Spanish representative, August 2015.

<sup>3</sup> The draft law has been approved as the Organic Law 1/2015 of 30 March 2015

## **Topic 5: The extraterritorial extension of jurisdiction**

The Spanish report highlights that Article 23 of the Judiciary Act establishes jurisdiction on criminal proceedings arising from offences committed within Spanish territory. It will also establish jurisdiction over offences committed outside of its territory provided that the offenders are Spanish nationals or habitual residents. In addition, in order to apply jurisdiction, the offence must also be punishable in the country it was committed with the exception of waived requirements outlined in international treaties. Furthermore, jurisdiction can only be applied to offences committed outside of its territory if the victim or the Public Prosecutors has filed a complaint to the Spanish judiciary or the offender has not served out their convicted sentence abroad. Moreover, the Spanish judiciary are competent to apply jurisdiction over registered legal persons as well as offences committed against Spanish nationals and habitual residents outside of its territory. The report fails to further elaborate on the information provided and it also fails to provide any information concerning the jurisdiction of offences committed using information and communication technology accessed within its territory.

## **Topic 6: Assistance, support and protection measures for child victims**

According to the Spanish report, a number of measures for assistance and support for child victims of sexual abuse/exploitation have been transposed into national framework; however, the report further states that not many of these measures are not sufficient despite the fact that guidelines for criminal proceedings to prevent re-victimization have been in place since 2009. The report highlights that the pending Statute for Victims aims to transpose further provisions of Articles 18, 19 and 20 of the Directive in order to ensure the 'widest possible' response to legal and social problems that may arise from physical, mental, moral and material injury. Therefore, in order to prevent re-victimization, the future measures will avoid contact between the child victim and the offender, as

well as reducing the amount of interrogations/interviews with the child and all statements will be recorded for the trial. Additionally, the new measures will provide a legal representation to the child victim, especially in the case where there is a conflict of interest. The new law Real Decreto-Ley 3/2013 provides for legal aid to child victims of sexual abuse, regardless of their financial resources. However, the report provides no information in relation to assistance and support being provided regardless of the child's willingness or if the age of the child is uncertain. It also fails to highlight that interviews with children will be conducted within a special premises, by the same trained professional, all within a reasonable period of time. Therefore, at the present time Spain's national framework in regards to topic 6 does not comply with the Directive and it is difficult to estimate the future extent of their compliance given the information provided.

## **Topic 7: Take down and blocking measures**

The Spanish report provides little information in regards to this matter; however, it does state that the courts can order the adoption of necessary measures for the removal of web pages contain or disseminating child pornography, or to make use of blocking access to that material within its territory. However, these measures are used more as a precaution..





## **Executive Summary on Sweden's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography**

Sweden's implementation of Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography

### **Introduction**

On 18 June 2012, Roschier prepared a report for Missing Children Europe examining whether and how Sweden has transposed the provisions of Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography (the "Directive"). On 13 March 2014, Roschier submitted a revised report presenting additional amendments that had been made to the Swedish legislation after 18 June 2012 for the purpose of fully implementing the Directive. Below is a short summary of Roschier's findings as regards Sweden's compliance with the Directive.

### **Topic 1: Knowingly obtaining access via information and communication technologies to child pornography**

It is our conclusion that Sweden has successfully implemented the articles and recitals of the Directive covered by topic 1 (articles 5(1), 5(3) and recital 18). This has been accomplished through chapter 16, section 10 a of the Swedish Penal Code (the "SPC"), pursuant to which it is punishable to obtain access to and view pornographic material depicting a child. The offence is punishable by a fine or imprisonment of up to two years. The Swedish legislation is technology neutral, i.e. the means of obtaining access to the child pornography is irrelevant.

### **Topic 2: Online grooming**

It is our conclusion that Sweden has successfully implemented the articles and recitals of the Directive covered by topic 2 (articles 6(1) and 6(2) and recital 19). This has been accomplished through chapter 6, section 10 a of the SPC, pursuant to which it is punishable to, with the intent to commit a sexual offence against a child under the age of consent, arrange to meet with the child and thereafter take any action that is likely to further such a meeting taking place. The offence is punishable by a fine or imprisonment of up to one year. Attempted solicitation is, in our view, punishable under Swedish law since, according to chapter 6, section 8 and 15 as well as chapter 23, section 1 of the SPC, it is punishable to attempt to facilitate that a child under the age of consent participates in a sexual posing. The punishment ranges from a fine to imprisonment of up to two years.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

It is our conclusion that Sweden has partly implemented the articles and recitals of the Directive covered by topic 3 (articles 10(1), 10(2), 10(3) and recitals 40-42). In regard to article 10(2), legislation allowing employers to request an extract from the criminal records, provided that the employment in question involves direct and regular contact with children, has been implemented. Furthermore, some specific operators, e.g. schools, may not

employ, assign, or accept as an intern anyone without first having reviewed an extract from the criminal records regarding that person. In regard to article 10(3), section 4 a and section 12 a of the Swedish Criminal Records Act enables for a Member State to access the criminal records of another Member State. There is no corresponding Swedish legislation to article 10(1), i.e. Member States' responsibility to take the necessary measures to ensure that a natural person who has been convicted of any of the offences referred to in articles 3 to 7 may be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children.

#### **Topic 4: Victim identification**

It is our conclusion that Sweden has successfully implemented the article of the Directive covered by topic 4 (article 15(4)). The police and the public prosecutor are responsible for investigating any suspected crime that may be prosecuted, including child sex crimes. There is a special investigative unit (the "SIU") dedicated to co-ordinating investigations of crimes involving child pornography. According to representatives of the SIU, identification of children in pornographic material is problematic. Nevertheless, the identifications are said to be relatively successful once the SIU is informed. Due to lack of resources on the local level and deficiencies in the internal communication, the SIU is not informed of all child pornographic material that is encountered. As we construe article 15(4) of the Directive, there is not an actual requirement that any particular results are reached. However, it stands to reason that at least some form of efficiency in the work with victim identification is required. Some improvements as regards the Swedish police's work with identifying children in pornographic material may be called for in order to ensure greater compliance with the Directive.

#### **Topic 5: The extraterritorial extension of jurisdiction**

It is our conclusion that Sweden has successfully implemented the article and recital of the Directive covered by topic 5 (article 17 and

recital 29). In regard to article 17(1), chapter 2, section 1 of the SPC stipulates that Swedish courts have jurisdiction and should apply Swedish law if the offence is committed in Sweden. In accordance with article 17(2), chapter 2, section 2 of the SPC, holds that Swedish courts have jurisdiction regarding offences that have been committed abroad, if the offence was committed by a Swedish citizen. Following amendments made on 1 July 2013, Sweden has successfully implemented article 17(4). As a result of the amendments, the condition that the acts are criminal offences at the place where they were performed no longer applies in cases where a Swedish citizen, outside of Sweden, purchases sexual acts from a child or exploits a child under fifteen years old for the purposes of performing or participating in sexual posing. The same applies when such an offence is committed against a child over the age of fifteen but under the age of eighteen, if the posing is likely to harm the child's health or development. Furthermore, the condition does not apply to the following crimes or attempts to commit such crimes, if the offense was committed against a person under the age of eighteen: rape, sexual coercion, sexual exploitation of a person in a position of dependence, child rape, sexual exploitation of children, sexual abuse of children and procuring. The condition neither applies to trafficking or child pornography offences nor attempts to commit such crimes.

#### **Topic 6: Assistance, support and protection measures for child victims**

It is our conclusion that Sweden has partly implemented the articles and recitals of the Directive covered by topic 6 (articles 18, 19, 20 and recitals 30, 31 and 32). According to chapter 14, section 1 of the Swedish Social Services Act (the "SSA"), public authorities and employees of such authorities are obliged to notify the social welfare board if they become aware of any circumstances that may necessitate action from the authorities. The Municipal Social Services (the "MSS") shall investigate any indication that the well-being of a child is jeopardized. The MSS shall especially act to

ensure that victims of crime and their families are given support and assistance. According to section 3 of the Swedish Health Care Act, all children who are domiciled in Sweden are entitled to health care and rehabilitation. There are certain rules to protect children in court, e.g. the Swedish Act on Special Representative of a Child. However, Sweden does not in every instance ensure that interviews with child victims are conducted by professionals trained for the purpose, that the interviews are conducted by the same person where possible and appropriate and that the interviews take place at premises designed or adapted for that purpose. As regards the Framework Decision, 2001/220/JHA, Sweden does not ensure that the victim is entitled to compensation for costs incurred by participating in the court proceedings when the victim has not been called by the court to be heard.

individual web page to force a re-examination of the SIU's assessment of the content of a web page as child pornography. According to us, it could be argued that Sweden does not provide adequate safeguards in accordance with recital 47, since external insight into the SIU's work is limited. Furthermore, it appears that there is no possibility for effective judicial redress for the owner of the blocked web page or the internet user.

## **Topic 7: Take down and blocking measures**

It is our conclusion that Sweden has partly implemented the article and recital of the Directive covered by topic 7 (article 25 and recital 47). According to chapter 36, section 2 of the Code on Judicial Procedure, a court may order that property which has been used as an aid to commit a criminal offence is forfeited if it is called for in order to prevent further criminal offences or if there are other special reasons. Servers containing child pornography may under these circumstances be forfeited. Servers located in Sweden that contain web pages with child pornography may be seized by the Swedish police, if they are reasonably presumed to become subject to such forfeiture. The Swedish national criminal investigation department runs a project on a voluntary basis with the aim of blocking web pages containing child pornography. When the SIU is informed of the existence of web pages containing child pornography, it reviews the web page. The SIU informs the provider of the internet service which then undertakes the necessary technical measures to block the access to the web page. Approximately 85-90 % of internet service providers are part of the project. There is, however, no possibility for the person maintaining the



## Executive Summary on the United Kingdom's Transposition of the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography

### Introduction

An executive summary prepared by Missing Children Europe in order to assess the transposition of the provisions of the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography into British national law.

### Topic 1: Knowingly obtaining access via information and communication technologies to child pornography

The United Kingdom's (UK) national framework does not comply with Article 5 (1) and (3) of the Directive in relation to topic 1, as even though The Protection of Children Act 1978 criminalizes the 'making', 'possession' and 'distributing' of an indecent photograph (pseudo-photograph), it fails to mention intentional 'access' of such images by means of the internet. The Act does not define 'to make'; thus, its natural meaning from the Oxford English Dictionary is used which describes it as '...to cause to exist; to produce by action, to bring about', etc. Section 7 of the Act applies this meaning to '...negatives, copies of photographs and data stored on a computer disk'. Therefore, downloading and/or printing of an indecent image from the internet are capable of amounting to the offence of 'making' the image. Recital 18 of the Directive outlines the issue of 'intention', which can be seen in the case of *R v Smith; Jayson* (2003) that the '...offence of making should be deliberate and intentional act with the knowledge that the image was made, or was likely to be, an indecent photograph or

pseudo-photograph of a child'. Therefore, the unintentional copying or storage of an image does not constitute as an offence. Section 6 (2)(a) of the Act states that a person convicted on indictment shall be liable for a term of imprisonment not exceeding 10 years, a fine or both. Section 6 (3)(a) states that a person who is summarily convicted shall be liable to imprisonment for a term not exceeding 6 months, to a fine of £1000, or both. In order to bring national framework in line with the Directive, an amendment should be made to Section 1 of the Act, making it liable to access images of child pornography, as well as bringing Section 6 (3)(a) up to the maximum term of imprisonment to 1 year rather than 6 months and/or a fine.

### Topic 2: Online grooming

The UK has not transposed Article 6 or Recital 19 in relation to topic 2 into national framework; thus it does not comply with the Directive. However, Section 15 of The Sexual Offences Act 2003 (England, Wales and Northern Ireland) and section 1 of The Protection of Children and Prevention of Sexual Offences Act 2005 (Scotland), cover the respective provisions of the Directive in regards to both online (internet and other technologies) and offline grooming ('real world'). It is outlined that a person of 18 or over (the offender) has met or communicated with a young person under the age of 16 on at least two occasions (one occasion for Scotland). They either meet that young person or travels with the intention of meeting that young person anywhere in the world. A meeting itself does not have to take place for it to be criminalized and the initial communication does not have to include sexual content. A

person guilty of this offence in both Acts can be held liable on summary conviction to imprisonment for a term not exceeding 6 months and/or a fine. On the conviction on indictment, the guilty person can be imprisoned for a term not exceeding 10 years. Although the UK framework does not comply with the Directive, it does go beyond the minimum requirements set out by the Directive; however, the definitions offered in both Acts are insufficient in regards third party offences.

### **Topic 3: Disqualification arising from convictions, screening and transmission of information**

Although Article 10 (1), (2) and (3) have not been formally transposed into the UK national framework, there are a number of national provisions in place that go beyond the minimum standards of the Directive.

The legal framework for the disqualification system is to be found in The Safeguarding Vulnerable Groups Act 2006 as amended by the Protection of Freedoms Act 2012, which prevents persons convicted of certain offences from working with children.

Upholding the safeguards of this act is the sole purpose of the Disclosure and Barring Service which regulates the database of persons barred from regulated activity relating to children. Inclusion on the list happens in two ways:

1) If a person has been convicted or cautioned for the most serious offences against children and is deemed to always be a threat to children under any circumstance, that person may be automatically included on the Children's Barred List without having the right to make representations as to why he or she should not be included on the list.

2) If a person has been convicted or cautioned for offences against children and is deemed to pose a serious risk towards children, but not in every conceivable case, that person may be added to the list but is given the right to make representations as to why he or she should be removed from the list.

This form of disqualification from working with children covers both professional and voluntary activities, as the UK's barring list does not make this distinction.

Once a person is added to the Children's Barred List he or she is barred from working or volunteering in "regulated activities" (which are defined by a series of criteria relating amongst others to the fact that the activity gives the person concerned the opportunity to have contact with children), in relevant establishments and in certain positions...

In regards to screening, the UK has both general and specific frameworks for employers to find out information regarding previous convictions. 3 levels of checks exist: (i) the Standard DBS (Disclosure and Barring Service) check, (ii) the enhanced DBS check (checks information available on the Police National Computer and information held locally by police forces) available amongst others for activities involving caring for, training, supervising or being in charge of children and (iii) the enhanced with a barred list check available for regulated activities, which in addition to the sources accessed under the enhanced check will also check against the children's barred list. It thus appears that the latter two checks focus more on activities involving work with children. Those that operate as regulated activity providers are moreover obligated under Section 6 of the Safeguarding Vulnerable Groups Act 2006 to carry out Enhanced with Barred List Check, as failure to do so is an offence.

Transmission of information on criminal convictions is carried out by the United Kingdom Central Authority for the Exchange of Criminal Records who sends information regarding convictions of national to other member states and receives information on convictions of UK nationals in other member states. The UK has also set up a system of record checks specifically relating to the protection of children, which is called the International Child Protection Certificate and offers the possibility to check criminal records of UK national, non-nationals and residents who wish to work with children overseas.

## Topic 4: Victim Identification

The UK have a number of legal and procedural instruments in place that involve victim identification from a local, national and international level. Guidance on identifying victims is established in the 'practice advice on investigating indecent images of children on the internet' (2005) which is produced on behalf of the Association of Chief Police Officers (ACPO) by the National Centre for Policing Excellence (NCPE). ACPO maintains links with similar police forces, such as the Force Intelligence Bureaus (FIBs) and the National Crime Squad Paedophile Online Investigation Team (NCS POLIT) in order to ensure that intelligence is quickly disseminated throughout the police service. When evidence is seized, one of the main purposes of the investigation is to '...identify victims, offenders or locations' which can be done through the Childbase database which holds images, information and so forth of previous cases on a national level. When assessing victims, offenders and locations, gaining access to information on a local level is critical, for example, most child victims will have been abused by someone they know; thus Section 17 of the Children Act 1989 ensures that local authorities comply with investigations.

In addition, on an international level, the UK has access to Interpol's 'Specialist Crime against Children Network', and participates in the Global Alliance against Child Sexual Abuse Online.

The report underlines that although the UK have measures in place for child identification, the current Acts and policies are fragmented; thus, bringing them under a single Act that complies with the Directive would enhance coherency.

## Topic 5: The extraterritorial extension of jurisdiction

The national framework within the UK has not yet transposed Article 17 or Recital 29 of the Directive in regards to topic 5; however, it should be noted that the UK has one of the harshest legislative measures for these kinds of offences within the European Union. Section

72 'offences outside the United Kingdom' of the Sexual Offence Act 2003 (SOA) is the main legal instrument for England and Wales, whereas for Northern Ireland, the Sexual Offences Order 2008 is the legal instrument which also restricts the applicability to England and Wales. Section 72 (1) of SOA establishes the jurisdiction of England and Wales over acts committed by all UK nationals outside of its territory. Moreover, the Criminal Justice and Immigration Act 2008 had removed the 'dual criminality' clause; thus bringing national framework in line with the Directive. However, even though section 72 (3) of SOA establishes the possibility of prosecuting a person who was not a UK national when the act was committed but meets the nationality conditions, strengthens the protection in the UK. Despite this though, this provision lacks clarity and is still subject to the dual criminality clause of other member states. It should also be noted that Scotland does not have this provision within the Sexual Offences (Scotland) Act 2009 in regards to section 72 (3) of SOA. In relation to Article 17 (2) (a) of the Directive, the UK has opted out of transposing this provision in regards to jurisdiction over victims, whereas Article 17 (2) (c) of the Directive in regards to jurisdiction over habitual residence of offenders was implemented by section 72 (2) of SOA. Section 72 of the framework also matches the requirements of the Directive, as '...meeting a child following online grooming' extends to the territorial application of national framework; however, it should be noted that at least part of the offence must take place in England, Wales or Northern Ireland. Overall, the UK's ability to prosecute sex offenders whilst abroad is very broad and covers most situations; however, enhancement in this area is restricted due to practicalities and costs.

## Topic 6: Assistance, support and protection measures for child victims

The UK have transposed the Articles 18 and 19 of the Directive in regards to topic 6, thus national framework complies with the Directive but does so with some minor shortcomings. The Secretary of State has initiated the 'Code of Practice for Victims of Crime' 2013 which

derives from the legal basis of the Domestic Violence, Crime and Victims Act 2003. This Act ensures that victims are treated correctly within the criminal justice system and also ensures that bodies, such as courts, policing bodies, probation providers and victim services adhere to minimum standards of the Code. The Sexual Offences Act 2003 provides the general framework for victim protection, as section 104 allows for two ways for a sexual prevention order to be made; 1) directly by the court of magistrate, or 2) an application made by a chief officer to a magistrate court. However, such an order will only be given if an offender has indeed committed such as that present a danger to the child and will last for a minimum of 2 years. Moreover, Article 18 (3) of the Directive has been transposed into the national Code, as Chapter 3, Part B indicates that ‘...where the age of the victim is uncertain and there are reason to believe that the person is under 18 years of age, service providers should presume that the person to be under 19 and therefore entitled to receive the enhanced entitlements set out in the separate section under this Code for victims who are under 18 years of age’. A representative from the witness care unit can be appointed to the child victim. They are responsible for ensuring that the child’s right to information is fulfilled before, during and after the criminal proceedings. The right to protection is detailed in the Youth Justice and Criminal Evidence Act (YJCA) 1999 which states that a witness may be eligible for special measures on the grounds of fear or distress over testifying. For example, screens may be put in place, live-links can also be connected, video/audio-recorded interviews provided, hearings without the public and so forth. Thus, also enhancing the protection of the privacy and identity of the child victim. However, the right to compensation is an area of concern, as an award will be withheld unless the incident gave rise to criminal injury, and the age and capacity of the application of the incident will also be subject to review. Furthermore, providing of support and assistance will not be subject to the willingness of the child’s cooperation and national framework also provides that each individual case will be assessed in regards to providing special measures. At the moment, UK

national law does not provide for an appointment of a special representative and it also does not provide services for reclaiming costs. Moreover, interviews conducted with children take place on specifically designed premises, by a trained specialist who aim to minimize the number of interviews and repeated questions. Thus, in order to fully comply with the Directive, national framework should review compensation measures for child victims, as well as transpose Article 20 of the Directive, making it a requirement to appointment of special representatives for child victims free of charge in England and Wales.

## **Topic 7: Take down and blocking measures**

The UK national framework for England and Wales, complies with Article 25 and Recitals 47 of the Directive in regards to topic 7 as the main legal basis regarding child abuse content is detailed in the Protection of Children Act 1978 (PCA) and the Sexual Offences Act 2003 (SOA). Section 1 of the PCA makes it a ‘... criminal offence to take, permit to be taken or make, distribute, show, advertise or publicise, or possess for distribution any indecent photograph or pseudo-photograph of a child under 18 years of age’. The word ‘pseudo-photograph’ extends the scope of the provision in that it can cover a range of images, such as cartoons, computer-generated images, etc. The Electronic Commerce Regulation 2002 of the E-Commerce Directive, provision 19 establishes that internet service providers have to remove or disable access to unlawful activity relating to child pornography. This is done through the mandated IWF (Internet Watch Foundation) which is a British based organisation that corroborates with the NCA (National Crime Agency) and CEOP (Child Exploitation and Online Protection Centre. Material) hosted in the UK is reported to the IWF or sought out by the IWF who will then remit the information to the relevant hosting company and law enforcement bodies. The IWF can also contact the hotlines and law enforcement bodies of a specific country through INHOPE (International Association of Hotlines); thus, the process of blocking and take-down procedures are then

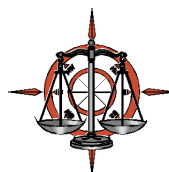
subjected to that specific country. Moreover, England and Wales have also transposed the optional blocking measures, as the IWF adds certain websites to the 'URL list' which blocks access to these websites and will stay on this list until they are removed.

### **Additional resources:**

To review national reports put together by ELSA (The European Law Students' Association), go to: [www.elsa.org/page/legal-research-group-on-children-rights-2/](http://www.elsa.org/page/legal-research-group-on-children-rights-2/)

### **Special thanks to:**

**ALLEN & OVERY**



**WILLIAM FRY III**

**ROSCHIER**