

International Legal Research Group on  
**CHILDREN'S RIGHTS**  
Together against sexual exploitation of children

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**elsa**

The European Law Students' Association



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## **INTERNATIONAL LEGAL RESEARCH GROUP ON CHILDREN'S RIGHTS**

Together Against Sexual Exploitation of Children

How has Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography been transposed into 12 EU Member States?

### **The European Law Students' Association**

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The European Law Students' Association

Legal Research Group on Children's Rights

| INTRODUCTION

# INTRODUCTION

## 1. WHAT IS ELSA?

The European Law Students' Association (ELSA) is a non-political, non-governmental, non-profit making, independent organisation which is run by and for students. ELSA has 42 member countries, is present at more than 300 law faculties and has 40 000 members. The association was founded in 1981 by five law students from Poland, Austria, West Germany and Hungary. Since then ELSA has aimed at uniting students from all around Europe and to provide a channel for the exchange of ideas and opportunities for law students and young lawyers to become internationally minded and professionally skilled. Our focus is to encourage individuals to act for the good of society in order to realize our vision; *“A just world in which there is respect for human dignity and cultural diversity”*.

## 2. LEGAL RESEARCH IN ELSA

A Legal Research Group (LRG) is one of many activities organized by ELSA aimed at development of legal skills: a group of law students and young lawyers carrying out research on a specified topic of law with the aim to make their conclusions publicly accessible.

In the 1980s, when ELSA was created as a platform for European cooperation between law students, sharing experience and knowledge was the main purpose of our organisation. In the 1990s, our predecessors made huge strides and built a strong association with a special focus on international exchange. In the 2000s, young students from Western to Eastern Europe were facing immense changes in their legal systems. Our members were part of such giant legal developments such as the EU expansion and the implementation of EU Law. To illustrate the achievements of previous LRGs, the outcome of the ELSA PINIL (Project on International Criminal Court National Implementation Legislation) has been the largest international criminal law research in Europe. In fact, the final country reports have been used as a basis for establishing new legislation in many European countries.

The more recent LRGs are electronically available - please click on the links to access. [ELSA for Children](#) (2012) was published on [Council of Europe's web pages](#) and led to the follow up project (on the same topic but restricted to EU legislation) you are now reading. In 2013, ELSA was involved in Council of Europe's No Hate Speech Movement. [The final report](#) was presented

at a conference in Oslo that same year and it has received a lot of interest from academics and activists in the field of discrimination and freedom of speech. The [results of the conference](#) have even been translated into [Japanese!](#)

### **3. THE LEGAL RESEARCH GROUP ON CHILDREN'S RIGHTS**

In 2013 the NGO coalition, grouping Missing Children Europe, eNACSO and ECPAT approached ELSA with the idea of launching a legal research group on the directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography.

The LRG "Together Against Sexual Exploitation of Children" took place in the time period Autumn 2013 - Spring 2014. From ELSA's side, 13 national research groups were involved (the Swedish is not included here since it is published separately) - each consisting of 3 to 5 national researcher, in addition to a national coordinator.

Researches were asked to fill in an academic framework which was structured in 7 chapters intended to depict the situation after the expiration of the transposition deadline fixed by the Directive (18 December of 2013), i.e. steps taken in view of transposing the Directive and the assessment of the (non) complying legislation. To ensure quality, the national research groups were supported by a national academic advisors. The final compilation of reports seeks to serve as a comparative source that can reflect similarities and differences between the national legislations that are investigated. Missing Children Europe will use ELSA's reports when writing their final recommendation which attempts to influence European decision makers.

This publication is a compilation of all submitted reports we received from the participating ELSA groups. In order to understand the structure and methodology of the national reports please refer to the questionnaire we received from the above-mentioned NGOs. It is presented below and it served as our academic framework.



#### **4. FOREWORD BY FRANCIS HERBERT, MISSING CHILDREN EUROPE**

I hereby wish to thank ELSA and each of the individual ELSA members who contributed to the 13 national reports for the Survey project “Together against sexual exploitation of children”.

The project is run by a coalition of 3 NGOs who are actively involved in the protection of child rights. They are ECPAT (End Child Prostitution, Child Pornography and Trafficking in Children for sexual purposes), eNACSO (the European NGO Alliance for Child Safety Online) and Missing Children Europe (the European Federation for Missing and Sexually Exploited Children).

The object of the project is to examine the ways in which Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, has been transposed by the 27 EU Member States which are bound by it (on the basis of the Protocol n° 22 annexed to the Treaty on the functioning of the European Union Denmark did not take part in the adoption of the Directive and is not bound by it or subject to its application).

We, the three organising NGOs, were aware of the fact that our project couldn't cover the entire Directive. We therefore decided to select seven provisions the object of which covers topics which are of specific interest to us: the fight against all forms of online sexual abuse or exploitation of children (topics 1, 2 and 7), the need to protect children against sexual offenders taking advantage of contacts offered by their professional or voluntary activities (topic 3), the need to offer the necessary tools to law enforcement in order to identify the children who are victim of online abuse (topic 4), the need to act against travelling sex offenders (topic 5), the need to protect the rights and interest of children during the criminal investigation and trial (topic 6).

The next challenge was a big one: we needed a network of 27 rapporteurs to cover the transposition in the Member States concerned.

This is precisely where ELSA's input was very helpful: With its 13 reports ELSA offered us a much needed, yes indispensable, complement to the work of the network of established lawyer rapporteurs contacted through Allen & Overy.

Even if, understandably, the quality may have been variable, it remains that each of these reports gave us a first insight in the sometimes very different legal and criminal policy approaches to some of the topics addressed. That in itself is crucial for a project which has the ambition to try to identify and compare the different ways in which a specific objective defined in the Directive can be achieved, taking into consideration the specificity of the cultural, legal and social background of the EU Member States concerned.

We look forward to continue working with ELSA in order to further streamline our cooperation on the final phases of the project.

F. Herbert

Legal Counsel

3rd of February 2015

Missing Children Europe<sup>1</sup>



**Missing  
Children  
Europe**

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<sup>1</sup> The responsibility for the information and views set out in the reports lies entirely with their authors.

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# ACADEMIC FRAMEWORK

QUESTIONNAIRE ON NATIONAL LEGISLATION RELATED TO DIRECTIVE  
2011/93/EU ON COMBATING SEXUAL EXPLOITATION OF CHILDREN AND  
CHILD PORNOGRAPHY

## 1. BACKGROUND AND OBJECTIVES

### 1.1. Background

Directive 2011/93/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 13/12/11. The Directive requires Member States to adapt their legislation by 18/12/13. The NGO coalition, grouping Missing Children Europe, Save the Children, NSPCC, eNACSO and ECPAT International, wishes to examine whether and how have transposed the provisions of the Directive on a selected number of topics.

### 1.2. Objectives

The Questionnaire seeks to gather information on:

- The situation after the expiration of the deadline fixed by Article 27(1) of the Directive, 18 December 2013.
- The steps taken in view of transposing the Directive.
- Your evaluation, i.e.:
  - a) Does the national legal framework in place on 18 December 2013 in your view, comply with the provisions of the Directive?
  - b) If no, what additional steps would, in your view, be required in order to comply with the Directive?
  - c) Any other comment.

## 2. IDENTIFICATION OF RESPONDENT

Member State (MS)	
Contact person (name, telephone, email)	

### 3. QUESTIONNAIRE

#### 3.1. Introduction

The questionnaire focuses on 7 selected topics each of which corresponds to one or several provisions of the Directive.<sup>1</sup> For each topic the relevant recital(s) have been indicated next to the article. Being aware that only the articles as such are legally binding in a Directive it still is important to assess the wording of each article in light of the corresponding recital. The recitals shed light on the intentions behind the wording of the specific article and are important elements for an interpretation of the legal provision.

#### 3.2. Questions to Answer: Topics One to Seven

Please answer the specific questions indicated under each topic:

**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) and Recital 18)**

- 1.1. Please describe the national legal framework with regard to obtaining such access.
- 1.2. Which steps been taken in your Member State in order to transpose Article 5(1) and (3)?
- 1.3. In your view, does this legal framework comply with Article 5(1) and (3)? If no, what additional measures should, in your view, be taken in order to comply with Article 5(1) and (3)?
- 1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

#### Provisions from Directive 2011/93 EU

**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. (...)

<sup>1</sup> Refer to <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:026:0001:0021:EN:PDF>

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. (...)

5. (...)

6. (...)

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.

## Topic 2. Online grooming: solicitation by means of information and communication technology of children for sexual purposes (Article 6 and Recital 19)

2.1. Please describe the national legal framework with regard to online grooming.

2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

2.3. Which steps have been taken in your MS in order to transpose Article 6?

2.4. In your view, does this legal framework comply with Article 6? If no, what additional measures should be taken in order to comply with Article 6?

### Provisions from Directive 2011/93 EU

#### Article 6. Solicitation of children for sexual purposes

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.

4.(...)

5.(...)

6. (...)

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.

### **Topic 3. Disqualification arising from convictions, screening and transmission of information concerning criminal records (Article 10 and Recitals 40-42)**

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art 10(1)): Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Articles 3-7 of the Directive?

If yes, does it cover:

3.1.1. Professional activities involving direct and regular contact with children?

3.1.2. Organised voluntary activities involving direct and regular contact with children?

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10(2)).

3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening.

3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?

3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:

a) Professional activities involving direct and regular contact with children?

b) Organised voluntary activities involving direct and regular contact with children?

3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:

- a) Professional activities involving direct and regular contact with children?
- b) Organised voluntary activities involving direct and regular contact with children?

3.2.5. If your MS does not foresee any legal framework on screening, would it still, in your view, be possible for an employer to request information on prior convictions without violating national legislation on privacy (or other)?

3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Article 10?

3.4. Which steps have been taken in your MS in order to implement Article 10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

3.5. In your view, does the current legal framework comply with Article 10? If no, what additional measures should be taken in order to comply with Article 10?

#### Provisions from Directive 2011/93 EU

##### **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 [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.

#### **Topic 4. Victim identification (Article 15(4))**

4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims).

4.2. Which steps have been taken in your Member State in order to implement Article 15(4)?

4.3. In your view, does the current legal framework comply with Article 15(4)? If no, what additional measures should be taken in order to comply with Article 15(4)?

#### Provisions from Directive 2011/93 EU

##### **Article 15. Investigation and prosecution**

1.(...)

2.(...)

3(...)

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.

#### **Topic 5. (Extraterritorial) jurisdiction (Article 17 and Recital 29)**

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive:

5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5)):

- Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?
- Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?
- Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?
- Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4)):

- Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

5.1.3. Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2)):

- Does your MS establish its jurisdiction where:
  - a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?
  - b) The offence is committed for the benefit of a legal person established in its territory (Art. 17 (2)(b))?
  - c) The offender is a habitual resident (Art. 17(2)(c))?
- If no, what are in your view the prospects of your MS prevailing itself of the option provided in Article 17?

5.2. Which steps have been taken in your MS in order to implement Article 17?

5.3. In your view, does the current legal framework comply with Article 17? If no, what additional measures should be taken in order to comply with Article 17?



### Provisions from Directive 2011/93 EU

#### **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.

## **Topic 6. Assistance, support and protection measures for child victims (Articles 18, 19, 20 and Recitals 30, 31, 32)**

6.1. Please describe the current national legal framework with regard to child victims:

6.1.1. General framework of protection (Art. 18):

- Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 *on the standing of victims in criminal proceedings*?

- From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?
- How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

#### 6.1.2. Specific assistance and support measures (Art. 19):

- Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art. 19 (1))?
- Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?
- Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?
- Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?
- Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art. 19(4))?
- Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe.
- Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

#### 6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20):

- Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which.
- Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:
  - a) Available for the purpose of claiming compensation?
  - b) Free of charge where the victim does not have sufficient financial resources?
- Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:
  - 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?
- Does the legal framework of your MS ensure that all interviews with a *child victim*, or where appropriate, a *child witness* may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

- Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, 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?
- Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify?

6.3. In your view, does the current legal framework comply with Articles 18, 19, 20? If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

#### Provisions from Directive 2011/93 EU

**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.

**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 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 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;
- (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.

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.

## **Topic 7. Measures against websites containing or disseminating child pornography (Article 25 and Recitals 46 and 47)**

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

7.1.1. Obligatory take down measures (Art. 25 (1)):

- Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:
  - a) Within its territory? If yes, please specify.
  - b) Outside its territory? If yes, please specify.

7.1.2. Optional blocking measures (Art. 25 (2)):

- Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify. If no, what is the current (political) position of your MS with regard to blocking, i.e. the likelihood of introducing blocking measures?

7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking).

7.3. In your view, does the current legal framework comply with Article 25? If no, what additional measures should be taken in order to comply with Article 25?

#### Provisions from Directive 2011/93 EU

**Article 25. Measures against websites containing or disseminating child pornography**

1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.

2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.

# NATIONAL REPORTS

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# ELSA AUSTRIA

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## 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) and Recital 18)

### 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

Section 207a of the Austrian Criminal Code (*StGB 1974* as amended 2004 and 2009 and introduced in 1994) covers the pornographic presentation of minors. It is structured in five paras, which shall be described in general first.

Para. 1 punishes the production, the offering, to provide, to loan, the public presentation or any other form to ease access to pornographic presentation of minors.

Para. 2 names more forms of how the crime can be committed. Therefore the production, the import, the transport or the export of child pornography to distribute is forbidden, with five qualifications, e.g. as committing this crime as a member of a criminal union or threatening the life of the presented minor.

In para. 3 the obtaining of possession of pornographic presentation is criminalised. Therefore the law divides between minors under 14 (imprisonment up to 2 years) and minors between 14 and under 18 (imprisonment up to 1 year).

Para. 3a criminalises the knowingly obtaining access to child pornography on the world wide web and is as sanctioned as para. 3.

Para. 4 defines the term “pornographic presentation” and in para. 5 impunity clauses can be found.<sup>1</sup>

Before the Amendment 2004 of the Criminal Code (*Strafrechtsänderungsgesetz 2004*) Section 207a only covered the pornographic presentation of minors under 14, but was then extended to minors between 14 and under 18. With the Second Law to Protect from Violence (2. GeSchG

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<sup>1</sup> Philipp in Höpfel/Ratz, Wiener Kommentar zum Strafgesetzbuch (Vienna Commentary on the Criminal Code), 2nd Edition “Criminal Code Section 207a Note 4” (2012).

BGBI I 2009/40) new forms of committing this crime were added to para. 2 and the sentence for these forms were extended to at least 6 months to a maximum of 5 years of imprisonment. Furthermore the above mentioned para. 3a was added, which criminalises the knowingly obtaining access to child pornography on the internet.

The corresponding provision to Article 5 (1), (3) and Recital 18 of the Directive are therefore para. 3 and 3a of Section 207a of the Austrian Criminal Code.

The main intention of the legislature was to protect the undistressed sexual evolution of children, but the protected common good behind this provision is the protection of the actor, therefore the sexual integrity of minors.

Offender, the person who commits the crime, can be anyone.<sup>2</sup>

The object as described in para. 4 sub-paras 1-4 can be summarised as realistic presentations which let believe that on the one hand a person under age was involved in the production and on the other hand they are depictions of the genitals or the pubic area of a minor.<sup>3</sup> In Ciper 4 it is stated that also “virtual pornography” is punishable under Section 207a. This means that also presentations which are completely computer-based animated or real pictures which were manipulated to give the impression that the actor is under age, are forbidden under this provision. Nevertheless if the person only appears to be a child, but was in fact 18 years of age or older, the crime is not constituted.<sup>4</sup>

The act of paras 1 and 2 can in general be described as an absolute ban on production and distribution.<sup>5</sup> Under para. 3 shall be punished who obtains child pornography through the world wide web and stores it on his hard or flash drive or files it in any other way.<sup>6</sup> Therefore under para. 3 only consumption isn't punishable, but only the obtaining or possession of child pornography. Obtaining means that the offender has to act himself; possession therefore means if the presentations are in his possession without him acting in any way.<sup>7</sup> That even the simple possession is forbidden, might seem hard at the first glimpse, but gets more understandable, if

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<sup>2</sup> Philipp in WK2, “Criminal Code Section 207a note 7” (2012).

<sup>3</sup> KS BT Section 207a.

<sup>4</sup> Philipp in WK2, “Criminal Code Section 207a note 7” (2012).

<sup>5</sup> Philipp in WK2, “Criminal Code Section 207a note 15” (2012).

<sup>6</sup> 15 Os 190/98, JBI 2000, 534.

<sup>7</sup> Philipp in WK2, “Criminal Code Section 207a note 20” (2012).

we see the consumer as causal to the production, because if there wouldn't be any consumer of child pornography, there also wouldn't be any market for it.<sup>8</sup>

As already mentioned, para. 3a was added with the Second Act to Protect from Violence (Second Amendment, 2<sup>nd</sup> GeGschG), which makes the knowingly obtaining access of child pornography via internet punishable. With “internet”, all kinds of services provided by the world wide web are meant. Therefore a person which gets access by incident to a site with child pornographic materials shall not be sanctioned. The criminal intent therefore is established by a recurring access to such sites or if a payment had to be made.<sup>9</sup> The access has to be made directly; therefore it is not punishable if a person only accesses a site which contains links to child pornography among others. It is also without sanction if a person only watches child pornography, if another person accessed it without any help of the first one.

In Section 215a para. 2a of the Austrian Criminal Code the watching of a live feed of a pornographic presentation of minors is sanctioned with up to 1 year of imprisonment, if the child was between 14 and under 18, with up to 2 years if it was younger. Main distinguishing characteristic to Section 207a is that the content is live and not time displaced.<sup>10</sup>

Section 207a can only be committed with intent. For para. 3 the intention has to cover the fact, that it is a pornographic presentation of a minor, for para. 3a (see above) the access has to be made knowingly.<sup>11</sup>

The participation to the offence under Section 207a has got no real problems as it can be solved with the general participation doctrine. The only problem that could be thought of, if a minor between 14 and 18 willingly participates in the production of a pornographic presentation. Shall he or she be punished too? This constellation can be solved on the basis of the doctrine of “necessary participation”. The participant shall be not be punishable, as it is him, who shall be protected by the provision.<sup>12</sup>

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<sup>8</sup> Hochmayr, *Strafbarer Besitz*, 31.

<sup>9</sup> JAB 106 BlgNR 24. GP 34.

<sup>10</sup> Philipp in WK2, “Criminal Code Section 215a note 10a” (2012).

<sup>11</sup> Philipp in WK2, “Criminal Code Section 207a note 26” (2012).

<sup>12</sup> Philipp in WK2, “Criminal Code Section 207a note 29” (2012).

According to the impunity clauses in Section 207a para. 5 a person shall not be punished, if the production and the possession of presentations of a minor older than 14 was made with her/his consent and is only to her/his personal use.<sup>13</sup>

Furthermore it is not punishable if a person produces or posses a virtual presentation of a minor over 14 only for her/his private consumption and a distribution is not possible.<sup>14</sup>

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

Section 207a of the Austrian Criminal Code does not only comply with the Directive, it even goes beyond it in a few points. According to Art 5 (3) of the Directive knowingly obtaining access to child pornography shall be punishable with a maximum term of imprisonment of at least one year. The Directive therefore doesn't differ between minors under 14 and minors between 14 and 18. In the Austrian Criminal Code it is expressed that minors under 14 need more protection and that the social inadequacy of pornographic presentation of such is worse and therefore the penalty is higher, so the maximum term of imprisonment is up to 2 years.

Although the Directive was transposed into the national legal framework, there have been several critical remarks as to how it was done. The most common argument is that they say the law seems to be too complex and confusing.<sup>15</sup>

It is also criticised that Section 207a goes way beyond its actual purpose, the protection of the actor. This, because even images which were taken without any harm to the actor are sanctioned, e.g. actors who just appear to be under 18 or are computer based produced.

The Austrian Criminal Code knows a so-called “protective-age-limit” (*Schutzaltergrenze*), which means in general that a person over 14 is free to do what he/she sexually wants. Therefore such a person is regarded by legislation as a “mature-minor” (Section 74 para 1 Criminal Code). This leads to the problem that, e.g. a boy of 18 years has got a girlfriend of 17 years and 9 months. If now she intentionally sends him a picture of herself in underwear or he takes a picture of her in a bikini he actually has to be punished by Section 207a, because even the impunity clauses of para. 5 don't work. This, because the pubic area of a minor is visible, but he or she sent it by email or “WhatsApp” or any other form of communication and therefore made it obtainable for others

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<sup>13</sup> Kienapfel/Höpfel/Kert, Strafrecht Allgemeiner Teil, 14th Edition, 79, note 53.

<sup>14</sup> EBRV StRÄG 2004, 294 BlgNR 22. GP 23.

<sup>15</sup> Philipp in WK2, “Criminal Code Section 207a note 2” (2012).

(in this case for the boy- or girlfriend).<sup>16</sup> This provision seems to be even more excessive when looking at the Austrian Marriage Law. In Section 1 para. 2 of the Austrian Marriage Law (“EheG”) 16 year old juveniles are allowed to marry, so if such a couple should take pictures of one another on a vacation to the sea and sends this pictures to friends, they actually could be sanctioned under Section 207a.<sup>17</sup>

On the other hand it is criticised, that in some points the provision doesn't go far enough. Paragraph 4 sub-para. 5 requires that the images of genitals or the pubic area of a minors, if it is a sensationally blurred, reduced to itself and loosened from other life-expressions image, it shall sexually arouse the viewer. Therefore it is claimed that all images of genitals or the pubic area of minors, if it is a sensationally blurred, reduced to itself and loosened from other life-expressions image, should be sanctioned and that it should not be required that the image shall sexually arouse the viewer.<sup>18</sup>

If no, what additional measures should, in your view, be taken in order to comply with Art. 5 (1) and (3)?

As already mentioned, according to para. 4 elements of the crime are not reached, if the person only appears to be a child but in fact was 18 years of age or older. Whether this should be covered, lies in the discretion of the Member States. It is up to them whether these Articles should apply.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 5</b>  <b>Offences concerning child pornography</b>            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. (...)</p>	<p><b>Section 207a Criminal Code</b>            (1) He who            1. Produces or            2. Offers, provides, loans, presents or makes available in any other way pornographic presentation of a minor (para. 4) shall be punished with imprisonment up to 3 years.</p>

<sup>16</sup>“Stellungnahme ÖGS (40 SN-67 ME) zu GZ: 318.016/6-II.1/2003”, p 8.

<sup>17</sup>“Stellungnahme ÖGS (40 SN-67 ME) zu GZ: 318.016/6-II.1/2003”, p 8.

<sup>18</sup>“Stellungnahme OGH (30 SN-67 ME) zu GZ: 318.016/6-II.1/2003”, p 5.

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. (...)

5. (...)

6. (...)

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.

(2) ...

(3) He who obtains or possesses pornographic presentation of a minor between 14 and 18 (para. 4 sub-para 3 und 4), sees a penalty of imprisonment up to 1 year. With imprisonment up to 2 years shall be punished who obtains or possesses pornographic presentation of a minor under 14.

(3a) As in para. 3 shall be punished, who knowingly accesses pornographic presentation of a minor on the internet.

(4) Pornographic Presentations of minors are

1. Realistic images of sexual conduct on a minor under 14 or on a minor under 14 by herself/himself or with an animal.

2. Realistic images of a conduct with a minor under 14, which leads to believe under the circumstances, that these are sexual actions on a minor under 14 or on a minor under 14 by herself/himself or with an animal.

3. Realistic images

a) of a sexual conduct mentioned in sub-para. 1 or of an action mentioned in sub-para 2, just with a minor between 14 and under 18, or

b) the genitals or pubic area of a minor, if it is a sensationally blurred, reduced to it self and loosened from other life-expressions image, which shall sexually arouse the viewer.

4. Pictorial presentations, if seen – by transformation of an image or through use of such one – lead to believe under the circumstances that they are presentations as mentioned in sub-para 1 – 3.

(5) By para. 1 (1) and para. 3 shall not be punished, he who

1. produces a pornographic presentation of a minor between 14 and 18 with his consent and to his own private use or possession

or

2. produces to his own private use or posses a pornographic presentation of a minor between 14 and under 18 as mentioned in para. 4 (4), if there is no danger of spreading the presentation.

## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

Section 208a of the Austrian Criminal Code covers the solicitation of children for sexual purposes. It is structured in three paras and was introduced into the Criminal Code in 2011 and amended in 2013.

Punishable under Section 208a of the Austrian Criminal Code is, who 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 her/him on a meeting and takes concrete preparatory actions to undertake the meeting, with the intent to sexually abuse the child and to commit offence under Sections 201 to 207a para. 1 sub-para. 1. An offence is punishable by a maximum term of imprisonment of 2 years.

Under para. 1a a person shall be punished who, by means of telecommunication or using a computer system, to commit offences provided under Section 207a para. 3 or 3a related to a pornographic presentation (Section 207a para. 4), solicits a minor to provide child pornography depicting that minor. The offence is punishable with up to one year imprisonment or with a fine up to 360 daily rates.

Section 208a para. 2 defines that according to para. 1 and 1a an offender shall not be punished, who voluntarily gives up his plan and reports his wrong doing to the police.<sup>19</sup>

Austrian Criminal Law did not criminalise grooming until the Law Amendment in 2011 (*Strafgesetznovelle 2011*). Section 208a consist of two phases. In the first instance it requires suggestion of a meeting by the offender or the agreement on it by means of telecommunication or using a computer system or in any other way under deception about his intention. Telecommunication is defined as a technical process of sending, transmitting and receiving of messages of any kind in the form of signs, language, pictures or sounds through technical

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<sup>19</sup> Section 208a para 2 Criminal Code.



services. The term computer system is legally defined in Section 74 para. 1 cipher 8.<sup>20</sup> The deception is only a requirement if the crime is committed in any other way and not by means of telecommunications or using a computer system, like talking to a child on the street. For example, the offender would be criminally liable, if he would pretend to show the victim his petting zoo, with the intention to lure the victim into his home and to commit offences punished under Sections 201 to 207a para. 1 sub-para. 1 Criminal Code.<sup>21</sup> Further the perpetrator must act with intent to commit an offence under the Sections 201 to 207a para. 1 (1) of the Austrian Criminal Code.<sup>22</sup>

In the evaluation procedure the limitation only to the commission of offences by means of telecommunication or using a computer system was criticized. Therefore the legislator enhanced the provision so it can be committed in any other way under deception of the intention of the offender. This alternative is a catchall element for every other form of solicitation, which is not covered by para. 1 line 1 (e.g. personal approach on the street, a personal letter, etc.).<sup>23</sup>

In the second instance a concrete preparatory action to undertake the meeting is required. The wording of the provision is rather broad and raises fears to get out of hands. The explanatory report to the Criminal Law Amendment makes clear that as concrete preparatory acts are considered buying a ticket to the place of the meeting, the transmission of the directions to the meeting place or a personal description to the victim or the arrival of the offender at the agreed location. But also the reservation of a table or buying tickets for the cinema would be punishable.<sup>24</sup>

The mental elements of Section 208a contain an important limitation to the criminal liability: The offender must propose a meeting with the intent to commit an offence under Sections 201 to 207a para. 1 sub-para. 1 to the victim.<sup>25</sup>

Victims can only be minors, i.e. persons under 14 years of age. *Ex lege* it is assumed that they never have the ability to sexual self-determination.<sup>26</sup> Under teenagers social contacts are maintained increasingly online and in this age the sexuality is mostly in a developing and

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<sup>20</sup> Mahler Christian, „Grooming“: Anbahnung von Sexualkontakten zu Unmündigen in JSt 2012, 22 (24).

<sup>21</sup> Sophie Zaubzer-Pesendorfer, „Schutz von Kindern vor Gewalt und sexuellen Übergriffen“, iFamZ 2012, 16 (19).

<sup>22</sup> Section 208a para. 1 Criminal Code.

<sup>23</sup> Mahler Christian, „Grooming“: Anbahnung von Sexualkontakten zu Unmündigen in JSt 2012, 22 (25).

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

experimental phase. Therefore it can be assumed that sexual contacts and their solicitation under peers do not cross the line of criminal liability in most of the cases. Hence the age tolerance clauses in the definitions of sexual abuse of minors under Sections 206 para. 4 and 207 para. 4 apply.<sup>27</sup>

As Section 208a of the Austrian Criminal Code is a preparatory crime, there is no criminal liability under this provision if the offender reaches the stage of attempt of the intended crimes under Sections 201 to 207a of the Criminal Code or even has already committed it<sup>28</sup>

As above mentioned, the law provides impunity in case of active repentance if the offender voluntarily and before the authority (Section 151 para. 3) finds out about his misconduct, gives up his plan and reports his wrong-doing to the police. The active repentance was criticized in the literature. It is unrealistic that an offender informs the criminal authority after giving up his undertaking.<sup>29</sup>

## 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

When the offence was committed “in any other way” as per para. 1 sub-para. 2 any other form of establishing a contact comes into consideration (e.g. personal approach on the street, a personal letter, etc.). However, this is only punishable if the offender deceives the underage person about his intentions to commit a criminal offence according to Sections 201 to 207a para. 1 sub-para. 1. This limitation is insofar relevant, as the specific risk of these behaviour results from the deception of the underage person.<sup>30</sup>

Austrian law thus prohibits not only cyber-grooming, but also such solicitation which is not carried out by using information and communication technology.

## 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

Online-grooming was legal until 2011. With the Criminal Law Amendment of 2011 the legislator created the new provision against online-grooming in Section 208a Criminal Code. Until the

<sup>27</sup> Age tolerance clause: Section 206 (4): sexual intercourse is not punishable if the victim is at least 13 years old and the age difference does not exceed three years and as long as the act was not in the intention of both parties.

Section 207 (4): Sexual intercourse is not punishable if the victim is at least 12 years old and the age difference does not exceed four years, as long as there are not any serious consequences.

<sup>28</sup> Mahler Christian, „Grooming“: Anbahnung von Sexualkontakten zu Unmündigen in JSt 2012, 22 (26).

<sup>29</sup> *Ibid.*

<sup>30</sup> Section 208a Abs 1 Z 2 Criminal Code.

entry into force of the provision on January 1, 2012 minors were protected by law only after the last preparatory act against the exercising sexual abuse itself. The prosecution of groomers failed regularly when the offender had not entered into a near attempt as defined by Section 15. All forms of preparation of sexual offences, including the solicitation of children for sexual abuses through the internet, so far went unpunished, as a mere preparatory acts.<sup>31</sup>

The provision of Section 208a was created to comply with the Council of Europe's Convention. On the 25th of October 2007 the Member States of the Council of Europe decided to pass the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. The Member States:

“Take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, para. 2, for the purpose of committing any of the offences established in accordance with Article 18, para. 1a, or Article 20, para. 1a, against him or her, where this proposal has been followed by material acts leading to such a meeting.”<sup>32</sup>

With the Criminal Law Amendments 2011 and 2013 the criminal provisions got also adapted to comply with the Directive 2011/93/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography replacing the Council Framework Decision 2004/68/JHA.<sup>33</sup> According to the new para. 1a a person should be punishable who solicits a person who has not reached the age of sexual consent, with the intention of an offence under Section 207a para. 3 or 3a of the Criminal Code in relation to a pornographic representation (Section 207a para. 4 Criminal Code), by means of telecommunications or using a computer system, to provide child pornography depicting that child. The active repentance provision in para. 2 got extended to apply also to para. 1a.<sup>34</sup>

#### 2.4. In your view, does this legal framework comply with Art. 6?

The provisions comply with Article 6 completely - it even goes beyond by providing for a maximum imprisonment for 2 years instead as required in the Directive with a maximum of 1 year. By that it undertakes the offence.

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<sup>31</sup> Mahler Christian, „Grooming“: Anbahnung von Sexualkontakten zu Unmündigen in JSt 2012, 22 (23).

<sup>32</sup> Art. 23, Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

<sup>33</sup> Erläuterungen zur Regierungsvorlage zur Strafgesetznovelle 2013, p. 1.

<sup>34</sup> Erläuterungen zur Regierungsvorlage zur Strafgesetznovelle 2013, p. 18.

As to the Austrian law for active repentance in the provision it does not contradict with the European Directive as Article 6 only demands adopting correspondent provisions and does not prohibit such an important clause to give the offender an opportunity to be not liable for his actions.<sup>35</sup> This rule is part of the Austrian Criminal Law to strongly protect the victims.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b>  <b>Solicitation of children for sexual purposes</b></p> <p>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.</p> <p>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.</p>	<p><b>Solicitation of minors for sexual purposes</b>  <b>Section 208a.</b></p> <p>(1) Who, with the intention of sexually abusing the child, commits offence punishable under Sections 201 to 207a para. 1 sub-para. 1, by means of</p> <ul style="list-style-type: none"> <li>- using telecommunication, using a computer system or</li> <li>- in any other way under deception about his intention</li> </ul> <p>proposes to an underage person a meeting or agrees with her/him on a meeting and takes concrete preparatory actions to undertake the meeting is punishable by a maximum term of imprisonment of 2 years.</p> <p>(1a) Who solicits a minor with the intention to commit offences punishable under Section 207a para. 3 or 3a related to a pornographic presentation (Section 207a para. 4) by means of telecommunication or using a computer system, to provide child pornography depicting that minor, shall be punishable with up to one year imprisonment or with a fine up to 360 daily rates.</p> <p>(2) According to para. 1 and 1a an offender shall not be punished, who voluntarily and before the authority (Section 151 para. 3) finds out about his misconduct, gives up his plan and reports his wrong doing to the authority.</p>

<sup>35</sup> Regierungsvorlage 1505 der Beilagen XXIV. GP, p. 7

[http://www.parlament.gv.at/PAKT/VHG/XXIV/I/L\\_01505/fname\\_234995.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/L_01505/fname_234995.pdf)

## TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

If yes, does it cover:

**3.1.1. Professional activities involving direct and regular contact with children?**

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

The Member State Austria provides a legal framework on disqualification arising from conviction from the offences listed in Articles 3-7 of the Directive. It covers both professional and organized voluntary activities.

The disqualification is regulated in Section 220b of the Austrian Criminal Code:

According to para. 1, the offender who committed a criminal offence against the sexual integrity and self-determination of a minor and who worked or intended to work at the time of the crime on a professional or voluntary level for an organization or any other facility which provides parenting, educating or supervising of minors or intensive contact with minors, is forbidden to exercise professional activities or any other comparable activities for at least 5 years, as long as the danger and possible risks of committing further comparable crimes while practicing exist that causes more than slight damages.

According to para. 2, the work ban is to be imposed for an indefinite time period if the danger posed by the offender of committing a crime according to para. 1 with grave consequences during practicing makes it appropriate, or if the offender has committed a crime according to para. 1 while practicing.

According to para. 3, the court has to reverse the work ban if additional circumstances occur or become known which would not have led to the work ban had they been known at the time of the verdict.

According to para. 4, in a case where a work ban has been imposed for an indefinite time period the court has to review every five years if the requirements of para. 2 are still met.

According to para. 5, the duration of the work ban starts from the date of the final judgment that imposed the work ban. Time periods where the offender is in custody due to regulatory actions will not be included.

According to para. 6, a person that practices, although he/she knows that the practice of the profession is prohibited according to Section 220b, will be punished with imprisonment up to 6 months or with a financial penalty up to 360 daily rates.<sup>36</sup>

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

No national provisions were implemented yet.

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

Basically Austria does not provide a general legal framework for screening with the exception of Section 9 (1) Criminal Register Code (*Strafregistergesetz*):

**Section 9 (1):**

Apart from other federal legislative regulations and certain cases stipulated by inter-governmental agreements, the state police department of Vienna is obligated to transmit information about entries in criminal records on demand by:

- all domestic authorities, offices of the federal police department, as well as commanders of the armed forces,
- authorities of member states of the European Union for the purpose of security administration, as well as all authorities abroad, as long as it is based on reciprocity,
- youth welfare organizations in order to avert a concrete threat of a certain minor caused by a certain person based on a special legislative regulation.<sup>37</sup>

<sup>36</sup> Section 220b Criminal Code: [http://www.jusline.at/220b\\_Taetigkeitsverbot\\_Criminal\\_Code.html](http://www.jusline.at/220b_Taetigkeitsverbot_Criminal_Code.html) (15.3.2014).

<sup>37</sup> Section 9 Criminal Records Code: [https://www.jusline.at/9\\_Strafregisterauskuenfte\\_StrG.html](https://www.jusline.at/9_Strafregisterauskuenfte_StrG.html) (16.3.2014).

**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

b) Organised voluntary activities involving direct and regular contact with children?

In process of this research no legislation was found that refers to the obligation of employers to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for both, professional activities and organized voluntary activities involving direct and regular contact with children.

**3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

In certain cases the Austrian legal framework provides the right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for professional activities involving direct and regular contact with children.

The right to demand information is regulated in Section 9a(2) and Section 9a(3) Criminal Records Code:

**Section 9a(2):**

Based on special legislative regulation the state police department of Vienna has 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 organizations, School Authorities, as well as to the administrative authority and the human resource department of the territorial authorities in connection with the employment of persons in facilities for parenting, educating and teaching of children and teenagers, as well as for the evaluation of potential adoptive parents and foster parents .

**Section 9a(3):**

Convictions of criminal offences against the sexual integrity and self-determination will not be removed from one's criminal record. Contrary to other convictions the restriction of access of information is not valid.<sup>38</sup>

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<sup>38</sup> 9a/2, 9a/3: [https://www.jusline.at/9a\\_Sonderauskuenfte\\_zu\\_Sexualstraftaetern\\_StrG.html](https://www.jusline.at/9a_Sonderauskuenfte_zu_Sexualstraftaetern_StrG.html) (16.3.2014).

b) Organised voluntary activities involving direct and regular contact with children?

In process of the research no legal framework was found that provides the right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for organized voluntary activities involving direct and regular contact with children.

**3.2.5. If your MS does not foresee any legal framework on screening, would it still, in your view, be possible for an employer to request information on prior convictions without violating national legislation on privacy (or other)?**

With the exception of the public bodies mentioned in Section 9a (2) Criminal Records Code, there exist no other possibility for employers to obtain knowledge about relevant convictions and work bans than through the participation of the potential employee.<sup>39</sup>

The possibility to request information on prior convictions is regulated in Section 10(1a) and (1b) Criminal Records Code:

**Section10 (1a):**

The “Criminal Record Certificate *Kinder- und Jugendwohlfahrt*” is to be issued on a special application to the applicant. It certifies that the applicant is not convicted of crimes against the sexual integrity and self-determination of a child and is not temporarily or permanently prevented from practicing according to Section 220b Criminal Code. Convictions of criminal offences against the sexual integrity and self- determination will not be removed from one’s “Criminal Record Certificate *Kinder- und Jugendwohlfahrt*”.

**Section10 (1b):**

The applicant has to attach a written request to the application for the “Criminal record certificate *Kinder- und Jugendwohlfahrt*”. This request has to be addressed to the applicant and must certify that that a “Criminal record certificate *Kinder- und Jugendwohlfahrt*” is needed in order to verify the qualification to practice a profession or voluntary work that covers mainly the supervision, support, parenting, care or education of minors.<sup>40</sup>

3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

The transmission of information on criminal convictions to European Member states is regulated in Section 9 (1) and 9b (1), (2) and (3) Criminal Records Code:

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<sup>39</sup> 532/ME XXIV. GP - Ministerialentwurf – Erläuterungen (2013).

<sup>40</sup> Section 10 *Strafregistergesetz*: [https://www.jusline.at/10\\_Strafregisterbescheinigungen\\_StrG.html](https://www.jusline.at/10_Strafregisterbescheinigungen_StrG.html) (16.3.2014).



**Section 9 (1)(3):**

Apart from other federal legislative regulations and certain cases stipulated by inter-governmental agreements, the state police department of Vienna is obligated to transmit information about entries in criminal records on demand by authorities of member states of the European Union for the purpose of security administration, as well as all authorities abroad, as long as it is based on reciprocity.<sup>41</sup>

**Section 9b**

(1) In relation to the other Member States of the European Union an attachment about the data of Section 2 Abs. 1 sub-para. 9 Criminal Records Code has to be enclosed to the transmission of information of the criminal record (after Sections 9 and 9a). The transmission of information is performed by using a form after annex IX of the „Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union“ (EU-JZG), BGBl. I Nr. 36/2004, in the version of BGBl. I Nr. 134/201. An additional translation is not necessary.

(2) The information has to be provided promptly and within ten working days of receipt of the request. If the state police department of Vienna needs further information for the identification of the person, whose information is requested, they have to consult promptly the central authority of the requesting Member State in order to provide the requested information within 10 working days after receiving the further information.

(3) If the central authority informs the state police department of Vienna, after transmitting the information of the criminal record, that that information is allowed to be transferred only for criminal proceedings, the information has to be marked appropriately. In this case the requesting Member State is to be referred to the sentencing state in order to receive further information.<sup>42</sup>

The transmission of information on criminal convictions from European Member states to Austria is regulated in Section 9c Criminal Records Code:

**Section 9c:**

The police state department of Vienna has to transmit requests of national authorities to access information of the criminal record of other member states to the central authority of the country of origin of the person concerned. The police state department of Vienna also has to forward incoming information to the requesting authority.

The transmission of criminal records certificates for citizens of other Member States of the European Union is regulated in Section 10a Criminal Records Code:

**Section 10a**

(1) If a citizen of another Member State requests a criminal record certificate, the competent authority has to act after Section 10 and has to inform the police state department of Vienna regarding the gathering of information of the criminal record of the country of origin of the applicant (*Formulars laut Anhang IX zum EU-JZG*). The country of origin has to transmit the gathered information to the person concerned.

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<sup>41</sup> Section 9 Strafregistergesetz: [https://www.jusline.at/9\\_Strafregisterauskuenfte\\_StrG.html](https://www.jusline.at/9_Strafregisterauskuenfte_StrG.html) (17.3.2014).

<sup>42</sup> Section 9b Strafregistergesetz: [https://www.jusline.at/9b\\_Anhang\\_zu\\_Strafregisterauskuenften\\_an\\_andere\\_Mitgliedstaaten\\_der\\_Europaeischen\\_Union\\_StrG.html](https://www.jusline.at/9b_Anhang_zu_Strafregisterauskuenften_an_andere_Mitgliedstaaten_der_Europaeischen_Union_StrG.html) (17.3.2014).

(2) If the country of origin does not react within two months of the request of information, the state police department of Vienna has to inform the person concerned that the country of origin has not transmitted any information of the national criminal record.

(3) The authority which is competent for the issue of a criminal record certificate after Section 10 is obligated to cooperate in conjunction with the request of information of the country of origin, especially with the verification of identification of the requested person. The competence for the cooperation is determined by the main residence of the applicant in the country. In the absence of a main residence in the country it is determined by the residence in the county, then by the last main residence in the country and then by the last residence in the country.

The reply of a request of a central authority of another Member State for information of the criminal record is regulated in Section 10b Criminal Records Code:

**Section 10b:**

The police state department of Vienna has to answer the request for information of an Austrian citizen's criminal record to a central authority of another Member State within twenty working days from receipt of the request. Content related restrictions after Section 10 (1) regarding the data after Section 2 (2) sub-para 1-9 and the ground of refusal after Section 10 (3) sub-para. 2 are not to be considered.

The notice to the member States of the European Union is regulated in Section 11a:

**Section 11a:**

If the state police department of Vienna knows that the convicted offender has several citizenships within the European Union, it has to inform the central authority of the convicted offender's country of origin as fast as possible about every single registered criminal conviction, as well as later amendments or cancellations or removals of entries. Requests of the central authority of the country of origin for transmission of a copy of a conviction based on a verdict and for permission for further information are to be forwarded to the ordinary court of first Instance for further action.

3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

The Austrian Government had to introduce new procedural legislation in order to implement the Directive 2011/93/EU, which is the Corrigendum to Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, before December, 18th, 2013. The substantive changes have been implemented in national law through legal amendments of the law reform governing sexual offences 2013.<sup>43</sup>

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<sup>43</sup> 532/ME XXIV. GP - Ministerialentwurf – Erläuterungen (2013), p. 2.

## Steps regarding disqualification

In general, Austria's criminal law has already fulfilled many international standards, as well as Regulation of the European Union. Despite recent changes to the Criminal Code, Austria had already ensured a high level of protection. Nevertheless, further changes are necessary in certain sections.<sup>44</sup>

Article 10 para. 1, in contrast to Article 5/3 of 2004/68/KI, intends to prohibit not only the supervision of children during professional activities but also activities involving "direct and regular contact with children". The Directive does not define the term "direct and regular contact with children". Its determination is reserved for the national State according to Recital 40. In order to implement the Directive, the Austrian legislator extended the list of criminal offences of the work ban of Section 220b Criminal Code. Now, the criminal offence covers not only activities which include parenting, educating and supervising of minors but also other activities involving intensive contact with minors. The extension of the work ban now covers professional and commercial activities, as well as activities for an organization or any other voluntary management.

The phrasing "intensive contact" complies with the guideline of the EU according to which it has to cover "direct and regular" contact. The contact is considered to be intensive if the interaction happens to be often and not only superficial. Typical activities are those that imply contact with minors and that provide the opportunity for the offender to get into contact with minors. For example: operators of school cafeterias, vendors in a toy store, children's doctor or – even under supervision – animators or other persons with similar activities at events or at facilities that have minors as their target audience. Activities which are not covered include, for example, sales activities at a supermarket in the area of a school. The work ban can include every activity but also only partial activities. For example, an operator of a catering company can be prohibited to operate a school cafeteria while he or she is still allowed to operate a canteen of a company.<sup>45</sup>

## Steps regarding screening

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<sup>44</sup> 2319 der Beilagen XXIV. GP - Regierungsvorlage – Erläuterungen, p. 1.

<sup>45</sup> 2319 der Beilagen XXIV. GP - Regierungsvorlage – Erläuterungen, p 19 462/ME XXIV. GP - Ministerialentwurf - Vorblatt und Erläuterungen, p. 22.

Article 10 para. 2 of the Directive wants to ensure that employers, when recruiting a person for professional or organized voluntary activities involving direct and regular contact 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.

In order to implement the Directive the Austrian legislator amended the criminal record law and added the option of requesting the “*Criminal record Certificate Kinder- und Jugendfürsorge*”.<sup>46</sup> This certificate informs about convictions against the sexual integrity and self-determination according to Section 2/1a Criminal Records Code, as well as data relating to the convictions according to Section 2/ 1 Z 7 and 8 or about the fact that the criminal record contains no such convictions or entries.

In respect of the evaluation of the candidate's suitability to perform, it is necessary that every person who applies for a professional or organized voluntary activity involving direct and regular contact with children, has the possibility to explicitly request his/ her personal “*Criminal record certificate Kinder- und Jugendfürsorge*”. The term “evaluation of the candidate's suitability to perform” is applicable to the stage of the application and to the evaluation of activities already performed within such areas.

An indispensable condition for the issue of the “*Criminal record certificate Kinder- und Jugendfürsorge*” is the presentation of a written request in which the issuer (usually the potential employer) certifies that the certificate is necessary in order to evaluate the candidate's suitability to perform. The following professional or voluntary activities come into consideration; activities in kindergartens, children's homes, apprentice's homes, youth centres, holiday camps, youth groups, SOS - children villages, facilities for supervision of juvenile perpetrators or afternoon childcare, sports clubs or children's department of hospitals or rehabilitation centres.<sup>47</sup>

### **Steps regarding transmission of information**

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<sup>46</sup> 2402 der Beilagen XXIV. GP - Regierungsvorlage - WFA und Vorblatt, p. 1.

<sup>47</sup> 532/ME XXIV. GP - Ministerialentwurf – Erläuterungen (2013), p. 11.

The Austrian Legislator has implemented the 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 that is mentioned in Article 10 (3) of the Directive, before April 27th, 2012.

Therefore, the Austrian legislator changed the phrase of the former Section 9 (1) Criminal Records Code “all foreign authorities as long as it is based on reciprocity” to “authorities of member states of the European Union for the purpose of security administration, as well as all authorities abroad, as long as it is based on reciprocity” and introduced Section 9(1)(3) that obligates the state police department of Vienna to transmit information about entries in criminal records on demand by “youth welfare organizations in order to avert a concrete threat of a certain minor caused by a certain person based on a special legislative regulation”.

Furthermore, the Austrian legislator introduced the regulations concerning the transmission of information on criminal convictions to European Member states after Section 9 (1) and 9b Criminal Records Code, the transmission of information on criminal convictions from European Member states to Austria after Section 9c, the transmission of Criminal records certificates for citizens of other Member States of the European Union after Section 10a, the reply of a request of a central authority of another Member State for information of the criminal record after Section 10b and the notice to the member States of the European Union after Section 11a.

### 3.5. In your view, does the current legal framework comply with Art. 10?

#### **Article 10 (1)**

The current Austrian legal framework regarding the work ban after Section 220b Criminal Code does not fully comply with Article 10 (1). On the one hand it goes further than the Directive because the work ban prevents a natural person not only from practicing at least professional activities involving direct and regular contacts with children but also from practicing professional and commercial activities, as well as activities for an organization or any other voluntary management. On the other hand it requires that the offender who committed a criminal offence against the sexual integrity and self-determination of minor has additionally to work or intended to work at the time of the crime on a professional or voluntary level for an organization or any other facility which provides parenting, educating or supervising of minors or intensive contact

with minors. Article 10 (1) only requires a convicted person, convicted of any of the offences referred to in Articles 3 to 7 of the Directive.

**Article 10 (2)**

The current legal framework regarding the entitlement of employers to request information on prior convictions, when recruiting a person for professional or organised voluntary activities involving direct and regular contacts with children, fully complies with Article 10 (2). According to the Directive, the Member State can decide whether the employer has 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 work ban. Therefore, Austria's current framework is sufficient.

**Article 10 (3)**

The current legal framework regarding the transmission of information on criminal convictions complies with fully complies with Article 10 (3).

If no, what additional measures should be taken in order to comply with Art. 10?

In order to fully comply with Article 10 (1), the Austrian legislator should waive the requirement that the convicted offender has additionally to work or intended to work at the time of the crime on a professional or voluntary level for an organization or any other facility which provides parenting, educating or supervising of minors or intensive contact with minors.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b> <b>Disqualification arising from convictions</b> 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.</p>	<p><b>Section 220 b Criminal Code:</b> If the offender has committed a punishable action against the sexual integrity and self-determination of a person under age, and has at the action time exercised an employment or other activity in an association or another institution or intends to exercise in education, training or supervision of a person under age or usually has intensive contacts with persons under age, the exercise to this and comparable activities is to be prohibited, for a</p>

	<p>duration from at least one and at most to five years, provided that the danger passes, that he will commit, otherwise, under exploitation to him, such an a punishable action with not only light outcome at compulsory opportunity.</p>
<p>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.</p>	<p><b>Section 9a (2) Criminal Records Code:</b> In accordance to special legal regulations, the federal police management of Vienna has to give to the youth well-being bearers, school authorities as well as official authorities and personnel places of the authorities in connection with the employment of people in facilities to the care, education or instruction of children and youthful information, data about according to Section 2 para. 1a indicated convictions as well as about data according to Section 2 para. 1 Z 7 and 8.</p> <p><b>Section 10a (1) Criminal Records Code:</b> If an application for exhibition of a penal register certificate is made by a citizen of another member state, the responsible authority has to go follow Section 10 and to concern, in addition, the federal police management of Vienna for the purpose of obtaining information from the penal register of the origin state of the applicant by means of form according to appendix IX to the EU-JZG of the central authority of the origin state of the applicant. The occurred information through the origin state is to be transmitted to the affected person.</p> <p><b>Section 10b (1) Criminal Records Code:</b> The federal police management of Vienna has to answer requests from central authorities of the other member states regarding information of the penal register for the purpose of information to the affected Austrian citizen within twenty working days from entrance of the request. Besides, the content restrictions. [...]</p>
<p>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</p>	<p><b>Section 9 (1) Criminal Records Code:</b> Disregarding federal laws and in interstate arrangements to intended cases, the land police management of Vienna has to give information about has to give free information from the penal register about registered data upon request according to Section2 para. 1 Z 1 to 6:</p> <ol style="list-style-type: none"> <li>1. To all home authorities, the offices of the federal police as well as concerning the members of the federal army also the military.</li> <li>2. Authorities of a member state of the European</li> </ol>



the exchange of information extracted from the criminal record between Member States [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.

Union for the purposes of the security management, as well as all foreign authorities, provided that mutuality exists,  
 3. In accordance with special legal regulations to youth well-being bearers for the avoidance or to the defence of a concrete danger of a certain child under age by a certain person.

**Section 9b (para. 1-3) Criminal Records Code:**

1) In proportion to the other member states of the European Union an appendix about everybody has to be connected to the information from the penal register (Sections 9 and 9a) according to Section 2 para. 1 Z 9 to taken up data. The information granting occurs under use of the form according to appendix IX to the federal law about the judicial cooperation in criminal cases with the member states of the European Union (EU-JZG), BGBl. I No. 36/2004, idF BGBl. I No. 134/2011. The connection of a translation is not necessary.

(2) The information is prompt to give at the latest, however, within ten working days from entrance of the request. If the federal police management of Vienna needs further information about the identification of the person to whom the request refers, she immediately has to consult the central authority of the asking for member state to be able to give the requested information within ten working days on receipt of the further information.

(3) If the central authority of the judgment state has informed the federal police management of Vienna on the occasion of the transmission of information from the penal register of the fact that these may not be passed on for other purposes than that one penal procedure, the information is to be marked accordingly. In such a case the asking for member state is to be expelled concerning further information to the judgment state.

**Section 9c:**

The police state department of Vienna has to transmit requests of national authorities to access information of the criminal record of other member states to the central authority of the country of origin of the person concerned. The police state department of Vienna also has to forward incoming information to the requesting authority.

The Transmission of Criminal records certificates for citizens of other Member States of the European Union is regulated in §10a *Strafregistergesetz*.



	<p><b>Section 10a</b></p> <p>(1): If a citizen of another Member State requests a criminal record certificate, the competent authority has to act after §10 <i>Strafregistergesetz</i> and has to inform the police state department of Vienna regarding the gathering of information of the criminal record of the country of origin of the applicant (<i>Formulars laut Anhang IX zum EU-JZG</i>). The country of origin has to transmit the gathered information to the person concerned.</p> <p>(2): If the country of origin does not react within two months of the request of information, the state police department of Vienna has to inform the person concerned that the country of origin has not transmitted any information of the national criminal record.</p> <p>(3) The authority which is competent for the issue of a criminal record certificate after Section 10 is obligated to cooperate in conjunction with the request of information of the country of origin, especially with the verification of identification of the requested person. The competence for the cooperation is determined by the main residence of the applicant in the country. In the absence of a main residence in the country it is determined by the residence in the county, then by the last main residence in the country and then by the last residence in the country.</p> <p><b>Section 10b:</b></p> <p>The police state department of Vienna has to answer the request for information of an Austrian citizen's criminal record to a central authority of another Member State within twenty working days from receipt of the request. Content related restrictions after Section 10 (1) regarding the data after Section 2/2/1-9 and the ground of refusal after Section 10/3/2.S are not to be considered.</p> <p><b>Section 11a:</b></p> <p>If the state police department of Vienna knows that the convicted offender has several citizenships within the European Union, it has to inform the central authority of the convicted offender's country of origin as fast as possible about every single registered criminal conviction, as well as later amendments or cancellations or removals of entries. Requests of the central authority of the country of origin for transmission of a copy of a conviction based on a verdict and for permission for further information are to be forwarded to the ordinary court of first Instance for further action.</p>
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## TOPIC 4.

### *Victim identification*

(Article 15 (4))

#### 4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

“Victim Identification is the term often given to the analysis of photographs and films depicting the sexual abuse of a child – known as child abuse material (CAM) – with the objective of locating the child and/or abuser seen in them. Victim identification is a combination of image analysis and traditional investigative methods. Image analysis is the examination of the digital, visual and audio content of those photographs and films for identification purposes. Clues can come from many places and in many forms, and it is the task of the victim identification specialist to retrieve those clues and piece them together using a range of specialized tools. The results of this analysis of the virtual world will be crucial to the investigation that can then take place in the physical world.”<sup>48</sup>

In general, the collaboration and coordination between the prosecuting authorities in Austria and other states concerning victim identification work well. The collaboration is based on the regulations of the police cooperation law, the INTERPOL bylaws, the EUROPOL convention and bilateral treaties related to the security police law, criminal law and criminal procedure law. The responsible Austrian registration office against child pornography of the criminal investigation department accepts information about material related to child pornography from national and foreign prosecuting authorities, as well as from internet users.<sup>49</sup> While investigating unknown victims and offenders of child abuse, the registration office against child pornography works already close with INTERPOL. INTERPOL is the largest international organization that fights against cross border crime. Due to the foundation of the INTERPOL office in Vienna, that is located in the criminal investigation department, the quality of the collaboration increased. Since the introduction of the International Child Sexual Exploitation image database (ICSE DB), managed by INTERPOL, in Austria in 2010, there is a constant international exchange based on this database which is the reason for the success of certain operations.<sup>50</sup> The ICSE DB:

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<sup>48</sup> <http://www.interpol.int/Crime-areas/Crimes-against-children/Victim-identification> (4.4.2014).

<sup>49</sup> [http://www.parlament.gv.at/PAKT/VHG/XXIII/AB/AB\\_00362/fnameorig\\_076251.html](http://www.parlament.gv.at/PAKT/VHG/XXIII/AB/AB_00362/fnameorig_076251.html) (5.4.2014).

<sup>50</sup> [http://www.bmi.gv.at/cms/bmi/\\_news/bmi.aspx?id=443664514438455A4A48513D&page=60&view=1](http://www.bmi.gv.at/cms/bmi/_news/bmi.aspx?id=443664514438455A4A48513D&page=60&view=1) (10.4.2014).

“Is a powerful intelligence and investigative tool which allows specialized investigators to share data with colleagues across the world. Available through INTERPOL's secure global police communications system (known as I-247), the ICSE DB uses sophisticated image comparison software to make connections between victims, abusers and places. [...] The ICSE DB enables certified users in member countries to access the database directly and in real time, thereby providing immediate responses to queries related to child sexual exploitation investigations.”<sup>51</sup>

In process of the research, no other national legal framework was found.

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

There are no actual steps which have been taken by Austria to implement Article 15 (4).

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)? If no, what additional measures should be taken in order to comply with Art. 15 (4)?

The current legal framework complies with Article 15 (4) because Austria takes 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.

## TOPIC 5.

### *(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

#### 5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

##### **5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

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<sup>51</sup> <http://www.interpol.int/Crime-areas/Crimes-against-children/Victim-identification> (4.4.2014).

Yes. The “principle of territoriality” (Section 62 Criminal Code) states that the Austrian criminal law applies for those acts which have been committed in Austria. It is sufficient that the offender has entered into a phase of executing the action in Austria.

The principle of territoriality is enhanced by the so called “flag principle” (Section 63 Criminal Code). Acts on board of ships and aircrafts fall under the criminal jurisdiction of the State in which they are registered.

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

Yes. Section 64 of the Austrian Criminal Code (*StGB*) lists offences which are punishable under Austrian law regardless where they were committed. Some offences require that the offender is an Austrian citizen. Regarding to Section 64 some sexual offences<sup>52</sup> are punishable under Austrian law if the offender or the victim is Austrian or has got his usual resident in-country or if through the crime other Austrian interests are violated or the offender was at the time of the crime foreigner, is in Austria and can't be extradited. Sexual offences which are not listed in Section 64 (1) 4a can be sanctioned if they were committed by an Austrian to an Austrian and if both have got their residence or ordinary residence in-country.

The Austrian criminal law applies also for other offences, than those mentioned in Sections 63 and 64, which were committed abroad, if the offence is also punishable by the laws of the place where the crime was committed, if the perpetrator was Austrian at the time of the offence or later gained the Austrian citizenship and still owns it at the beginning of the criminal procedure.

The punishability is omitted, if the punishability of the crime is ceased by laws of the place where the crime was committed or if the perpetrator was legally binding discharged by a court of the state where the crime was committed or the prosecution was suspended by any other way or if the perpetrator was legally binding sentenced by a foreign court and the sentence was fully executed, or if it wasn't executed, it was waived or the execution is past the statute of limitation

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<sup>52</sup> Section 6a (1) 4a Criminal Code: Genital mutilation according to Section 90 (3), extortion abduction (Section 102), deliverance to a foreign power (Section 103), black-birding (Section 104), human trafficking (Section 104a), serious coercion according to Section 106 (1/3), forbidden adoption placement (Section 194), forcible rape (Section 201), sexual coercion (Section 202), sexual abuse of a defenceless or mentally handicapped person (Section 205), heavy sexual abuse of minors under 14 (Section 206), sexual abuse of minors under 14 (Section 207), pornographic presentation of minors according to Section 207a (1) and (2), sexual abuse of juveniles (Section 207b), abuse of authoritative relation according to Section 212 (1), promotion of prostitution and pornographic presentation of minors (215a), transnational prostitution trade (Section 217).

by the foreign law or as long as the execution of the sentence of a foreign court is totally or partial suspended.

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

There is no specific legislative provision in this regard, even though in Section 64 (6) of the Austrian Criminal Code is a general clause which says that “other sanctioned actions, which has to be followed by Austria, even though they were committed abroad, if it is its duty, not minding the criminal laws of the place where the crime was committed”.

However, it would seem that where an offence can be committed by means of information and communication technology accessed from Austria (even where the technology is not based in Austria), the offender would be subject to the jurisdiction of the Austrian courts if it fits the requirements of Sections 62-65.<sup>53</sup>

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

No.

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

Yes. As mentioned above, Section 64 of the Austrian Criminal Code (*StGB*) lists offences which are punishable under Austrian law regardless where they were committed and also regardless of the condition that the offences are criminal offences at the place they were performed. Regarding

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<sup>53</sup> See the corresponding provisions.

to Section 64 some sexual offences<sup>54</sup> are punishable under Austrian law if the offender or the victim is Austrian or has got his usual resident in-country or if through the crime other Austrian interests are violated or the offender was at the time of the crime foreigner, is in Austria and can't be extradited. Sexual offences which are not listed in Section 64 (1) 4a can be sanctioned if they were committed by an Austrian to an Austrian and if both have got their residence or ordinary residence in-country.

### 5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

As noted above, in respect of the prosecution of offences which would be offences under Sections 90, 102-104a, 106, 194, 201-202, 205-207b, 212, 215a and 217 of the Austrian Criminal Code it is not a condition that the acts must be committed in Austria when the perpetrator or the victim is Austrian or has his habitual residence in the country.

Section 64 paragraph 1 line 6 provides that Austria is obliged to prosecute other punishable actions, even if they have been committed abroad, regardless of the criminal laws on the site of crime. Line 7 provides that offences can be sanctioned if they were committed by an Austrian to an Austrian and if both have got their residence or ordinary residence in-country.

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

No, it is not.

c) The offender is a habitual resident (Art. 17(2)(c))?

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<sup>54</sup> Section 6a (1) 4a Criminal Code: Genital mutilation according to Section 90 (3), extortion abduction (Section 102), deliverance to a foreign power (Section 103), black-birding (Section 104), human trafficking (Section 104a), serious coercion according to Section 106 (1/3), forbidden adoption placement (Section 194), forcible rape (Section 201), sexual coercion (Section 202), sexual abuse of a defenseless or mentally handicapped person (Section 205), heavy sexual abuse of minors under 14 (Section 206), sexual abuse of minors under 14 (Section 207), pornographic presentation of minors according to Section 207a (1) and (2), sexual abuse of juveniles (Section 207b), abuse of authoritative relation according to Section 212 (1), promotion of prostitution and pornographic presentation of minors (215a), transnational prostitution trade (Section 217).

Yes. Like stated above Section 64 (1) 4a also provides that offences which fall under this provision were committed by a person, who has his habitual residence in Austria, are punishable under Austrian law.

If no, what are in your view the prospects of your MS prevailing itself of the option provided in Article 17?

Austria has transposed most part of the optional jurisdiction from Article 17 (2) of the Directive into Austrian law. Lacking is the establishment of jurisdiction for offences committed for the benefit of a legal person established in its territory (Section. 17 (2)(b)).

5.2. Which steps have been taken in your MS in order to implement Article 17?

The legislation referred to above was partially introduced to implement Article 17 of the Directive.

5.3. In your view, does the current legal framework comply with Article 17?

No, not in full.

If no, what additional measures should be taken in order to comply with Article 17?

In the enumeration of the Sections 62-65 solicitation of children for sexual purposes (Sec. 208a) and also offences committed by means of information and communication technology accessed from Austria, even where the technology is not based in Austria, are not mentioned explicitly.

Even though Sec. 64 (6) of the Austrian Criminal Code contains a general clause which says that:

“Other sanctioned actions, which has to be followed by Austria, even though they were committed abroad, if it is its duty, not minding the criminal laws of the place where the crime was committed”,

legislation should be introduced to conform that the Austrian courts can assert jurisdiction where an offence is committed by means of information and communication technology accessed from Austria and for solicitation of children according to Sec. 208a.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <p>(a) the offence is committed in whole or in part within their territory; or</p> <p>(b) the offender is one of their nationals.</p> <p>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:</p> <p>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</p> <p>(b) the offence is committed for the benefit of a legal person established in its territory; or</p> <p>(c) the offender is an habitual resident in its territory.</p> <p>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.</p> <p>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.</p> <p>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</p>	<p><b>Punishable actions in-country</b> <b>Section 62</b> The Austrian criminal laws apply for all offences, committed in-country.</p> <p><b>Punishable actions on board of Austrian ships or aircraft</b> <b>Section 63</b> The Austrian criminal laws also apply for offences, which were committed on board of an Austrian ship or aircraft, unattached where it is located.</p> <p><b>Punishable actions abroad, which are prosecuted regardless to the laws of the place where the crime was committed</b> <b>Section 64</b> (1) The Austrian criminal laws apply unharmed by the criminal law of the place where the crime was committed for following offences committed abroad:</p> <p>4a. Genital mutilation according to Section 90 (3), extortion abduction (Section 102), deliverance to a foreign power (Section 103), black-birding (Section 104), human trafficking (Section 104a), serious coercion according to Section 106 (1/3), forbidden adoption placement (Section 194), forcible rape (Section 201), sexual coercion (Section 202), sexual abuse of a defenceless or mentally handicapped person (Section 205), heavy sexual abuse of minors under 14 (Section 206), sexual abuse of minors under 14 (Section 207), pornographic presentation of minors according to Section 207a (1) and (2), sexual abuse of juveniles (Section 207b), abuse of authoritative relation according to Section 212 (1), promotion of prostitution and pornographic presentation of minors (215a), transnational prostitution trade (Section 217), if</p> <p>a) the offender or the victim is Austrian or has got his usual resident in-country,</p> <p>b) through the crime other Austrian interests are violated or</p> <p>c) the offender was at the time of the crime foreigner, is in Austria and can't be extradited;</p> <p>5. ...</p> <p>Other sanctioned actions, which has to be followed by Austria, even though they were committed abroad, if it is its duty, not minding the criminal</p>



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.

laws of the place where the crime was committed. Sanctioned actions, committed by an Austrian to an Austrian, if both have got their residence or ordinary residence in-country.

Participation (Section 12) to a punishable act, which was committed by the offender in-country, as fencing (Section 164) and money laundering (Section 165) in connection to a crime committed in-country.

...

(2) If it is only impossible to exert the criminal laws mentioned in sub-para. 1, because the offence proves to be action which is sentenced more stringent, the offence committed abroad shall be, not concerned by the laws of the place where the crime was committed, be punished by the Austrian criminal laws.

**Punishable actions abroad, which are only prosecuted if they are punishable by the laws of the place where the crime was committed**

**Section 65** (1) For other offences, than those mentioned in Sections 63 and 64, which were committed abroad, the Austrian criminal laws apply, if the offence is also punishable by the laws of the place where the crime was committed:

1. If the the perpetrator was Austrian at the time of the offence or later gained the Austrian citizenship and still owns it at the beginning of the criminal procedure.
2. If the perpetrator was a foreigner at the time of the offence, get caught in-country and cant be extradited to a foreign country because of an other reason than the offence

The sentence should be determined in a way, that the offender isn't worse-posed by the whole impact than by the law of the place where the crime was committed.

If there is no penal power on the place where the crime was committed, it is adequate, if the crime is punishable by the Austrian laws.

**The punishability is omitted:**

1. If the punishability of the crime is ceased by laws of the place where the crime was committed;
2. If the perpetrator was legally binding discharged by a court of the state where the crime was committed or the prosecution was suspended by an other way;
3. If the perpetrator was legally binding sentenced by a foreign court and the sentence was fully executed, or if it wasn't executed, it was waived or

	<p>the execution is past the statute of limitation by the foreign law;</p> <p>4. As long as the execution of the sentence of a foreign court is totally or partially suspended. Preventative measures as provided in the Austrian laws, if the requirements are fulfilled, shall be directed against an Austrian even though if he cannot be punished in-country according to the causes of the previous sub-para.</p>
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## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

#### 6.1. Please describe the current national legal framework with regard to child victims

##### 6.1.1. General framework of protection (Art. 18)

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

According to Section 10 para 1 of the Austrian Code of Criminal Procedure a victim of a crime has the right to participate in the criminal proceedings. In this context, the law enforcement authorities (criminal police, prosecution) and the court are obliged to respect the rights and interests of the victims.<sup>54</sup> Section 10 para 3 of the Austrian Code of Criminal Procedure describes the standing on victims in criminal proceedings in more detail and states that:

“All authorities, bodies and people engaged in criminal proceedings have to treat victims with respect for their personal dignity and note their interest in protecting their highly personal sphere of life during criminal proceedings. This is especially true for disseminating photographs and information of data, that could easily acquaint the victim's identity to a larger group of people, without this being provided in purpose of criminal justice.”

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

<sup>54</sup> Eder-Rieder, “Die Stellung des Opfers im neuen Strafverfahren, JSt 2008”, 114.

Section 78 para. 1 of the Austrian Code of Criminal Procedure provides information about the “duty of disclosure” (*Anzeigepflicht*) of criminal offences. This “duty of disclosure” obliges all public authorities or departments to report a suspected crime that happens within their legal sphere of action to the criminal police or prosecution. Although two exceptions can be found in section 78 para. 2, even though the principle of the protection of victims, pursuant to Section 78 para. 4, has top priority.

More specific rules for different professional groups, such as doctors or teachers can be found in relevant regulations. Individuals, however, are not subject to reporting, but have the right to lodge a complaint.<sup>55</sup>

Section 78 of the Austrian Code of Criminal Procedure states that:

“(1) If an authority or public office suspects a criminal offence within its legal sphere of action, it is required to report this to the criminal police or prosecution.

(2) An obligation to report pursuant to paragraph 1 does not apply

1. If the disclosure would affect an official action that requires the effectiveness of a personal mutual trust,

2. If and as long as there are sufficient reasons to believe that a criminal offence will be omitted in a short time by compensating measures.

(3) The authority or public office has to provide highest standards of the protection of victims and other people; if necessary, there is also a duty of disclosure pursuant to para. 2.”

Another protective regulation in terms of child abuse can be found in Section 211 para. 1 of the Austrian Civil Code that provides information about the point in time when competent authorities, in this case child care departments, are forced to intervene if it has been failed on acting in the best interest of the child.

“The youth welfare department has to apply measures necessary to maintain the welfare of minor court orders in the area of child custody. In exigent circumstances, it can take the necessary measures of care and education provisionally while the judicial decision is pending, and he has to apply for decision immediately within eight days. In the scope of the measures taken, the youth welfare department is provisionally entrusted with custody.”

“The best interest of the child” (german: “*Kindeswohl*”), defined in section 138 of the Austrian Civil Code, is the highest principle within Austria's' Family Law, especially in fields of public youth welfare and guardianship courts.

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<sup>55</sup>Zenz, “Die Anzeigepflicht von Ärzten, Jugendwohlfahrtseinrichtungen und Schulpsychologen bei Verdacht auf Kindesmisshandlung (Dissertation)”, <http://www.plattform-educare.org/Dissertationen/Kindesmisshandlung.pdf>, accessed on 15 March 2014.

“In all matters relating to the minor child, in particular the care and personal contacts, the best interest of the child (child welfare) should be considered as highest principle and to ensure the best possible.”

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

In the case that there is allegedly a child subject to an offence in Austria, the competent child care department, which is instituted in the district authority or the responsible magistrate, will be notified about child abuse immediately. They support children and adolescents in terms of violence and provide guidance further on.

According to jurisdiction, children at the age of five years old are generally considered as witnesses for questioning. Though there are exceptions to this rule, as to allow child victims under five years old also to act as witnesses. In fact, each individual case needs to be considered very carefully under the eyes of a psychological expert who determines the capacity of their understanding. That is why the Austrian Supreme Court considers even three to four year old child victims eligible for being a witness. Nonetheless, the ability to act as a witness under the age of 3 is not negotiable.<sup>56</sup>

### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art. 19 (1))?

Since 1 January 2006, Austria has adopted a legal right to support victims of violence or dangerous criminal threat, as well as victims who are violated in their sexual integrity under certain conditions. Basically, there are two support components of facilitation ("dual facilitation"): firstly, the psychosocial support before, during and after police and judicial hearings and secondly, the legal assistance, i.e. legal advice and representation in court by attorneys.<sup>57</sup>

Section 66 para. 2 of the Austrian Code of Criminal Procedure states that victims of sexual abuse are always granted psychosocial and legal assistance before, during and post trial. In fact, the

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<sup>56</sup> Bart, "Kinder als Zeugen im Strafverfahren – insbesondere als Opfer sexuellen Missbrauchs", ÖJZ 1998 (818) 3.

<sup>57</sup> Bundeskanzleramt Österreich, <http://www.frauen.bka.gv.at/site/7224/default.aspx>, accessed 15 March 2014.

amendment of the sexual criminal law from 2008 made psychosocial assistance mandatory for child victims under the age of 14.<sup>58</sup>

"Victims within the meaning of Section 65 para. 1 lit a or b must be granted at their request psychosocial and legal assistance, to the extent necessary to provide procedural rights of victims with the greatest possible consideration of their personal involvement. Victims who may have been violated in their sexual integrity and haven't completed their fourteenth year of life yet are obligated to psychosocial assistance. Psychosocial and legal assistance must be given before, during and after trial. The Federal Minister of Justice is authorized to provide appropriate facilities and facilitation to victims who are within the meaning of Section 65 para 1 lit a or b of the Austrian Code of Criminal Procedure."

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

In cases of domestic violence within the family, Austria has two main regulations of protection.

The first regulation can be found in Section 382b of the Austrian Enforcement Act that provides the protection of domestic violence within the family. This basically means that a temporary injunction may be obtained against the violator by the competent court. In fact, the temporary injunction instructs the violator to leave his/her home and also stay away from the surrounding area.

"(1) The Court has to grant the request of a victim, who was been insulted, threatened, physically and mentally attacked by a close relative and therefore makes it impossible to live in the same apartment, to

1. Make the violator leave the apartment and its surrounding area
2. Prohibit the violators return to his home and the immediate environment, if the applicant is in urgent need of the accommodation."

Since 1 September 2013, child care departments have to be immediately notified by the police about a temporary injunction, i.e a prevention to enter the home, for providing the highest standards of protection for domestic violence in families. As soon as this step is taken, the child care department informs other institutions or professionals who may take care of the children further. Help will be provided either in terms of psychological care or other supports, such as intervention centres for minors who were victims of violence.<sup>59</sup>

<sup>58</sup> Die österreichische Justiz, <http://www.justiz.gv.at/web2013/html/default/2c94848535a081cf0135a49ef4880021.de.html>, accessed 15 March 2014.

<sup>59</sup> Help.gv.at, <https://www.help.gv.at/Portal.Node/hlpd/public/content/291/Seite.2910017.html>, accessed 16 March 2014.

Section 38 Security Police Act states another personal protection order (para 1), as well as another prohibition order to enter the home in cases of domestic violence (para 2).

“(1) If on the basis of certain facts, especially if there happened previous dangerous attacks on life, health or freedom, and public security assumes that an immediate attack might be approached, they are authorized to enter

1. The apartment of the endangered, and its immediate vicinity;
2. And, if the endangered is a minor (under age 14), they are also authorized to enter
  - a) the school of the endangered
  - b) a institutional child care center
  - c) a facility of child care that differs from lit b), such as after-school care clubs.

- (2) In course of a prohibition order to enter the home, bodies of public security are authorized to
  1. Make the violator aware of his prohibition order in terms of entering the home, as well as the places which are under protection.
  2. Make him leave the protected place pursuant to Para 1, if he refuses to cooperate.
  3. To take away the keys to the apartment pursuant to Para 1 Clause 1.
  4. To give the violator the opportunity to gather his personal gadgets from the apartment and get information about a place to stay.”

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

No, a child victims' willingness to cooperate in the criminal investigations, prosecution and trial are not made conditional to assistance and support measures in Austria. More importantly, there is no obligation to testify for victims of sexual offences (no age limit) if the parties had an opportunity to participate in a previous court hearing (“adversarial hearing”), as well as under 14-year-old victims of other offences, if the parties also had an opportunity to participate in a previous court hearing.<sup>60</sup>

Section 156 para 1 Clause 2 of the Austrian Code of Criminal Procedure says that:

- “(1) The obligation to testify is exempt:
2. People who might have been hurt by the accused alleged offence and who have not yet reached the age of fourteen at the time of their testimony or may have been injured in their sexual sphere, if the parties had the opportunity to participate in a previous adversarial hearing (Sections 165, 247).”

Furthermore, Section 158 para 1 Clause 2 of the Austrian Code of Criminal Procedure provides that:

- “(1) Answering individual questions can refuse:

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<sup>60</sup> Gewaltinfo.at, <http://www.gewaltinfo.at/recht/strafverfahren/zeugen.php>, accessed 16 March 2014.

2. People who have been injured by the alleged offence of the accused in their sexual sphere or could have been hurt, as far as they reveal details of the facts, the description of which they consider to be unreasonable.”

Especially notable is Section 158 para 2, since it states an exception of section 158 para 1 clause 2 and provides that it is necessary for victims to testify because of the urgent and special importance of their testimony.

“(2) The people referred to in para 1 may be required to testify despite refusal, if it is indispensable because of the special importance of their testimony for the subject of the proceeding.”

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

Section 70 para 2 of the Austrian Code of Criminal Procedure provides information about specific circumstances of a particular victim of its sexual integrity.

“(2) Victims who may have been violated in their sexual integrity shall be informed at the latest before their first questioning, as well as their following legal rights:

1. To demand to be heard by a person of the same sex within the investigation process.
2. Answering questions on the circumstances of their most personal lives or details of the offence the description of which they consider unreasonable to refuse (Section 158 para 1,2).
3. To demand to be heard in a gentle way within the trial (Section 165, 250, para 3).
4. To demand the public be excluded from the main hearing (Section 229 para 1).”

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

In Austria, children of sexual abuse are particularly vulnerable victims. Therefore Section 66 para 2 of the Austrian Code of Criminal Procedure obliges psychosocial assistance for child victims under the age of 14. This kind of assistance is also granted for children older than 14 but it is not mandatory.

“Victims within the meaning of section 65 para 1 lit a or b must be granted at their request psychosocial and legal assistance, to the extent necessary to protect the procedural rights of victims with the greatest possible consideration of their personal involvement. Victims who may have been violated in their sexual integrity and haven't completed their fourteenth year of life yet are obligated to psychosocial assistance. Psychosocial and legal assistance must be given before, during and after trial. The Federal Minister of Justice is authorized to provide appropriate facilities and facilitation to victims who are within the meaning of section 65 para 1 lit a or b Code of Criminal Procedure.”

Furthermore, Section 66 para 1 of Austrians Code of Criminal Procedure provides additional information about the specific catalogue of a victim's legal rights, such as representation and access to files.

- “(1) Victims have the legal right – regardless of their status as a private party
1. To be represented (Section 73).
  2. To access records (Section 68).
  3. To be informed by the subjects of the proceedings and their basic rights prior to interrogations (Section 70 para 1).
  4. To be notified of the progress of the proceedings (Section 177 para 5, 194, 197, Section 3, 206, and 208, para 3),
  5. On translation assistance by interpreters in accordance with Section 56 para 2 and 7
  6. Participate in an adversarial questioning of witnesses (Section 65) and at a “*Tatrekonstruktion*” (section 150 para 1),
  7. To be present during trial and to interview defendants, witnesses and experts, as well as one of their claims,
  8. To require the continuation of a set by the prosecution proceedings (Section 195 para 1).”

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe

There are several organizations in Austria which are specialized in assisting and supporting families of child victims.<sup>61</sup> These institutions are child care departments, child protection centres, psychological care facilities specialized in sexual abuse, as well as physicians/hospitals and the police.<sup>62</sup>

Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

Parents, who have custody of their children, are their legal representatives. Therefore, they have access to the files regarding their children.

Article 4 of the Framework Decision 2001/220/JHA was transposed in Section 68 of the Austrian Code of Criminal Procedure that states:

- “(1) Private parties and private prosecutor are entitled to get access to the file, as far as their interests are concerned; agreed, that the Section 51, 52 , Section 1 para 2 clause 1 and 3 as well as

<sup>61</sup> Beratungsstellen, <http://www.beratungsstellen.at/fachgebiete/beratungsstellen-mit-fachgebiet-sexueller-missbrauch-in-wien/ges2/5/0/W/0>, accessed 16 March 2014.

<sup>62</sup> Bundesministerium für Wirtschaft, Familie und Jugend, [http://bmwa.cms.apa.at/cms/content/attachments/8/6/4/CH0617/CMS1263906444774/kso-6\\_aufgabe-2013-web.pdf](http://bmwa.cms.apa.at/cms/content/attachments/8/6/4/CH0617/CMS1263906444774/kso-6_aufgabe-2013-web.pdf), accessed 16 March 2014.



Section 53 shall apply. In addition, access to the file may only be refused or restricted, to the extent if the purpose of the investigation or an unaffected statement would be at risk as a witness.  
 (2) This right of access is also granted to victims who do not participate as a private party in the proceedings.  
 (3) The prohibition of publication under Section 54 applies to victims, a private party and private plaintiff.”

### 6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which

Section 66 para 1 sub-para. 1 of the Austrian Code of Criminal Procedure provides information about the legal representation and states that victims may be represented by attorneys, recognized victim protection facilities, such as intervention centers against domestic violence, e.g. “*Weißer Ring*” (pursuant to Section 25 para 3 of the Federal Security Police Act, “*SPG*”), or by other qualified people – among others legally trained relatives. These people support and assist victims and exercise their procedural rights, unless otherwise specified by the law.<sup>63</sup>

Additionally, Section 73 of the Austrian Code of Criminal Process describes legal representatives in more detail and states that:

“Representatives assist and support liable parties, victims, private parties, private prosecutors and “*Subsidiärankläger*”. They practice the procedural rights of the represented, as long as it is in alignment with the law. As a representative is a person entitled to exercise the legal profession, according to Section 25 para. 3 *SPG*, recognized organizations for protection or other suitable people who may be nominated.”

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:

a) Available for the purpose of claiming compensation?

Legal assistance is regulated in Section 66 para. 2 Austrian Code of Criminal Procedure. Victims according to Section 65 sub-para. 1 lit a, who were violated in their sexual integrity, have a right to psychosocial and legal facilitation on demand, as far as it is necessary to maintain their procedural rights.

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<sup>63</sup> Eder-Rieder, Die Stellung des Opfers im neuen Strafverfahren, JSt 2008, 114 (114).

Whether assistance is necessary or not, has to be evaluated by the institutions offering this assistance themselves. However, it is not possible to lodge an appeal if a victim is refused to get assistance, which is criticised in the doctrine. Therefore an introduction of a judicial monitoring of the institution's evaluation concerning the granting of psychosocial and legal assistance is worth considering.

However, victims of sexual violence under an age of 14 have a right to psychosocial facilitation in any way. (Section 66 para. 2 Austrian Code of Criminal Procedure).

The legal facilitation includes legal counselling and representation by an attorney. It is also available for the purpose of claiming compensation according to section 67 Austrian Code of Criminal Procedure.

b) Free of charge where the victim does not have sufficient financial resources?

The arising costs are covered by the Austrian ministry of justice.<sup>64</sup>

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

The interview of the victim generally takes place after the report of the incident to the competent authorities. Section 9 Austrian Code of Criminal Procedure regulates the so-called "principle of acceleration" (in German: "*Beschleunigungsverbot*") according to which criminal proceedings have to be conducted in a timely manner.

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

The situation differs according to where the interview takes place. All regional courts provide special premises equipped for interviewing child victims<sup>65</sup>, whereas most police stations lack in

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<sup>64</sup> Lurf, "Opferschutz im Strafverfahren", p. 219.

<sup>65</sup> Report of the forensic- psychiatric ambulance of the "General Hospital Vienna ("AKH Wien") and the university for medical sciences of Vienna ("Medizinische Universität Wien") p. 25  
[http://www.meduniwien.ac.at/orgs/fileadmin/gerichtsmedizin/images\\_2012/Forensisch-Psychiatrische\\_Kinderschutzambulanz\\_Voelkl-Kernstock\\_29.11.2012.pdf](http://www.meduniwien.ac.at/orgs/fileadmin/gerichtsmedizin/images_2012/Forensisch-Psychiatrische_Kinderschutzambulanz_Voelkl-Kernstock_29.11.2012.pdf).

child- appropriate rooms<sup>66</sup>. Nevertheless, the ministry of inner affairs planned a working group aiming at introducing more appropriate rooms in the executive authorities' premises.

c) Interviews with the child victim are carried out by or through professionals trained for this purpose?

The treatment of victims during the judicial procedure is part of the annual further education program of judges and prosecutors<sup>67</sup>. Sexual crimes are qualified as so-called "offences of morality" (in German: "*Sittlichkeitsdelikte*"). Only judges and prosecutor with a special expert knowledge are allowed to deal with such cases.

Furthermore, according to Section 165 para. 3 Austrian Code of Criminal Procedure, legal authorities can also engage an official expert, such as a publicly authored and sworn psychiatrist to conduct the interview. This can especially be the case if the victim is a minor and particularly if he or she is under the age of 14.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

There are generally no limits concerning the number of persons conducting the interviews with the child victim. Nonetheless, according to article 3 of the UN Convention on the Rights of the Child, which was implemented in Art 1 of the Austrian "federal constitutional law on the rights of children" (in German: "*Bundesverfassungsgesetz über die Rechte von Kindern*"); the best interests of the child shall be a primary consideration. Thus, a limitation of interviewers seems imperative if it is in the child's best interest.

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?

Para. 5 Austrian Code of Criminal Procedure determines the so-called principle of "legality and proportionality" (in German: "*Gesetz- und Verhältnismäßigkeit*"). Criminal police, public prosecution department and judicature only have the right to interfere into rights of a person if this is explicitly regulated by law and necessary to fulfil their tasks. Section 2 sentence 1 regulates that,

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<sup>66</sup> Haller/Hofinger „Studie zur Prozessbegleitung“, p. 114.

<sup>67</sup> „Zweiter österreichischer Kinderrechtebericht“, p. 133 [http://www.kinderrechte.gv.at/wp-content/uploads/2013/10/2\\_Oesterreichischer\\_Staatenbericht\\_zum\\_Uebereinkommen\\_ueber\\_die\\_Rechte\\_des\\_Kiandes\\_2002.pdf](http://www.kinderrechte.gv.at/wp-content/uploads/2013/10/2_Oesterreichischer_Staatenbericht_zum_Uebereinkommen_ueber_die_Rechte_des_Kiandes_2002.pdf).

among several possible investigatory actions, competent authorities have to take the least harmful action for the persons concerned.

What is more, according to para. 156 section 1 line 2 Austrian Code of Criminal Procedure, persons under the age of 14 and/or that could have been violated in their sexual integrity, have the right to refuse to give testimony according to section 250 para. 3 Austrian Code of Criminal Procedure if he or she has already been interviewed and the involved parties have had the opportunity to take part in it.

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?

The accompaniment of a legal representative during the interview is permitted by law.

Witnesses of sexual violence have the right to be accompanied by a person of his or her choice, a so-called "*Vertrauensperson*", which can be translated as "person of trust"<sup>68</sup>, according to section 160 para. 2 Austrian Code of Criminal Procedure. When it comes to witnesses under the age of 14, the consultancy of a "*Vertrauensperson*" during the interview is mandatory according to section 160 para. 3 Austrian Code of Criminal Procedure.

Even though witnesses are generally free in their choice of a „*Vertrauensperson*“, they are restricted in some constellations. According to section 160 para. 2 Austrian Code of Criminal Procedure, persons who are suspected to be involved in the crime, who already testified or who might be summoned to court as a witness, as well as person that could influence the witnesses' testimony, are prohibited from being present during the interview. Hence, when it comes to a testimony of a child victim of sexual violence, close relatives are generally inappropriate "persons of trust" since they might have a negative influence on the child itself and/or might be needed as witnesses themselves.<sup>69</sup>

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

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<sup>68</sup> <https://www.help.gv.at/Portal.Node/hlpd/public/content/291/Seite.2910420.html>, access: 02.03.2014.

<sup>69</sup> Lurf, „Opferschutz im Strafverfahren auf internationaler und nationaler Ebene“ p. 117.

The audio-visual recording of interviews of a child victim of sexual violence is possible but requires the permission of the minor itself as well as of its legal representative. An interview will not be recorded if the perpetrator was using a camera during the crime<sup>70</sup>. A recorded interview can be used as evidence in criminal court proceedings whereat the victim has to be informed about according to section 165 para. 5 Austrian Code of Criminal Procedure.

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

Section 10 para. 3 Austrian Code of Criminal Procedure explicitly imposes the protection of the victim's most personal sphere of life and particularly highlights the protection of its identity. In cases of serious endangerment of a witnesses' life, health or personal freedom according to Section 162, the public can be excluded from parts of or from the trial<sup>71</sup> as a whole according to Sections 229 and 456 Austrian Code of Criminal Procedure,<sup>72</sup>. Beyond that, during the hearing of witnesses it is also possible to temporarily preclude the accused person from the trial according to section 250 para. 1 Austrian Code of Criminal Procedure.

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

For certain cases of sexual crimes, Austrian law provides a special kind of interview, the so-called "contradictory interview" (in German: "*kontradiktorische Einvernahme*")<sup>73</sup>. It means that victims are interviewed in a separate room and can be heard in the courtroom through audio-visual systems, such as cameras. This kind of interview can be conducted by request of the prosecution department, ex officio or by so-called victims especially "worthy of protection" (para. 165 section 3 sentence 1 and section 4).

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<sup>70</sup> "Zweiter Österreichische Kinderrechtsbericht" p. 133 [http://www.kinderrechte.gv.at/wp-content/uploads/2013/10/2\\_Oesterreichischer\\_Staatenbericht\\_zum\\_Uebereinkommen\\_ueber\\_die\\_Rechte\\_des\\_Kiandes\\_2002.pdf](http://www.kinderrechte.gv.at/wp-content/uploads/2013/10/2_Oesterreichischer_Staatenbericht_zum_Uebereinkommen_ueber_die_Rechte_des_Kiandes_2002.pdf).

<sup>71</sup> <https://www.help.gv.at/Portal.Node/hlpd/public/content/291/Seite.2910420.html>.

<sup>72</sup> Lurf, "Opferschutz im Strafverfahren" p. 163.

<sup>73</sup> Lurf, "Opferschutz im Strafverfahren" p. 163.

While this type of interview is mandatory for victims of sexual violence aged under 14, older persons generally have to apply for it<sup>74</sup>. Only if it seems imperative according to judicial discretion, the “contradictory hearing” can be conducted without a special request.<sup>75</sup>

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

General protection of the privacy, identity and image of a victim is provided in the already mentioned Section 10 para. 3 Austrian Code of Criminal Procedure. According to Section 162 sentence 1 Austrian Code of Criminal Procedure a witness has the right not to answer questions concerning his or her identity as mentioned in Section 161 Austrian Code of Criminal Procedure in cases of serious endangerment of the witnesses' or a third persons' life, health or personal freedom. Likewise, under the same circumstances, according to Section 51 para. 2 Austrian Code of Criminal Procedure, it is possible to exclude personal data from the files as well as other data that could give information about the identity of a person. What is more, according to Section 54 Austrian Code of Criminal Procedure the accused person and his or her legal representative are explicitly prohibited from publishing personal data of victims and their relatives.

6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify

Concerning Article 20: The Austrian provisions concerning the representation and interview of the child victim have been quite well developed already before the Directive 2011/93 has been issued. This is why there have not been any concrete further steps taken to implement article 20.

6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

Concerning Article 20: In contrast to the aforesaid concerning steps being taken in order to implement Article 20, Austrian law does however not fully comply with Article 20. On the one hand, Austrian regulations dealing with access to legal counselling, the representation and accompaniment during the interview, as well as protection of the privacy and identity of the child

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<sup>74</sup> Seiler, “Strafprozessrecht”<sup>13</sup>, p. 122.

<sup>75</sup> Schwaighofer, „Zur Verwendbarkeit kontradiktorischer Zeugenaussagen”, ÖJZ 2006/17.

victim, fit up to standards as prescribed in the Directive 2011/93. On the other hand, provisions concerning the conduct of the interview, such as certain qualifications required by the interviewer, rather seem as recommended ideal conditions than as imperatively required.

If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

To begin with, Austrian law shows a deficit in concrete provisions concerning the process of interviewing witnesses of sexual abuse.

Interviewing victims of sexual abuse in premises adapted for this purpose should no longer have the character of simple recommendations. It should be legally prescribed in police stations as well as in court.

What is more, it should go without saying that an interview conducted by a person with a professional training in interviewing victims of sexual abuse of course fits best to the victim's interests. Section 165 para. 3 line 2 Austrian Code of Criminal Procedure, which was already described above, prescribes that a professional expert can be commissioned to conduct the interview especially if the witness is younger than the age of 14. This section should however not only highlight the interests of witnesses younger than the age of 14, but should also focus on persons at least younger than the age of 18.

The same goes for the contradictory hearing: While witnesses younger than the age of 14 are ex officio questioned in a contradictory hearing, older persons have to request for it. In order to comply with Article 20 of the Directive, a contradictory hearing should become the general norm for victims of sexual abuse and not the exception.

To sum up, considering the fact that the interview is one of the psychologically most challenging procedural part for the victim itself, as well as that the interview itself is often one of the few evidences in a trial to give proof of the crime, victim- friendly regulations concerning the interview should be prioritized.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b></p>	<p>No provisions.</p>
<p><b>Article 19</b>  <b>Assistance and support to victims</b></p>	<p>No provisions.</p>
<p><b>Article 20</b>  <b>Protection of child victims in criminal investigations and proceedings</b></p> <p>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.</p>	<p><b>Section 187 in connection with section 213 sentence 1 Austrian General Civil Code:</b>  <b>Section 187:</b>  As far as neither parents nor grandparents can be charged with custody of the child, the court has to charge another appropriate person as a custody, with regard to the best interests of the child.</p> <p><b>Section 213 sentence 1:</b>  In case that another person has to be partly or completely charged with custody of a minor and in case there cannot be found any relatives or other close or particularly appropriate persons, the court has to charge the youth welfare authorities with custody of the minor.</p>
<p>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.</p>	<p><b>Section 66 para. 2 sentence 1 Austrian Code of Criminal Procedure:</b>  Victims according to section 65 cipher 1 lit a or b have, on their demand, to be granted psychosocial and legal counselling, as far as it is necessary to maintain their procedural rights, with greatest respect to their personal concern.</p>
<p>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:</p>	<p><b>Para. 9 section 1 sentence 2 Austrian Code of Criminal Procedure:</b>  Criminal proceedings have to be conducted in a timely manner without unjustified delay.</p>
<p>(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;</p>	<p>No provisions.</p>



<p>(b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;</p>	<p><b>Section 165 para. 3 sentence 2 Austrian Code of Criminal Procedure:</b> Especially if the witness is younger than the age of 14, a publicly appointed and sworn expert can be commissioned with hearing the witness.</p>
<p>(c) interviews with the child victim are carried out by or through professionals trained for this purpose;</p>	<p>No provisions.</p>
<p>(d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;</p>	<p><b>Para. 5 section 2 sentence 1 Austrian Code of Criminal Procedure:</b> Among several possible investigatory actions or compulsory measures, competent authorities have to take the least harmful action for the persons concerned.</p>
<p>(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;</p>	<p>No provisions.</p>
<p>(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.</p>	<p><b>Section 160 para. 2 sentence 1 and para. 3 Austrian Code of Criminal Procedure:</b> <b>Section 160 para. 2 sentence 1:</b> On demand of the witness, any person of his or her trust has to be permitted to be present during the hearing. <b>Para. 3:</b> During the hearing of a mentally ill or mentally disabled person, or of a person younger than the age of 14, a person of trust has to be present in any case.</p>
<p>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.</p>	<p><b>Section 165 para. 1 and para. 5 sentence 1 Austrian Code of Criminal Procedure</b> <b>Section 165 para. 1:</b> A contradictory hearing of the accused person or of the witness, as well as its audio-visual recording is legitimate, if there is concern that the hearing may not be possible during the main trial due to factual or legal causes.</p>

	<p><b>Section 165 para. 5 sentence 1:</b>          Before the hearing takes place, the court has to inform the witness that during the main trial the written protocol of the hearing may be read out and audio-visual recordings may be presented, even if he or she refuses to give evidence during the following proceedings.</p>
<p>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:</p> <p>(a) the hearing take place without the presence of the public;</p> <p>(b) the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies.</p>	<p><b>Section 162 sentence 1 and section 229 para. 1 Austrian Code of Criminal Procedure:</b>  <b>Section 162 sentence 1:</b>          If there is concern that the witness may severely endanger his or her or a third person's life, health, physical integrity or freedom by announcing his or her name and other personal data (section 161 para. 1 Austrian Code of Criminal Procedure) or by answering questions, by which inferences could be drawn on these data, he or she may get permission not to answer such questions.</p> <p><b>Section 229 para. 1 Austrian Code of Criminal Procedure:</b>          The public may be excluded from the main trial ex officio or upon application of a person involved in the trial or of a victim:</p> <ol style="list-style-type: none"> <li>1. in case of disturbance of public order or national security;</li> <li>2. before discussion of the personal sphere of life or sphere of secrets of the accused person, victim, witness or a third person;</li> <li>3. in order to protect the identity of a victim or of a third person due to reasons as mentioned in section 162 Austrian Code of Criminal Procedure.</li> </ol> <p><b>Section 165 para. 3 Austrian Code of Criminal Procedure:</b>          During the hearing of a witness the opportunity to participate has to be restricted upon application of the public prosecution department with respect to his or her young age, mental situation or state of health. The involved persons and their representatives can follow the hearing by the use of technical equipment providing audio-visual transmission and can make use of their right to ask questions without being present during the hearing. (...) In any case an encounter of the witness with the accused person or other persons involved has to be avoided.</p>

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.

**Section 10 para. 3 sentence 1 and 2, section 51 para. 2 sentence 1 and section 54 Austrian Code of Criminal Procedure:**

**Section 10 para. 3 sentence 1 and 2:**

All competent authorities, institutions and persons dealing with criminal proceedings have to treat the victim with respect to his or her personal dignity and have to pay attention on the protection of his or her most personal sphere of life. This especially goes for the disclosure of personal photographs as well as the disclosure of personal data, by which the victim's identity could become known in a bigger circle of persons, if there are no legal grounds in criminal justice for such a disclosure.

**Section 51 para. 2 sentence 1:**

In case of an endangerment as mentioned in section 162 Austrian Code of Criminal Procedure (see translation at 5.) a.)), it is legitimate to exclude personal data, as well as other information that may allow references on the identity or on personal living conditions of the endangered person, from the files, as well as to distribute copies in which these information has been made unrecognizable.

**Section 54:**

The accused person and his legal representative are permitted to utilize information they got during a non-public trial or non-public taking of evidence or by inspection of files. Nonetheless, they are prohibited from distributing such information in media or in any other way, by which the information gets accessible to broad public under the following conditions: these information have to contain personal data of other persons involved in the trial or of third persons and they must have not been subject of a public trial or been made public in another way and there must be interests in secrecy worth being protected (sections 1 para. 1, 8, 9 DSG 2000) of other persons involved in the trial or of third persons which must overbalance the public interest on information.

## TOPIC 7.

*Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

**7.1.1. Obligatory take down measures (Art. 25 (1))**

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

a) Within its territory? If yes, please specify

b) Outside its territory? If yes, please specify

There haven't been established any regulations regarding the issue of the removal of web pages containing or disseminating child pornography in Austria yet. In fact, there is a great amount of legislative action needed.

Nonetheless, Austria provides online registration offices, such as “Stopleveline”, where child pornographic web pages can be reported. In experience, not every report may be classified as illegal. If the contents are illegal “Stopleveline” will transmit the information received to the competent authority of the ministry of interior. In the case that web pages that contain child pornography are found within the territory of Austria, there won't be any problems with its immediate removal. Yet the fact that most child pornographic contents are found on foreign web servers complicate their removal considerably but do not make it impossible. Therefore “Stopleveline” 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 percent of illegal contents located all over Europe have been removed within 72 hours.<sup>76</sup>

**7.1.2. Optional blocking measures (Art. 25 (2))**

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify

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<sup>76</sup> Die Presse, [http://diepresse.com/home/panorama/oesterreich/1389785/Kinder pornos\\_Paedophile-schotten-sich-ab](http://diepresse.com/home/panorama/oesterreich/1389785/Kinder pornos_Paedophile-schotten-sich-ab), accessed 21 March 2014.

Child pornography is defined as a criminal act in section 207 a Austrian Criminal Code and is described as:

Para. 1:

A person who

1. produces or
2. imports, transports or exports for the reason of distribution or
3. offers, provides, dedicates, shows to another person or makes accessible in any other way, a pornographic depiction of a minor has to be sentenced with custodial sentence of up to three years.

In Austrian law there cannot be found any concrete provisions regulating the blocking of access to web pages as prescribed in the Directive 2011/93/EU. However, the Austrian minister for inner affairs stated on the occasion of a parliamentary request, that, if a provider is hosting material according to section 207a Austrian Criminal Code, the material has to be deleted from its servers or put offline. Otherwise, legal actions, such as confiscation of the relevant servers can be legitimate<sup>63</sup>.

To which extent blocking measures for web pages containing or disseminating child pornography should be introduced in practice is still a quite open question. The public discussion started rolling when an Austrian internet provider company (*UPC Telekabel Wien*) was taken to court for not having blocked a certain website disseminating videos violating copyright laws<sup>77</sup>. The European Court of Justice decided in a preliminary decision procedure that internet providers can be condemned to block websites under certain circumstances<sup>78</sup>. This decision is subject of a controversial political debate<sup>79</sup>, which is given proof by the existence of a number of private initiatives<sup>80</sup>.

<sup>77</sup> <http://diepresse.com/home/techscience/internet/1491002/EuGH-ebnet-Weg-fur-Sperren-von-DownloadWebsites-in-Osterreich>, access: 19.03.2014.

<sup>78</sup> <http://futurezone.at/netzpolitik/upc-klage-wegen-kino-to-internetprovider-muessen-kuenftig-websites-sperren/37.712.302>, access: 20.03.2014.

<sup>79</sup> [http://www.ispa.at/fileadmin/ISPA/Service/Positionspapiere/Zugangssperren/20100430\\_KiPo-Positionspapier\\_final.pdf](http://www.ispa.at/fileadmin/ISPA/Service/Positionspapiere/Zugangssperren/20100430_KiPo-Positionspapier_final.pdf) or [http://www.parlament.gv.at/PAKT/VHG/XXII/I/I\\_00294/fnameorig\\_010159.html](http://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00294/fnameorig_010159.html)

<sup>80</sup> For example "stopline" (<http://www.stopline.at/de/home/>, access: 19.03.2014) or "ispa" ([https://www.wko.at/Content.Node/branchen/b/sparte\\_iuc/Telekommunikations--und-Rundfunkunternehmungen/Infos-fuer-](https://www.wko.at/Content.Node/branchen/b/sparte_iuc/Telekommunikations--und-Rundfunkunternehmungen/Infos-fuer-), access: 19.03.2014).

7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

Concerning Article 25 para. 2: As already said above, in Austrian law there were no concrete steps taken to implement concrete provisions regulating the blocking of access to web pages as prescribed in the Directive 2011/93/EU.

7.3. In your view, does the current legal framework comply with Article 25? If no, what additional measures should be taken in order to comply with Article 25?

Concerning Article 25 para. 2: Regardless of the fact that Austrian law doesn't provide any concrete steps regulating the blocking of certain websites, there are however ways to control and restrict media containing or disseminating child pornography, such as prescribed in the already mentioned section 207a Austrian Criminal Code. Hence, in the result of legal actions, the Austrian provisions comply with the prescriptions of Article 25 para. 2 to a certain extent.

# ELSA BULGARIA

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

The corresponding Bulgarian law is Article 1 and Article 159, para 6 of the Bulgarian Criminal Code. Article 1, para 1 of the Bulgarian Criminal Code establishes the scope of this act, namely:

“[...] to protect the person and rights of citizens and the whole legal order established in this country against criminal encroachments.” In addition, para 2 of Article 1 states that „for achievement of this objective the Criminal code shall determine which acts dangerous to society constitute crimes and what punishments shall be imposed for them [...]”

This means that any acts dangerous to society shall be determined as a crime and any act determined as a crime in the Bulgarian Criminal Code is definitely a crime according to the Bulgarian law. This includes the crime established in Article 159, para 6 (the Bulgarian Criminal Code) which corresponds to that provided for in Article 5 (3) of the Directive. Article 9 of the Bulgarian Criminal Code states that a crime is any act dangerous to the society which has been declared punishable by law. Moreover, Article 35 of the Bulgarian Criminal Code says that punishment may be imposed to a person who has committed a crime, and such punishment shall correspond to the crime and the punishment for the crime may only be imposed by the national courts. In addition, Article 11, para 2 of the Criminal Code states that:

“An act shall be considered intentional where its perpetrator was conscious its nature of dangerous to society, foresaw its consequences as dangerous to society and wished or allowed the occurrence of such consequences.”

All these provisions altogether guarantee that intentional conduct is punishable. Art. 159, para 6 says that:

“A person who possesses or provides for himself/herself or for another person through a computer system or in another manner a pornographic material in whose creation a person who has not turned 18 years of age has been used or a person who looks like such a person, shall be punished by deprivation of liberty of up to one year or a fine of up to BGN two thousand.”



## 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

As far as we know such steps have not been taken.

## 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

Regarding Article 5(1) – the Bulgarian law guarantees that intentional conduct, when committed without rights, is punishable.

Regarding Article 5(3), the corresponding provision - 159, para 6 of the Bulgarian Criminal Code was adopted in 2007 and has not been amended ever since. It is obvious that no steps have been taken towards harmonization of the Bulgarian legislation with the Directive. For the most part, the current provision meets the requirements of the Directive. It is inconsistent in the section regarding the punishment. According to the Bulgarian Criminal Code, if a person commits this crime, they can be sentenced with deprivation of liberty of up to one year or a fine up to BGN 2000. In the second case (a fine up to BGN 2,000) they will successfully avoid the imprisonment which does not comply with the aim of the Directive.

## If no, what additional measures should, in your view, be taken in order to comply with Art. 5 (1) and (3)?

Compliance with Article 5(1) already exists, and therefore, no additional measures need to be taken.

There are two options for amendment of Art. 159, para 6 of the Bulgarian Criminal Code in order to achieve compliance with Article 5(3) of the Directive.

Option 1 is to amend Article 159, para 6 as follows:

“A person who possesses or provides for himself/herself or for another person through a computer system or in another manner a pornographic material in whose creation a person who has not turned 18 years of age has been used or a person who looks like such a person, shall be punished by deprivation of liberty of up to one year and a fine of up to BGN 2000.”

Thus, deprivation of liberty would become inevitable together with the fine. As such, the provision could cover/correspond to the requirement of the Directive with regard to the punishment.

Option 2 is to amend Article 159, para 6 as follows:

“A person who possesses or provides for himself/herself or for another person through a computer system or in another manner a pornographic material in whose creation a person who has not turned 18 years of age has been used or a person who looks like such a person, shall be punished by deprivation of liberty of up to one year.”

In this case only a deprivation of liberty would be stipulated.

1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

The corresponding provision here is Article 195, para 6 of the Bulgarian Criminal Code:

“A person who possesses or provides for himself or for another person through a computer system or in another manner a pornographic material in whose creation a person who has not turned 18 years of age has been used or a person who looks like such a person, shall be punished by deprivation of liberty of up to one year or a fine of up to BGN two thousand.”

The Criminal Code explicitly says that an object of the crime could also be a person “who looks like” a person who has not turned 18 years.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 5</b>  <b>Offences concerning child pornography</b></p> <p>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.</p> <p>2. (...)</p> <p>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.</p> <p>4.(...)</p> <p>5.(...)</p> <p>6. (...)</p>	<p><b>Bulgarian Criminal Code</b>  <b>Article 1</b></p> <p>(1) (Amended, SG No. 1/1991) The objective of the Criminal code shall be to protect the person and rights of citizens and the whole legal order established in this country against criminal encroachments.</p> <p>(2) For achievement of this objective the Criminal code shall determine which acts dangerous to society constitute crimes and what punishments shall be imposed for them, and shall specify the cases where instead of punishment measures for social influence and education may be imposed.</p> <p><b>Article 9</b></p> <p>Crime shall be an act dangerous to society (action or inaction), which has been culpably committed and which has been declared punishable by law.</p> <p>(2) Criminal shall not be an act which, although formally containing the elements of crime provided</p>

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.

by law, because of its insignificance is not dangerous to society or its danger to society is obviously insignificant.

**Article 35**

- (1) Penal responsibility is personal.
- (2) A punishment may be imposed only on a person who has committed a crime provided for by the law.
- (3) The punishment shall correspond to the crime.
- (4) A punishment for a crime shall be imposed only by the established courts of law.

**Article 159**

(6) (Renumbered from paragraph 5 and amended, SG No. 38/2007) A person who possesses or provides for himself or for another person through a computer system or in another manner a pornographic material in whose creation a person who has not turned 18 years of age has been used or a person who looks like such a person, shall be punished by deprivation of liberty of up to one year or a fine of up to BGN two thousand.

## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

Section 8 of the Bulgarian Criminal Code entitled „Debauchery” provides the legal framework on this matter. Para 1 and 2 of Article 155a state that:

- “(1) 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 in Internet or in another manner information about him/her, shall be punished by deprivation of liberty of one to six years and by a fine from BGN five thousand to BGN ten thousand.
- (2) The same punishment shall be imposed also on that 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 in Internet or in another manner.”

Article 6 of the Directive corresponds to para 2 of the above mentioned. The stipulated punishment is the same as in para 1, i.e. a deprivation of liberty of one to six years cumulatively given with a fine from BGN 5,000 to BGN 10,000.

## 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

Both hypotheses – “on-line grooming” and “off-line grooming” are given in one Article, namely – 155a of the Code:

“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 in Internet or in another manner information about him/her, shall be punished by deprivation of liberty of up to five years and by a fine from BGN five thousand to BGN ten thousand.”

The term “in another manner” gives a very wide scope of possible actions, which includes all types of establishing a contact, including offline.

## 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

The abovementioned article was adopted in 2007 and amended in 2010. It has not been changed ever since, which means that it has not been revised since the Directive has been adopted.

## 2.4. In your view, does this legal framework comply with Art. 6?

Article 6 of the Directive gives us the following regulation:

1. The Directive requires that “Member States shall take the necessary measures to ensure that the following intentional conduct is punishable”. The analysis made with regard to Article 5 (1) in Topic 1 of this questionnaire is also applicable here;
2. This intentional conduct must be punishable, according to Bulgarian law it is;
3. The conduct shall be punished with a maximum term of imprisonment of at least 1 year. According to the Bulgarian Criminal Code this crime is punishable by a maximum term of imprisonment for six years, a minimum of one and, furthermore - by a fine;
4. The Directive also regulates the age of the victim. The victim is a person who has not reached the age of sexual consent. According to the Bulgarian law, this is a person who has not turned 14 years of age. According to the Bulgarian Civil Law only a person who has turned 14 is able to

give consent for any kind of legal actions. The Bulgarian Criminal Law accepts the same terms. This age is applicable for sexual acts as well;

5. The Directive also requires that “Member States shall take the necessary measures to ensure that an attempt, by means of information and communication technology, ... is punishable.” Article 18, para 1 of the Bulgarian Criminal Code regulates matter related to the attempt. The attempt, as regulated in the Bulgarian Criminal Code, is an act that has been commenced, but not completed or, although completed, the consequences dangerous to society provided by the law and desired by the perpetrator have not occurred. Article 18, para 2 states that:

“for an attempt, the perpetrator shall be punished by the punishment provided for completed crime, with due consideration taken of the degree of implementation of the intent and the reasons because of which the crime remained unaccomplished.”

This article is a general provision. This means that the Bulgarian criminal system guarantees that an attempt to any crimes is punishable, including solicitation of children for sexual purposes.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b>  <b>Solicitation of children for sexual purposes</b>            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.</p> <p>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.</p>	<p><b>Bulgarian Criminal Code</b>  <b>Article 1</b>            (1) (Amended, SG No. 1/1991) The objective of the Criminal code shall be to protect the person and rights of citizens and the whole legal order established in this country against criminal encroachments.            For achievement of this objective the Criminal code shall determine which acts dangerous to society constitute crimes and what punishments shall be imposed for them, and shall specify the cases where instead of punishment measures for social influence and education may be imposed.</p> <p><b>Article 9</b>            (1) Crime shall be an act dangerous to society (action or inaction), which has been culpably committed and which has been declared punishable by law.            (2) Criminal shall not be an act which, although formally containing the elements of crime provided by law, because of its insignificance is not dangerous to society or its danger to society is obviously insignificant.</p>

	<p><b>Article 35</b></p> <p>(1) Penal responsibility is personal.</p> <p>(2) A punishment may be imposed only on a person who has committed a crime provided for by the law.</p> <p>(3) The punishment shall correspond to the crime.</p> <p>(4) A punishment for a crime shall be imposed only by the established courts of law.</p> <p><b>Article 155a</b></p> <p>(New, SG No. 38/2007)</p> <p>(1) Anyone, who for the purpose of establishing a contact with a person who is under 18 years of age,...shall be punished by deprivation of liberty of up to five years and by a fine from BGN five thousand to BGN ten thousand.</p> <p>(2) The same punishment shall be imposed also on that 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 in Internet or in another manner.</p>
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### TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

If yes, does it cover:

#### 3.1.1. Professional activities involving direct and regular contact with children?

The Bulgarian legislation provides a general legal framework on disqualification from conviction of any offences. In accordance with Article 37, para. 1 of the Bulgarian Criminal Code among

other listed punishments could be found “deprivation of the right to hold a certain state or public office” and “deprivation of the right to exercise a certain vocation or activity”.

Article 49 of the Code states that the punishment deprivation of rights, be it the right to hold a certain state or public office or the right to exercise a certain vocation or activity, could be imposed separately or in combination with another punishment. Moreover, Article 50, para. 1 stipulates that:

“The punishment by deprivation of the right to hold a certain state or public office and deprivation of the right to exercise a certain vocation or activity shall be imposed in the cases provided by the law, if holding the respective office or exercising the respective vocation or activity is incompatible with the nature of the committed crime.”

However, Article 160 of the Criminal Code does not include sexual offences against children in the list of the crimes which are punished with these two punishments. Therefore, the answer to this question should be negative. Yet it should be mentioned that the bill of a new criminal code provides a rule on disqualification from professional activities involving direct and regular contact with children.

On the other hand, the Bulgarian legislation, and in particular, the Criminal Procedure Code in Article 69, para.1 foresees “Removal of defendant from office”:

**Article 69, para. 1 of the Criminal Procedure Code**

“Where the charge is for a malicious crime of 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 the circumstances under the case, the Court may remove the defendant from office.”

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

Article 9, para. 1 of the Child Protection Act stipulates that “Legal entities, as well as separate natural persons shall participate in the activities related to child protection under the terms and conditions set forth in an act.”

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

As a result of the fact that under the current Bulgarian legislation sexual crimes against children are not punished with deprivation of exercising the professional activities involving contact with children, there are rules that regulate the access to information by employers concerning previous convictions. The Bulgarian Labour Code provides in Article 62, para 7 that documents which are obligatory for entering into a labour contract should be further specified by the Minister of Labour and Social Policy. Ordinance №4/11.05.1993 on the Documents Required for a Labour Agreement regulates that certificates of previous convictions must be provided to the employer.

**Ordinance No. 4/11.05.1993**

**Article 1**

“(1) For signing a labour agreement the following documents are required: ...  
Certificate of Conviction when a law or regulation requires clear criminal record;”

**3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?**

Yes, there are a number of examples that could be given as a specific legal framework on screening with regard to activities involving direct and regular contacts with children.

Regulation on Application of the Child Protection Act

In accordance with Chapter Four of the Regulation entitled “Licensing of providers of social services for children” (Article 34 and the following) social services for children could be provided by natural persons and legal entities after being granted a license and registered under the Social Assistance Act. Articles 42b and 42c of the Child protection Act state:

**Article 43b, para. 1**

“The chairperson of the State Agency for Child Protection shall issue a license for the provision of social services for children upon a proposal of a commission, including representatives of the ministry of labor and social policy, Ministry of Education and Science, Ministry of Health, Ministry of Interior, Ministry of Justice, State Agency for Child Protection and Agency for Social Assistance.”

**Article 43c.**

“The license shall be issued, when:

- 1.The candidate is a natural person, registered under the Commercial Act, or legal entity;
- 4.The candidate has not been convicted of a crime, as for the legal entities this requirement refers to the members of the steering bodies;”



Summarising, to obtain a license for providing social services for children the applicant, be it natural person or legal entity, should verify by a certificate that he/she has not been subject to prior convictions. This license is granted by decision of the chairperson of the State Agency for Child Protection. As an administrative act, this decision could be appealed before an administrative court.

#### Ordinance on the necessary documents for occupying a state position- Article 2, para. 2, item 5

##### **Article 2,**

para. 1 When applying for a state position a written request (Form №1) for appointment is submitted.

para. 2 The written request is also accompanied by:

5. A certificate of prior convictions;

#### Regulation on the Application of the Public Education Act

Article 125 of the abovementioned act states that positions of teachers and counsellors cannot be occupied by persons who are sentenced to imprisonment for an intentional crime or are deprived of the right to practice their profession.

#### Child Protection Act

Although the next regulation does not fall exactly within the scope of the question, it should be mentioned too. According to Article 11 (entitled “Protection against Violence”) para.1 of The Child Protection Act “Every child has the right to protection against involvement in activities that are harmful to his or her physical, mental, moral and educational development”. Para. 3 further explains that:

“Every child has the right to protection against the use of children for purposes of begging, prostitution, dissemination of pornographic material, receipt of unlawful pecuniary income, as well as protection against sexual abuse.”

When the upbringing puts a child in a dangerous situation that undermines its dignity, physical or psychological well-being, it should be reported to the authorities. In this case, the child could be placed with relatives or friends or if that is impossible with a foster family. In both cases foster families should meet the legal criteria of providing healthy environment. (for more information concerning the procedure of child's placement out of the family refer to Chapter Four “Child Protection Measures” of the Child Protection Act).

**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

The abovementioned Ordinance No. 4/11.05.1993 on the Documents Required for a Labour Agreement could apply in this case. Article 1 provides the necessary documents among which under item 5 is a “certificate of conviction when a law or regulation requires clear criminal record”.

b) Organised voluntary activities involving direct and regular contact with children?

The Bulgarian legislation does not regulate voluntary work. However, in the recent years bills on the matter were twice introduced before the National Assembly but none of them passed. Codification in this field should be further pursued. For all we know, there is no legal obligation.

**3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

Yes. According to Article 2 of The Ordinance No. 4/11.05.1993 which stipulates that the employer could demand submission of some other documents besides these in Article 1, the employers do have the right to demand such information. This general provision could apply in the cases of Article 3 to 7.

b) Organised voluntary activities involving direct and regular contact with children?

There are no legal provisions that concern this matter.

**3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?**

Ordinance No. 8/ 28.02.2008 issued by the Ministry of Justice regulates this matter. According to it information on previous convictions should be provided to:

- Judicial authorities of a country, when regulated in an international treaty to which the Republic of Bulgaria is a party, or in an act of the EU;
- An authority in a MS which transmits and receives information of prior convictions.

Chapter Five of the ordinance under the name “International Collaboration” further explains that the authority over international bilateral and multilateral contracts to which Bulgaria is a party and EU acts on receiving and transmitting information on convictions lies in the hands of the Central Office of Convictions. Article 50 foresees the procedure of providing information from the Record of Convictions to another MS for the purposes of criminal proceedings. The Central Office of Convictions transmits information concerning:

- Court judgments and sentences given by Bulgarian courts to Bulgarian citizens;
- Court judgments and sentences given by another MS courts to Bulgarian citizens;
- Judicial acts given by third countries to Bulgarian citizens.

### 3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

According to Article 10, para. 1 in order to avoid repetition of offences a natural person who has been convicted of offences referred to in Articles 3 to 7 should be “temporarily or permanently prevented from exercising at least professional activities involving direct and regular contact with children”. Although there is a general rule in the Bulgarian Criminal Code which provides the punishment of deprivation of the right „to hold a certain state or public office“ or „to exercise a certain vocation or activity“, sexual offences against children do not fall within the scope of this rule. However, this lapse has been noticed and we assume that in the near future there would be amendments.

When it comes to the second paragraph of Article 10, according to the Bulgarian legal system, employers are entitled to request information in terms of existence of criminal convictions for the offences referred to in Articles 3 to 7 when entering into a labour contract. Such rule does not exist in the case of voluntary activities.

Ordinance No. 8 of 2008 on the Functions and the Organization of the Activity of the Conviction offices issued by the Ministry of Justice duly regulates the exchange of information on criminal record between MS.

### 3.5. In your view, does the current legal framework comply with Art. 10?

We believe that the current legal framework provides quite general rules that regulate disqualification arising from convictions. However, the legal system complies with Article 10 to a considerable extent.

However, some remarks should be addressed. The necessary amendment in regards to the disqualification from professional activities should be made. It should be suggested that a future regulation on voluntary work should be imposed.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b>  <b>Disqualification arising from convictions</b></p> <p>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.</p> <p>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</p>	<p><b>The Instruction of the Minister of labour and social policy on the documents needed for entering into a labour contract (1993)</b></p> <p><b>Article 1</b>            When entering into a labour contract the following documents are needed: ...</p> <p>5. certificate of prior convictions when provided in a law.</p> <p><b>Article 2</b>            The employer may demand other documents besides the ones in Article 1 to be submitted when provided in a law.</p>

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 [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.

**Ordinance № 8 of 2008 on the Functions and the Organization of the Activity of the Conviction offices issued by the Ministry of Justice**

**Chapter five "International collaboration"**

**Article 47**

(1) The Central office of convictions fulfills the obligations of the Ministry of Justice to be a central authority on international bilateral and multilateral contracts and acts of the EU concerning receiving and providing to other countries of information about convictions.

(2) The exchange with other countries of information about convictions is carried out in accordance with the regulations provided in the international contract.

## TOPIC 4.

### *Victim identification*

(Article 15 (4))

4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

The Bulgarian legislation provides general provisions in terms of investigation and prosecution of offences referred to in Articles 3 to 7. Under the name "Obligation of the citizens and officials to signal" the Bulgarian Criminal Procedure Code provides the following:

**Article 205**

"(1) Anyone who becomes aware of a general crime is obliged to immediately signal the Authority of the pre-trial proceedings or another state authority.

(3) In the cases under para. 1 and 2 pre-trial body immediately exercises its powers to initiate criminal proceedings."

Article 7 of the Child Protection Act codifies a rule which closely resembles the abovementioned:

"(1) 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.

(2) The same obligation shall be undertaken by all persons, who become aware of the said situation in the course of exercising their profession or occupation, irrespective of them being bound by occupational secret.

(3) Central and regional bodies of the executive authority as well as the specialized institutions for children in view of their official duties shall timely render assistance and provide information to the State Agency for Child Protection and to the Social Assistance Directorates under the conditions and the procedure of the Protection of Personal Data Act.”

The State Agency for Child Protection (established in 2001) has a database of files of children who have been victims of violence.

“The main tool for data gathering is a specially developed information card which is filled by all child protection departments at municipal level. The questions in the card include key indicators on active cases of violence against children during the reporting period: number of cases of violence against children; type of violence; place of violence; age and family status of children who are victims of violence; profile of the sender of the signal; profile of the perpetrator of violence; measures taken.”<sup>1</sup>

After being duly reported to the authorities a process of investigation and analysis of child pornography material is initiated. A signal for the offence could be sent by a natural person, institution (school, hospital) or a partnering state.

#### 4.2. Which steps have been taken in your MS in order to implement Article 15 (4)?

According to Article 15 (4) of the Directive 2011/93/EU:

“MS 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.”

In 2007 Bulgaria signed and in 2011 ratified the Lanzarote Convention where under Article 30, para. 2 a similar rule could be found:

“Each Party shall take the necessary legislative or other measures, in conformity with the fundamental principles of its internal law ... to enable units or investigative services to identify the victims of the offences established in accordance with Article 20, in particular by analysing child pornography material, such as photographs and audiovisual recordings transmitted or made available through the use of information and communication technologies.”

In case of suspicion of a cybercrime (child pornography- related crimes are cybercrimes according the Convention on Cybercrime signed by Bulgaria) the investigative bodies are entitled

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<sup>1</sup> First thematic monitoring round “Sexual abuse of children in the circle of trust” on the Lanzarote Convention, Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, Replies registered by the Secretariat on 22 August 2014.

to intercept real time electronic services. Under Chapter 19 of the Law on Electronic Communication (LEC) entitled "Providing conditions for interception of electronic services related to protecting national security and ensuring public order" the following could be found:

**Article 305.**

(1) The undertakings providing public electronic communications networks and/or services shall provide, launch and sustain for their own account, interception interfaces, from which the intercepted electronic communications can be transmitted to the facilities of the State agency "Technical operations" and State agency "National security".

**Article 310.**

Before an interception based on legal grounds takes place, State agency "Technical operations" and State agency "National security" shall require from the undertakings providing public electronic communications and/or services, as follows:

1. Data to determine the identity of the subscriber, number or another identification feature of the electronic communications service;
2. Information about the service and the characteristics of the electronic communications system, used by the object of interception and delivered by the undertakings providing public electronic communications networks and/or services;
3. Information about the technical parameters of the transmission to the facilities of the State agency "Technical operations".

The Special Surveillance Means Law (SSML) states that special surveillance means should be used when preventing or uncovering serious intentional crimes (among which is child pornography). In accordance with Article 304 of LEC interception shall be used only in accordance with the SSML. Therefore, interception of electronic services could be used in relation to investigation and prosecution of the offences regulated in Article 3 to 7.

Article 12, para. 1 of the Special Surveillance Means Law stipulates that special surveillance means should be used in relation to:

- (1) people for whom there are data received and grounds for the assumption that they prepare, commit or have committed serious intentional crime.
- (2) people for whom there are data received and grounds for the assumption that they are being used by people fulfilling the requirements in item 1 without understanding of the criminal nature of the committed acts.

The law further states (Article 19b SSML) that the State Agency "Technical Operations" is entitled to:

- Provide, develop and use special surveillance means;
- Use specific methods and special investigative techniques to guard the life, health and property of citizens;

- Observe, photograph, videotape, make sound recording, film in connection with the collection of data to protect the rights and freedoms of citizens, national security and public order;
- Control transfer of data and receiving of information through cable means of communication;
- Perform operational and technical examination of mail and other correspondence to protect the rights and freedoms of citizens, national security, public order and the control of other persons who perform such inspection;
- Develop and use an information fund;
- Participate in joint actions with the competent authorities to prevent, intercept and uncover crimes.

The results obtained by such special surveillance means should be used only for prevention, uncovering and proof of crimes in the terms and conditions specified in the internal law.

It should be mentioned that SSML provides a regulation on the use and application of special investigative techniques in relation to international cooperation in criminal matters (for more information chapter four of SSML). Special intelligence means may be used when provided for in an international treaty entered into force for the Republic of Bulgaria. Such means can be used for the prevention and investigation of crimes which are expressly provided in the international treaty. The obtained results may be used for the purposes of international legal assistance, as well as for internal investigation according to the national legislation.

4.3. In your view, does the current legal framework comply with Art. 15 (4)? If no, what additional measures should be taken in order to comply with Art. 15 (4)?

As a result of the conducted research we believe that necessary measures of enabling investigative services to attempt to identify the victims of the offences referred to in Articles 3 to 7 are taken.



Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 15</b> <b>Investigation and prosecution</b></p> <p>1.(...)</p> <p>2.(...)</p> <p>3(...)</p> <p>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.</p>	<p><b>Special Surveillance Means Law</b> <b>Article 12, para. 1</b></p> <p>Special surveillance means should be used in relation to:</p> <p>1. People for whom is received data and there are grounds for an assumption that they prepare, commit or have committed serious intentional crime.</p> <p>2. People for whom is received data and there are grounds for an assumption that they are being used by people fulfilling the requirements in item 1 without understanding of the criminal character of the committed acts.</p>

## TOPIC 5.

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

**5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

Article 3, para. 1 of the Bulgarian Criminal Code states that it shall apply to all crimes committed on the territory of the Republic of Bulgaria. In this case, the nationality of the offender or the

victim is irrelevant. The only exception of para.1 where the Criminal Code is not applicable is in para. 2 of the same article:

“The issue of liability of foreign citizens who are granted immunity with respect to the penal jurisdiction of the Republic of Bulgaria shall be decided in compliance with the regulations of international law adopted thereby.”

It is also worth mentioning Article 4 of the Criminal Procedure Code (CPC). Article 4 provides that despite the fact that criminal proceedings in another country are initiated or a court judgment has been passed and entered into force, the Bulgarian authorities should initiate another criminal proceeding:

**Article 4**

“(1) 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 of proceedings by the authorities of the Republic of Bulgaria of the same crime and regarding the same person.

(3) The provisions of para. 1 and para. 2 shall not apply if stipulated in an international treaty of which Republic of Bulgaria is a party which has been ratified, promulgated and entered into force.”

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

The answer to this question is affirmative. Evidence to sustain this answer could be found in the Criminal Code Article 4, para. 1 which stipulates that it is applicable to the Bulgarian citizens and their crimes committed abroad.

**Article 4, para. 1**

“The Criminal Code shall apply to the Bulgarian citizens also for crimes committed by them abroad.”

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

Yes. Concerning this question the following codified rules which were introduced in Bulgarian legislation in 2007 could be found in the Criminal Code:

**Article 155a**

“(1) 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 in

Internet or in another manner information about him/her, shall be punished by deprivation of liberty of up to five years and by a fine from BGN five thousand to BGN ten thousand.

(2) The same punishment shall be imposed also on that 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 in Internet or in another manner.”

#### **Article 159**

“(1) A person who produces, displays, presents, broadcasts, distributes, sells, rents or otherwise circulates a pornographic material, shall be punished by deprivation of liberty of up to one year and a fine of BGN one thousand (1,000) to three thousand (3,000).

(2) A person who distributes through Internet a pornographic material, shall be punished by deprivation of liberty of up to two years and a fine of BGN one thousand to three thousand.

(4) Regarding acts under paras. 1-3, where a person who has not turned 18 years of age, or a person who looks like such a person, has been used in the creation of a pornographic material, the punishment shall be deprivation of liberty of up to six years and a fine of up to BGN eight thousand (8,000).”

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

Under the Bulgarian legislation “crimes against the person” are crimes of a private nature meaning that a complaint of the victim is a preliminary and obligatory condition of prosecution. However, there are some exceptions. Offences under Chapter Two, Section 8 „Debauchery“ (where sexual offences against children are provided) are of general nature, i.e. proceedings are initiated by the authorities. Thus, investigation and prosecution of the offences referred in Articles 3 to 7 is not subordinate to a report or an accusation of the victims and could not be stopped by them.

In its second section Article 17 (5) sets out the following requirement “Member state shall take the necessary measures to ensure that its jurisdiction is not subordinated to ... a denunciation from the State of the place where the offence was committed”. The Bulgarian Criminal Code applies to Bulgarian citizens who have committed crimes abroad (Article 4) and to foreign citizens who have committed crimes of general nature abroad, whereby the interests of the Republic of Bulgaria or of Bulgarian citizens have been affected (Article 5). The investigation is initiated by the Bulgarian authorities. Therefore, the prosecution of sexual offences against children does not depend on a denunciation of another State.

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

No. The jurisdiction based on the nationality of the offender for offences committed outside the Bulgarian territory is provided in Article 4, para. 1 of the Criminal Code. In order for a prosecution to be initiated the following requirements are needed:

- The action to be criminalized by the Bulgarian legislation, whether or not the same action is subject to prosecution in the State where it was performed;
- The perpetrator to be a Bulgarian citizen (including a person holding dual citizenship);
- The crime not to be committed within the Bulgarian territory.

### **5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))**

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

When a crime of general nature is committed against Bulgarian nationals, the interests of the Republic of Bulgaria and its citizens are affected. Therefore, irrelevant of the fact where the nationals are residing or the citizenship of the perpetrator the Bulgarian Criminal Code is applicable.

When it comes to the second segment of the question (jurisdiction over crimes against habitual residents), we could not find any regulation.

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

If a legal person established in Bulgaria benefits from a crime referred to in Articles 3 to 7 and committed outside the Bulgarian territory it should be held liable for civil damages. According to the Bulgarian legislation a legal person cannot be a subject to a criminal prosecution, but its representatives could. The legal person is only liable for damages awarded in a civil case.

c) The offender is a habitual resident (Art. 17(2)(c))?

The answer to this question should be negative.

### 5.3. In your view, does the current legal framework comply with Article 17?

In conclusion, we could assume that the Bulgarian legislation has already met the requirements provided in Article 17. However, it could be suggested that a further regulation on the habitual residence and the offences referred to in Articles 3 to 7 should be considered.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <p>(a) the offence is committed in whole or in part within their territory; or</p> <p>(b) the offender is one of their nationals.</p> <p>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:</p> <p>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</p> <p>(b) the offence is committed for the benefit of a legal person established in its territory; or</p> <p>(c) the offender is an habitual resident in its territory.</p> <p>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.</p> <p>4. For the prosecution of any of the offences</p>	<p><b>Bulgarian Criminal Code</b></p> <p><b>Article 3, para. 1</b> The Criminal code shall apply to all crimes committed on the territory of the Republic of Bulgaria.</p> <p><b>Article 4 para. 1</b> The Criminal code shall apply to the Bulgarian citizens also for crimes committed by them abroad.</p> <p><b>Article 5</b> The Criminal code shall also apply to foreign citizens who have committed crimes of general nature abroad, whereby the interests of the Republic of Bulgaria or of Bulgarian citizens have been affected.</p> <p><b>Article 155a</b> (1) 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 in Internet or in another manner information about him/her, shall be punished by deprivation of liberty of up to five years and by a fine from BGN five thousand to BGN ten thousand.</p>

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.

(2) The same punishment shall be imposed also on that 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 in Internet or in another manner.

## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

#### 6.1. Please describe the current national legal framework with regard to child victims

##### **6.1.1. General framework of protection (Art. 18)**

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

In accordance with the obligation to send information on the transposition of the Framework Decision pursuant to Art. 18 of the same, Bulgaria has sent the required information. The recent report of the Commission made it clear that Bulgaria, as a Member State it had not transposed the Framework Decision in a single act of national law. This decision is justified by the existing provisions in our legislation, the main sources being referred to the Bulgarian Criminal Code and the Bulgarian Criminal Procedure Code.

No new rules have been adopted in accordance with this decision or any changes either. However, our country has rules on a lot of these issues that assure the EU legislation. Specific information in a summarized form on the corresponding provisions in the Bulgarian legislation would look as follows: in compliance with Art. 1 of the Decision, there is a broad definition of “a victim” in the Bulgarian legislation.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

Our legislation has legitimated the right and duty of the competent authorities to provide special protection for children at risk in establishing one of the situations referred to in the ADDITIONAL PROVISIONS § 1., item 11. The protection measures listed in Art. 4 of the law, namely:

**Art. 4** (Amended. - SG. 36 of 2003)

(1) Child protection under this Act shall be effected by:

- assistance, support and services in a family environment;
- family accommodation of relatives or friends;
- (new - SG. 38 2006) adoption;
- placement in a foster family;
- (new - SG. 14 of 2009) the provision of social services - residential;
- (previous item. 5 - SG. 14 2009) accommodation in a specialized institution;
- (previous item. 6 - SG. 14 2009) police protection;
- (previous item. 7 - SG. 14 of 2009) special protection in public places;
- (previous item. 8 - SG. 14 of 2009) information on the rights and duties of parents and children;
- (previous item. 9 - SG. 14 of 2009) providing preventative security measures and protection of the child;
- (previous item. 10th - SG. 14 of 2009) to provide legal assistance from the state;
- (amended. - SG. 38 2006, prev. 11th - SG. 14 of 2009) special care for children with disabilities;
- (new - SG. 59 of 2007 with effect from 24.07.2007, the previous item. 12th - SG. 14 2009) taking provisional measures to protect the child in cases and under conditions Art. 12 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on October 19, 1996 (ratified by Law - SG. 9 of 2006) (SG. 15 of 2007), hereinafter referred to as "the 1996 Convention".

Take place only after a signal has been registered in “Social Assistance” Department and as a result of the evidence gathered upon the signal the social worker working on it is to decide whether to open a case. When opening the case it is subject to assessment and the social worker makes a plan that includes long-term and short-term objectives, activities for their achievement

and protection measures. This procedure is covered in Chapter Three. The procedures for implementation of the measures for child protection - from art. 9 to art. 33.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

In accordance with Art. 10, para. (2) from the Child Protection Act in situations where the age of the person is uncertain but there are relevant circumstances and sufficient evidence that the victim is a child, then they do have the right of protection under the Child Protection Act. The Bulgarian legislation does not establish a specific procedure and proof of age. It is possible to derive rules to be used for such purpose by the rules in force for determining the age of the refugees. The Law on Asylum and Refugees Art. 61 reads as follows:

**Art. 61** (Amended. - SG. 52 of 2007)

(1) An application for asylum shall be registered in the Presidential Administration. [...];

(3) Where a reasonable doubt that the alien is under age or a minor, the interviewer shall appoint an expert to establish his age.

### **6.1.2. Specific assistance and support measures (Art. 19)**

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

In such case the child victim is under the protection of the law. Pursuant to art.25 of the Child Protection Act:

**Grounds for placement outside the family**

**Art. 25**

(1) (Amended. - SG. 36 2003, previous Article. 25th - SG. 14 of 2009)

“A child may be placed outside the family:

when he is a victim of domestic violence and there is a serious risk of harm to the child's physical, mental, moral, intellectual and social development.”

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:

a) Available for the purpose of claiming compensation?



b) Free of charge where the victim does not have sufficient financial resources?

It is in art. 4 of the Child protection Act stated that the State is obliged to provide legal assistance when a child is in risk. That is an obligation that should be executed as a protection measure. It is given from the State and should be free of charge.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3)

The answer to the above question regarding the interviews with child is set out in Art. 15 of the Child Protection Act. What is written in the Act can be summarized as follows: hearing a child if he/she is under the age of 10 is required in any administrative or judicial proceedings affecting the rights or his interests, but given that their interests are not damaged. If the child is less than 10 years old, the hearing is set depending on the degree of its development. The regulatory obligations of the administrative body or court before the hearing of the child are to provide the necessary information to help them form their opinion, to inform them of the possible consequences of their wishes of maintaining their opinion, including any decision of the court or administrative body. It is important that the judicial or administrative authorities should provide an appropriate environment for the child's hearing, it must be consistent with his age. During the hearing and advising the child the condition for their realization is the presence of a social worker from the "Social Assistance" department, and if necessary, the presence of another appropriate specialist is acceptable too. If it is in the interest of the child, it could be also attended by a parent, guardian, custodian or another person caring for the child, another relative that the child knows.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

Taking the witness statement of a child might be an audio-visually recorded and it is an option.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b></p> <p>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.</p> <p>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.</p> <p>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.</p> <p><b>Article 19</b>  <b>Assistance and support to victims</b></p> <p>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 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.</p> <p>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.</p> <p>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</p>	<p><b>Child protection Act</b>  <b>Principles of child protection</b></p> <p>4 (Amended. - SG. 36 of 2003, amended. No.. 59 of 2007 with effect from 24.07.2007 d .; am. Amended and supplemented. No.. 14 of 2009)</p> <p>(1) Child protection under this Act shall be effected by:</p> <ol style="list-style-type: none"> <li>1 assistance, support and services in a family environment;</li> <li>2 family accommodation with relatives or friends;</li> <li>3 (repealed. - SG. 63 2003 new units. 38th 2006) adoption;</li> <li>4 placement in a foster family;</li> <li>5 (new - SG. 14 of 2009) provision of social services-residential type;</li> <li>6 (previous. 5 - SG. 14 2009) accommodation in a specialized institution;</li> <li>7 (previous. 6 - SG. 14 2009) police protection;</li> <li>8 (previous. 7 - SG. 14 of 2009) special protection in public places;</li> <li>9 (previous. 8 - SG. 14 of 2009) information on the rights and duties of parents and children;</li> <li>10 (previous. 9 - SG. 14 of 2009) providing preventative security measures and protection of the child;</li> <li>11 (previous. 10th - SG. 14 of 2009) to provide legal assistance from the state;</li> <li>12 (amended. - SG. 38 2006 ; prev. 11 pc. 14 of 2009) special care for children with disabilities;</li> <li>13 (new. - SG. 59th of 2007, in force from 24.07.2007 d .; prev. 12, iss. 14 2009) taking provisional measures to protect the child in the cases and provisions of Art. 12 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on October 19, 1996 (ratified by law-SG. 9 of 2006) (SG. 15 of 2007), hereinafter referred to as "the 1996 Convention"</li> </ol> <p>(2) (New - SG. 63 2003 .; amend. Issue. 14th 2009) A child may be adopted under the terms and provisions of the Family Code.</p> <p>(3) (prev. 2 - SG. 63 2003 .; amend. Issue. 14th</p>

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.

2009) The criteria and standards for social services for children in the implementation of measures under par. 1, p. 1, 2, 4-6 are determined by an ordinance adopted by the Cabinet of the Minister of Labour and Social Policy.

#### ADDITIONAL PROVISIONS

§ 1. (Amended. Amended and supplemented. - SG. 36 2003 .; issue. 38th 2006 .; issue. 14th 2009) For the purposes of this Act:

11 (previous. 5 - SG. 36 2003 .; prev. 6 am. Entirely No.. 14 of 2009) "Child at Risk" is a child:

- a) whose parents are deceased, unknown, deprived of parental rights or whose parental rights are limited, or the child is left without their care;
- b) who is a victim of abuse, violence, exploitation, or any other inhuman or degrading treatment or punishment or outside the family;
- c) for which there is a risk of harm to the child's physical, mental, moral, intellectual and social development;
- d) suffering from disabilities and refractory diseases identified by the specialist;
- e) for which there is a risk of dropping out of school or who has dropped out of school.

#### Right of Protection

**Art. 10** (suppl. - SG. 36 2003 .; am. Amended and supplemented. No.. 84 of 2013)

(1) Every child has the right to protection for normal physical, mental, moral and social development and protection of their rights and interests.

(2) (New - SG. 84 2013) Right to protection under this law have a person - the victim of violence or exploitation, which age has not been established and for which it can be reasonably assumed that is a child.

(3) (suppl. - SG. 36 2003 .; prev. 2 pc. 84 2013) There shall be no restriction of rights or privileges based on race, ethnicity, gender, origin, property, religion, education, beliefs or disability.

#### Protection against Violence.

##### Art. 11

(1) Every child has the right to protection against involvement in activities that are harmful to the child's physical, mental, moral and educational development. (2) Every child has the right to protection against offending his dignity methods of education, physical, mental or other forms of

	<p>violence and effect contrary to its interests.</p> <p>(3) Every child is entitled to protection against the use of begging, prostitution, dissemination of pornographic material, receipt of unlawful material benefit, and against sexual violence.</p> <p>(4) Every child has the right to protection against involvement in political, religious and trade union activities.</p>
<p><b>Article 20</b> <b>Protection of child victims in criminal investigations and proceedings</b></p> <p>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.</p> <p>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.</p> <p>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:</p> <p>(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;</p> <p>(b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;</p> <p>(c) interviews with the child victim are carried out by or through professionals trained for this purpose;</p> <p>(d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;</p> <p>(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</p>	<p><b>Participation in procedures</b></p> <p><b>Art. 15</b> (amended. Amended and supplemented. - SG. 36 2003 .; amend. Issue. 14th 2009)</p> <p>(1) In any administrative or judicial proceedings affecting the rights or interests of a child it must be heard if is under age 10, unless this would be detrimental to its interests.</p> <p>(2) If the child has not reached the age of 10, it may be heard depending on the degree of its development. Hearing decision is motivated.</p> <p>(3) Before the hearing of the child, the court or administrative body shall: 1 to provide the necessary information to help him form his opinion; 2 to inform him of the possible consequences of his desires, the claims his opinion, and any decision of the court or administrative body.</p> <p>(4) (Amended. - SG. 36 2003 .; am. Fully pc. 14 of 2009) Judicial and administrative authorities shall provide an appropriate environment for the hearing of the child, consistent with his age. The hearing and advising the child must attend a social worker from the "Social Assistance" at the present address of the child and, if necessary, and other appropriate specialist.</p> <p>(5) (new - SG. 36 of 2003, amended. No.. 38 2006 .; am. Fully pc. 14th 2009) The court or administrative hearing body shall be carried out in presence of a parent, guardian, custodian, other person caring for the child or other relative, child person, except when it does not meet the interests of the child.</p> <p>(6) (prev. 5 - amend. SG. 36 of 2003, amended. Amended and supplemented. No.. 38 2006 .; am. Fully pc. 14 2009) In any case the court or administrative authority shall notify the "Social Assistance" at the present address of the child, for the notification from the court, the provisions of</p>

<p>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.</p> <p>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.</p> <p>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:</p> <p>(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.</p> <p>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.</p>	<p>the Civil Code, and for notification by the administrative authority, the provisions of the Administrative Code. "Social support" send a representative, expressing an opinion, failing submit a report.</p> <p>(7) (prev. 6 - SG. 36 2003) "Social support" may represent the child in cases provided by law.</p> <p>(8) (prev. 7 - SG. 36 2003) The child has the right to legal aid and appeal in all proceedings affecting his rights or interests.</p>
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## TOPIC 7.

### *Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

#### **7.1.1. Obligatory take down measures (Art. 25 (1))**

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

a) Within its territory? If yes, please specify

b) Outside its territory? If yes, please specify

With regard to the above questions in topic 7 the Bulgaria legislation does not provide any measures concerning removal of web pages containing or disseminating child pornography, despite the provision of the Directive. Such amendments or additions to the law are necessary with regard to the Convention on Cybercrime Adopted at the 109<sup>th</sup> meeting of the Committee of Ministers of the Council of Europe and opened for signature in Budapest on 23 November 2001 ratified by law adopted by the 39<sup>th</sup> National Assembly 1.04.2005 SG. 29 of 05.04.2005. Issued by the Ministry of Justice published. SG. 76 of 15.09.2006., effective in the Republic of Bulgaria since 1.08.2005.

#### **7.1.2. Optional blocking measures (Art. 25 (2))**

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify. If no, what is the current (political) position of your MS with regard to blocking, i.e. the likelihood of introducing blocking measures?

Despite the unperformed legislative changes, the public authorities recognize the need to regulate this matter and in April 2014 the Ministry of Interior got the right to block the access to child pornography sites in the country. This would be carried out by introducing a filter that would block the access to such sites. Blocking itself would be done automatically upon a site with such content, in which case the user would be redirected immediately to stop page explaining why the access was blocked.

Additionally, since 1 June 2010 Foundation "Applied Research and Communications", "Parents" and „DeConi" has participated in the program "Safer Internet" 2009-2013 initiated by the European Commission, on which continued the maintenance of the Hotline for fighting illegal and harmful content and conduct for children on the Internet developed even more active work in providing information, training and awareness of the problems of safety for children and young people on the Internet. A major priority of the hotline is combating the spread of child

pornography on the Internet, but in recent years as new threats emerged grooming children for sexual abuse (grooming) and online bullying (cyber-bullying).

7.3. In your view, does the current legal framework comply with Article 25? If no, what additional measures should be taken in order to comply with Article 25?

The Laws that are in force in Bulgaria largely do not cover the texts of this Directive as well as other legislation of the Community law. However, both public and private sector initiatives are carried out with continuous action to secure the rights and interests of the children victim of this type of crime. In opinion the current projects do largely serve as a good mechanism of removal and blocking of web pages containing or disseminating child pornography.

However, legislative changes are needed. The stipulated measures must comply with the Charter of Fundamental Human Rights and should be in the sense and under the democratic foundations of a contemporary state.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 25</b>  <b>Measures against websites containing or disseminating child pornography</b></p> <p>1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.</p> <p>2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.</p>	<p><b>Criminal Code</b>  <b>Article 155a</b></p> <p>(1) 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 in Internet or in another manner information about him/her, shall be punished by deprivation of liberty of up to five years and by a fine from BGN five thousand to BGN ten thousand.</p> <p>(2) The same punishment shall be imposed also on that 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 in Internet or in another manner.</p> <p><b>Article 159</b></p> <p>(1) A person who produces, displays, presents, broadcasts, distributes, sells, rents or otherwise circulates a pornographic material, shall be punished by deprivation of liberty of up to one year</p>

	<p>and a fine of BGN one thousand (1,000) to three thousand (3,000).</p> <p>(2) A person who distributes through Internet a pornographic material, shall be punished by deprivation of liberty of up to two years and a fine of BGN one thousand to three thousand.</p>
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# ELSA CROATIA

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

Croatian Criminal Code<sup>1</sup>, like other criminal codes across the Europe, consists out of two parts - general and special part. When analysing the conduct in question, we ought to mention the article about intention in general part of this Code. Intention can be direct (*dolus directus*) and indirect intention (*dolus eventualis*). A perpetrator is acting with direct intent when he/she is aware of the elements of a criminal offence and wants it or is certain of their realization<sup>2</sup>. A perpetrator is acting with indirect intent when he/she is aware that he/she is capable of realizing the elements of a criminal offence and agrees to this.<sup>3</sup>

At this point, it is crucial to define the term "child". Criminal Code defines a child as a person who has not attained the age of eighteen years.<sup>4</sup>

In the special part of the Criminal Code, there is a special chapter on criminal offences of sexual abuse and sexual exploitation of children where articles regulating the offences in connection with the child pornography are codified. Pornography is now incriminated within two separate articles, specifically incriminating exploitation of children for pornography and especially introducing children to pornography.<sup>5</sup> Also, there is an Article regulating criminal offences related to the pornographic performance. Criminal Code, in accordance with Article 2 of the Directive, defines all aspects of the child pornography. Child pornography is defined as any

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<sup>1</sup> Criminal Code (Official Gazette 125/11, 144/12).

<sup>2</sup> *Ibid.* Article 28, §2.

<sup>3</sup> *Ibid.* Article 28, §3.

<sup>4</sup> *Ibid.* Article 87, §7.

<sup>5</sup> Kurtović Mišić, Anita; Garačić, Ana, Kaznena djela protiv spolne slobode i spolnog ćudoređa (Criminal offenses against sexual freedom and sexual morality), Hrvatski ljetopis za kazneno pravo i praksu (Croatian Annual of Criminal Law and Practice), vol. 17, number 2/2010, p. 605.

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. For the purpose of everything listed, any material that is artistic, medical or scientific in character shall not be deemed as pornography.<sup>6</sup>

Most important provisions regarding prevention, protection and punishment of the perpetrators are listed in the same article named Exploitation of Children for Pornography which now reads as following:

“whoever entices, recruits or incites a child to participate in the taking of child pornography pictures or whoever organizes or makes possible the taking of child pornography pictures shall be sentenced to imprisonment for a term of between one and eight years.”<sup>7</sup>

The second paragraph of this article, precisely describes all possible acts of perpetrators, also mentioning the phrase “knowingly obtains access”. The sentence referred to in paragraph 1 of the same Article shall be imposed on whoever takes child pornography pictures or produces, offers, makes available, distributes, transmits, imports, exports, procures for himself/herself or for another person, sells, gives, exhibits or possesses child pornography or knowingly obtains access, through information and communication technologies, to child pornography.<sup>8</sup>

Croatian Constitutional Court tried to clarify the definition of the pornography. It stated that:

“the purpose of the pornography is a satisfaction of some sexual interest, its manifestation is an explicit demonstration of some sexual attitude on despicable, insulting and humiliating way, but also, it is characteristic that it is deprived of any political, artistic or scientific values and messages.”<sup>9</sup>

## 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

Previous Criminal Code<sup>10</sup> which was in force until 31<sup>st</sup> December 2012 had three articles regulating criminal offences on child pornography (i.e. Exploitation of children or minors for pornography, Initiation of children with pornography and Child pornography on the computer system and network). This was not systematic, accurate and descriptive.

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<sup>6</sup> Criminal Code (*op. cit.* (no. 1), Article 163, §6.

<sup>7</sup> *Ibid.* Article 163, §1.

<sup>8</sup> *Ibid.* Article 163, §2.

<sup>9</sup> Constitutional Court of the Republic Croatia, judgement no. U-III-279/98.

<sup>10</sup> Criminal Code (Official Gazette 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08).

The new Criminal Code entered into force on 1<sup>st</sup> of January 2013. It has adopted a more systematic approach, but also introduced more severe penalties, e.g. before changes of the Act maximum sentence for offences of exploitation of children or minors for pornography was five years of imprisonment and today it is eight years.

However, even before its entry into force, Criminal Code was amended. Those amendments included some minor changes of the articles at issue. *Exempli gratia*, before introducing this amendments, the criminal offence would only be committed if the perpetrator saved the material of the child pornography on his computer or other informatic accessories.<sup>11</sup> Now, the criminal offence is committed even when the perpetrator is only temporally accessing to the pornographic material<sup>12</sup> as the norm reads as following “knowingly obtaining access, by means of information and communication technology, to child pornography”.

Therefore, it can be concluded that Croatia implemented the relevant provisions in accordance with Convention on cybercrime<sup>13</sup>, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse<sup>14</sup> and Directive 2011/93 /EU on combating sexual exploitation of children and child pornography.

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

In our opinion, The Republic of Croatia, consequently, has fully harmonized its criminal legislation with the international law and the European law and the Directive 2011/93 /EU on combating sexual exploitation of children and child pornography, precisely, Article 5(1) and (3).

To conclude and summarize, Croatia transposed provisions of the Convention on cybercrime, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and Directive 2011/93 /EU on combating sexual exploitation of children and child pornography into its legislation.

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<sup>11</sup> Pavlović, Šime; Kazneni zakon - zakonski tekst, obrazloženje, poveznice, komentar, sudska praksa (Criminal code- legal text, explanation, links, commentary, case law), Libertin naklada, Rijeka, 2012, p. 339.

<sup>12</sup> *Loc.cit.*

<sup>13</sup> Convention on cybercrime, (CETS No.:185).

<sup>14</sup> Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.: 201).

1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

Croatia did not by its discretion limit the scope in the context of the paragraph 7 of the Article 5. As already mentioned above, paragraph 6 of the Article 166 of the Criminal Code reads as following:

“Child pornography shall mean 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. For the purpose of this Article, any material that is artistic, medical, scientific, informative or similar in character shall not be deemed pornography.”

In Croatian Criminal Code, the perpetrator of offences related with child pornography is a person who accesses the conduct where main subject is a child is or an adult shown as a child.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 5</b>  <b>Offences concerning child pornography</b></p> <p>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.</p> <p>2. (...)</p> <p>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.</p> <p>4. (...)</p> <p>5. (...)</p> <p>6. (...)</p> <p>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</p>	<p><b>Criminal Code</b>  <b>Exploitation of Children for Pornography</b></p> <p><b>Article 163</b></p> <p>(1) Whoever entices, recruits or incites a child to participate in the taking of child pornography pictures or whoever organizes or makes possible the taking of child pornography pictures shall be sentenced to imprisonment for a term of between one and eight years.</p> <p>(2) The sentence referred to in paragraph 1 of this Article shall be imposed on whoever takes child pornography pictures or produces, offers, makes available, distributes, transmits, imports, exports, procures for himself/herself or for another person, sells, gives, exhibits or possesses child pornography or knowingly obtains access, through information and communication technologies, to child pornography.</p> <p><b>Article 87</b></p> <p>(7) A child shall mean a person who has not attained the age of eighteen years.</p>

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.	
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## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

New Criminal Code incriminated the act of online grooming in the §1 of Article 161. This provision on the solicitation of children via online grooming reads:

“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 acts leading to such a meeting, shall be sentenced to imprisonment for a term of up to three years.”

Article is in accordance with the Directive that states in Article 6 which prescribes a maximum term of imprisonment of at least 1 year.

### 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

In the Recital 19 MS are encouraged to criminalize off-line grooming in any way, including the preparatory offences and attempt to commit the offences of sexual abuse or sexual exploitation of children by off-line grooming. This is criminalized in the Article 161 of the Criminal Code. The first paragraph describes off-line grooming in the sequel of describing online grooming, by saying “... OR in some other way, to meet up with him/her or a third party...”

Also, in the next two paragraphs of the Article 161, some preparatory measures are punishable such as collecting, giving or transferring data on persons under the age of fifteen for the purpose of committing the offences of off-line grooming as well as the offences of online grooming.

### 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

Although there were some amendments of the new Criminal Code, article 161 was not amended since its content was already in compliance with this Directive as it was made in accordance with the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse<sup>15</sup> also known as “the Lanzarote Convention”, which Republic of Croatia is a member of. The Article 23 served as a model for incriminating child grooming in the Article 161, entitled “Child Enticement for the Purpose of Satisfying Sexual Needs”. This way the legislator wishes to protect children against sexual abuse of adults who have contacted them by telephone, via Internet (social networks, chat rooms, various games, etc.) or in any other way. However in order to be punishable an adult has to take certain actions that the meeting between him and the child takes place. A mere contact is not sufficient. The attempt to do this crime is punishable, as well as preparatory measures, such as gathering information about the child, for instance its phone number, address, e-mail address or the name of the school it attends.<sup>16</sup>

### 2.4. In your view, does this legal framework comply with Art. 6?

In our opinion, Croatian legal framework follows and complies with the Article 6 very faithfully. The first paragraph of the Article 6 of the Directive corresponds to the first paragraph of the Article 161 of the Croatian Criminal Code, as well as the mentioned Article 3 (4), which coincides with the Article 158 (§1-2) of the Criminal Code.

The §2 of the Article 6 of the Directive corresponds to the §3 of the Article 161 of the Criminal Code since they are both dealing with criminalization of the attempt to commit the noted offences. The Article 5 (2) of the Directive, referred to in the second paragraph of the Article 6 concurs with Article 161 (§2 - 3) of the Criminal Code.

Therefore, it should be noted that Croatian legislator has done a tremendous work by transposing Article 6 in its legislation through the Article 161 of the Criminal Code.

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<sup>15</sup> Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No.: 201).

<sup>16</sup> Turković, Ksenija; Novoselec, Petar *et al.*, *Komentar Kaznenog zakona (Criminal Code Commentary)*, Zagreb, 2013, p. 219.

If no, what additional measures should be taken in order to comply with Art. 6?

It might be beneficial to amend the §1 of the Article 161 in a way that it refers to the Article 163 (exploitation of children for pornography). This change would be clearer and more holistic and it would also be in accordance with the Article 6. The abovementioned article would read as “An adult who, with the intention that he/she or a third party commit the criminal offence referred to in Article 158 and Article 163, etc.”

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b>  <b>Solicitation of children for sexual purposes</b></p> <p>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.</p> <p>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.</p>	<p><b>Croatian Criminal Code</b>  <b>Child Enticement for the Purpose of Satisfying Sexual Needs</b></p> <p><b>Article 161</b></p> <p>1. 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 the 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 acts leading to such a meeting, shall be sentenced to imprisonment for a term up to three years.</p> <p>2. 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 Article shall be sentenced to imprisonment for a term up to one year.</p> <p>3. A perpetrator who attempts to commit the criminal offence referred to in paragraph 1 of this Article shall be punished.</p>



## TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

If yes, does it cover:

**3.1.1. Professional activities involving direct and regular contact with children?**

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

Criminal Code states that the court shall impose upon a perpetrator who committed criminal offence in carrying out the duties of his/her office a safety measure of prohibition from holding an office or engaging in an activity. Also, when it comes to perpetrators of criminal offences committed against children, including; sexual abuse of a Child under and over the age of fifteen, child enticement for the purpose of satisfying sexual needs, child pandering, exploitation of children for pornography and pornographic performances and serious criminal offences of child sexual abuse and exploitation; the court may impose a prohibition from holding an office or engaging in a activity that involves regular contact with children when the criminal offences were not committed in carrying out the duties of his/her office or the activity, and may impose it as a lifelong measure.<sup>17</sup>

In addition to the safety measure of prohibition from holding an office, the court may, if it is necessary to deter the perpetrator from committing a new/another/further criminal offence, impose the following special obligations on the perpetrator: prohibition from frequenting certain places, objects or events which might be conducive to the commission of a new criminal offence, prohibition from approaching the victim or some other persons, prohibition from socializing with certain person or a group of persons who might indicate him/her to commit a

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<sup>17</sup> Criminal Code (op. cit. (no. 1), Article 71§1.

criminal offence, prohibition from employing, teaching or accommodating such persons.<sup>18</sup> These types of special obligations may be imposed in addition to a sentence of community service, conditional sentence and partial conditional sentence.

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

Act on legal consequences of conviction, on criminal record and rehabilitation<sup>19</sup> states that criminal records are kept for natural and legal persons convicted for criminal offences in the Republic of Croatia and for criminal offences of sexual abuse and exploitation of children. Criminal records are created and maintained by the Ministry of Justice, which is also the body in charge for exchange of such data with other countries. There records are kept using information technology, providing protection of the entered data according to the special regulations listed in the Act on the personal data protection of the Republic of Croatia.

**3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?**

The legal basis for keeping a list of perpetrators of sexual abuse and exploitation of children is found in the Article 13 paragraph 4 of the Act on legal consequences of conviction, on criminal record and rehabilitation of the Republic of Croatia. Article 13 states that the courts, public authorities and institutions founded in order to protect the rights and interests of children may, based on an adequate request, submit data on perpetrators who are convicted of crimes against sexual abuse and exploitation of a child, such as sexual abuse of a child under and over the age of fifteen, child enticement for the purpose of satisfying sexual needs, child pandering, exploitation of children for pornography and pornographic performances and serious criminal offences of child sexual abuse and exploitation.

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<sup>18</sup> *Ibid.* Article 62, §2.

<sup>19</sup> Act on legal consequences of conviction, on criminal record and rehabilitation (Official Gazette 143/12).

The right to acquire special certificates that contain data on perpetrators who are convicted for crimes at issue is granted to the bodies which are not involved in the criminal proceedings against the perpetrators of these crimes, but are rather dealing with the special procedures to protect the rights and interests of children as well as procedures delegating certain tasks and duties in working with children.

**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

- a) Professional activities involving direct and regular contact with children?
- b) Organised voluntary activities involving direct and regular contact with children?

To give a proper answer to this question, one must consult subsidiary legal source. Primary and Secondary Education Act clearly stipulates that employment with the school cannot employ a person who has been convicted for crimes of sexual abuse and exploitation of children.<sup>20</sup> From the wording on this norm, it should be concluded the employer has the obligation to demand this information.

**3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

- a) Professional activities involving direct and regular contact with children?

Providing information from the criminal records is considered rather as an exception than the rule because “nobody has the right to demand from the public to submit a proof of being either convicted or not convicted for a criminal offence.”<sup>21</sup> However, Article 14(2) of the Act on legal consequences of conviction, on criminal record and rehabilitation reads:

“... when it comes to future employment or assignment of activities whose conduct involves regular contact with children, the employer may, with the consent of the person for whom the information is required, apply for a special certificate for data from Article 13 Paragraph 4 this Act.”<sup>22</sup>

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<sup>20</sup> Primary and Secondary Education Act (Official Gazette 94/13), Article 106, §1-2.

<sup>21</sup> Act on legal consequences of conviction, on criminal record and rehabilitation (opt.cit.(no.19), Article 14 .

<sup>22</sup> *Ibid.* Article 14, §2.

In other words, the employer has the right to demand this piece of information.

b) Organised voluntary activities involving direct and regular contact with children?

Volunteering used to provide services to children is prohibited to individuals who are sentenced for a crime against sexual freedom or who have been sentenced to a misdemeanour.<sup>23</sup>

### 3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

In Croatia, provisions from the Article 10 are implemented in the Act on legal consequences of conviction, on criminal record and rehabilitation, specifically in Articles 23 to 34 which entered into force on 1 July 2013.

Paragraph 2 of Article 23 of that Act reads as following:

“Transmission of information on criminal convictions from the criminal records of EU Member States on legal persons shall be made in accordance with the provisions of international treaties, and if there are none, pursuant to the Act on Mutual Legal Assistance in Criminal Matter.”<sup>24</sup>

To be more specific, if the procedure will be conducted on the basis of the Act on the Mutual Legal Assistance in Criminal Matters, the Ministry of Justice shall notify the foreign competent authority of all criminal convictions and measures relating to nationals of the foreign country and introduced into the court record, at least once a year, if an international agreement provides otherwise”.<sup>25</sup>

Furthermore, Council Framework Decision 2009/315/JHA has foreseen the initiation of ECRIS - European Criminal Records Information System, of which Croatian criminal record and register of paedophiles has been a part of since 1st July, 2013.

The main purpose of ECRIS is to ensure additional flow and transmission of information on criminal convictions, pursuant to paragraph 3 of Article 10 among Member States.

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<sup>23</sup> Act on Volunteering, (Official Gazette 58/07,22/13) Article 10, §2.

<sup>24</sup> Act on legal consequences of conviction, on criminal record and rehabilitation (*opt.cit.*(no.19), Article 23, §2.

<sup>25</sup> *Ibid.* Article 20, §3.

3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

In order to implement Article 10, with regard to each of the three obligations described, Croatian legislator enacted the Act on criminal consequences of conviction, on criminal record and rehabilitation.

Before this Act, disqualification, screening and transmission of information on criminal convictions were regulated by Criminal Code, Act on Mutual Legal Assistance in Criminal Matter and Ordinance on Criminal Record.<sup>26</sup>

Regarding transmission of information on criminal convictions, Act on Mutual Legal Assistance in Criminal Matter, to be more specific Article 20 paragraph 3 in now substituted by whole Title regarding International Data Transmission from Criminal Records in the Act on legal consequences of convictions, on criminal record and rehabilitation.

In accordance with the Act on Mutual Legal Assistance, transmission of information on criminal convictions was a duty of the national courts on an annual basis, with some exceptions when courts demand information from the criminal records of other Member State by special request.

By enacting new Act, transmission has become more opportune – it is no longer executed among the national courts on an annual basis but delivered for any kind of mutual legal assistance in criminal matter. Situations in which information can be transmitted with or without a request via ECRIS, between central authorities of the Member States are now more defined enabling better information flow.

3.5. In your view, does the current legal framework comply with Art. 10?

In our opinion, provisions regarding the dealing with the offenders, their rehabilitation and usage of information from the Registry need to be elaborated furthermore.

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<sup>26</sup> Ordinance on Criminal Record (Official Gazette 92/2009).

If no, what additional measures should be taken in order to comply with Art. 10?

Current legal framework does comply with Article 10, but there are still some shortcomings and omissions in the conduct of criminal records on crimes of sexual abuse and exploitation of children.

Paedophile-sex Offender Registry which is kept by the Ministry of Justice was introduced on January 1<sup>st</sup> 2013, and based on the European practice by which the register is not available to the general public, but only to the official parties. Records consist of the names of persons who have been convicted for crimes of sexual abuse and exploitation of a child and other offenses.

In its short practice, Registry has been fulfilling only its form – most of the information is not updated frequently nor properly used – many employers are still skipping this inevitable step in the employment. Rehabilitation begins after serving the sentence, and after the expiry of that date person is treated as he or she has never been punished at all.

It follows that in the case a person is nominated for work with children, and the institution asks for verification, there will be no legal barriers to employment, since this person will no longer be in the registry. Criminal records are deleted on the basis of the decision on the rehabilitation of the body responsible for keeping criminal records, as well as the final court decision on the rehab.

This especially applies to private companies (e.g. private kindergartens), whose employers are, in accordance with the Act on legal consequences of convictions, on criminal record and rehabilitation not obliged to check whether the candidate is in the Registry.

Further steps could be undertaken regarding the police or probation service supervision of the offenders after serving their sentence which is regulated by Criminal Code, Article 76. The Article now reads the providing mandatory supervision can be determined for those who have committed a crime for which a prison sentence of 5 or more years for intentional criminal offense and 2 or more years for intentional criminal offense involving violence is given. Supervision takes at least one year.<sup>27</sup> The article as it is now, is poorly written because of its imprecision – possibility of no police supervision for crimes with prison sentence less than 2 years and possibility of recidivism - therefore difficult to be implemented if there will be no changes in the provisions, thus highlighting the biggest flaw.

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<sup>27</sup> Criminal Code (opt.cit.(no.1), Article 76, §1-2.

Additional and necessary measures, when ensuring entitlement for employers to demand information on the existence of prior criminal conviction for the offences listed in Article 3-7 of the Directive when recruiting a person, are still based on right to demand to seek such information instead of a prescribed obligation. There are only few requests of that matter in the last year and it has to be ever increasing, especially by employers when recruiting a person for professional or voluntary work involving direct and regular contact with children.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b> <b>Disqualification arising from convictions</b></p> <p>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.</p> <p>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.</p> <p>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</p>	<p><b>Croatian Criminal Code</b> <b>Article 71</b></p> <p>The court may impose upon a perpetrator of a criminal offence referred to in Article 105, paragraph 3, Article 106, paragraphs 2 and 3, Articles 110 and 111, Article 112, paragraph 1, Articles 114, 116, 118, 119, 120, Article 154, paragraph 1, item 2, Articles 158, 159, 161, 162, 163, 164 and 166 of this Act committed against a child a prohibition from holding an office or engaging in an activity that involves regular contact with children also when the above offences were not committed in carrying out the duties of his/her office or the activity, and may impose it as a lifelong measure.</p> <p><b>Act on criminal consequences of conviction, on criminal record and rehabilitation</b> <b>Article 14</b></p> <p>(2) Exceptionally, when it comes to future employment or assignment of activities whose conduct involves regular contact with children, the employer may, with the consent of the person for whom the information is required, apply for a special certificate of data from Article 13 Paragraph 4 this Act.</p> <p><b>Article 23</b></p> <p>(2) Transmission of information on criminal convictions from the criminal records of EU Member States on legal persons shall be made in accordance with the provisions of international treaties, and if there are none, pursuant to the Act on Mutual Legal Assistance in Criminal Matter.</p>

February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.

**Act on Mutual Legal Assistance in Criminal Matter**

**Article 20**

The Ministry of Justice shall notify the foreign competent authority of all criminal convictions and measures relating to nationals of the foreign country and introduced into the court record, at least once a year, if an international agreement provides otherwise.

## TOPIC 4.

### *Victim identification*

(Article 15 (4))

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

Although paragraph 4 of Article 15 states that Member States shall take the necessary measures to enable investigative units or services to attempt to identify the victims of the offences in particular by analysing child pornography material, there is no corresponding provision in our national legislation, strictly defining this procedure and which investigative units or services and in which matter are enabled to attempt this identification process.

Secondly, Ministry of the Interior, in October 2013, has launched "Red Button" application, as a part of IPA twinning project "Capacity Building in the Field of Fight against Sexual Exploitation and Sexual Abuse of Children, and on Police Assistance to Vulnerable Crime Victims", helping to prevent child abuse and pornography and to collect material for further investigation.

"Red Button" is an application for on-line registration of any violence against children as well as the application of inappropriate Internet content. It is adjusted for children and it teaches them basic legal rules, defines what is forbidden in Croatia and instructs them how to seek for help.

The Croatian police have decided to change the strategy of working in the criminal acts of sexual abuse and exploitation of children and their activities have become more directed toward the identification of the victims and apprehension of so-called „contact offenders“ who recorded and produced child pornography.



In June last year, Croatian police merged on Interpol's international database of child pornography, whose purpose is the identification of victims - children. So far, this database connected 40 Member States of Interpol. There are numerous links to pornographic content, IP addresses, etc., in this database. Croatia is the first country in the region, which has thus shown that it is one of the objectives of the protection of children everywhere, even on the Internet.

After certain pornography material was found and registered, police authorities investigate the source of the material and track down offenders.

Up until now, such report went exclusively through traditional channels, logging the relevant police authority, but from now on all forms of online abuse can be applied via the associated application. Crime officers who are in charge of juvenile delinquency and crime at the expense of the youth and families, investigated 29 cases of child victims of pornography in Croatia.

Offenses which may be subject to police investigation can be found in Chapter XVII. Criminal Code<sup>28</sup> including offenses of sexual abuse and exploitation of a child, enticement of children for sexual gratification needs or exploitation of children for pornography, intrusive behaviour and unauthorised use of personal data.

If the abuser is not from Croatia, all data is being forwarded to the police of the country from which the abuser comes from and the investigation is being conducted by those authorities. Under no circumstances is the child abuse being ignored.

The IPA twinning project, including the Red Button application, is still being implemented due to finding financial resources for new technological equipment mentioned in the IPA project plan itself, needed to successfully complete the project.

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)? If no, what additional measures should be taken in order to comply with Art. 15 (4)?

In our view, current legal framework does not comply with Article 15(4). Although there are no corresponding provisions in our national legislation that cover prior art method of investigation, the IPA twinning project and regulations within the project have set up grounds for investigative units to investigate this kind of subject. Provisions in Criminal Procedure Act<sup>29</sup> initiate the

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<sup>28</sup> Criminal Code (op. cit. (no. 1), Chapter XVII.

<sup>29</sup> Criminal Procedure Act (Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13,145/13).

procedure set out in Article 15(4), but only on the pornographic material of victims already identified.

“Red Button” application is still in its initial phase and we are still not familiar with the possible outcome, but regulations considering the usage of the material collected via this application need to be further adopted.

## **TOPIC 5.**

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

### **5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

Criminal Code<sup>30</sup> is based on territoriality principle which states that the criminal legislation will apply to everyone who commits a criminal offence in its territory, regardless of who is the perpetrator, who is the victim or whether the offence is committed in whole or in part of its territory. Furthermore, the criminal legislation shall be applied to anyone who commits a criminal offence aboard a national vessel or an aircraft, irrespective of where the vessel or the aircraft is located at the time the criminal offence was committed. Institution of criminal proceedings for criminal offences committed in the territory of the Republic of Croatia has some particularities. For instance, if the criminal proceeding in a foreign country has ended with a judgment, criminal proceeding in the Republic shall be instituted only upon an authorization from the State Attorney. Additionally, if the offence was committed in the territory of a signatory state to the Convention implementing the Schengen Agreement, and if the Criminal Proceeding has ended with a judgment in that state, Republic of Croatia will consistently implement

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<sup>30</sup> *Ibid.* Article 10.

principle of *ne bis in idem* - meaning that it will not pursue the perpetrator with additional criminal proceeding for the same offence.

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

Extraterritorial jurisdiction of the Republic of Croatia is, among other principles, based on the nationality of the perpetrator (active personality jurisdiction). Article 14 of the Criminal Code states that the criminal legislation shall be applied to a Croatian citizen who commits a criminal offence outside of the territory of the Republic, providing that the criminal offence in question is also punishable under the law of the country in which was committed. Exceptions from this rule are offences of sexual abuse and sexual exploitation of children. Croatian criminal jurisdiction shall apply if the perpetrator was Croatian citizen at the time when he committed the offence, if the perpetrator lost Croatian citizenship after he committed the offence or if he acquires citizenship after he commits the offence.

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

Sentence of imprisonment shall be imposed upon anyone who commits a criminal offence of sexual abuse of a child using communication technology, regardless of whether the technology is accessed from the territory of the Republic or not.

For example, an adult who, with the intention that he/she or a third party commit the criminal offence of sexual abuse of a child 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 acts leading to such a meeting, shall be sentenced to imprisonment for a term of up to three years.<sup>31</sup> Also, the sentence shall be imposed on whoever takes child pornography pictures or produces, offers, makes available, distributes, transmits, imports, exports, procures for himself/herself or for another person, sells, gives, exhibits or possesses child pornography or knowingly obtains access, through information and communication technologies, to child pornography.<sup>32</sup>

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<sup>31</sup> *Ibid.* Article 161, §1.

<sup>32</sup> *Ibid* Article 163, §2.

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

Active personality jurisdiction in the Republic of Croatia is limited in that sense that the Croatian criminal legislation shall not be initiated if under the law of the country in which the criminal offence was committed, the criminal offence in question is prosecuted on the basis of a motion or private action, and such motion or private action have not been filed, or the statute limitations for criminal prosecution has expired.<sup>33</sup>

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

Croatia applies its criminal legislation to an alien who outside its territory commits a criminal offence for which a sentence of imprisonment is five years or more, provided that the offence is also punishable under the law of the country in which it was committed.

In cases concerning the offences referred to in Article 17, the criminal legislation of the Republic of Croatia shall be applied to cases where the criminal offences is not punishable under the law of the country in which it was committed, but only if the offence was committed by a Croatian citizen or a person with permanent residence in Croatia.<sup>34</sup> This exception applies to following offenses; sexual abuse of a child under and over the age of fifteen, cases of satisfying lust in the presence of a child under the age of fifteen, cases of child enticement for the purpose of satisfying sexual needs, child pandering, exploitation of children for pornography and pornographic performances, acquainting children with pornography and in cases against serious criminal offence of child sexual abuse and exploitation.

### **5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))**

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<sup>33</sup> *Ibid* Article 18, §2.

<sup>34</sup> *Ibid*. Article 14, §3.

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

Criminal jurisdiction of the Republic of Croatia is applied to an alien who, outside of the territory of the Republic, commits a criminal offence against a Croatian citizen or a habitual resident (passive personality principle).

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

Act on the Responsibility of Legal Persons for the Criminal Offences<sup>35</sup>, states that the legal person shall be punished for a criminal offence of a responsible person if such offence violates any of the duties of the legal person or if the legal person has derived or should have derived illegal gain for itself or third person.

The responsible person is a natural person in charge of the operations of the legal person or entrusted with the tasks from the scope of operation of the legal person.<sup>36</sup>

c) The offender is a habitual resident (Art. 17(2)(c))?

If no, what are in your view the prospects of your MS prevailing itself of the option provided in Article 17?

The criminal legislation of the Republic of Croatia shall be applied to a habitual resident of the Republic of Croatia, whether he committed the offence in the territory of the Republic or outside of the territory of the Republic of Croatia. In that sense habitual residents are in equal position as the Croatian citizens.<sup>37</sup>

## 5.2. Which steps have been taken in your MS in order to implement Article 17?

Croatian legislator had in mind the implementation while drafting the new Criminal Code. Prior to the new one, Code stated that the criminal legislation of the Republic of Croatia shall be applied to a Croatian citizen or a person with permanent residence in the Republic of Croatia

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<sup>35</sup> Act on the Responsibility of Legal Persons for the Criminal Offences (Official Gazette 151/03, 110/07, 45/11, 143/12).

<sup>36</sup> *Ibid.* Article 4.

<sup>37</sup> *Ibid.* Article 14, §1.

who outside of the territory of the Republic of Croatia commits a criminal offence, provided that the criminal offence in question is also punishable under the law of the country in which it was committed.<sup>38</sup>

Legislator excluded, in paragraph 3 of the Article 14, criminal offences of sexual abuse and sexual exploitation of children from that provision, stating that in the cases of; sexual abuse of a child under and over the age of fifteen, in cases of satisfying lust in the presence of a child under the age of fifteen, in cases of child enticement for the purpose of satisfying sexual needs, child pandering, exploitation of children for pornography and pornographic performances, acquainting children with pornography and in cases against serious criminal offence of child sexual abuse and exploitation, the criminal legislature shall be applied even though the criminal offence in question is not punishable under the law of the country in which it was committed.

Regarding Article 17 paragraph 2, section C of the Directive, the changes in the Croatian legislature were made in that sense that the habitual resident is now equal as the Croatian citizen regarding the offences he committed.

Regarding paragraphs 1 and 2 of the Directive, Croatian legislature already had corresponding provisions that provided protection of rights guaranteed by the Article 17. Those provisions were stated at the Article 10, and Article 15 of the Criminal code.

### 5.3. In your view, does the current legal framework comply with Article 17?

In our own estimation, Croatian legislator failed to implement certain paragraphs of the Article 17. For example, paragraph 5 states that for the prosecution of any of the offences committed outside the territory of the Member State concerned, each Member shall take 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 denunciation from the State of the place where the offence was committed.

Article 18 paragraphs 1 and 3 of the Croatian Criminal code state that in cases where the criminal offence is committed outside of the territory of the Republic of Croatia, criminal proceedings for the purpose of applying the criminal legislation of the Republic of Croatia shall not be instituted if: the *res judicata* sentence has been carried out under the law of the country in which the person

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<sup>38</sup> *Ibid.*

was convicted and if under the law of the country in which the criminal offence was committed the criminal offence in question is prosecuted on the basis of a motion or private action, and such motion or private action have not been filed.

If no, what additional measures should be taken in order to comply with Article 17?

Legislator should, in cases of sexual abuse and sexual exploitation of children, modify the rules on initiating criminal proceedings so that the proceedings of the offences committed against sexual freedom of children, which are committed outside of the territory of the Republic of Croatia, are not subordinated to the condition that the criminal offences can be prosecuted only on the basis of a motion or a private action.

Despite the fact that the Republic of Croatia takes into consideration its legal interest in persecuting that type of offences, assuming that the legal interest is greater in countries in which the offence took place or in which the victim is resident, it is crucial that Republic of Croatia modifies the rules on initiating criminal proceedings so that it can provide maximum legal protection of sexual freedom of children.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <ul style="list-style-type: none"> <li>(a) the offence is committed in whole or in part within their territory; or</li> <li>(b) the offender is one of their nationals.</li> </ul> <p>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:</p> <ul style="list-style-type: none"> <li>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</li> <li>(b) the offence is committed for the benefit of a legal person established in its territory; or</li> </ul>	<p><b>Croatian Criminal Code</b></p> <p><b>Article 10</b> The criminal legislation of the Republic of Croatia shall be applied to anyone who commits a criminal offence in its territory.</p> <p><b>Article 15</b> The criminal legislation of the Republic of Croatia shall be applied to an alien who outside the territory of the Republic of Croatia commits a criminal offence other than those established in accordance with the provisions of Articles 13 and 16 of this Act against a citizen of the Republic of Croatia, a person with a permanent residence in the Republic of Croatia or a legal person registered in the Republic of Croatia, provided the criminal offence in question is also punishable under the law of the country in which it was committed.</p>

(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.

### **Act on the Responsibility of Legal Persons for the Criminal Offences**

#### **Article 3**

The legal person shall be punished for a criminal offence of a responsible person if such offence violates any of the duties of the legal person or if the legal person has derived or should have derived illegal gain for itself or third person.

### **Croatian Criminal Code**

#### **Articles 10 and 14**

The criminal legislation of the Republic of Croatia shall be applied to anyone who commits a criminal offence in its territory.

The criminal legislation of the Republic of Croatia shall be applied to a Croatian citizen or a person with permanent residence in the Republic of Croatia who outside the territory of the Republic of Croatia commits a criminal offence other than those established in accordance with the provisions of Articles 13 and 16 of this Act, provided the criminal offence in question is also punishable under the law of the country in which it was committed.

#### **Article 161**

(1) An adult who, with the intention that he/she or a third party commit the 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 meeting, shall be sentenced to imprisonment for a term up to one year.

(2) The sentence referred to in paragraph 1 of this Article shall be imposed on whoever takes child pornography pictures or produces, offers, makes available, distributes, transmits, imports, exports, procures for himself/herself or for another person, sells, gives, exhibits or possesses child pornography or knowingly obtains access, through information and communication technologies, to child pornography.

#### **Article 14**

(3) In cases referred to in paragraphs 1 and 2 of this Article, with respect to criminal offences referred to in Article 115, paragraphs 3 and 4, and Articles 116, 153, 154, 158, 161, 162, 163, 164, 166 and 169 of this Act and other criminal offences provided for by international treaties to which the Republic of



	<p>Croatia is a party, the criminal legislation of the Republic of Croatia shall also be applied to cases where the criminal offence is not punishable under the law of the country in which it was committed.</p> <p><b>Article 18</b></p> <p>In cases referred to in Articles 14, 15 and 17 of this Act, criminal proceedings for the purpose of applying the criminal legislation of the Republic of Croatia shall not be instituted:</p> <ol style="list-style-type: none"> <li>1. If the res judicata sentence has been carried out or is in the process of being carried out or can no longer be carried out under the law of the country in which the person was convicted,</li> <li>2. If the perpetrator has been acquitted by a judgment having the force of res judicata in a foreign country or if he/she has been granted pardon under the law of the country in which he/she committed the criminal offence,</li> <li>3. If under the law of the country in which the criminal offence was committed, the criminal offence in question is prosecuted on the basis of a motion or private action, and such motion or private action have not been filed, or the statute of limitations for criminal prosecution.</li> </ol>
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## TOPIC 6.

*Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

6.1. Please describe the current national legal framework with regard to child victims

### 6.1.1. General framework of protection (Art. 18)

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

Croatia has transposed Council Framework Decision 2001/220/JHA into Croatian legislation by the Act on Amendments and Supplements to the Criminal Procedure Act<sup>39</sup> and the Act on Amendments and Supplements to the Juvenile Courts Act.<sup>40</sup>

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

Police officers, initially when providing intervention upon report on violence committed against children, are obliged to act particularly thoughtful and professional, being aware they do not stress out the victims they encounter even more.<sup>41</sup> When the police (or other competent authority) have determined the veracity of the report of the criminal offence regarding child abuse or sexual exploitation, child victim is provided with further assistance and support. Croatian Family Act<sup>42</sup> stated in Article 108 that every person is obliged to notify a social welfare centre about infringement of the child's rights, especially about all forms of physical or mental violence, sexual abuse, neglect or negligence, abuse or exploitation of the child. Social welfare centre is then, immediately upon receiving this information, obliged to examine the case and take measures for the protection of the child's rights.<sup>43</sup>

Specific measures provided during the procedures will be described afterwards.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

According to the Criminal Procedure Act, child is defined as a person under the age of eighteen.<sup>44</sup> In some cases, age of a person is uncertain or it is not familiar. Therefore, in accordance with the Directive, new paragraph<sup>45</sup> has been introduced into the Act. If it is not possible to determine the age of the victim but from the circumstance it could be concluded it is a minor, it will be presumed that the person is a child.

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<sup>39</sup> Criminal Procedure Act, (*op.cit.* (no. 29), Article 3.

<sup>40</sup> Juvenile Courts Act (Official Gazette 84/11, 143/12, 148/13) Article 1.a.

<sup>41</sup> *Priručnik (Handbook)*, Psychological Assistance Society, United Nations Development Programme in Croatia, 2010.

<sup>42</sup> Family Act (Official Gazette 116/2003, 17/2004, 136/2004, 107/2007, 61/2011), Article 108, §1.

<sup>43</sup> *Ibid.* Article 108, §2.

<sup>44</sup> Criminal Procedure Act (*op.cit.* (no. 29), Article 202, §37.

<sup>45</sup> *Ibid.* Article 44, §3.

### 6.1.2. Specific assistance and support measures (Art. 19)

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art. 19 (1))?

Child victims enjoy various assistance and support measures before, during and after the criminal proceeding. In order to assist them, they are entitled to have legal representative. Usually, parents or guardians represent child in the proceedings. However, in the cases when the perpetrator is a parent or guardian, special guardian will be appointed. He will then represent the child or appoint another legal representative. Police, investigator, State Attorney's Office and the court are obliged to act with special attention towards the victim.<sup>46</sup> These authorities should inform the victim about their rights and instruct them how to exercise their rights. Moreover, they should also take care about the best interest of a child victim while taking procedural actions.

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

Area of protection of children that are victims of abuse within their family is regulated with the Act on protection against domestic violence<sup>47</sup> and with the Criminal Code for situations where domestic violence constitutes criminal offence. In these cases, protection of child victims is also regulated by the Criminal Procedure Act<sup>48</sup>. Competent authorities that take procedural actions regarding the domestic violence are obliged to act urgently. Interests of a child victim have priority in all procedures. According to The Protocol for acting in cases of domestic violence<sup>49</sup> the police will carry out the interview with the victim in the separated premise without the presence of the offender. That enables the victim to disclose undisturbedly and without fear all facts to the police officer. The officer will then introduce the victims to their legal rights, especially about protection measures, and inform them about following measures and actions that will be taken against the offender.

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<sup>46</sup> *Ibid.* Article 16, §2.

<sup>47</sup> Act on Protection against Domestic Violence (Official Gazette 137/09, 14/10, 60/10).

<sup>48</sup> Criminal Procedure Act (*op.vit.* (no. 29)).

<sup>49</sup> The Protocol for Acting in Cases of Domestic Violence, Ministry of the Family, Veterans' Affairs. and Intergenerational Solidarity, 2005., p.7.

If the courts find that the facts and circumstances established during criminal proceedings indicate that it is necessary to undertake measures for the protection of the minor's rights and well-being, they will inform social welfare centre. Another important protection measure is depriving the parent of the right to parental care. When the social welfare centre learns of circumstances of sexual abuse committed by the parent, or any other circumstance referred in the Article 114,<sup>50</sup> the social welfare centre is obliged to institute a procedure for depriving the right to parental care as soon as possible.<sup>51</sup> If the court finds that the parent abused or gravely infringed parental responsibilities, duties and rights, it will deprive the parent of the right in an extra-contentious procedure.<sup>52</sup>

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

There is no specific provision in Croatian legislation that regulates this question. However, best interest of the child is a guiding principle in all procedures. Family act contains a provision which reads as following:

“In actions in which a child's right or interest is decided upon, the child has the right to learn, in an appropriate way, the important circumstances of a case, receive advice and express its opinion, and be informed of the possible consequences emerging from the acknowledgement of that opinion. The opinion is taken into consideration with respect to the child's age and maturity.”<sup>53</sup>

If one interprets the right “receiving advices” extensively it could be concluded somebody else has the obligation to give the advice in the child's best interest.

Children that have suffered from sexual abuse or violence often clam up and refuse to cooperate in any way. Reasons can be various. They often do not feel comfortable talking about traumatic experience, they feel ashamed, or in cases of abuse within family, they often feel sort of responsible and they do not want to destroy family by telling the truth about an abusive parent or a relative. Therefore, in these situations, despite unwillingness to cooperate, child victims receive maximum assistance and support.<sup>54</sup>

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<sup>50</sup> Family Act (*op.cit.* (no. 41), Article 114, §2.

<sup>51</sup> *Ibid.*, Article 114, §3.

<sup>52</sup> *Ibid.*, Article 114, §1.

<sup>53</sup> Family Act (*op.cit.* (no. 41), Article 88, §5.

<sup>54</sup> The Protocol for Acting in Case of Sexual Violence, Government of the Republic of Croatia, Zagreb, 2012.

All criminal offences regarding sexual abuse or exploitation of children are offences that are prosecuted *ex officio*. In this context, police is obliged to undertake all measures to discover the perpetrator, and find and preserve traces and evidence. In situations where child refuses to give statement and does not want to participate in criminal proceedings, the police is obliged to collect other available evidence and inform State Attorney's Office.<sup>55</sup>

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

Each particular victim is supposed to be treated with special consideration, paying special attention to his or her age, personality features, education and circumstances in which lives to avoid possible adverse consequences for its development.<sup>56</sup> If necessary, the examination of a child or minor should be made with the assistance of a psychologist, pedagogue or other professional. Also, the expert that will carry out the examination of child victim, should first gain as much as possible information from school, social welfare centre, family members etc. in order to know in which way the examination should go and to prevent unnecessary interrogation.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

Child victims are considered vulnerable, particularly as victims of criminal offences against sexual freedom and morality. Due to their age, knowledge, vulnerability in general, dependence on their parents, they should receive special treatment which suits them best regarding their situation. Authorities are obliged to act towards them with special care, inform them about their rights, ensure they have adequate representative if needed, secure that the abuser is no longer in their surrounding etc. As it will be explained in the following text, it is necessary to ensure that the procedural actions do not traumatize victims even more, or expose them to unnecessary new nuisances.

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe

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<sup>55</sup> *Ibid.*, p.11.

<sup>56</sup> Criminal Procedure Act (*op. cit.* (no. 29), Article 44, §2.

Area of assistance and support to the family of child victim has not been specifically regulated in the Croatian legislation; however there are few mechanisms that provide help to the family. Within County courts in Zagreb, Vukovar, Osijek, Zadar, Split, Sisak and Rijeka, and within Municipal Criminal Court of Zagreb, under the supervision of the Ministry of Justice, Support Office for Witnesses and Victims<sup>57</sup> was established. Volunteers in the Office provide emotional support and practical help before, during and after the proceeding. They provide practical information to witnesses, victims and members of their family and direct them where they can seek for professional help.

Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

As stated in the Framework Decision 2001/220/JHA, Article 4, it is important that family receives essential information in due time. Criminal Procedure Act stipulates what is understood under case insight and who is entitled to have insight. Information about child that participates in procedure is considered a secret.<sup>58</sup> Parent, as a legal representative of the child, is present during all proceedings in connection with the child and therefore has right to be informed not only about everything that has been determined, but also about the following measures that are planned regarding the case. Only in the situation where the parent is a suspect or there are strong indications that he or she endangers child's rights, information will be redirected to the competent authority of social welfare.<sup>59</sup> However, right to receive all relevant information is not satisfactorily regulated in our national legislation.

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which

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<sup>57</sup> The Support Office for Witnesses and Victims, <http://zrtveisvjedoci.pravosudje.hr/Default.aspx?sec=126>, visited on 14/03/2014.

<sup>58</sup> Criminal Procedure Act (*op. vit.* (no. 29), Article 183, §3.

<sup>59</sup> The Protocol for Acting in Case of Sexual Violence, (*op.vit.* (no. 53).

Child victim has a right to a special representative at the expense of the budget funds.<sup>60</sup> Also, child victim can choose a person of trust<sup>61</sup>; legal representative or other adult, unless he or she is a witness in the concrete proceeding.

In cases where child interest are in conflict with parent interests (or guardian), court is obliged to notify the social welfare centre, which will then appoint a special representative if that is necessary to protect child's best interest.<sup>62</sup>

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:

a) Available for the purpose of claiming compensation?

This area is regulated with 'The Crime Victims' Compensation Act.'<sup>63</sup> The procedure of the enforcement of the right to compensation starts with filling out an official form. To get assistance in completing it, the victim (or representative) can contact competent authorities or make a free-of-charge call to the National Call Centre for Victims of Crime and Misdemeanour.<sup>64</sup> Victims' right to claim financial compensation is also regulated in the Criminal Procedure Act with Article 43, paragraphs 2 and 3.

b) Free of charge where the victim does not have sufficient financial resources?

Likewise previous question, this is regulated in the Criminal Procedure Act with Article 44, paragraph 1.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

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<sup>60</sup> Criminal Procedure Act (*op. vit.* (no. 29), Article 44, §1.

<sup>61</sup> *Ibid.*, Article 202, §38.

<sup>62</sup> *Ibid.* Article 53, §1.

<sup>63</sup> The Crime Victims' Compensation Act (Official Gazette 80/08, 27/11).

<sup>64</sup> The brochure on the victims' rights pursuant to the crime victims' compensation act, <http://www.mprh.hr/odjel-za-naknade-u-kaznenim-postupcima>, visited on 14/03/2014.

Pursuant to the Article 4 in Juvenile Courts Act, criminal proceedings against minors, young adult and dealing with the protection of children are urgent.<sup>65</sup> Also, according to the Protocol for acting in case of sexual violence<sup>66</sup>, police officers act hurriedly and without delay when receiving report about violence and sexual abuse. Authorities should immediately include officer qualified for sexual violence. That person should collect relevant information and interview victim as soon as possible. Afterward, officer should notify the State Attorney's Office about collected information, in order to coordinate following actions.<sup>67</sup>

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

Interview with the child should be held in special premises.<sup>68</sup> It is important to ensure that the potential abuser is not present in the same room. Otherwise, probability of getting truthful and complete testimony is diminished. Furthermore, premises should be adequately soundproof. Very often sexually abused children are being threatened with violence so they would not reveal „secret“. Thus, when being examined, if they have feeling that someone might hear their conversation with psychologist or other professional, they might shut down and refuse to talk.<sup>69</sup>

In 2011, Ministry of the Interior presented 15 new premises, specially designed for performing interviews with child victims. During 2012 within the project IPA 2009 – “Capacity building in the field of fight against sexual exploitation and sexual abuse of children and on police assistance to vulnerable crime victims”<sup>70</sup> police has equipped additional 45 premises.

Also, Juvenile Courts Act prescribed the Article 115<sup>71</sup> that children can be interviewed in their residence if that is more acceptable.

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<sup>65</sup> Juvenile Courts Act (*op.cit.* (no. 40), Article 4.

<sup>66</sup> The Protocol for Acting in Case of Sexual Violence, Government of the Republic of Croatia, Zagreb, 2012.

<sup>67</sup> *Ibid.*, p.12.

<sup>68</sup> Criminal Procedure Act, (*op.cit.* (no. 29), Article 292, §1.

<sup>69</sup> Buljan-Flander, Gordana et. al., Dijete u kaznenom postupku (Child in criminal proceedings), Paediatrica Croatia, Vol. 48, No 4, October - December 2004, <http://www.paedcro.com/hr/280-280>, visited on 14/03/2014.

<sup>70</sup> Capacity building in the field of fight against sexual exploitation and sexual abuse of children and on police assistance to vulnerable crime victims, <http://www.mup.hr/UserDocsImages/topvijesti/2013/travanj/prezentacija02.pdf>, Ministry of the Interior, visited on 30/03/2014.

<sup>71</sup> Juvenile Courts Act (*op.cit.* (no. 40), Article 115.



c) Interviews with the child victim are carried out by or through professionals trained for this purpose?

Courts in Croatia have professional associates with required profiles such as social education - special education teachers and social workers, psychologists, psychiatrists, paediatricians who participate in the proceedings in accordance with the law. The Criminal Procedure Act prescribed in Article 292, paragraph 1, that the examination of child should be carried out with the assistance of psychologist, pedagogue or other expert.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

If it is possible, the same expert will conduct all interviews. Victim can also ask to be examined by the person of same sex.

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?

Interviews are most likely to be audio-video taped. Victim will be interviewed again exceptionally, only if the court finds it necessary.

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?

The victim will be provided with a legal representative or counsel. Child victim can also choose an adult of trust to be his or her accompaniment through proceedings.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

As previously stated, all interviews with child victims and child witnesses may be audio-visually recorded. That sort of recorded interviews are credible evidences in criminal court proceedings.

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

Child, in order to protect his privacy and identity, has the right to secrecy of personal data and the right to a proceeding excluded of the public.<sup>72</sup>

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

Child can be interviewed in their own dwellings or any other premises (other than courtroom) using communication technologies. Regulated in the Criminal Procedure Act with Article 292.

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

Childs' privacy must always be protected.<sup>73</sup> In cases of reproducing recordings with child appearances, image and voices must be altered.

Also, according to the Criminal Code<sup>74</sup>, pornographic material which was created by the commission of the criminal offences of exploitation of children for pornography, shall be destroyed.

6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify

The Criminal Procedure Act pointed out in Article 1.a, paragraph 3, that the Directive 2011/93/EU has been transposed into Croatian legislation. The Act has improved measures required to protect and assist child victims and witnesses. Special premises have been designed to carry out interviews with them. Professional experts, qualified especially for sexual violence, are now working with victims before, during and after the proceedings. Victims are entitled to legal representatives and persons of trust to escort them in court. Protection of their privacy, identity

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<sup>72</sup> Criminal Procedure Act, (*op.cit.* (no. 29), Article 44, §1.

<sup>73</sup> *Ibid.*

<sup>74</sup> Criminal Code (*op. cit.* (no. 1), Article 163, §4.

and image is also guaranteed by the law. Therewithal, using modern equipment for witness and victim examination became reality in courts practice.<sup>75</sup>

### 6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

In general, our national legislation is mostly accordant with Articles 18, 19, 20. However, assistance and support measures regarding the standing of victims and their family in criminal procedure should be strengthened.

If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

It is always possible to improve the situation regarding the protection of child victims. It would be rather important to continue rising the level of awareness regarding the protection of children that have suffered from any form of sexual violence. First of all, it is necessary to work on prevention and reduction of child pornography. Thus, in 2013, Ministry of Interior represented new project IPA-2009 "Capacity building in the field of fight against sexual exploitation and sexual abuse of children and on police assistance to vulnerable crime victims."<sup>76</sup> The project is being financed by the European Commission.

Later on, it is necessary to provide appropriate help to the victims and their family and to neutralize the trauma as much as possible. Croatian legal framework provides very good grounds for progress. The problem lies in the fact that many steps that are crucial in acting in cases of sexual violence, are left out because they are not prescribed by law. It is of great importance to fix by law provisions that will oblige authorities to better cooperation and more urgent reaction.

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<sup>75</sup> *Priručnik (Handbook)*, Psychological Assistance Society, United Nations Development Programme in Croatia, 2010., p. 99.

<sup>76</sup> Capacity building in the field of fight against sexual exploitation and sexual abuse of children and on police assistance to vulnerable crime victims, (*op.cit.* (no. 75).

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b>            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.</p>	<p><b>The Criminal Procedure Act</b>  <b>Title V. Victim, injured person and private prosecutor</b>  <b>Article 43</b>            1. Victim of the criminal offence according to this Act has:            1) Right to effective psychological and other professional assistance and support from authorities, organization or other institution competent for assistance for criminal offences victims.</p> <p><b>Article 44</b>            1. Competent authorities shall act towards the child victim taking into account the best interest of the child.</p>
<p>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.</p>	
<p>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.</p>	<p><b>Article 44</b>            3. If the age of the victim is not familiar, it shall be presumed that the person is a child if there is probability that the victim is under the age of eighteen.</p>
<p><b>Article 19</b>  <b>Assistance and support to victims</b>            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 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</p>	<p>No specific provision.</p>

<p>abuse within their family.</p> <p>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.</p>	
<p>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.</p>	<p><b>Article 44</b></p> <p>2. The court, State Attorney, investigator and the police shall treat the child victim with special consideration when performing procedural actions, paying special attention to his or her age, personality features, education and circumstances in which he or she lives in order to avoid possible adverse consequences for his or her education and development.</p>
<p>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.</p>	<p><b>Croatian Criminal code</b> does not define particularly vulnerable victims but prescribes higher penalties for criminal offences committed against these persons.</p>
<p>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.</p>	<p><b>Criminal Procedure Act</b></p> <p><b>Article 184</b> stipulates that the victim, injured party and their representative have right to case insight.</p>
<p><b>Article 20</b> <b>Protection of child victims in criminal investigations and proceedings</b></p> <p>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.</p>	<p><b>Article 53</b></p> <p>If the injured party is a child, and the interests of the child are in the contrary with the interest of parents, court shall notify competent social welfare centre to appoint a special representative if that is necessary to protect child interests.</p> <p><b>Juvenile Court Act</b></p> <p><b>Article 116</b></p> <p>1. If the investigatory judge or juvenile judge finds that in order to protect legal interests of the child victims, it would be reasonable to appoint a legal representative for him or her, the president of the court shall, at the proposal of the investigatory</p>

	<p>judge or juvenile judge, appoint for him or her legal representative from the ranks of attorneys-at-law. Attorney should have strong inclinations towards upbringing, needs and benefits of the youth, and shall have basic knowledge of criminology, social pedagogy and social welfare for young persons.</p>
<p>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.</p>	<p><b>The Criminal Procedure Act</b> <b>Article 43</b></p> <p>2. In accordance with special provisions, a victim of a criminal offence for which punishment of imprisonment for a term of 5 years or longer is prescribed will have a right to a counsel at the expense of the budget funds before testifying in criminal proceedings and in submitting claims for indemnification, if they suffer from more severe psychophysical damage or more severe consequences from the criminal offence</p> <p><b>Juvenile Court Act</b> <b>Article 116</b></p> <p>3. Child victim shall be ensured with assistance and support, provided by professional associate from county or municipal court.</p> <p><b>The Criminal Procedure Act</b> <b>Article 44</b></p> <p>1. Child victim, besides rights from Article 43 and other provisions of this Act, has right to:</p> <ol style="list-style-type: none"> <li>1) Representative on at the expense of the budget funds.</li> <li>2) Accompaniment of a person of his or her trust in taking procedural actions.</li> <li>3) Being questioned in presence of the person of trust.</li> </ol>
<p>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:</p> <ol style="list-style-type: none"> <li>(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;</li> <li>(b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;</li> <li>(c) interviews with the child victim are carried out by or through professionals trained for this purpose;</li> </ol>	<p><b>The Criminal Procedure Act</b> <b>Article 292</b></p> <p>1. Unless otherwise prescribed, child that is not fourteen years old shall be examined by investigating judge. The examination shall be carried out in the absence of the judge and parties in premises where child shall be questioned by means of technical devices for video and audio taping. The examination is carried out with the assistance of a psychologist, educator or other expert person. Unless it is in contrary with child interests, parent or guardian can also be present. The child can be questioned by the parties through</p>

<p>(d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;</p> <p>(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;</p> <p>(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.</p> <p>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.</p>	<p>expert person based on the approval of the investigating judge. The examination shall be video-taped and audio taped, and tape shall be sealed and attached to the record. Child can be examined again only exceptionally, and in the same way.</p> <p>4. Upon the request of the child witness of the criminal offence against sexual freedom and sexual morality, trafficking, or if the criminal offence has been committed within family, witness shall be examined in the same way prescribed in the paragraph 3 of this Article. Witness can be examined again only exceptionally, if court finds it necessary.</p>
<p>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:</p> <p>(a) the hearing take place without the presence of the public;</p> <p>(b) the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies.</p>	<p><b>The Criminal Procedure Act</b>  <b>Article 44</b>  1. Child victim, besides rights from Article 43 and other provisions of this Act, has right to:  4) exclusion of the public</p> <p><b>Article 388</b>  1. Council shall exclude the public from the whole or part of the trial if this is necessary for:  1) The protection of the interests of a minor.</p> <p><b>Article 292</b>  3. Witness who cannot appear in court due to their age, illness, or physical disabilities may give testimony in their dwellings or on any other premises where they are situated. These witnesses may be questioned by means of technical devices for video and audio taping carried out by an expert person. If required so by the condition of a witness, questioning shall be organized in such a manner that the witness can be questioned by the parties without their presence in a room where the witness is situated.</p>
<p>6. Member States shall take the necessary measures, where in the interest of child victims and taking into</p>	<p><b>Criminal Procedure Act</b>  <b>Article 44</b></p>

<p>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.</p>	<p>1. Child victim, besides rights from Article 43 and other provisions of this Act, has right to:</p> <p>4) Secrecy of personal information</p> <p><b>Article 330</b> Unless prescribed otherwise by this Act, content of the recording shall be determined by its reproduction. If child was recorded, recording shall be reproduced with alteration of image and voice, having in mind interest of a proceeding in general.</p>
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## TOPIC 7.

### *Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

#### **7.1.1. Obligatory take down measures (Art. 25 (1))**

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

- a) Within its territory? If yes, please specify
- b) Outside its territory? If yes, please specify

Obligatory take down measures against websites containing or disseminating child pornography are partially regulated by the Criminal Code in Articles 163 (4) and 164 (5). The take down measures will take place after judgment with final force and effect. In our opinion the formulation concerning items that shall be seized seems to be rather unsuitable. Although websites are used for committing or facilitating the commission of the criminal offences, they are not material items. They cannot be precisely defined as special devices, means or computer programmes nor as data (which are indicated in the Articles 163 (4) and 164 (5)). Therefore, obligatory take down measures can be enforced only by extensive interpretation of what can be understood as item that can be seized or destroyed according to these Articles.



Our law provides only measures concerning removal of web pages containing or disseminating child pornography hosted at the territory of the Republic of Croatia (Articles 163 and 164).

In case of an abuser who is not a Croatian citizen and is not in the territory of Croatia, Ministry of the Interior is entitled to forward gathered information to the police of the abuser's country, which then can initiate proceedings.

### **7.1.2. Optional blocking measures (Art. 25 (2))**

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify

Currently there is no legal framework that could provide concrete measures concerning blocking of access to web pages containing or disseminating child pornography within its territory.

If no, what is the current (political) position of your MS with regard to blocking, i.e. the likelihood of introducing blocking measures?

Although Croatian legal framework does not provide for blocking measures, there are various possibilities to report illegal content found on the Internet which depicts, describes, encourages or is in any way connected with sexual abuse over children. Centre for Missing and Exploited Children provides application forms for reporting different cases of child pornography, visual presentation of child sexual abuse, child trafficking or inappropriate chat with children on the Internet. Based on the report, the operator checks reported web pages. If it is determined that the particular page satisfies previously mentioned conditions, the operator shall find the location of the server and take further steps. In case the server is within national territory, competent department of the Ministry of the Interior shall be informed. Possible following steps are arrest, investigation, institution of proceedings and judgment.

Furthermore, in 2013, Ministry of Interior has initiated a new application "Red Button"<sup>77</sup>, which enables faster and easier report of any form of online sexual exploitation or child abuse. Also, it is adjusted to children and educates them about their rights. It acquaints them with basic legal rules, defines what is forbidden in the Republic of Croatia and instructs them how to seek for help.

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<sup>77</sup> Red Button, see more: <https://redbutton.mup.hr/>, 2014.

However, none of these applications ensures that the content will be removed and the page will be blocked promptly.

Combating against child pornography on the Internet is facilitated by different forms of censorship. Most common techniques are IP address blocking, DNS blocking and redirecting, URL blocking, packet filtering and restarting Internet connection.<sup>78</sup> For now, introducing other blocking measures laid down by law is not planned.

## 7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

Articles 163 and 164 are the most relevant provisions regarding the obligatory take down measures from the first paragraph of Article 25. However, their enforcement depends on the way items listed in the Articles are interpreted. Optional blocking measures from the second paragraph of Article 25 have not yet been implemented in our Criminal Code, because of our current political position towards blocking the internet content.

## 7.3. In your view, does the current legal framework comply with Article 25?

In our view, our national legislation does not entirely comply with the provisions of the Directive. There are shortcomings in terms of specifying the websites as the crucial segment in the exploitation of children for pornography and ensuring their prompt removal. Also, our legislation is insufficiently harmonized with the Directive regarding the second paragraph of Article 25 and the optional blocking measures stated in it.

## If no, what additional measures should be taken in order to comply with Article 25?

Croatian legislation should follow examples from Great Britain and Germany. The Government should sign a contract with the biggest Internet companies that would oblige companies to forbid access to web pages containing or disseminating child pornography. This particular area has been sensitive considering there have been many protests against taking this measures, claiming it opens the doors of Internet censorship. Certainly, child pornography cannot be seen as a right to freedom of expression. The main purpose of blocking measures is to protect

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<sup>78</sup> Centar informacijske sigurnosti; dokument „Cenzura na Internetu“; <http://www.cis.hr/dokumenti/cenzura-na-internetu.html>, 2014, visited on 25/03/2014.

children and therefore their introduction is surely a well-intended measure. However, they should be developed in appropriate way, not violating other fundamental rights guaranteed by the Constitution.

In order to comply with Article 25, Croatian legislation should ensure that existing measures of blocking and removing inappropriate web pages are regulated by the law. In view of prompt removal of content or blocking access to websites, it would be rather necessary to bring an adequate provision that would enable carrying out this measure before reaching the judgment with final force and effect, considering criminal procedure is, in most cases, particularly long. Furthermore, Croatia should develop more efficient cooperation with other Member States of the European Union regarding the information exchange and establishing complete national lists of websites with child abuse content.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 25</b>  <b>Measures against websites containing or disseminating child pornography</b></p> <p>1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.</p> <p>2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.</p>	<p><b>Croatian Criminal Code</b>  <b>Exploitation of Children for Pornography</b>  <b>Article 163</b></p> <p>4. Special devices, means or computer programmes or data intended for, adapted to or used for committing or facilitating the commission of the criminal offences referred to in paragraphs 1, 2 and 3 of this Article shall be seized, while the pornographic material which was created by the commission of the criminal offences referred to in paragraphs 1, 2 and 3 of this Article, shall be destroyed.</p> <p><b>Exploitation of Children for Pornographic Performances</b>  <b>Article 164</b></p> <p>5. Special devices, means, computer programmes or data intended, adapted or used for committing or facilitating the commission of the criminal offences referred to in paragraphs 1, 2 and 3 of this Article shall be seized, while the pornographic material which was created by the commission of the criminal offences referred to in paragraphs 1 and 2 of this Article shall also be destroyed.</p>

# ELSA FRANCE

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

The principal piece of legislation on child pornography is Article 227-23 of the Penal Code. This provision relates to taking, recording and transmitting of child pornography for the purpose of distributing it. Offenders incur five-years of imprisonment and a fine of 75,000 Euros. The distribution of such images or material is subject to the same penalties. This Article also provides for a higher penalty of up to 3 years and to a fine of 75,000 Euros when a telecommunications network has been used to distribute the material. The notion of the pornographic representation of children includes fixtures made from pictures of children but also all kinds of child-pornographic images.

If the Law only punishes taking, recording and transmitting of child pornography in a view of distributing it when it comes to minors, it also punishes the mere fact of having such conduct - without any intention of distribution- for children under the age of 15.

Moreover, Article 2 of the Decree 2003-372 of the 15th April 2003 enacting 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.

### 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

Previous to the transposition of the Directive, only possession of child pornography was punishable. Thus, the transposition law has amended Article 227-23 of the Penal Code in order to include an offence in relation to the acquisition of child pornography, in particular, in return for payment.

The transposition law extends the offence provided for in Article 227-23 Paragraph 5, which criminalises the habitual consultation or consultation in consideration of a payment of child pornography websites. The nature of the access may be, for instance, deduced from the fact that a recurrent payment is in place. This amendment attests to the aim of targeting those who intentionally access child pornography, not individuals who inadvertently accessed such material.

Furthermore, the transposition law introduced three amendments to Article 227-23 of the Penal Code which defines offences related to child pornography. First, the offence of taking, transmitting or recording pornographic images or representations of a child will be deemed to have been committed even in the absence of any intention to distribute the image or representation, as long as a child under the age of 15 is affected. This amendment was necessary in order to bring French law into line with Article 5, Paragraph 6 of Directive 2011/93/EU, which criminalises the production of child pornography even in the absence of distribution.

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

The acquisition, possession, production and distribution of child pornography are indeed punishable by a minimum of 3 years of imprisonment. Intentional access is now criminalized in accordance with Article 5 (3). Therefore, this legal framework meets the requirements of Articles 5 (1) and (3).

### 1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

Article 227-23 of the Penal Code is already in line with Article 5 (7) of the Directive as it covers any pornographic image of a person whose physical appearance is similar to a child, unless it is proved that the person was over 18 on the day picture was taken or recorded.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 5</b>  <b>Offences concerning child pornography</b></p> <p>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.</p> <p>2. (...)</p> <p>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.</p>	<p><b>All articles are from the French Penal Code</b></p> <p><b>Article 227-23 Paragraph 4</b></p> <p>Habitual consultation or consultation in consideration of a payment of public online communication services making available such an image or representation, acquiring or possessing such an image or representation by any mean is punished by two years of imprisonment and a fine of 30 000 Euros.</p>
<p>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.</p>	<p><b>Article 227-23 Paragraph 6</b></p> <p>The provisions of the present article also apply to the pornographic images of a person whose physical appearance is that of a minor unless it is proved that the person was over eighteen on the day his picture was taken or recorded.</p>

## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

The offence of grooming involves a request addressed by an adult to a child under 15 or a child allegedly under 15 for sexual purposes using information technologies. Article 226-22-1 of the Penal Code sanctions grooming with two-years of imprisonment and a fine of 30,000€. Conviction for such an offence can rise to a five-year imprisonment and a fine of 75,000€ 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 seven-year of imprisonment and a fine of 100,000€ when the minor was put in contact with the perpetrator through the use of an electronic communications network.

## 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

There is no offence in relation to off-line grooming in France since the redactors of the transposition law took the view that establishing such an offence would present difficulties. However, Article 225-12-1 of the Penal Code punishes Child prostitution.

## 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

The criminal offence defined in Article 6 of the Directive was already punishable under French law. However, Article 227-22 was modified to comply with the Article 6 of the Directive. The scale of penalties referred to under this Article has indeed been modified to reach the minimum threshold of imprisonment term set up in the Directive.

Furthermore, the transposition of the Directive also lead to the punishment of knowingly attending gatherings involving indecent exposure or sexual relations in the presence or with the participation of a minor when only the convening of such gathering was previously punish.

## 2.4. In your view, does this legal framework comply with Art. 6?

For the most part, French legislation was already in compliance with the obligations set out in the Directive, including Article 6. However, some changes have been introduced on foot of the Directive, such as the introduction of the offence of forcing or threatening a child into sexual activities with a third party, the increase of some sentences and the ban on child pornography.



Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b>  <b>Solicitation of children for sexual purposes</b>            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.</p>	<p><b>Article 227-22</b>            Making sexual proposals to a minor under the age of 15 or any person purporting to act as such by the use of a telecommunications network is punished by two years of imprisonment and a fine of 30 000 Euros.</p> <p>The penalty is increased to five years of imprisonment and a fine of 75 000 Euros where proposals lead to a meeting.</p>
<p>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.</p>	<p><b>Article 227-23 Paragraph 1 to 4</b>            Taking, recording or transmitting a picture or representation of a minor with a view to circulating it, where that image or representation has a pornographic character, is punished by five years of imprisonment and a fine of 75 000 Euros. When concerning a minor under the age of 15, this conducts are also punishable even if committed without a view to circulating it.</p> <p>The same penalty applies to offering or distributing such a picture or representation by any means, and to importing or exporting it, or causing it to be imported or exported.</p> <p>The penalties are increased to seven years of imprisonment and a fine of 100 000 Euros where use was made of a communication network for the circulation of messages to an unrestricted public in order to circulate the image or representation of a minor.</p> <p>Habitual consultation or consultation in consideration of a payment of public online communication services making available such an image or representation, acquiring or possessing such an image or representation by any mean is punished by two years of imprisonment and a fine of 30 000 Euros.</p> <p><b>Article 227-23 Paragraph 7</b>            Attempts to commit misdemeanour referred to in this Article are punish with the same penalties.</p>

	<p><b>Article 227-22</b>  Facilitation or attempt to facilitate the corruption of a minor is punished with five-years of imprisonment and a fine of 75 000 Euros. The penalties are increased to seven-year of imprisonment and a fine of 100 000 Euros when the minor was put in contact with the perpetrator through the use of an electronic communications network.</p>
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### TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

If yes, does it cover:

**3.1.1. Professional activities involving direct and regular contact with children?**

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

In order to prevent reoffending, the French legislation provides a complete legal framework on disqualification arising from conviction for the offences listed in Articles 3-7 of the Directive (Article 131-27 to Article 131-29 of French Penal Code).

Indeed, in criminal matters, the prohibition to engage in paid or voluntary work is viewed as an additional penalty. The prohibition covers all professional or charitable activities set out in the law criminalising the offence or professional or charitable activities in relation to which the offence was committed.

Article 222-45 of Penal Code provides that natural persons convicted for intentional offences against the physical integrity of the person, sexual aggressions or trafficking in drugs - pursuant to Sections 1, 3 and 4 of the Code –

“also incur the following penalties:

1° forfeiture of civic, civil and family rights [...]

2° prohibition [...] to hold public office,

3° prohibition, either indefinitely, or for a period of up to ten years, on engaging in paid or voluntary work involving regular contact with minors.”

According to Article 227-29, 6° & 8° of the Penal Code, natural persons convicted for “offences against minors and the family”, also incur the same prohibition for the same period of time.

Furthermore, courts can order a person convicted for a sexual offence to undergo legal and social supervision after completing their prison sentence. This includes persons convicted for offences involving a sexual act without violence against children, possession and dissemination of child pornography or dissemination of pornographic content accessible by a minor (Articles 221-9-1; 222-48-1 and 227-31 of the Penal Code). Such offenders can be banned from engaging in paid or voluntary work involving regular contact with minors for a period up to ten years (Article 132-45 of the Penal Code).

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

While there is no explicit piece of legislation in France governing background checks, there are some provisions on the data, which may be required by employers. Pursuant to Article L.1221-6 of the French Labour Code, future employers can only obtain information facilitating an assessment of the job-applicant's professional skills directly related to the position offered<sup>1</sup>.

While French legislation does not allow direct and unconditional access to information on the criminal record of candidates for employment, the law provides some exceptions. In France

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<sup>1</sup> <http://whoswholegal.com/news/features/article/29116/background-checks-europe>.

criminal records come in three forms, called certificates (*Bulletin*). Each type of certificate is only accessible to designated persons.

The first Certificate is the most comprehensive. It includes most convictions and decisions against the person and can only be consulted by police and judicial authorities (Article 774 of the Code of Criminal Procedure).

The second and third Certificates can be consulted for the purpose of screening. The second Certificate (Article 775 of the Code of Criminal Procedure) is available to certain French administrative authorities and private organisations i.e. organisations:

- Charged by the state (either through legislation or regulation) with the performance of an activity that persons with existing convictions or disciplinary sanctions are not allowed to exercise.
- Responsible for activities for minors.<sup>2</sup>

The third Certificate (Article 777 of the Code of Criminal Procedure) is the only criminal record certificate that can be obtained by and that is only issued to the individual concerned. Therefore, it is not directly available to employers or prospective employers, but can be required of the job-applicant. It includes prison sentences of more than two years, along with certain measures issued when the individual has committed crimes against minors or of a sexual nature, regardless of the length of the sentence.

Furthermore, the Law No 2004-204 of 9 March 2004 established a national Sex Offenders Database (*fichier judiciaire automatisé des auteurs d'infractions sexuelles ou violentes*). The implementation measures have been set out in Decree No 2005-627 of 30 May 2005. The French data protection watchdog, CNIL (*Commission Nationale de l'Informatique et des Libertés*) approved these implementation measures. This database aims to reduce reoffending, identify and localise sex offenders who have already been convicted of an offence. The database is held by the criminal case's service, under the authority of the Minister of Justice and under the control of an independent judge. The information contained in the database is directly accessible to *Préfets* (high ranking civil servant) and state services listed in the Decree provided for by Article 706-53-12, to examine requests for approval in relation to activities or professions which involve contact

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<sup>2</sup>[http://www.cpni.gov.uk/documents/publications/2009/2009-criminal\\_records\\_disclosure\\_countries-1\\_march09.pdf?epslanguage=en-gb](http://www.cpni.gov.uk/documents/publications/2009/2009-criminal_records_disclosure_countries-1_march09.pdf?epslanguage=en-gb).

with minors as well as for the rules in relation to the exercise of such activities or professions. The French Penal Code provides for the removal of information from the database upon the death of the person concerned or after the following periods of time:<sup>3</sup>

- 30 years in relation to an offence punishable by ten years imprisonment;
- 20 years in all other cases.

According to the Code, neither amnesty, rehabilitation or regulations leading to the erasure of criminal convictions shall lead to the erasure of the records.<sup>4, 5</sup>

### **3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?**

In most cases, activities involving direct and regular contact with children are fall into the category of regulated activities. With regard to screening, a distinction should be drawn based on the type of employer. While checks are almost automatic for public employers, private employers do not have the same privilege.

Exercising a state-funded activity, including activities involving direct and regular contacts with children, almost always require a clean criminal record. This obligation is designed to ensure the security of the State and its citizens. Therefore, applicants generally must provide a clean criminal record for the civil service entrance examination. Private employers are subject to restrictions and, in general, are limited to requesting a copy of the third certificate from applicants.

Furthermore, in accordance with Article R79 of Code of Criminal Procedure, Certificate No 2 is issued to children's judges during investigation procedures to enabling individuals, facilities, services, or public or private organisms for confiding minors.

Furthermore, other measures are in place such as those provided for by the *Direction régionale de la jeunesse, des sports et de la cohésion sociale*. This public body is not only responsible for delivering certifications and training for activities involving regular contact with children, but has also access to the national Sex Offenders Database (Article R53-8-24 f) of the Code of Criminal Procedure). So, it has access to the list of persons that cannot be employed for such purposes. The association conducting organised voluntary activities involving direct and regular contact

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<sup>3</sup> Note that this is an unofficial translation of the Criminal Code, Article 706-53-4 of the Criminal Code.

<sup>4</sup> Article 706-53-4 of the Criminal Code.

<sup>5</sup> <http://www.niassembly.gov.uk/researchandlibrary/2011/4511.pdf>.

with children may submit a request in relation to the applicant's presence on the list. Moreover, in the area of activities for children (summer camps, scouts, etc.), individuals who wish to work with children must obtain a certificate of aptitude (*Brevet d'aptitude aux fonctions d'animateur - BAFA*), which can only be obtained by persons with a clean criminal record. An upper limit of 20% is applied to the number of persons who may work for a given employer without any qualification. Therefore, obtaining the BAFA is effectively obligatory for non-professional persons seeking to work with children.

**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

There is such an obligation in force with regard to social and medical institutions. According to the *Circulaire* n°2001-306 of 3 July 2001 on the prevention of violence and abuse, in particular, sexual violence and abuse, in this area, for children or vulnerable persons, when recruiting managers of state institutions, are obliged to check the certificate No 2 of the person concerned.

In state bodies, the automatic – and therefore mandatory – processing of criminal records when recruiting for professional activities involving direct and regular contact with children ensures more efficient child protection.

b) Organised voluntary activities involving direct and regular contact with children?

According to the same *circulaire*, managers must ask the applicant to produce their Certificate No 3 before assigning them to a voluntary position involving direct, regular and frequent contact with minors.

**3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

According to Article 776:

“Managers of legal persons, whether constituted by public or private law, who exercise a cultural, educational or social activity (...) involving minors may obtain the delivery of Certificate no. 2 of the criminal records for the sole purpose of recruitment.”

Since this second Certificate lists judicial control orders or any bans on exercising a particular profession or activity involving regular contact with minors, any public or private employers has the right to screen future employees on offences listed in the Directive.

Moreover, employers have the right to ask applicants to provide a copy of their third certificate.

b) Organised voluntary activities involving direct and regular contact with children?

According to Article 776 of Code of Criminal Procedure, the approved bodies can request Certificate No2. Plus, no text prohibits employers to request a copy of the third certificate when they hire a new employee. Employers have a right to request information on prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for organised voluntary activities involving direct and regular contact with children.

### 3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

With a view to tackling the opportunity for criminals to avoid security measures simply by moving between EU Member States, the French legislation provides a framework for the transmission of information on criminal convictions.

Indeed, according to the Article 776 Paragraph 6 of Code of Criminal Procedure, the competent authorities in the Member States of the European Union can request information about criminal or disciplinary sanctions imposed on a professional. Certificate No. 2 is delivered to this authority. Moreover, there is no need to obtain the consent of the individual when exchanging information from the criminal registers. The National Criminal Records services are responsible for the transmission of such information. According to the most recent statistics, the process is efficient since 72% of requests are solved within 24 hours instead of the 7 day-deadline provided for at the European level.<sup>6</sup>

Therefore, the French legislation complies with Paragraph 3 of Article 10.

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<sup>6</sup> <http://www.justice.gouv.fr/justice-penale-11330/linterconnexion-des-casiers-judiciaires-bilan-et-perspectives-23097.html>

3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

The content of Article 10 of the Directive was already implemented in the French legislation before the transposition process.

With regard to screening, the national Sex Offender Database (*fichier judiciaire automatisé des auteurs d'infractions sexuelles ou violentes*) was established by the Law No 2004-204 of 9 March 2004.

With regard to sharing criminal records between Member States, France took part in the pilot project 'Network of Judicial Registers' with Germany in 2003. Even prior to the entry into force of ECRIS (*European Criminal Records Information System*) in 2011, 11 Member States were exchanging criminal records with France (Germany, Belgium, Bulgaria, Spain, Luxemburg, Poland, Czech Republic, Slovakia, Italy and United Kingdom). This project provided the impetus for the ECRIS system, which operates since 2012.

3.5. In your view, does the current legal framework comply with Art. 10? If no, what additional measures should be taken in order to comply with Art. 10?

Before implementing the Directive French legislation was already in line with Article 10 of the Directive. The French statutes ensure good protection to children by providing a full legal framework covering screening, disqualification and transmission of information on criminal records. In practice, it is quite impossible for a person who has been convicted of a sexual offence to be recruited for professional activities involving direct and regular contact with children or for organised voluntary activities involving direct and regular contact with children.

However, no specific legal provisions clearly provide for disqualification due to offences set up in Article 6 of the directive regarding off-line grooming.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b>  <b>Disqualification arising from convictions</b>            1. In order to avoid the risk of repetition of offences, Member States shall take the necessary</p>	<p><b>Article 222-45 of the Penal Code</b>            Natural persons convicted of the offences set out under sections 1,3 and 4 also incur the following penalties:</p>



<p>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.</p>	<ol style="list-style-type: none"> <li>1. Forfeiture of civic, civil and family rights, pursuant to the conditions set out under Article 131-26;</li> <li>2. Prohibition, pursuant to the conditions set out under Article 131-27, on holding public office</li> <li>3. Prohibition, either indefinite or for a period of up to ten years, on engaging in paid or voluntary work involving regular contact with minors;</li> </ol> <p><b>Article 227-29 of the Penal Code</b> Natural persons convicted of the offences provided for under the present chapter also incur the following additional penalties: [...]</p> <ol style="list-style-type: none"> <li>6. prohibition, for a period of up to ten years or permanently, to undertake any professional or charitable activity involving regular contact with minors.</li> </ol>
<p>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.</p>	<p><b>Article 776 Paragraph 2 of the Code of Penal Procedure</b> Managers of legal persons, whether constituted by public or private law, who exercise a cultural, educational or social activity within the meaning of Article L.312-1 of the Code for Social Action and Families involving minors may obtain the second Certificate of the criminal records for the sole purpose of recruiting an individual if this Certificate does not record any convictions. The list of such legal persons is determined by a Decree drawn up by the Minister of Justice and other relevant Ministers.</p>
<p>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 [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.</p>	<p><b>Article 776 Paragraph 1 and 3 of Code of Penal Procedure</b> The second Certificate of the criminal records is delivered: (...)</p> <ol style="list-style-type: none"> <li>6. To the competent authorities designated by order of the Minister of Justice when they receive, to implement an international convention or an act adopted on the basis of the Treaty on the Functioning of European Union, an information request about criminal or disciplinary sanctions imposed on a professional, from a competent authority of another contracting state party to that convention, of a Member State of the European Union or of a State that is a party to the agreement about the European Economic Area, responsible</li> </ol>

	<p>for applying measures restricting the pursuit of an activity, based, in this State, on criminal or disciplinary penalties imposed on that Professional.          (...)                   The second Certificate of the criminal records is transmitted, to implement an international convention or an act adopted on the basis of the Treaty on the Functioning of the European Union, to the competent authorities of another State referred to in 6° of this article.</p>
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## TOPIC 4.

### *Victim identification*

(Article 15 (4))

#### 4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

The support and effective protection of child victims of sale, trafficking, sexual abuse or exploitation is a complex process that requires an interdisciplinary and holistic approach in order to monitor children from identification to support stage (which may take the form of accommodation in a reception centre) rehabilitation/reintegration of the child should be pursued in all cases, through legal, medical and psychological assistance.

In France, there are several ways for victims of sale, trafficking, sexual abuse or exploitation to report such crimes. The following services are accessible to all, including children. Firstly, through the 119 number, a free hotline operating 24h/7 is available to children in danger or at risk. This service is also responsible for forwarding such information to competent services, to the *Conseil général* (local authorities) or directly to the public prosecutor when the information gathered warrants it. An alert to the services in charge of Social Assistance of Children (SAC) or to the prosecutors can also be introduced by the police or *gendarmerie*, physicians, school personnel, social workers, the child himself/herself or another person in their environment.

Regarding complains of sexual abuse on the Internet, a range of reporting mechanisms have been put in place, through cooperation with the Association of Service Providers and Internet

services and through the official portal for reporting illegal content on the website of the Ministry of the Interior (accessible at the following address: [www.internet-signalement.gouv.fr](http://www.internet-signalement.gouv.fr)).

Generally, child protection is essentially based on the Law No. 2007-293 of 5 March 2007. The main objectives of the law are the prevention of abuse, detection of risks for minors and diversification of intervention and support for children and their families. It also aims at improving the warning, and sets limits for the rules on professional secrecy and enhances training offered to professionals. The law also limits the systematic recourse to the courts by focusing on social measures. Furthermore, it has strengthened the flow of information between the different actors in the protection process, including the SAC and the judiciary.

Regarding identification by police officers, Articles 706-35-1 et 706-47-3 of the Code of Penal Procedure created a form of cyber patrols which are aimed to prevent and fight against certain offenses when they are committed by means of information and communication technology. Those legal provisions were completed with one *décret* from the 3 Mai 2007 and one *arrête* of the 30 March 2009 which précised the implementation conditions.

Besides, two Central offices were set up to fight offenses related to violence against persons and crime connected with information technology and communication: the Central Office for Action to Combat Crime connected with Information Technology and Communication<sup>7</sup> and the Central Office for Repression of Violence against persons<sup>8</sup>. Inside the second of those two offices a central group on minor victims responsible for providing pornographic images to the INTERPOL database was created. It so far leads to identify 99 minors victim of abuse in France.

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

It is important to emphasise that no further steps were taken by the French legislator to implement Article 15(4) of the Directive. Indeed, cyber patrols were implemented since 2007.

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)?

The French legislation does provide a complete framework aim at identifying sexual exploitation, sexual abuse, taking, recording and transmitting of child pornography, pimping and online

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<sup>7</sup> Created by the *Décret* <sup>7</sup> Created by the *Décret n°2006-519* of 6 Mai 2006.

<sup>8</sup> Created by the *Décret n°2006-519* of 6 Mai 2006.

grooming of children. There is however a lack concerning victim identification. Indeed, the French legislator is having a preference for perpetrators identification and punishment rather than for victim identification and support.

For example, even though the duties of the two Central Offices referred to above shall allow them to track and find victims of offenses referred to in Article 3 to 7 of the Directive, it does not seem to be completely the case. Indeed, Article 2 of the 2000 *Decret* allow the first office to fight against specific infractions related Crime connected with Information Technology and Communication, while the second office has specific jurisdiction regarding child pornography. However their main duties are to:

- Lead and coordinate the operational implementation of the fight against perpetrators of those crimes;
- Investigate;
- Provide the necessary assistance to police and *gendarmerie* services;
- Centralize and disseminate information about such crimes.

In the same line, the cyber patrols provided by Article 706-35-1 are aimed at ascertaining infraction and not at identifying victims. If it leads to the same purpose which is preventing for the worse to happen this make a difference regarding the care a victim might need. Indeed, such investigators often present themselves as a victim rather than look for potential victim on the Internet.

If no, what additional measures should be taken in order to comply with Art. 15 (4)?

In order to strengthen the protection of children victim of criminalized conduct we strongly recommend to enable the Central Office for Action to Combat Crime connected with Information Technology and Communication and the Central Office for Repression of Violence against persons or more broadly the Ministry of Interior to:

- Conduct training to officers in charge of investigating the Internet to enable them to identify potential victims and provide care for such persons.
- Include a victim-based approach in the Law regarding cyber patrols.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 15</b> <b>Investigation and prosecution</b></p> <p>1.(...)</p> <p>2.(...)</p> <p>3(...)</p> <p>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.</p>	<p><b>Article 706-35-1 of the Code of Penal Procedure</b></p> <p>For the purpose of ascertaining infraction referred to in Article 225-4-1 to 225-4-9, 225-5 to 225-12 and 225-12-1 to 225-12-4 of the Penal Code and, when they are committed by means of information and communication technology, collects evidence and searches for the perpetrators, police officers acting in the course of the investigation or by rogatory commissions may, if they are affected to a specialized service and duly empowered, under conditions set out in a decree, proceed to the following acts without being held responsible :</p> <p>1° participate to online exchanges under a pseudonym</p> <p>2° get in touch with persons likely to commit such crimes by this mean</p> <p>3° retrieve, transmit in response to a specific request, acquire or retain illicit content under conditions set out in a decree.</p>

## TOPIC 5.

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

**5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

According to Article 113-2 of the French Penal Code, French criminal law applies to all offences committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of the constituent elements was committed within that territory.

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

The French Penal Code distinguishes between “*crime*” (Felony) and “*délit*” (Misdemeanour) according to the nature of the offence.

Article 113-6 states that French criminal law applies to all felonies committed by a French individual outside the French territory. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed.

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

Various articles of the French Penal Code relate to the offences mentioned in Article 17 (3).

Article 227-23 of the French Penal Code establishes numerous offences on the matter without specifying whether the means needs to be based or not on its territory.

First of all, it establishes the offence of taking, saving or transmitting a pornographic image or representation of a minor for the purpose of distributing it. This article also includes the offence of offering such image or representation, making it available, distributing it, importing or exporting it or having it imported or exported by any means. Also, generally consulting or consulting an online public communication service in return for payment that makes such an image or representation available, to acquire or keep such image or representation by any means is considered an offence.

If the image or representation involves a child younger than 15 years of age, this is considered an aggravating circumstance and these facts are punishable even if there was no intention to distribute the image or representation. Other aggravating circumstance relate to when an electronic communications network was used to broadcast the image or representation of the minor to an unrestricted public and when the above offences are committed by an organized group.

Attempt to commit these offences is equally punishable with the same punishments.

These measures are equally applicable to pornographic images of a person who looks like a minor unless it is established that this person was eighteen years of age the day the image concerning him was taken or saved.

Article 227-26 adds aggravating circumstances to the offence established at Article 227-5, which covers the offence of an adult who, without exercising any violence, duress, threat or surprise commits an act of sexual violence on a person aged younger than fifteen years of age. Such aggravating circumstances include, for example, the circumstance whereby the minor was put in contact with the offender by using, for the purpose of disseminating messages to an unrestricted public, an electronic communication network and also when the offence was committed by various people acting either as perpetrators or accomplices.

Article 225-7 relates to procuring and presents various scenarios that constitute this offence. The tenth scenario given relates to the use, for the purpose of disseminating messages to an unrestricted public, of an electronic communication network.

Article 222-24 establishes the aggravating circumstances to rape and includes the situation in which the victim was put in contact with the offender by the use, for the dissemination of messages for the unrestricted public, of an electronic communications network.

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

Generally, French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic (Article 113-6). It is also applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed (Article 113-6, Paragraph 2). French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place (Article 113-7).

In the abovementioned scenarios, the prosecution of misdemeanours may only be instigated at the behest of the public prosecutor. It must be preceded by a complaint made by the victim or

his successor, or by an official accusation made by the authority of the country where the offence was committed (Article 113-8).

However, articles 222-22 Paragraph 3, Article 225-11-2, Article 225-12-3 and Article 227-27-1 outline various derogations to the principle established at Article 113-8. These derogations enable France to exercise its jurisdiction in case of an offence committed by a French or foreign national even without a complaint made by the victim or an official accusation made by the authority of the country where the offence is committed.

Article 222-22 Paragraph 3 defines sexual aggression as being any sexual assault committed with violence, constraint, threat or surprise and specifies that in case of sexual aggression committed abroad against a minor by a French or person normally residing on French Territory, French Law applies by way of derogation to the second Paragraph of Article 113-6 and the dispositions of the second sentence of Article 113-8 are not be applicable.

Article 225-11-2 states that in case of procuring in respect of a minor committed abroad by a French national or a person residing habitually on French Territory, French Law will apply by way of derogation to the second Paragraph of Article 113-6 and the dispositions of the second sentence of Article 113-8 are not be applicable.

Law n° 2013-711 of 5<sup>th</sup> August 2013 recently amended this article and added that the same principles apply in case of the crimes committed on a minor mentioned at Articles 225-7 (Aggravating circumstances to procuring which includes when committed towards a minor), 225-8 (Procuring committed by an organized gang) or 225-9 (Procuring committed by resorting to torture or acts of barbarity) committed outside the French territory by a foreign national residing habitually on French territory.

Article 225-12-3 establishes that in the case of misdemeanours defined by Articles 225-12-1 and 225-12-2 committed abroad by a French national or person residing habitually on French territory, French Law will apply by way of derogation to the second Paragraph of Article 113-6 and the dispositions of the second sentence of Article 113-8 are not be applicable. On the one hand, Article 225-12-1 covers the offence of soliciting, accepting or obtaining, in exchange for remuneration or a promise of a remuneration, relations of a sexual nature with a minor who engages in prostitution, even if not habitually. It also covers the offence of soliciting, accepting or obtaining in exchange for remuneration or a promise of remuneration, sexual relations with a person whose particular vulnerability, due to age, sickness, infirmity, a physical or psychological



disability or to pregnancy, is apparent or known to the offender, and who engages in prostitution, even if not habitually. On the other hand, Article 225-12-2 lists the aggravating circumstances of the offence which include: where the offence is committed habitually or against more than one person, where the person was put in contact with the offender by the use, for the dissemination of messages to an unrestricted public, of an electronic communication network and where the offence was committed by a person abusing the authority conferred upon him by his position. The penalty is increased further where the offence was committed against a minor under fifteen years of age.

Article 227-27-1 states that where the offences under Articles 227-22, 227-23 or 227-25 to 227-27 are committed abroad by a French national or a person habitually residing on French territory, French law shall apply notwithstanding the second Paragraph of Article 113-6 and the provisions of the second sentence of Article 113-8 do not apply. The articles mentioned above include:

- Corruption of a minor.
- Taking, recording or transmitting a picture or representation of a minor with a view to circulating it, where that image or representation has a pornographic character, offering or distributing such a picture or representation by any means, and to importing or exporting it, or causing it to be imported or exported, use made of a communication network for the circulation of messages to an unrestricted public in order to circulate the image or representation of a minor or possessing such an image or representation.
- The commission without violence, constraint, threat or surprise of a sexual offence by an adult on the person of a minor under fifteen years of age and the aggravating circumstances to such an offence.

It can therefore be concluded that, although French jurisdiction over a French national or an habitual resident on its territory committing a misdemeanour outside France is usually subordinated to the conditions of prosecution only being possible following a report by the victim or a denunciation by the State where the offence was committed, numerous derogations to this principle have been envisaged by the French Penal Code.

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

As mentioned above, French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic (Article 113-6). It is also applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed (Article 113-6, Paragraph 2).

However, various derogations apply to the principle that French jurisdiction is subordinated to the condition that the acts are criminal offences at the place where they are performed. These derogations are covered at articles 222-22 Paragraph 3, Article 225-11-2, Article 225-12-3 and Article 227-27-1, the exact same articles mentioned in the previous answer.

### **5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))**

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

Article 113-7 of the French Penal Code established that France will exercise its jurisdiction for all offences committed by a French or foreign individual outside of French territory when the victim, at the time of the offence, is of French Nationality. No reference is made to a habitual resident in its territory and it is therefore probable that France will not establish its jurisdiction in this case.

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

The French Penal Code reserves numerous articles to the responsibility of legal persons. The main article is Article 121-2 which recognizes that legal persons can be criminally liable. Furthermore, Articles 225-12 and 227-28-1 specifically define legal persons' responsibility for offences relating to procuring (include procuring involving a minor) and offences towards minors (including offences relating to child pornography). It is therefore possible to conclude that France will establish its jurisdiction for offences committed for the benefit of a legal person established in its territory.

c) The offender is a habitual resident (Art. 17(2)(c))?

The only reference to an offender who is a habitual French resident is made at Articles 222-22 Paragraph 3, Article 225-11-2, Article 225-12-3 and Article 227-27-1, when stating the derogations to the general principle that French Law is only applicable when certain conditions are fulfilled.

5.2. Which steps have been taken in your MS in order to implement Article 17?

Following the implementation of the Directive, France enacted Law n°2013-711 of 5<sup>th</sup> August 2013, increasing France's jurisdictional powers for offences committed by a foreign national residing habitually on French territory without its jurisdiction being subordinated to the conditions mentioned in Paragraphs 4 and 5 of the Directive.

5.3. In your view, does the current legal framework comply with Article 17? If no, what additional measures should be taken in order to comply with Article 17?

In my view, France's position was already generally conforming to the requirements of the Directive, meaning that its legislation did not require major modifications following the implementation of the Directive.

I believe France's current legal framework complies mostly with Article 17. As required by this article, France establishes its jurisdiction where the offence is committed in whole or in part within its territory (as required by art. 17 (1)(a)), where the offence is committed outside its territory but the offender is one of its nationals (as required by Art. 17 (1) (b)) and when the offence is committed by means of information and communication technology accessed from its territory (art. 17 (3)).

However, I believe further measures could be taken in relation to Paragraphs 4 and 5 of Article 17. These two articles require Member States jurisdictions to prevent their jurisdictions being subordinated to certain conditions for most of the offences established in the Directive.

In relation to Paragraph 4, whilst France has enacted provisions relating to some of the sanctions mentioned by this Paragraph, it is debatable whether its legislation is sufficient. For example, France has ensured that offences relating to procuring in respect of a minor (Offences mentioned at Paragraph 5, 6 and 7 of Article 4) and offences concerning sexual abuses towards

minors (Paragraph 4, 5 and 6 of Article 3) are not subordinated to the condition that the acts are criminal offences at the place where they were performed. However, Article 4 at Paragraphs 2 and 3 requires Member States to ensure that this condition does not also apply for offences relating to causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes for which France does not seem to have enacted any provisions. One could however question whether these offences could be considered as activities of procuring, offences which France has enacted provisions for. Furthermore, the offence mentioned at Article 5 Paragraph 6, concerning the production of child pornography, still seems to be subordinated to the condition that the act are criminal offences at the place where they were performed, seeing as France has not enacted any provisions on the matter.

In relation to Paragraph 5, France has enacted provisions relating to some of the sanctions mentioned by this Paragraph but does not seem to have transposed this Paragraph completely. It does not seem to cover the offences mentioned at Article 5 Paragraph 6, concerning the production of child pornography and does not seem to have enacted provisions for offences concerning solicitation (Article 6), incitement, aiding and abetting and attempt (Article 7). France will only be able to establish its jurisdictions for these offences 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.

Furthermore, it must be noted that the recent amendments introduced by the Law of the 5<sup>th</sup> August 2013 that increased the possibilities for France to exercise its jurisdiction only apply to habitual residents on its territory. No reference to nationals is made.

Finally, in relation to Article 17(3), even if France establishes the offences committed by means of information and communication technology, it does not specifically mention whether or not the means need to be based in its territory or not for France to exercise its jurisdiction.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <p>(a) the offence is committed in whole or in part within their territory; or</p> <p>(b) the offender is one of their nationals.</p>	<p><b>All articles are from the French Penal Code</b></p> <p><b>Article 113-2</b> French Criminal law is applicable to all offences committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory.</p> <p><b>Article 113-6</b> French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed. The present article applies even if the offender has acquired French nationality after the commission of the offence of which he is accused.</p>
<p>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:</p> <p>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</p> <p>(b) the offence is committed for the benefit of a legal person established in its territory; or</p> <p>(c) the offender is an habitual resident in its territory.</p>	<p><i>Corresponding provisions to Art. 17 (2) (b) of the Directive</i></p> <p><b>Article 121-2</b> Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in Articles 121-4 and 121-7. However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions. The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth Paragraph of Article 121-3.</p> <p><b>Article 225-12</b> Legal persons may be convicted of the offences defined by Articles 225-5 to 225-10, pursuant to the conditions set out under Article 121-2.</p>

	<p>The penalties incurred by legal persons are:          1° a fine, pursuant to the conditions set out under Article 131-38; 2° the penalties set out under Article 131-39.</p> <p><b>Article 227-28-1</b>          Legal persons declared criminal liable in the manner prescribed by Article 121-2 for the offences provided for under Articles 227-18 to 227-26 incur, besides a fine following the manner provided under Article 131-38, the penalties referred to from 2° to 5° and from 7° to 9° of Article 131-39.          The prohibition referred to under 2° of Article 131-39 applies to the activity in course of which or on the occasion of the performance of which the offence was committed.</p>
<p>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.</p>	<p><b>Article 227-23</b>          Taking, recording or transmitting a picture or representation of a minor with a view to circulating it, where that image or representation has a pornographic character, is punished by five years' imprisonment and a fine of €75,000.          The same penalty applies to offering, making available or distributing such a picture or representation by any means, and to importing or exporting it, or causing it to be imported or exported.          The penalties are increased to seven years' imprisonment and a fine of €100,000 where use was made of a communication network for the circulation of messages to an unrestricted public in order to circulate the image or representation of a minor.          Consulting habitually or in exchange for payment an online public communication service that provides such an image or representation, acquiring or possessing such an image or representation is punished by ten years' imprisonment and a fine of €30,000.          The offences set out in this Article are punished by ten years' imprisonment and by a fine of €500,000 where they are committed by an organised gang.          Attempt to commit the felonies described by this Article is subject to the same penalties.          The provisions of the present Article also apply to the pornographic images of a person whose physical appearance is that of a minor unless it is proved that the person was over eighteen on the day his picture was taken or recorded.</p>

	<p><b>Article 227-25</b> The commission without violence, constraint, threat or surprise of a sexual offence by an adult on the person of a minor under fifteen years of age is punished by five years' imprisonment and a fine of €75,000.</p> <p><b>Article 227-26</b> The offence set out under Article 227-25 is punished by ten years' imprisonment and a fine of €150,000: [...] 4° when the minor was put in contact with the offender by using a telecommunications network for the dissemination of messages to an unrestricted public.</p> <p><b>Article 225-7</b> Procuring is punished by ten years' imprisonment and a fine of €1,500,000 where it is committed: [...] 10. Through the use of a communications network for the distribution of messages to a non-specified audience.</p> <p><b>Article 222-24</b> Rape is punished by twenty years' criminal imprisonment [...] 8° where the victim has been brought into contact with the perpetrator of these acts through the use of a communications network, for the distribution of messages to a non-specified audience; [...]</p>
<p>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.</p> <p>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</p>	<p><i>Corresponding provisions to Arts. 17 (2), (4) and (5)</i></p> <p><b>Article 113-7</b> French Criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place.</p> <p><b>Article 222-22</b> Sexual aggression is any sexual assault committed with violence, constraint, threat or surprise. Rape and other sexual aggressions are committed when they are imposed on the victim in the circumstances mentioned in this section, regardless of the nature of existing relationship between the</p>

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.

aggressor and the victim, including where they are married.

Where a sexual aggression was committed abroad against a minor by a French national or a person habitually resident in France, French law applies notwithstanding the second Paragraph of article 113-6 and the provisions of the second sentence of Article 113-8 are not applicable.

**Article 225-12-3**

In the case of Misdemeanours established by Articles 225-12-1 and 225-12-2 committed abroad by a French national or habitual resident residing on French territory, French law is applicable notwithstanding the second Paragraph of Article 113-6 and the provisions of the second sentence of Article 113-8 are not applicable.

**Article 225-11-2**

In the case of Misdemeanours established by 1° of Article 225-7 committed abroad by a French national or habitual resident residing on French territory, French law is applicable notwithstanding the second Paragraph of Article 113-6 and the provisions of the second sentence of Article 113-8 are not applicable.

The same principle shall apply where one of the felonies mentioned at Articles 225-7-1, 225-8 or 225-9 is committed on a minor outside of the French territory by a foreign national habitually residing on French territory.

**Article 227-27-1**

Where the misdemeanours under Articles 227-22, 227-23 or 227-25 to 227-27 are committed abroad by a French national or a person habitually residing on French territory, French law shall apply notwithstanding the second Paragraph of Article 113-6 and the provisions of the second sentence of Article 113-8 do not apply.

**TOPIC 6.**

*Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)



## 6.1. Please describe the current national legal framework with regard to child victims

### 6.1.1. General framework of protection (Art. 18)

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

In a report of April 2009, the European Commission examined the measures taken by the Member States to comply with the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings<sup>9</sup>. While most of the provisions should have been transposed by March 2006, the European Commission indicated that France had not detailed the measures taken to transpose the Framework Decision into its national legislation.

In its report, the European Commission underlined some of the efforts made by France regarding the protection of victims. Firstly, the French legislation specifically protects some citizens considered as “particularly vulnerable” because of their age, their mental and/or physical fragility. Children have been integrated into this category of “particularly vulnerable” persons. Secondly, according to Article 2 of the Framework Decision, the European Commission recognized that France is actually ensuring that victims have “a real and appropriate role” in its criminal legal system. The same is true for Article 3 of the Framework Decision: indeed, France has established the right for the victims to be heard and to supply evidence during criminal proceedings. Thirdly, a law adopted in 2002<sup>10</sup> provides for the possibility for victims to see their legal defence costs paid by the State. For some particularly serious crimes, the legislator even excluded the notion of private income from the conditions to be fulfilled to receive free legal aid. Furthermore, according to Article 6 of the Framework Decision, the French legislation ensures that - where warranted - victims have free and full access to the information and advices they may need. Finally, France also communicated a number of pre-existing provisions at the national level, concerning the different roles that associations for victims can play, especially on their support after closure of the criminal proceedings.

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<sup>9</sup> Report of the European Commission:

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_criminal\\_matters/jl0027\\_fr.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/jl0027_fr.htm).

<sup>10</sup> Law N°2002-1138, 9 September 2002, Orientation and Programmation for Justice:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000775140>.

However, since the publication of this report in 2009, nothing indicates that France fully transposed all the provisions of the abovementioned Council Framework Decision.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

The child must be assisted and represented throughout the proceedings, as soon as any case of sexual abuse or exploitation on children has been disclosed. There are two main ways of disclosing cases of sexual abuse or exploitation:

*The Complaint ("la plainte")*

The complaint enables the launching of the public action. Article 15-3 of the Code of Penal Procedure provides that police officers have an obligation to accept complaints from anyone who believes that he or she has been the victim of a violation. In France, only a person over the age of 18 or a person that has been legally emancipated has the right to file a complaint. In cases where the victim is a minor, the victims' parents or any legal representative can file a complaint on the child's behalf. It goes without saying that the child can nevertheless report by him- or herself that he or she has been victim of sexual abuse or sexual exploitation (in particular if his or her legal representatives are part of the abuses).

*The reporting of incidences ("le signalement")*

The reporting of incidences consists in notifying and alerting the administrative and judicial authorities about cases on child abuses. The reporting is justified by "warning indicators" of abuses (injuries on the child's body, behavioural disorders, suicide attempt, etc.). The reporting can be made for different reasons: hospitalization, children seeking for assistance to their relatives or any professional or phone calls at the national helpline for abused children. The persons informed have to complete a form. Thus, the situation of the child can be evaluated and administrative or legal measure may be taken when the child is in immediate danger.

More generally speaking, the French legislator imposes on each citizen to not remain silent and take actions when they know that a child is at risk (Articles 434-1 and 434-3 of the Penal Code). Furthermore, there is a specific obligation for some professionals, to report the situation of a child in danger: it includes among others police officers, state employees, healthcare and social workers. According to Article 226-14 of the Penal Code, provisions of Article 226-13 on professional secrecy do not apply:

“to the one who informs the judicial, medical or administrative authorities about privation or ill-treatment, including when it comes to abuses and sexual mutilations, of which he was made aware and which were inflicted to a minor or to a person who was unable to protect him- or herself because of his or her age, physical or psychic disability”.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

The French legislation contains no provision regarding the support of a child victim where the age of this child is uncertain.

However, it is important to note that it is possible to overcome this uncertainty. Indeed, in order to fill in the report form, a number of informations has to be provided: it includes the identity and the age of the child victim, his or her address, his or her family situation, the place in which the child attends school, the identity of the person who has parental authority, and any further document or medical certificate that has been realized. The same applies for the complaint: regardless if the complaint has been filed on an internet platform or directly at the police station, the form must specify the complete civil status of the victim.

### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art. 19 (1))?

In France, the status of the person who represents the child during the criminal proceedings does not matter. Indeed, it can be the child's legal representative (for example, his or her parents...) or a special representative (for example, an ad hoc administrator...). When they filed a complaint on the behalf of the child, all these actors, including the child him - or herself, are informed about the victim's procedural rights.

Among these, the legislation protects the right to receive informations (about the functioning of the criminal legal system), the right to the assistance of defence counsel (and more particularly, the appointment of a lawyer), the right to be part of the proceedings, the right to appeal (also against the decision of the examining judge to dismiss the case), and the right to claim for compensation for the harm suffered.

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

There are two main ways to address the situation of children who report cases of abuse within their family.

First, the national child and youth care services have to contact and send a report to the Public Prosecutor so that measures can be imposed to the parents of the child when this kind of situation is reported by the child him- or herself, or someone else and:

- the child's legal representatives refuse the proposed assistance or support;
- if the assistance or support provided is insufficient to limit the risk incurred by the child.

Besides, in case of emergency situations requiring an immediate protection of the child, the Public Prosecutor will be competent to take a number of measures, which include among others, the placement of the child in a foster family or a care centre.

The question concerning the appointment of a special representative to assist and represent the child will be address bellow.

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

The French legislation contains no provision regarding conditionality on assistance and support measures provided to the child victim. The medical and psychological examination that a child may undergo according to Article 706-48 of the Code of Penal Procedure is for example not mandatory. However, this is a very important step to support the child. Moreover, the proceedings will be complicated if the child victim does not want to cooperate.

In any case, one cannot force a child to cooperate if he doesn't want to. Consequently, particular emphasis has been placed on exchanges with the child in order to establish a solid and trusting relationship. The objective of all professionals involved with minors' victim of sexual abuse and exploitation is to open children to dialogue, so that they cooperate of their own will.

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

All the professionals (i.e. educational, social, medical and judicial workers) have to establish a report on the child's profile and situation in order to ensure that the child will receive adequate

support regarding his or her personal situation and expectations. This point has been examined by a Circular adopted in May 2005 on the improvement of the judicial support in proceedings related to sexual offences. This Circular has been adopted in the context of the *Outreau* case, in order to complete pre-existing laws on children and sexual abuse. Among the measures, it recommended to improve the investigations concerning the familial environment in which the child is living. Knowing contextual elements should help the creation of a personalized program for the assistance and support of the child victim.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

The French legislator estimates that the particular vulnerability of children is linked to their age and therefore provides for a strengthened protection of children.

A number of Articles in the French legislation have been amended and completed with this notion. For example, if the offense of rape is punishable with fifteen years of imprisonment (Article 222-23 of the Penal Code), it is punishable with twenty years of imprisonment, when committed on a minor or a person whose particular vulnerability was visible or known by the perpetrator (Article 222-24).

As shown by this example, it is important to note that the vulnerability is considered as an aggravating circumstance.

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe

The French legislation contains no measures providing assistance and support to the family of the child victim. Moreover, the French legislation is far from been extensive in this area. Most of the assistance and the support provided to the family of child victim are coming from associations or other non-governmental organizations.

In Written Questions on the compensation of minors victims of sexual abuse,<sup>11</sup> the French *Sénat* indicated that for the parents, anxiety and fear they have suffered because of the offence committed on their child constituted a moral damage which should be compensated. As a result,

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<sup>11</sup> *Sénat*, Written Question N°33741: <http://www.senat.fr/questions/base/2001/qSEQ010633741.html>.

they should be entitled to a financial compensation to the national compensation commission (“*Commission d'Indemnisation des Victimes d'Infraction*”). However, there are no further informations available about it.

Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

A number of provisions oblige to inform victims about their rights and remedies available. In the case of child victim, all the informations will be communicated to his or her legal representatives, or where relevant, to the ad hoc administrator.

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which

Measures have been adopted by the French legislator in accordance with the provisions of this Article. Indeed, the Public Prosecutor or the examining judge can appoint an ad hoc administrator when:

- The interests of the child are in opposition with the interests of his or her legal representatives;
- The protection of the child “is not completely guaranteed by his or her legal representatives or one of them”.

It is important to note that where incestuous facts have been reported, the appointment of an ad hoc administrator is compulsory, unless decided otherwise by the Public Prosecutor or the examining judge.

Article R-53 and following of the Code of Penal Procedure indicate a number of conditions to appoint an ad hoc administrator. It can be either a close member or friend of the family or one of the people which is indicated on a list. To be on the list, these people must comply with a number of cumulative conditions (age, place of residence, motivation, absence of conviction). During criminal proceedings, the *ad hoc* administrator shall have two main functions. Firstly, he has a “legal” function: indeed, among others, he will file the civil case, choose a lawyer (preferably, a lawyer trained on child issues) and make a legal aid application. Secondly, he has a more “social” function, as he will assist the child throughout the proceedings. He will not only

explain the proceedings and their different stages, but also prepare the child to possible psychological or medical examinations. Moreover, he has to go with the child to some audiences and hearings.

The *ad hoc* administrator is appointed for the time of the proceedings. If the child and his or her lawyer decide to appeal the decision adopted by the Court, the *ad hoc* administrator will continue to represent and assist the child. The administrator's mission ends by the final court's decision. However, if the child victim obtains a financial compensation for the harm suffered, the *ad hoc* administrator will have to refer the case to the national compensation commission to receive the money and put it on a bank account in the name of the minor child. Then, the bank account is placed under the supervision of the guardianship judge (“*juge des tutelles*”).

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:

a) Available for the purpose of claiming compensation?

As any other victim of a criminal offence, the child must be able to benefit from the assistance of a lawyer. The lawyer will have to represent and defend the interests of the child. France has created legal access points and free legal advice offices in order to help children who are victim of sexual abuse or exploitation in their own family.

The minor child him- or herself (when he or she has reached the age of discernment), the legal representatives or the *ad hoc* administrator can appoint a lawyer. In the case where none of them has made a choice, the examining judge will automatically request the President of the bar to appoint a lawyer.

There is an important point: the earlier the lawyer is present for the proceedings, the better it is. Indeed, he or she will have to defend the interest of the child before the Court, but he or she will also have to explain the functioning of the proceedings and support the child in the fulfilment of a number of formalities. It is also the role of lawyers to claim for the attribution of damages.

b) Free of charge where the victim does not have sufficient financial resources?

In France, a legal aid has been created.<sup>12</sup> As a result, the State will either pay a part, or the entire expenses linked to the proceedings. Indeed, the minor child must have the opportunity to benefit from all the rights guaranteed by the French legislation. It includes access to justice. The remuneration of a lawyer must not constitute an obstacle to this right.

Two main situations can be distinguished. When the minor child undertakes:

- A so-called “spontaneous” initiative, he or she will normally benefit from the entire legal aid;
- An initiative with his or her legal representatives, they will normally have to pay the lawyer and the fees linked to the proceedings. However, they have also the possibility to seek for financial support. It must be noted that they must comply with a number of conditions. Indeed, a number of resources are taken into account to evaluate the access to the legal aid (salaries, alimony, estate income...).

To improve the access of victims to law and justice, a law has been adopted in September 2002<sup>13</sup>. It provides for the possibility to grant legal aid without any conditions to victim of the most serious violations of personal integrity, such as violence and aggravated rapes which have been seriously wounded and psychologically weakened following the offence.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

Interviews with the child victim will begin as soon as an investigation has been launched, following the complaint or the reporting of incidences.

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

France has recently created specific structures within hospitals, which are child-friendly designed, to interview child victim. Being child-friendly designed means among others, the presence of a

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<sup>12</sup> Law N°91-647, 10 July 1991, Legal Aid:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006077779>.

<sup>13</sup> Law N°2002-1138, 9 September 2002, Orientation and Programmation for Justice:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000775140>.



comfortable and cosy room with soft colours and drawings on the walls. Moreover, toys are placed at disposal for the youngest children.

As a result, the collaboration between health professionals and those working for justice has been improved, as it combines investigations and medical support. It ensures that the situation of these children is specifically addressed.

c) Interviews with the child victim are carried out by or through professionals trained for this purpose?

The interviews with the child victim are carried out by a number of professionals who received a specific training. It must be noted that a number of them have multidisciplinary skills. The National Centre of Police Studies and Training which has established a partnership with the Psychology Department of the University Paris X - Nanterre is, for example, providing trainings for policeman.

These trainings enable these professionals to develop their skills regarding the ways used by children to communicate, the questions they may ask to the child victim, methods used to objectively and faithfully transpose the words of the child.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

The French law contains no obligation regarding this particular point. This practice has however been recommended in the 2005 Circular on the improvement of the judicial support in proceedings related to sexual offences.

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?

For the answer to this question, please have a look to the question below: "Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?"

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?

During the interviews, it is possible for the child victim to be accompanied by a « third party » (“*tiers*”) who is not involved in the abuses and cannot be questioned by the investigators. It can be a family member, an ad hoc administrator, a psychologist, a doctor or an educator. The presence of a third party during the interviews aims, on the one hand, at ensuring that the child has a moral support, and on the other hand, at avoiding the loneliness of the child during the interviews. Usually, the presence of such person requests an authorization of the Public Prosecutor's Department or of the examining judge.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

Article 706-52 of the Code of Penal Procedure provides for an audio-visual interview of the child victim. Since the adoption of a law in March 2007,<sup>14</sup> this interview is mandatory in case of sexual abuse or exploitation. There are a number of objectives surrounding this law. First of all, it aims at avoiding, or at least, limiting other interviews. When the interview is made, a copy of the recordings is established in order to facilitate its consultation, especially during the proceedings. If it is necessary, another interview can be organized. However, this new interview cannot intervene before the Public Prosecutor's department has given its authorization. Moreover, the consent of the child is also required. Secondly, recorded interviews can be used to avoid confrontations between the child and the presumed author of the abuses.

Besides, the second alinea of Article 706-52 provides for the interview to be exclusively audio recorded. This Article applies to very specific circumstances and requires two cumulative conditions to be fulfilled. Firstly, it has to respect a decision adopted by the Public Prosecutor or the examining judge. Secondly, this decision must be justified by the protection of the child's interest. This alinea is most of the time applied to children who have been exposed to pornography.

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

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<sup>14</sup> Law N°2007-291, 5 March 2007, Strengthening the Balance of the Criminal Procedure: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006055594>

If closed hearing (“*huis clos*”) are not specifically applied to minor victims in France, this measure participates to their protection as it guarantees the anonymity of the victim. Indeed, proceedings are usually public before Criminal (“*Tribunal correctionnel*”) or Crown Court (“*Cour d'Assises*”) but it is possible for the child's lawyer to ask the Court to close the doors (Article 400 of the Code of Penal Procedure). Moreover, Article 306 of the Code of Penal Procedure provides for the doors to be closed when judicial proceedings deal with sexual assaults unless the victim decided otherwise.

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

The French legislation contains no provision regarding this particular point. However, it is usually admitted that the victim is not obliged to be present in the courtroom. If the child victim does not want to attend the hearings, his or her lawyer will represent the child. It is important to note that if the child victim is present, a number of measures can be taken. In the courtroom for example, his or her lawyer can ask for the victim to be installed in such a way that his or her eyes do not cross the eyes of the presumed author of the sexual abuse or exploitation.

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

As such, Article 39 *bis* of the 1881 law on the freedom of the press has been modified in 2000. It created a “diffusion offence” in case of revelation of a child victim identity, regardless of the offence that was suffered. Moreover, the minority of the child will be appreciated at the time the offence was committed. As a result, the “diffusion offence” will be punishable even if the victim is major at the time of the proceedings. The offence will also be punishable when the given informations contain “sufficient elements of individualization”, i.e. elements which enable people to identify the victim (the address of the child, the place in which the child attends school or pictures of family members for example). This Article does not apply whenever the child gives his or her written authorization to the publishing.

### 6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

For a number of years now, plans and measures have been developed to provide assistance, support and protection to the children victim of sexual abuse or exploitation. The French legislation aims on the one hand at identifying and reporting these cases as early as possible, and on the other hand at ensuring that genuine care and support are provided to the victims at the judicial, psychological and medical levels. Nevertheless, certain provisions can be improved at the national level in the light of the texts adopted by the European Union.

### If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

Concerning additional measures that should be taken by France to comply with Articles 18, 19 and 20 of the Directive 2011/93/EU on combating sexual exploitation of children and child pornography, two main elements must be underlined:

First of all, concerning the French legislation.

- Generally speaking, France should finalize the transposition of the Directive and the Framework Decision in order to ensure the full protection of the child victim of sexual abuse.
- Moreover and more especially, the legislation lacks legal provisions and measures for the assistance and support of the family of child victims (in the case of abuses committed by third persons outside the family). The family should be more supported (psychological assistance...), and prepared.

Last but not least, a better follow-up of the implementation of the legal provisions should be ensured. Indeed, the French *Sénat* considered that the legislation was for most of its part in accordance with the Directive. However, limits to the system were observed. The Circular adopted in 2005 on the improvement of judicial support in proceedings related to sexual offences is a prime example. At this time, audio-visually recorded interviews were too often left aside.

This example, among others, shows that France should make a point of implementing more effectively the provisions available on the assistance and support of child victim of sexual abuse or exploitation.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b></p>	<p>No provisions.</p>
<p><b>Article 19</b>  <b>Assistance and support to victims</b>            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.</p>	<p><b>Improvement of the judicial support in proceedings related to sexual offences</b>            An investigation for sexual assaults cannot be limited to the interviews of the child victim and the presumed author of the abuses, to a possible confrontation that may be completed by some psychological examinations with the aim to give credence to one or another. This is too simplistic. [...] You have to make sure that the Public Prosecutor order the investigator to proceed to objective investigations on the context and the environment in which the child and his or her family is living.</p>
<p><b>Article 20</b>  <b>Protection of child victims in criminal investigations and proceedings</b>            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.</p>	<p><b>Article 706-50 of the Code of Penal Procedure</b>            The Public Prosecutor or the examining judge who has been seized with facts committed wilfully against minors, shall appoint an ad hoc administrator when the protection of the minor's interests is not completely ensured by his or her legal representatives, or one of them. The ad hoc administrator ensures the protection of the minor's interests and exercises - where relevant - the rights granted to civil claimants. In the case where the victim has constituted him- or herself civil claimant, the judge shall automatically appoint a lawyer for the minor if he or she did not already chose one. The above provisions shall apply to the trial court.</p> <p><b>Article 706-51 of the Code of Penal Procedure</b>            Pursuant to the above article, the ad hoc administrator is appointed by the competent magistrate, either among the child's loved ones, or on a list of people. The terms and conditions creating this list shall be laid down by decree in Council of State. This decree shall also specify the conditions of indemnities.</p>
<p>2. Member States shall ensure that child victims have, without delay, access to legal counselling and,</p>	<p><b>Article 9-1 of the Law adopted on the 10<sup>th</sup> of</b></p>

<p>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.</p>	<p><b>July 1991 on Legal Aid</b>          In any proceedings that concern the minor, and when the minor is consulted under the conditions mentioned in Article 388-1 of the Civil Code, if he chooses to be heard with a lawyer or if the judge appoints a lawyer, he or she shall benefit from the legal aid.</p> <p><b>Article 706-51-1 of the Code of Penal Procedure</b>          Every minor who is victim of one of the offences mentioned in Article 706-47 shall be assisted by a lawyer, when the minor is heard by the examining judge. When the lawyer has not been appointed by the minor's legal representatives or by the ad hoc administrator, the judge informs the President of the Bar, so that he automatically appoints a lawyer. Provisions of Article 114 apply to the lawyer in case of later hearings.</p>
<p>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:</p> <ul style="list-style-type: none"> <li>(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;</li> <li>(b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;</li> <li>(c) interviews with the child victim are carried out by or through professionals trained for this purpose;</li> <li>(d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;</li> <li>(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;</li> <li>(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.</li> </ul> <p>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</p>	<p><b>Article 706-52 of the Code of Penal Procedure</b>          In the course of the investigation, the interview of a minor victim of one of the offences mentioned in Article 706-47 [of the Code of Penal Procedure] is subjected to an audio-visually recorded interview. The interview (as mentioned in the preceding Paragraph) may be exclusively audio recorded, when the Public Prosecutor or the examining judge has issued a decision on this point, and when it is justified by the minor's interests. The Public Prosecutor, the examining judge or the police officer in charge of the investigation or operating on rogatory commission may request appoint any competent person to proceed with the interview. The provisions of Article 60 shall apply to this person, who is also subject to professional secrecy (in the conditions mentioned in Article 11). A copy of the recordings shall be established to facilitate later consultation, during the proceedings. The copy shall be placed on the victim's personal file. The original is placed under closed seals. By decision of the examining judge, the audio-visually recorded interview shall be viewed or listened to during the proceedings. However, the copy shall be viewed or listened to by the parties to the proceedings, the lawyers or the experts in the presence of the examining judge or the court clerk. [...]          By the expiration of a period of five years from the end of the court action, the recordings and the copy shall be destroyed within one month.</p>

<p>recorded interviews may be used as evidence in criminal court proceedings, in accordance with the rules under their national law.</p>	<p><b>Article 706-53 of the Code of Penal Procedure</b>          At all stages of the proceedings, the minor victim of a crime or an offence shall, if he or she requests it, be accompanied by his or her legal representative, and where relevant, by the person of his or her choice, unless he or she has made application of Article 706-50, or unless the competent judicial authority has taken another motivated decision on this point.</p>
<p>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:</p> <p>(a) the hearing take place without the presence of the public;</p> <p>(b) the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies.</p>	<p><b>Article 306 of the Code of Penal Procedure</b>          1° The discussions are public, unless the publicity is considered dangerous for public order and morality. In this case, the Court shall declare it by a decision sought in a public hearing.          [...]          3° In the event of proceedings instituted for rape, torture and act of barbarism including sexual assaults, the closed-door shall be accorded to the victim-civil claimant or one the victims-civil claimant who has requested it ; in other cases, the closed-door may be ordered, only if he victim-civil claimant or one the victims-civil claimant does not oppose.</p>
<p>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.</p>	<p><b>Article 39 Bis of the Law adopted on the 29th of July 1881, Freedom of press</b>          The fact of disseminating, in any ways, informations regarding the identity or which allows the identification of:</p> <p>1° a minor having left his or her parents, guardian, the person or the institution which was responsible for the minor, or to which the minor has been entrusted;</p> <p>2° a minor abandoned in the conditions mentioned in Articles 227-1 and 227-2 of the Penal Code;</p> <p>3° a minor who committed a suicide;</p> <p>4° a minor victim of an offence, is punishable with a fine of 15,000 euros.</p>

## TOPIC 7.

*Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

### 7.1.1. Obligatory take down measures (Art. 25 (1))

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

a) Within its territory? If yes, please specify.

The transposition of the Directive provides for measures for the prompt deletion Internet pages containing or disseminating child pornography hosted in their territory.

b) Outside its territory? If yes, please specify.

In addition, cooperation with the Member States in third countries has been developed (U.S.A and others) on the removal of internet pages that are not hosted on the territory of the European Union.

### 7.1.2. Optional blocking measures (Art. 25 (2))

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify

Blocking access to web pages containing or disseminating child pornography is possible when it is impossible to remove the source of child pornography pages. This applies mostly to servers hosted in third countries which do not cooperate with the French authorities, or if the procedure would be too onerous. In such cases, Member States may then block access to such content on their territory.



Moreover, Law n° 2007-297 of 5 March 2007 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.

Besides, Law No. 2011-267 of 14 March 2011 (LOPPSI 2) has made it possible to force Internet Service Providers (ISP) to block access to websites containing child pornographic content. A blacklist of such websites shall be established by the police. Furthermore, Internet addresses designated by administrative order are filtered.

### 7.3. In your view, does the current legal framework comply with Article 25?

French law is already largely in line with the requirements of the Directive.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 25</b>  <b>Measures against websites containing or disseminating child pornography</b></p> <p>1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.</p> <p>2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.</p>	<p><b>Article 227-23 of the Penal Code</b></p> <p>Taking, recording or transmitting a picture or representation of a minor with a view to circulating it, where that image or representation has a pornographic character, is punished by five years of imprisonment and a fine of 75 000 Euros. When concerning a minor under the age of 15, this conducts are also punishable even if committed without a view to circulating it.</p> <p>The same penalty applies to offering or distributing such a picture or representation by any means, and to importing or exporting it, or causing it to be imported or exported.</p> <p>The penalties are increased to seven years of imprisonment and a fine of 100 000 Euros where use was made of a communication network for the circulation of messages to an unrestricted public in order to circulate the image or representation of a minor.</p> <p>Habitual consultation or consultation in consideration of a payment of public online communication services making available such an image or representation, acquiring or possessing such an image or representation by any mean is punished by two years of imprisonment and a fine of 30 000 Euros.</p> <p><b>Article 227-24 of the Penal Code</b></p> <p>The manufacture, transport, distribution by</p>

	<p>whatever means and however supported, of a message bearing a pornographic or violent character or a character seriously violating human dignity, or the trafficking in such a message, is punished by three years' imprisonment and a fine of 75 000 Euros, where the message may be seen or perceived by a minor. Where the offences under the present article are committed through the press or by broadcasting, the specific legal provisions governing those matters are applicable to define the persons who are responsible.</p>
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# ELSA GERMANY

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## 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) and Recital 18)

1.1. Please describe the national legal framework with regard to obtaining such access

Please see the reply to question 3 of this topic.

1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

The national legal framework complies with the Directive, there is no need for implementation.

1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

According to §184b IV of the German Criminal Code it is punishable to own or to obtain possession of child pornography. After a new court decision in 2010, the mere looking at a website that contains child pornography is equivalent of owning such a material.

According to §184b V it is necessary that the obtaining access is committed without right. It is not punishable, if the person acts within the scope of his work-related commitments.

Owning material that includes child pornography will be punished with up to two years of imprisonment. That complies with Art. 5 (1) and (3) of the Directive.<sup>1</sup>

If no, what additional measures should, in your view, be taken in order to comply with Art. 5 (1) and (3)?

There are no additional measures necessary.

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<sup>1</sup> NJW 2010, 1893; OLG Hamburg, Urteil vom 15.02.2010 Az. 2 - 27/09 (REV) 2 - 27/09 - 1 Ss86/09; § 184 b, StG; <http://www.familien-strafrecht.de/Rechtsanwalt-Verbreitung-von-Kinderpornographie-sexuelle-Handlungen-Jugendpornographie.html>; Kindhäuser/Neumann/Paeffgen/Frommel, §184d, Rn15.

1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

Art. 5 (7): Pursuant to §184b IV of the German Criminal Code child pornography has to display a realistic and authentic occurrence. Looking at child pornography with participants who resemble being under age (*Scheinminderjährigkeit*) is punishable under specific conditions:

It is not sufficient for the viewer to doubt the age of the participants. On the contrary, the viewer has to conclude that the person is under age. Defined indicators for that are physical appearance such as body proportions and the face, the manner of speaking, the clothing, the enrolment and the place where the recording was taken (e.g. child room, school). If the participant is under 14, but in his outward appearance looks like a full aged person (at least 18 years old), it is a case for §184b. If the participant is over 14 but under 18, §184c of the German Criminal Code applies.<sup>2</sup>

Art. 5 (8): The production of child pornography within the meaning of the law §184b I Nr. 3 of the German Criminal Code is meant as a preparation of distribution. As a result, the production only for personal use is not punishable. Nevertheless it can be prosecuted as possession of child pornography according to §184b IV.<sup>3</sup>

## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

2.1. Please describe the national legal framework with regard to online grooming

Please see reply to the following question.

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<sup>2</sup> [http://www.bundespruefstelle.de/bpjm/redaktion/PDF-Anlagen/bpjm-aktuell-kriterien-der-scheinminderj\\_C3\\_A4hrigkeit-aus-2-09,property=pdf,bereich=bpjm,sprache=de,rwb=true.pdf](http://www.bundespruefstelle.de/bpjm/redaktion/PDF-Anlagen/bpjm-aktuell-kriterien-der-scheinminderj_C3_A4hrigkeit-aus-2-09,property=pdf,bereich=bpjm,sprache=de,rwb=true.pdf); [http://www.bundesverfassungsgericht.de/entscheidungen/rk20081206\\_2bvr236908.html](http://www.bundesverfassungsgericht.de/entscheidungen/rk20081206_2bvr236908.html).

<sup>3</sup> S/S/Perron/Eisele, §184b, Rn7.

## 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

It is not punishable to merely approach a child (e.g. going to a theme park, swimming, etc.). That would amount to a criminal law based on thoughts or ideas and would penalize socially adequate behaviour. The attempt to commit an offence described in §176 of the German Criminal Code is chargeable as laid down in §176 VI. As a consequence, offline grooming is punishable under certain circumstances: This is the case if, in the delinquent's opinion, there are no significant intermediate steps between contacting the child and the actual offence, what means that the offence has to be imminent.

## 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

The national legal framework complies with the Directive, there is no need for implementation.

## 2.4. In your view, does this legal framework comply with Art. 6?

Yes. According to §176 IV Nr. 3, it is punishable to influence a child by use of writings in order to induce the child to sexual action. Writings include messages through the Internet via chatrooms, emails, pictures or webcam. It is not necessary for the offender to abuse the child after the contact. The preparation for the offence is already punishable. In consequence, §176 IV Nr. 3 goes one step further than the Directive demands: A meeting between the offender and the contacted child is not necessary for culpability.<sup>4</sup>

## If no, what additional measures should be taken in order to comply with Art. 6?

There are no additional measures necessary.

## **TOPIC 3.**

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

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<sup>4</sup> [http://jerzy-montag.de/userspace/BV/jerzy\\_montag/Dokumente/Rechtspolitik/Grooming-Kurzgutachten.pdf](http://jerzy-montag.de/userspace/BV/jerzy_montag/Dokumente/Rechtspolitik/Grooming-Kurzgutachten.pdf); <http://www.heymanmschrkrim.de/das-archiv/jahr-2011/heft-2/>.

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

According to §25 of the German Youth Employment Protection Law<sup>5</sup> German Youth Employment Protection Law (JArbSchG), persons convicted of the offences described in §§174-184g of the German Criminal Code are not allowed to supervise or to instruct adolescents.

It is possible to impose a supervision of conduct called „*Fuehrungsaufsicht*“ after a conviction according to §§174 – 174c, 176-180, 181a and 182 of the German Criminal Code. As long as the supervision of conduct is active, the court can issue instructions concerning a disqualification from professional activities, which the delinquent could exploit in a criminal way, as laid down in §68b I Nr. 4 of the German Criminal Code.

The court can ban the convicted person from professions as laid down in §70 of the German Criminal Code. The ban of employment is a restriction order according to §61 Nr. 6 of the German Criminal Code. There has to be a connection between the profession and the offence, in order for the judge to be able to declare the disqualification lasting one to five years or in severe cases a lifetime. This applies if there is a reason to believe, that the delinquent will use his profession to commit further crimes.<sup>6</sup>

A violation against the ban of employment can result in a prison sentence up to 1 year or a financial penalty. Even prior to his conviction, the judge can temporarily ban the defendant from a profession.

If yes, does it cover:

**3.1.1. Professional activities involving direct and regular contact with children?**

Yes (see above).

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

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<sup>5</sup> <http://www.dict.cc/englisch-deutsch/%5Bact%5D.html>.

<sup>6</sup> S/S/Stree/Kinzig, §70, Rn20.

Yes. §72a III of the Social Security Statutes VIII (SGB VIII): Offenders of the §§174-184g of the German Criminal Code are not allowed to supervise or to instruct adolescents within the frame of voluntary activities.

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

Usually (unless exceptions apply, see reply to the following questions), an employer is not allowed to ask about previous convictions. If the employer does, he violates the employee's right to privacy. There is no general duty of disclosure concerning the criminal record.

**3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?**

Yes. An employer may inquire about any previous conviction(s), if there is a specific relation to the professional activity in question. For that, the employee brings forward a criminal record. When a previous conviction is deleted after several years or was not recorded because the punishment was minor, it is not mentioned in the criminal record. This legislation changed on the 1st of May 2010 with the implementation of the extended criminal record, as laid down in §§30a, 31 BZRG (Federal Central Criminal Register Act). This ensures an encompassing recording of all previous convictions for a similar offence. According to §72a of the Social Security Statutes VIII (SGB VIII), employers and youth welfare services are allowed to ask for a criminal record with regular time intervals.<sup>7</sup>

**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

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<sup>7</sup> <http://www.kinderschutzbund-nrw.de/pdf/ArbeitshilfeFuehrungszeugnis.pdf>.



It is at the employer's discretion to ask for a criminal record, there is no obligation to demand information on the existence of prior criminal convictions.<sup>8</sup>

b) Organised voluntary activities involving direct and regular contact with children?

An employer also has no obligation to ask for a criminal record when recruiting a person for a voluntary activity.

**3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

Yes (see above).

b) Organised voluntary activities involving direct and regular contact with children?

Yes. According to §30a BZRG and §72a SGV VIII organizations have the right to ask for a criminal record if they recruit a person for a voluntary activity.

**3.2.5. If your MS does not foresee any legal framework on screening, would it still, in your view, be possible for an employer to request information on prior convictions without violating national legislation on privacy (or other)?**

Germany has provided in a legal framework for screening.

3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

The transmission of information is regulated in the Federal Central Criminal Register Act (BZRG) §§53a et seq.:

**§53a Limits of international cooperation**

The registration of a conviction which was not issued within the scope of the national jurisdiction is prohibited, if the conviction does not respect the fundamental legal principles of the national legislation.

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<sup>8</sup> <http://beauftragter-missbrauch.de/course/view.php?id=87>.

**§56b Retention for the purpose of disclosure to member states of the European Union**

If the registration of a conviction issued by a judge of another member state is not legal under specific circumstances, and the convicted person has German citizenship, the convictions will be recorded in a special register.

Criminal notifications about individuals, who have citizenship of a fellow MS of the EU, are passed on to the authorities of the specific MS. If one person has citizenship of multiple MS, each MS has to be notified.

In order for Information from the German register to be transferred to the criminal register of another MS, a criminal record for personal matters or to be given to an employer is to be issued in accordance with § 30. The individual has to have German citizenship and live in the MS that is requesting the information. The query needs to show, that the Individual put forward a corresponding request to the MS.

3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

The national legal framework complies with the Directive, there is no need for implementation.

3.5. In your view, does the current legal framework comply with Art. 10?

The current legal framework complies with Art. 10.

**TOPIC 4.***Victim identification*

(Article 15 (4))

4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

The national legal framework complies with the Directive, there is no need for implementation.

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)?

Yes, the national legal framework complies with Art. 15 (4) of the Directive. For the purpose of identification, the Federal Criminal Police Office keeps pictures in stock to compare new material with older, already identified victims. The Federal Criminal Police Office established a central department for child pornography. The office searches specifically for such material and analyses the participants.

Another possibility to identify victims (and offenders) is a public manhunt: The Federal Criminal Police Office releases images of the victim and the offender, in order to receive hints from public for identification.<sup>9</sup>

## TOPIC 5.

### *(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

#### **5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

Yes, §3 of the German Criminal Code (StGB) includes the basic principle that German criminal law shall apply to acts committed on German territory. Exceptions to this rule for acts committed abroad are included in the reply to the next question.

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

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<sup>9</sup>[http://www.bka.de/nr\\_198404/DE/Fahndungen/Personen/UnbekannteTatverdaechtige/SexualstraftaeterSaegling/sexualstraftaeterSaegling.html?\\_\\_nnn=true](http://www.bka.de/nr_198404/DE/Fahndungen/Personen/UnbekannteTatverdaechtige/SexualstraftaeterSaegling/sexualstraftaeterSaegling.html?__nnn=true).

For acts committed abroad §5, (8) of the German Criminal Code German criminal law shall apply if the offender is German and if it concerns one of the following offences listed in the Directive:

Art. 3, §2 Directive: engaging in sexual activity in the presence of a child (§176, (4), 1 StGB);

Art. 3, §4 Directive: engaging in sexual activity with a person under fourteen years of age (child) or allowing the child to engage in sexual activity with the offender (§176, (1) StGB);

Art. 3, §6 Directive: inducing a child to engage in sexual activity with a third person or to allow third persons to engage in sexual activity with the child (§176, (2) StGB);

Art. 3, §4 and §5 Directive: inducing the child to engage in sexual activity, unless the act is punishable under subsection (1) or subsection (2) above (§176, (4), 2 StGB);

Art. 3, §6 Directive: presenting a child with written materials (§11 (3)) to induce him to engage in sexual activity with or in the presence of the offender or a third person or allow the offender or a third person to engage in sexual activity with him (§176, (4), 3 StGB);

Art. 9, c Directive: supplying or promising to supply a child for an offence under subsections (1) to (4) above or agreeing with another to commit such an offence (§176, (6) StGB).

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

German criminal law applies to the dissemination of pornographic performances via broadcast, media services, or telecommunications services when it concerns child pornography and is committed abroad. This is included in the German Criminal Code by conjunction of §6 (jurisdiction over offences committed abroad), §184d and §184c (1) to (3) of the German Criminal Code.

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

There is one case (§182, (3) and (5) StGB) in which the offender needs to be German in order for Germany to have jurisdiction (§5, (8) StGB) and the offence may only be prosecuted upon

request unless the prosecuting authority considers proprio motu that prosecution is required out of special public interest. It concerns the following acts:

“A person over twenty-one years of age who abuses a person under sixteen years of age by:

1. Engaging in sexual activity with the person or causing the person to engage actively in sexual activity with him or
2. Inducing the person to engage in sexual activity with a third person or to suffer sexual acts committed on their own body by a third person,

and thereby exploits the victims lack of capacity for sexual self-determination shall be liable to imprisonment of not more than three years or a fine.”

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

For the offences provided by Art. 3(4), (5) and (6) of the Directive, §5 of the German Criminal Code applies. This means that when committed abroad, Germany's jurisdiction is not subordinated to the condition that the acts are a criminal offence at the place where they were performed.

For the offences listed in Art. 4(2), (3), (5), (6) and (7) and Art. 5(6) of the Directive, §7 of the German Criminal Code states that when these offences are committed abroad German criminal law shall apply if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender:

1. Was German at the time of the offence or became German after the commission; or
2. Was a foreigner at the time of the offence, is discovered in Germany and, although the Extradition Act would permit extradition for such an offence, is not extradited because a request for extradition within a reasonable period of time is not made, is rejected, or the extradition is not feasible.

### **5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))**

Does your MS establish its jurisdiction where:

- a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

For offences committed abroad, it is only the following offence (including in attempted form) for which it is required that the offender and the victim are German at the time of the offence and have their main livelihood in Germany (conjunction of §174 (1) and (3) and §5, (8) of the German Criminal Code):

“Whosoever engages in sexual activity

1. With a person under sixteen years of age who is entrusted to him for upbringing, education or care;
2. With a person under eighteen years of age who is entrusted to him for upbringing, education or care or who is his subordinate within an employment or a work relationship, by abusing the dependence associated with the upbringing, educational, care, employment or work relationship; or
3. With his biological or adopted child not yet eighteen years of age,
4. or allows them to engage in sexual activities with himself, shall be liable to imprisonment from three months to five years.”

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

There are no explicit references to committing any of the offences in the Directive “for the benefit of a legal person”. However, for the offence of distribution, acquisition and possession of child pornography (§184b, (1) and (3) of the German Criminal Code) the penalty is raised when the act is performed on a commercial basis. The same is valid for the offence of distribution, acquisition and possession of juvenile (from 14 to 18 years of age) pornography (§184c, (1) and (3) of the German Criminal Code).

c) The offender is a habitual resident (Art. 17(2)(c))?

For offences committed abroad, it is only the following offence (including in attempted form) for which it is required that the offender and the victim are German at the time of the offence and have their main livelihood in Germany (conjunction of §174 (1) and (3) and §5, (8) of the German Criminal Code):

“Whosoever engages in sexual activity

1. With a person under sixteen years of age who is entrusted to him for upbringing, education or care;
  2. With a person under eighteen years of age who is entrusted to him for upbringing, education or care or who is his subordinate within an employment or a work relationship, by abusing the dependence associated with the upbringing, educational, care, employment or work relationship; or
  3. With his biological or adopted child not yet eighteen years of age,
- or allows them to engage in sexual activities with himself, shall be liable to imprisonment from three months to five years.”

## 5.2. Which steps have been taken in your MS in order to implement Article 17?

None.

## 5.3. In your view, does the current legal framework comply with Article 17?

The current legal framework largely complies with Art. 17, however the rules on jurisdiction for offences committed abroad are only applicable to certain offences (see above). Several offences listed in the Directive do not fall within the scope of the Sections in the German Criminal Code on jurisdiction for offences committed abroad, such as the offences listed in Art. 4 and 6 of the Directive

## If no, what additional measures should be taken in order to comply with Article 17?

The scope of §6 could be extended to include the offences listed in Art. 4 and 6 of the Directive.

## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

## 6.1. Please describe the current national legal framework with regard to child victims

### **6.1.1. General framework of protection (Art. 18)**

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

Yes.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

In German Criminal Procedure Code (§397a (1), 4 StPO), victims have the right to join a public prosecution or an application in proceedings for preventive detention as private accessory prosecutor. This right also exists for victims of the offences listed in Art. 3, §§2, 4, 5, 6 and Art.

4, §§5 and 6 of the Directive and Art. 5, §6 of the Directive who have not attained the age of 18 at the time of their application for private prosecution or cannot sufficiently safeguard their own interests.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

This has not been dealt with in German criminal law.

### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art 19.(1))?

The following measures have been introduced into the German Criminal Procedure Code:

- The right for the examination of a witness to be recorded on an audio-visual medium in the case of persons of less than 18 years of age who have been aggrieved as a result of the criminal offence, this is necessary to safeguard their interests meriting protection (§58a (1) StPO).
- Mandatory defence counsel shall be appointed by the judge upon application or ex officio if it is evident that the accused cannot defend himself, particularly where an attorney has been assigned to the aggrieved person pursuant to the provisions on private prosecution (§140 (2) StPO).
- The right to replace the examination of a witness under 18 years of age by the showing of an audio-visual recording of his previous judicial examination if the defendant and his defence counsel were given the opportunity to participate in such examination (§255a (2) StPO).

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

No.



Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

No.

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

The specific needs of the child victim are considered when selecting the court and with regard to the public nature of hearings:

- §24 of the Courts Constitution Act (GVG) provides in the right for the public prosecution office to bring charges before the regional court due to the particular need for protection of persons aggrieved by the criminal offence who might be considered witnesses or due to the particular scale or the special significance of the case.
- §26 of the Courts Constitution Act states that in matters relating to the protection of children and juveniles, the public prosecutor should only prefer charges before the juvenile courts if children or juveniles are required as witnesses in the proceedings or if a hearing before the juvenile court appears expedient for other reasons.
- §172 of the Courts Constitution Act gives the court the opportunity to exclude the public from a hearing when a person under the age of 18 is examined.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

Please see reply to the previous question.

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)?

Not explicitly stipulated in German legislation.

Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

The right to receive notification (of termination and outcome of proceedings and specific measures taken against the convicted person) is open to the aggrieved person who joined the proceedings as a private accessory prosecutor and this can be done by the parents of a child if it was killed through an unlawful act (§395(2)(1) StPO).

### 6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which.

There is no obligation but the opportunity to apply for such special victim counsel is provided in the German Criminal Procedure Code (§397a (1)(4) StPO).

If a victim of one of the offences against sexual self-determination (§§174 to 182 of the German Criminal Code representing the acts listed in Art. 3, §§2, 4, 5, 6 and Art. 4, §§5 and 6 of the Directive and Art. 5, §6 of the Directive) has not attained the age of 18 at the time of his application or cannot sufficiently safeguard his own interests himself, an attorney shall be appointed as his counsel upon application of the private accessory prosecutor.

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)?

Yes.

If yes, please specify if it is:

a) Available for the purpose of claiming compensation?

A general right for compensation by the aggrieved person has been included in the German Criminal Procedure Code. The aggrieved person or his heir may, in criminal proceedings, bring a property claim against the accused arising out of the criminal offence if the claim falls under the jurisdiction of the ordinary courts and is not yet pending before another court, in proceedings before the Local Court irrespective of the value of the matter in dispute.

b) Free of charge where the victim does not have sufficient financial resources?

Yes, §397a (2) of the German Criminal Procedure Code states that where the conditions for an appointment have not been fulfilled, the private accessory prosecutor shall, upon application, be

granted legal aid for calling in an attorney subject to the same provisions as apply in civil litigation if he cannot sufficiently safeguard his own interests or if this cannot reasonably be expected of him.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

Not explicitly stipulated in German legislation.

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

Not explicitly stipulated in German legislation.

c) Interviews with the child victim are carried out by or through professionals trained for this purpose?

The German Criminal Procedure Code only provides in the fact that the presiding judge solely conducts the examination of witnesses under 18 years of age (§241a StPO). There is no specific rule for child victims.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

Please see reply to the previous subquestion (c).

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?

Not explicitly stipulated in German legislation.

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?

§406f of the German Criminal Procedure Code contains a general right (not limited to child victims) for the aggrieved person to request to be accompanied at the examination by a person

whom they trust and who has appeared at the examination, except where this could endanger the purpose of the investigation. The person conducting the examination shall decide on this request; the decision shall not be contestable. The reasons for denying the request shall be documented in the files.

Also relevant in this respect is the right to refuse testimony. In accordance with §52 (2) stop if minors for want of intellectual maturity, or minors or persons placed in care due to mental illness or mental or emotional deficiency have no sufficient understanding of the importance of their right of refusal to testify, testimony may be taken from such persons only if they are willing to testify and if their statutory representative also agrees to their examination. If the statutory representative is accused himself, he may not decide on the exercise of the right of refusal to testify. If both parents are entitled to act as statutory representative, the same applies to the parent who is not accused.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

Yes, §58a of the German Criminal Procedure Code provides in the possibility to record the examination of a witness on an audio-visual medium. The examination shall be recorded if in the case of persons of less than 18 years of age who have been aggrieved as a result of the criminal offence, this is necessary to safeguard their interests meriting protection.

The use as evidence is explicitly allowed by §255a of the German Criminal Procedure Code which states that in proceedings relating to criminal offences against sexual self-determination, the examination of a witness under 18 years of age may be replaced by the showing of an audio-visual recording of his previous judicial examination if the defendant and his defence counsel were given the opportunity to participate in such examination. Supplementary witness examination is admissible.

There are no specific rules for child victims in the German Criminal Procedure Code.

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

There is a general right (not limited to children) in the German Criminal Procedure Code (§168e StPO) to have a “separate examination” of a witness under the following conditions. If there is an imminent risk of serious detriment to the well-being of the witness in the event of his being examined in the presence of persons entitled to be present and if that risk cannot be averted in some other way, the judge shall carry out the examination separately from those entitled to be present. There shall be simultaneous audio-visual transmission of the examination to the latter. Their rights of participation shall otherwise remain unaffected. The decision to organise this separate examination is incontestable. The abovementioned §58a of the German Criminal Procedure Code providing in the organisation of a hearing by audio-visual medium is applicable to this situation.

Also relevant in this respect is the provision in the German Courts Constitution Act (§171b GVG) that the public may be excluded from the proceedings if circumstances from the private sphere of a participant in the proceedings, a witness or a person aggrieved by an unlawful act are mentioned, the public discussion of which would violate interests that are worthy of protection, unless there is an overriding interest in public discussion of these circumstances. This does not apply if the persons whose private sphere is affected object to exclusion of the public in the main hearing. The person whose private sphere is affected can apply for such exclusion of the public. The decision is not contestable.

The court may exclude the public from a hearing or from a part thereof if a person under the age of 18 is examined (§172 GVG).

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

Please see the reply to the previous question with regard to §58a of the German Criminal Procedure Code providing in the organisation of a hearing by audio-visual media.

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

Please see also the reply to the question regarding the presence of the public.

6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify

Yes, specific steps have been taken and have partially led to amendments of the relevant national legislation (as described above). These amendments were prepared by a special Roundtable Conference on the sexual exploitation of children.

6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

Largely yes, however several specific provisions are lacking (see reply to the following question).

If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

In order to implement Art. 18, §3 and Art. 20, §3, a) to e) of the Directive specific measures should be taken with regard to inter alia the organisation of interviews (hearings) with a child victim. Furthermore, measures ensuring protection for children who report cases of abuse within their family are necessary.

## TOPIC 7.

*Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

### 7.1.1. Obligatory take down measures (Art. 25 (1))

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

a) Within its territory? If yes, please specify

Yes. The German parliament prepared a specific law on the blocking of internet pages containing inter alia child pornography, however after adoption of the act it was annulled in December 2011. It was held that blocking websites would not be efficient as this could be technically circumvented and deleting (taking them down) them would legally be the best option to take. No new legislative proposal is being prepared since the taking down of such websites is already possible by telecommunication providers based on the violation of their general terms and conditions or under the general procedural measures regarding confiscation of illegal goods (§74 of the German Criminal Code and §94 of the German Criminal Procedure Code).

b) Outside its territory?

No.

#### **7.1.2. Optional blocking measures (Art. 25 (2))**

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)?

No (see reply to the first question of this topic).

If no, what is the current (political) position of your MS with regard to blocking, i.e. the likelihood of introducing blocking measures?

Please see reply to the first question of this topic.

7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

As explained above, the German legislator has chosen the direction of taking such websites down instead of blocking them.

7.3. In your view, does the current legal framework comply with Article 25?

Yes.

# ELSA ITALY

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

According to the Italian Criminal Code (hereinafter named "ICC") the conduct of knowingly obtaining access, by means of information and communication technology, to child pornography material does not constitute, in itself, a criminal offence.

According to Law no. 38 of 6 February 2006 (which implemented the Framework Decision of the Council of the European Union (2004/68/GAI) of 22 December 2003 on the fight against the sexual exploitation of children, widening the criminally relevant conducts) only the – subsequent – conduct of obtaining and/or holding material relating to child pornography is criminally prosecutable (Article 600 quater ICC).

In this respect, the decisions issued by Italian Courts confirm that the mere visualization of material relating to child pornography is not punishable if not followed by the subsequent download and detention of such material (for example see decision no. 41570/2007 of the Italian Supreme Court (*Corte di Cassazione*) which states that only the conduct of procuring child pornography "downloaded" from a web site constitutes the offence provided for by Article 600 quater ICC.

### 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

No step has been taken in this respect, yet.

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

The current national framework does not comply with Article 5 (1) and (3).

If no, what additional measures should, in your view, be taken in order to comply with Art. 5 (1) and (3)?

In order to comply with Article 5(1) and (3) the Italian Parliament should introduce an article which expressly punishes the relevant conduct.

1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

Due to the lack of a legal framework punishing the mere access to material relating to child pornography we are not in a position to envisage the possible choice of the MS in this respect. However, apparently the maintenance of the current “restricted” concept of child pornography is not subject of serious doctrinal debates. Even after the recent Law no. 172 of 1 October 2012 (implementing the Lanzarote Convention) child pornography exists only in case of any representation of the sexual organs of minors for sexual purposes (see decision no. 5874/2013 of the Italian Supreme Court), although it is no longer required “eroticism” of representation (as requested under the previous decisions issued by the Italian Supreme Court). Article 600 quater 1 ICC, relating to “virtual” pornography, applies only to a virtual image produced "using images of minors up to eighteen years old or parts of them". Hence, the limit of the “real” minor age of the subjects involved in the production of such material is confirmed within the legal framework and, also in light of this, it seems unlikely that MS will consider to apply the discretion left pursuant to paragraph 7 of Article 5.

## **TOPIC 2.**

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

## 2.1. Please describe the national legal framework with regard to online grooming

Law no. 172 of 1 October 2012 that implemented the Lanzarote Convention of the Council of Europe (entered into force on 23 October 2012) introduced, amongst other provisions, Article 609 undecies of the ICC. The mentioned article provides that whoever with the aim of committing the criminal offences as provided by articles 600, 600 bis, 600 ter, 600 quater, also with regard to the pornographic material indicated under Article 600 quater.1, 600 quinquies, 609 bis, 609 quater, 609 quinquies, 609 octies, solicits an individual younger than sixteen years, shall be punished with imprisonment from one to three years. According to Article 609 undecies, second paragraph, of the ICC the term “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. Legislative decree no. 39 of 4 March 2014, transposing the Directive 2011/93/EU, introduced Article 609 duodecies in the ICC; the mentioned Article provides that whoever uses techniques to be anonymous on the internet shall be punished with the same penalty set out by Article 609 undecies, increased by no more than a half.

## 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

According to Article 609 undecies of the ICC offline grooming is a punishable conduct, effective from 23 October 2012.

## 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

In Italy, Article 6, first paragraph, is implemented by Article 609 undecies of the ICC.

## 2.4. In your view, does this legal framework comply with Art. 6?

The current Italian legal framework does comply with Article 6, with the exception of its second paragraph (as mentioned in Topic 1, the conduct provided under Article 5 (3) of the Directive is not punishable).

If no, what additional measures should be taken in order to comply with Art. 6?

To fully comply with Article 6 the Italian Parliament should introduce the conduct provided by Article 5 (3) as a criminal offence (for further information see Topic 1).

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b>  <b>Solicitation of children for sexual purposes</b>            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.</p>	<p><b>Article 609 undecies ICC - Solicitation of minors</b>            1. Whoever, with the aim of committing the criminal offences as provided by articles 600, 600 bis, 600 ter, 600 quater, also with regard to the pornographic material indicated under Article 600 quater.1, 600 quinquies, 609 bis, 609 quater, 609 quinquies, 609 octies, solicits an individual younger than sixteen years, shall be punished, if the conduct does not constitute a more serious offence, with imprisonment from one to three years. 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.</p>
<p>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.</p>	<p><b>Article 56 ICC - Attempted offence</b>            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, if the established penalty is life imprisonment; and in other cases with the punishment provided for the offence, decreased by one-third to two-thirds. If the culprit voluntarily desists from action, he shall be punished only for the accomplished acts, if they constitute per se a different offence. If the culprit voluntarily prevents the event, he shall be punished with the penalty provided for the attempted offence, decreased by a third to a half.</p> <p><b>Article 600 quater ICC - Possession of pornographic material</b>            Whoever, apart from the cases provided for by Article 600-ter, knowingly obtains or holds pornographic material made using children under</p>

	<p>the age of eighteen years, shall be punished with imprisonment up to three years and a fine of not less than EUR 1,549.</p> <p>The penalty is increased up to two-thirds if the material is held in significant quantities.</p>
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### TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

Yes, it does. The actual version of the ICC, as amended by Law no. 172 of 1 October 2012, establishes different interdiction measures for, among others, individual convicted for sexual related crimes, in two articles: 600 septies.2 and 609 nonies.

The former establishes that the conviction or the application of the punishment upon request of the parties according to article 444 of the Italian Code of Criminal Procedure (hereinafter "ICCP") for one of the criminal offences indicated in articles 600-600 quinques (which include sexual offences against children, like children's sexual exploitation, child pornography and organisation and propaganda of trips with the intention of fruition of the activity of minors' prostitution) and in Article 414 bis of the ICC introduced by Law no. 172 of 1 October 2012 (incitement to practices of paedophilia and child pornography) implies the application of ancillary penalties. Among them, the first paragraph, number 2) of this Article provides the perpetual disqualification from any office related to ward, trusteeship or support service. Furthermore, if the criminal offence has been committed against a victim of less than eighteen years, the second paragraph of Article 600 septies.2 establishes as ancillary penalty 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.

Article 609 nonies of the ICC establishes that the ancillary penalties above indicated apply also to individuals convicted for sexual offences typified in articles 609 bis, (sexual violence), 609 ter (sexual violence with aggravating circumstances), 609 quater (sexual acts with minors), 609 quinquies (corruption of minors), 609 octies (gang rape) and the new crime established in Article 609 undecies (solicitation of minors): in particular, Article 609 nonies provides that the conviction or the application of the punishment upon request of the parties according to article 444 of the ICCP for one of the criminal offences indicated in the articles referred above, entails in any case, among them, the perpetual disqualification from any office related to ward, trusteeship or support service, the suspension from carrying out a profession or art and, when the victim is a young person under eighteen years, the perpetual ban from holding 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.

Moreover, Article 609 nonies establishes that conviction for one of criminal offences under articles 600 bis, second paragraph, 609 bis, 609 ter, 609 quater, 609 quinquies and 609 octies, third paragraph, implies 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. In case of infringement of these security measures, the last paragraph of Article 609 nonies establishes a new criminal offence, which is punished with imprisonment up to a maximum of three years<sup>1</sup>.

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<sup>1</sup> Notwithstanding the above, authors criticize how Law n. 172 of 1 October 2012 has introduced in the Italian criminal system a particular provision, the submission to psychological counselling for those who have been convicted for sexual offences against minors. During the parliamentary works, the Commission of Justice introduced an amendment which established the compulsory psychological treatment in case of conviction for sexual offences, both during the execution of the sentence and for five years after it, to tackle in an effective way sexual deviant orientations. The final version of this provision is softer than the one introduced during parliamentary works, for different reasons. The first one is that the provision has been inserted in the Italian criminal system amending not the ICC, but Law no. 354 of 26 July 1975 (Law of the penitentiary system), with the new Article 13 bis, which establishes the psychological treatment as a discretionary measure, and only for the period of the execution of the sentence. Furthermore, this article must be intended considering also article 4 bis of the same law, concerning benefits that prisoners can achieve. Paragraph 1 quinquies (introduced by Law no. 172 of 1 October 2012) of article 4 bis establishes that prisoners can obtain these benefits only if they accept to be submitted to psychotherapy. This provision could jeopardize the aim of the submission to treatments, only to achieve advantages and not for real willpower to redeem.

If yes, does it cover:

**3.1.1. Professional activities involving direct and regular contact with children?**

Yes.

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

Yes, provided that they can be qualified as carried out within a public or private structure.

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

Yes, it does. In particular, it is worth mentioning three relevant laws:

Legislative decree no. 196 of 30 June 2003 (Code for the protection of personal data)

Establishes under Article 27 that:

“treatment of judicial data<sup>2</sup> by private subjects or economic public institutions is allowed only if it has been expressly authorized by a rule of law or an administrative measure adopted by the Data Protection Authority in which are specified the relevant aims of public interest of the treatment of personal data, which kind of data are involved and the performable operations.”

Legislative decree no. 276 of 10 September 2003

Article 10 establishes that:

“it is forbidden for employment agencies and for the other public and private subjects, authorized or accredited, to carry out any kind of investigation, any data treatment or workers pre-selection, even with workers' consent, based on personal opinions, political or trade-union affiliation, religion, sex, sexual orientation, marital status, filiation or pregnancy, age, handicap, race, ethnic or national origin, colour, descent, health status or language group, or for any possible disputes with former employers, unless these features could weigh on the manner of performing the work or are a genuine and determining occupational requirement for the work performance. It is also forbidden to process workers' personal data which are not related with personal aptitudes or for the access to employment”.

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<sup>2</sup>Art. 4, paragraph 1, e) of Legislative decree no. 196 of 30 June 2003 defines judicial data as: personal data adapted to reveal the measures referred to Article 3, paragraph one, letters a) to o) and r) to u), of Presidential Decree of 14 November 2002, n. 313, relating to criminal records, register of penalties for administrative offenses and related pending charges, or to be cited as defendant or investigated, in accordance with Articles 60 and 61 of the ICCP.

Article 8 of Law no. 300 of 20 May 1970 (Workers' Statute)

According to it,

“The employer is prevented, both during the recruiting stage and during employment, from carrying out any investigation, also through third parties, on political, religious or trade union related opinions of the employee, as well as with regard to any circumstance which is not relevant for the evaluation of the professional attitude of the employee to carry out the specific duties assigned”.

The mentioned articles would prevent the employer also from requesting/gathering any information relating to the existence of criminal convictions if this piece of information does not have any impact on the specific duties to be carried out.

On the other hand, Article 28 of the Presidential Decree no. 313 of 14 November 2002 (Consolidate Law on criminal records) establishes that Public Administrations and public service operators have the right to obtain certificates established under Articles 23 (general certificate, criminal certificate, civil certificate) and Article 27 (certificate of charges pending), related to individuals older than eighteen years, if such certificates are necessary to carry out their functions.

**3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?**

Yes, under Article 25-bis of Presidential Decree no. 313 of 14 November 2002, as introduced by Legislative decree no. 39 of 4 March 2014 which implemented the Directive effective from 6 April 2014.

**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

Yes. Article 25-bis of Presidential Decree no. 313 of 14 November 2002, as recently introduced, establishes that criminal records must be requested by an employer recruiting individuals to carry



out both professional and voluntary organised activities entailing direct and regular contacts with children<sup>3</sup>.

b) Organised voluntary activities involving direct and regular contact with children?

Yes. See answer above.

**3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

Yes.

b) Organised voluntary activities involving direct and regular contact with children?

Yes.

3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

Italy has not implemented the Council Framework Decision 2009/315/JHA of 26 February 2009 (Exchange of information from criminal records) nor the Council Framework Decision 2009/316/JHA of 6 April 2009 (establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA).

However, we have been informed by the Legislative Office of the Ministry of Justice that MS has recently drawn up a draft legislative decree which should be approved in the short-medium period by the Italian Parliament. Moreover, it appears that significant steps have been already taken by the above mentioned Ministry of Justice in order to ensure a prompt functioning of the ECRIS system as soon as the legislative decree will be eventually issued<sup>4</sup>.

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<sup>3</sup> Failure to comply with the above mentioned provision is sanctioned with a penalty ranging between Euro 10,000 and 15,000.

<sup>4</sup> With the Ministerial circular of 1 February 2013 (European Criminal Records - Start of ECRIS (European Criminal Records Information System) the Italian Ministry of Justice establishes the substitution of the pilot project NJR with ECRIS. The ministerial circular states that "The process of interconnection of national registers has already started during the second half of 2012 by nineteen EU countries, to which Italy will be included in February 2013. The procedure for technical interconnection requires the establishment of bilateral links between different countries; it is expected that the exchange with an EU Member State already interconnected will be realized within two months. It

In light of the above, it emerges that Italian law currently regulates only the exchange of information pursuant to the Convention promulgated by the Council of Europe on 20 April 1959 about the judiciary assistance. This convention sets out cooperation among adhering states only at judiciary level. This entails that – pending full implementation of the above mentioned Framework Decisions - Italy can exchange information regarding criminal proceedings only with foreign judicial authorities.

3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

Legislative decree no. 39 of 4 March 2014 has been the last and the most recent step towards implementation of article 10 of the Directive.

3.5. In your view, does the current legal framework comply with Art. 10?

Italy fully complies with the first and the second paragraphs of Article 10. A few steps have been taken to comply also with the third paragraph.

If no, what additional measures should be taken in order to comply with Art. 10?

In order to comply with Article 10, the Italian Parliament should implement the Council Framework Decision 2009/315/JHA of 26 February 2009.

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is reasonable to predict that the second phase of the project, which aims to achieve the full coverage of the connections with all the EU State Members, could be completed within the year. At the end of the first phase, so at the end of next March, it is estimated that Italy will be connected with the following countries: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Netherlands, Poland, United Kingdom, Slovakia, Romania, Spain and Hungary". Furthermore, in March 2013 the Central Criminal Office of the General Directorate of Criminal Justice organised a training course for the staff of the judicial offices to explain the ECRIS system and the procedures for the acquisition of the European certificate (ECRIS certificate). According to the above Ministerial circular, ECRIS could be actually considered ready to be inserted in the Italian system. The Report on the Administration of Justice in 2013 - Affairs Department of Justice, published on 24 January 2014 in the Ministry of Justice website, explains that at the end of 2013 Italy has reached the connection through the ECRIS system, that is potentially functioning, with all the EU States members, with the exception of Cyprus, Croatia, Finland, Greece, Ireland, Malta, Portugal, Slovakia, Slovenia, Sweden and Hungary, due to technical problems. During the same year, also a few improvements was included in the system.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b>  <b>Disqualification arising from convictions</b></p> <p>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.</p>	<p><b>Article 600 septies.2 ICC - Ancillary penalties</b></p> <p>The conviction or the application of the punishment upon request of the parties according to article 444 of the ICCP for one of the criminal offences indicated under this section (articles 600-604) and for the criminal offence indicated under Article 414 bis of the ICC<sup>5</sup> entails:</p> <ol style="list-style-type: none"> <li>1) Loss of parental responsibility, whenever being a parent constitutes an aggravating circumstance;</li> <li>2) Perpetual disqualification from any office related to ward, trusteeship or support service;</li> <li>3) Loss of alimonies and exclusion from the victim's line of succession;</li> <li>4) Disqualification from public offices on a temporary basis or for a five-year period in case of a prison sentence from three to five years, without prejudice to article 29, I paragraph, in respect of perpetual disqualification.</li> </ol> <p>Whenever the offences have been committed against minors, the conviction or the application of the penalty upon request of the parties in accordance with article 444 of the ICCP, for one of the criminal offences under this section and for the criminal offence under article 414-bis hereof, entails, in any event, the 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.</p> <p>In any event, businesses engaged in any activity aimed at the offences hereunder shall be closed and the relevant licences, permits, authorisations shall be revoked.</p> <p><b>Article 609 nonies ICC - Ancillary penalties and other criminal effects</b></p> <p>The conviction or the application of the punishment upon request of the parties according to article 444 of the ICCP for one of the criminal offences under articles 609-bis, 609-ter, 609-quater, 609-quinquies, 609-octies and 609-undecies, entails:</p> <ol style="list-style-type: none"> <li>1) Loss of parental responsibility, whenever being a parent constitutes an aggravating circumstance;</li> <li>2) Perpetual disqualification from any office related</li> </ol>

<sup>5</sup> Incitement to paedophilia and child pornography related activities.

	<p>to ward, trusteeship or support service;</p> <p>3) loss of alimonies and exclusion from the victim's line of succession;</p> <p>4) disqualification from public offices on a temporary basis or for a five-year period in case of prison sentence from three to five years, without prejudice to article 29, I paragraph, in respect of perpetual disqualification;</p> <p>5) suspension from profession or trade.</p> <p>The conviction or the application of the punishment upon request of the parties in accordance with article 444 of the ICCP for any of the criminal offences under articles 609-bis, 609-ter, 609-octies and 609-undecies whenever they have been committed against minors, and under 609-quater and 609-quinquies, entails in any event the 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.</p> <p>The conviction for the criminal offences under article 600-bis, II paragraph, and 609-bis (under the aggravating circumstances specified under article 609-ter), 609 quarter, 609 quinquies and 609 octies (under the aggravating circumstances specified under the latter article, III paragraph), entails (following the enforcement of the penalty and for a minimum period of one year):</p> <ol style="list-style-type: none"> <li>1) the possible imposition of restrictions on movement and free circulation, as well as the prohibition of approaching places usually attended by minors;</li> <li>2) the prohibition of engaging in activities requiring regular contact with minors;</li> <li>3) the obligation to inform the police about residential address and any change thereof.</li> </ol> <p>Whoever violates the provisions under paragraph III shall be subject to imprisonment up to three years.</p>
<p>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</p>	<p><b>Article 25 bis of the Presidential Decree no. 313 of 14 November 2002</b></p> <p>The criminal record certificate referred to in Article 25, must be requested by whomever intends to recruit a person to carry out professional activities or organised voluntary activities involving direct and regular contacts with children, in order to verify the existence of convictions for any of the offences referred to in Articles 600-bis, 600-ter, 600-quater, 600-quinquies and 609-undecies of the ICC, or the existence of any disqualification from the exercise</p>

<p>involving direct and regular contacts with children arising from those criminal convictions.</p>	<p>of activities involving direct and regular contacts with children. The employer who fails to implement the obligation referred to in Article 25-bis of the Presidential Decree no. 313 of 14 November 2002, shall be subject to a financial penalty ranging from € 10,000.00 to € 15,000.00.</p>
<p>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 [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.</p>	<p><b>Ministerial circular of 1 February 2013 from Ministry of Justice</b> With respect to the circular dated 12 November 2010 of this Department, the SS. LL. are informed that the pilot project NJR - Judicial Registers Network will shortly be replaced by the ECRIS system, which will carry out the effective European Criminal Records, in collaboration and with the support of EU institutions. [...] Although the delay, at the national level, in the adoption of European legislation that would better articulate and define the legal basis of ECRIS, largely represented by the Convention on Mutual Assistance in Criminal Matters of 1959, this Department has introduced all the useful initiatives to ensure, within a reasonable time, the perfection of the process of adoption of the Framework Decision of the European Council No. 315 and No. 316 of 2009 and 675 of 2008, which regulate the working of ECRIS and give full effect to the use of the ECRIS certificate, even and especially for the application of recidivism. The process of interconnection of national registers has been already started during the second half of 2012 by nineteen EU countries, within which Italy will be included in February 2013.  The procedure for technical interconnection requires the establishment of bilateral links between different countries; it is expected that the exchange with a EU Member State already interconnected will be realized within two months. It is reasonable to predict that the second phase of the project, which aims to achieve the full coverage of the connections with all the EU State Members, could be completed within the year.  At the end of the first phase, so at the end of next March, it is estimated that Italy will be connected with the following countries: Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania,</p>

	<p>Netherlands, Poland, United Kingdom, Slovakia, Romania, Spain and Hungary.</p> <p>During this period, from the beginning of March, the Central Criminal Office (III) of the General Directorate of Criminal Justice, will direct the organization of a training course for the staff of the judicial offices, in which will be explained the operation of the ECRIS system and the procedures for the acquisition of the European certificate (ECRIS certificate).</p> <p>In the training course will be also explained the Italian SAGACE system (<i>Sistema di Archiviazione e Gestione degli Avvisi di Condanna Esteri</i>, in English System of Storage and Management of Notices of Foreign Condemnation) directed, as known, to simplify and to support the process of exequatur of foreign judicial measures issued against Italian citizens. This system, already explained during the course on NJR, differs from the previous version only for the fact that it refers to a database, the ECRIS one, which is richer and more complete than the previous database of NJR. [...].</p>
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## TOPIC 4.

### *Victim identification*

(Article 15 (4))

#### 4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

In order to contrast sexual related offences against children Law no. 269 of 3 August 1998, as amended by Law no. 38 of 6 February 2006, under Article 14 establishes that the Postal and Communication Police Service<sup>6</sup>, following authorization of the judiciary authority, have the possibility to activate unmarked sites on internet, realize and manage communications or exchange areas using chat or e-mail, with the participation of Police Officers under cover. The mentioned bodies are also entitled, following due authorization and with the sole purpose of

<sup>6</sup> A special branch of Italian National Police, active in the area of child sexual abuse through internet.

obtaining evidence, to proceed with simulated purchase of pornographic material<sup>7</sup> and relevant intermediation activities, including the participation to trips organised with the intention of fruition of minors' prostitution.

The theme of online child pornography is tackled, for the first time, by the above mentioned Law no. 38/2006. To fight this phenomenon, amongst other provisions, the mentioned law set up the National Centre Against Child Pornography on Internet (C.N.C.P.O.) and the Observatory to fight paedophilia and child pornography.

The C.N.C.P.O. has the purpose of collecting any possible signal, also originating from foreign police Authorities and from public and private subjects involved in the fight against child pornography, using internet and other communication nets<sup>8</sup>. It coordinates all investigative activities carried out by the Postal and Communication Police concerning child sexual abuse through internet<sup>9</sup>.

The Observatory to fight paedophilia and child pornography has been created with the purpose of acquiring and monitoring data and information connected to the activities of prevention and repression of the phenomenon of sexual abuse and sexual exploitation of children which are carried out by all the Public Administrations.

Among the responsibilities of the Observatory, there is the creation of a database collecting, thanks to the contributions provided by the involved Administrations, the necessary information

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<sup>7</sup>The Judiciary Authority is immediately informed of the purchase and can also order to postpone the requisition of the purchased material when there is the necessity to acquire further useful pieces of evidence.

<sup>8</sup> C.N.C.P.O. coordinates all investigative activities carried out by police officials concerning child grooming, production, trade, distribution, detention of child pornographic material and sexual tourism through internet. C.N.C.P.O. is dedicated to monitoring the net to detect child pornographic sites. To that end, C.N.C.P.O. receives reports on illegal contents of sites from voluntary associations dedicated to children protection, common citizens, providers and every single member of the Authorities, also foreign, which is active in the legal analysis for the identification of children victim of abuse.

<sup>9</sup>The Italian legal framework provides for several legal instruments to investigate child pornography related crimes. Whenever a crime is committed using computer or online technologies, ICC allows interceptions. They can be done with reference to the accounts, i.e. the signed subscriptions with the providers for the access to internet, or to the telephone consumption used by the investigated. A further instrument is the duplication of e-mail account, that allows the criminal investigation division, under the authorization of the Judiciary Authority, to acquire all the messages received by and, sometimes, sent to, the e-mail account under investigation. As further support to the activity carried out by Italian Authorities there is an innovative technology, so called "PhotoDna". This tool has been created by Microsoft and NetClean and adopted by the Postal and Communication Police. PhotoDna, which computes hash values of images in order to identify alike images, allows creating a connection between the reports of the online services and the investigations carried out by the Authorities, quickening examination of the huge number of seized images and pictures and, consequently, also victims identification.

to monitor the phenomenon of sexual abuse and sexual exploitation, child pornography and the precautionary and repressive actions connected to it.

Attention of the Postal and Communication Police Service within the identification activity is also focused on the confiscated material, with the aim of identifying and put under protection the victims found on the images or on the recordings.<sup>10</sup> These activities are carried out by the Postal Police under the coordination of C.N.C.P.O., applying all the methodologies shared at international level through the Interpol net.

From 2011, C.N.C.P.O. is directly connected with the international database of child pornography on internet called International Child Sexual Exploitation (I.C.S.E.), located in France, in Lion, by the General Secretariat of the Interpol, to enhance and improve investigative techniques allowing to identify perpetrators and victims of online child sexual exploitation offences.<sup>11</sup>

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

Please see the answer above.

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)?

The current legal framework complies with Article 15 (4).

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 15</b> <b>Investigation and prosecution</b></p> <p>1.(...)</p>	<p><b>Article 14 of Law no. 269/1998 - Counteracting measures</b></p> <p>1. In the framework of the activities established by the police superintendent or by the local chief of the applicable body (the latter at least at provincial level), judicial police officers operating in structures</p>

<sup>10</sup>The analysis of child pornographic images and recordings permits to recreate the story of the abuse, to locate territorially the background where it took place and, in some cases, to identify the abuser and the victim. The methodology used to examine the material benefits from the connections in real time with the C.N.C.P.O.

<sup>11</sup> Thanks to the main role took on by Interpol, amongst other things, child pornographic images and recordings that circulate on the intranet can be acquired by detectives of any country.



<p>2(...)</p> <p>3(...)</p> <p>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.</p>	<p>specialised in the repression of sexual offences/protection of minors or in structures aimed at fighting organised crime - subject to authorisation of the judicial authorities – may simulate the purchase of pornographic material, and engage in relevant intermediation activities, and participate in the tourism initiatives under article 5 hereof for the exclusive purpose of obtaining evidence of the offences under articles 600-bis, I paragraph, 600-ter, I, II, III paragraphs, and 600-quinquies of the ICC as introduced by this law. Such purchase shall be immediately notified to the judicial authorities who may defer the seizure, by reasoned order, until the investigation is concluded.</p> <p>2. In the framework of the telecommunications police duties, as defined by the decree referred to under article 1, XV paragraph, of the law no. 249 dated 31 July 1997, the body of the Ministry of the Interior aimed at ensuring safe and regular telecommunication services shall carry out - only upon grounded request of the judicial authorities (otherwise such request shall be set aside) - the activities necessary to fight the offences under articles 600-bis, I paragraph, 600-ter, I, II, III paragraphs, and 600-quinquies of the ICC committed by means of information and communication technology or by publicly available telecommunications networks. To that end, the persons in charge may use concealed identity also in order to activate websites, to create or manage communication/exchange platforms on networks or on information technology systems as well as to participate in them. The aforementioned specialised personnel shall carry out the activities under I paragraph also by means of information and communication technology.</p> <p>3. The judicial authorities – by reasoned order – may defer issuing apprehension, arrest or seizure orders, or defer enforcing same, whenever necessary to obtain substantial evidence or to identify or apprehend the perpetrators of the offences under articles 600-bis, I paragraph, 600-ter, I, II, III paragraphs, and 600-quinquies of the ICC. When the victim of the offence is identified or identifiable, the measure shall be adopted after consultation with the public prosecutor of the juvenile court in the district where the minor's usual residence is located.</p>
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**Article 14 bis of Law no. 269/1998 - National Centre Against Child Pornography on Internet**

1. The National Centre Against Child Pornography on Internet, hereinafter the "Centre", is set up at the body of the Ministry of Interior referred to under article 14, II paragraph, with the task of collecting any information, which may also come from foreign police, public and private entities committed to fighting child pornography and which is connected with websites disseminating material linked to the sexual use of minors by internet and other communication networks as well their managers and the individuals profiting from the relevant payments. Judicial police agents and officers are obliged to provide the aforementioned information. Without prejudice to the initiatives and decisions of the judicial authorities, in case of corroborating results, the website concerned as well as its managers and the individuals profiting from the relevant payments are included in a list constantly updated.

2. The Centre uses the human resources, tools and financial means available. The establishment and functioning of the Centre must not generate new or additional charges for the State accounts.

3. The Centre notifies the President of the Council of Ministers – Equal Opportunities Department – of information and statistical data about paedopornography on the internet for the purpose of preparing the national plan for the fight against paedophilia and the prevention of paedophilia and the annual report referred to under article 17, XVII paragraph.

**Article 17, paragraph 1-bis, of Law no. 269/1998**

[...] within the Department of equal opportunities of the Cabinet Office is established the Observatory to fight paedophilia and child pornography with the aim of acquiring and monitoring data and information related to the activities, carried out by all Public Administrations to prevent and repress paedophilia [...].

## TOPIC 5.

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive<sup>12</sup>

### 5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

Yes. According to Article 6 of the ICC, Italian courts have jurisdiction if the offence is wholly or in part committed within the Italian territory.

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

Yes, for those offences which are qualified as criminal offences according to Italian law (i.e. with the exclusion of the offence indicated under article 5, paragraph 3, of the Directive), Article 604 of the ICC establishes that Italian courts have jurisdiction where the offence is committed outside national territory by an Italian national.

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

Yes, for those offences which are qualified as criminal offences according to Italian law (i.e. with the exclusion of the offence indicated under article 5, paragraph 3, the Directive), provided that the action qualifying the offence is committed within the national territory.

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<sup>12</sup> According to our reading, the article is divided into on the one hand a number of compulsory grounds and modalities of jurisdiction, which either are complete, i.e. cover all offences in the Directive (paras. 1, 3 and 5) or partial, i.e. cover only certain of the offences in the Directive (para. 4), and on the other hand the an optional extension of jurisdiction (para. 2).

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

No.

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

No.

### **5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))**

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

According to Article 604 of the ICC, Italian courts have jurisdiction only where the victim is a national. On the other hand, habitual residents are not taken into consideration by the applicable provisions, and, consequently, they are excluded from the scope thereof.

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

No.

c) The offender is a habitual resident (Art. 17(2)(c))?

No.

If no, what are in your view the prospects of your MS prevailing itself of the option provided in Article 17?

It does not seem that MS currently intends to avail itself of the option provided.

5.2. Which steps have been taken in your MS in order to implement Article 17?

See answers above.

5.3. In your view, does the current legal framework comply with Article 17?

In our view the Italian current legal framework complies with Article 17, save for the section regulating the optional extension of jurisdiction.

If no, what additional measures should be taken in order to comply with Article 17?

In order to fully comply with Article 17 the Italian legislator should introduce a discipline to cover all the optional extension of jurisdiction, the main part of which is not provided yet.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <p>(a) the offence is committed in whole or in part within their territory; or</p> <p>(b) the offender is one of their nationals.</p> <p>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:</p> <p>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</p> <p>(b) the offence is committed for the benefit of a legal person established in its territory; or</p> <p>(c) the offender is an habitual resident in its territory.</p> <p>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</p>	<p><b>Art. 6 ICC. - Crimes committed within the territory of the State.</b></p> <p>Anyone who commits a crime within the territory of the State shall be punished according to Italian law. A crime is deemed to have been committed within the State when, be it an act or an omission, it has partially or totally occurred within the territory, or the event which is the consequence of the act or omission has occurred within the territory.</p> <p><b>Art. 7 ICC. - Offences committed abroad.</b></p> <p>A citizen or foreigner who commits any of the following offences in foreign territory shall be punished according to Italian law:</p> <p>(1) crimes against the personality of the Italian State;</p> <p>(2) crimes of counterfeiting the seal of the State and of using such counterfeited seal;</p> <p>(3) crimes of counterfeiting money which is legal tender in the territory of the State, or duty-bearing paper or Italian public credit securities;</p> <p>(4) crimes committed by public officers in the service of the State by abusing the powers or violating the duties pertaining to their office; or</p> <p>(5) any other offence for which specific provisions of law or international conventions establishes the applicability of Italian criminal law.</p>

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.

**Art. 9 ICC. - Common Crimes by Citizens Abroad.**

A citizen who, apart from the cases specified in the two preceding articles, commits in foreign territory a crime for which Italian law prescribes life imprisonment or imprisonment for a minimum of at least three years, shall be punished according to that law, provided he is within the territory of the State.

With respect to crimes for which a punishment restrictive of personal freedom for a shorter period is prescribed, the offender shall be punished on demand of the Ministry of Justice, or on petition or complaint of the victim.

If, in a case designated in the preceding provisions, the crime was committed to the detriment of the European Community, of a foreign State or of a foreigner, the offender shall be punished on demand of the Minister of Justice provided his extradition has not been granted, or has not been accepted by the Government of the State in which he committed the crime.

**Art. 10 ICC. - Common Crimes by Foreigners Abroad.**

A foreigner who, apart from the cases specified in Articles 7 and 8, commits in foreign territory, to the detriment of the State or a citizen, a crime for which Italian law prescribes life imprisonment or imprisonment for a minimum of at least one year, shall be punished according to that law, provided he is within the territory of the State and there is a demand by the Ministry of Justice, or a petition or complaint by the victim.

If the crime was committed to the detriment of the European Community, of a foreign State or of a foreigner, the offender shall be punished according to Italian law, on demand of the Ministry of Justice, provided that:

- (1) he is within the territory of the State,
- (2) the crime is one for which the punishment prescribed is life imprisonment, or imprisonment for a minimum of at least three years; and
- (3) his extradition has not been granted, or has not been accepted by the Government of the State in which he committed the crime, or by that of the State to which he belongs.

**Art. 604 ICC. - Act committed abroad.**

The regulation of the present section (Articles 600-602), as well as those foreseen by articles 609-bis,

	<p>609-ter, 609-quater, 609-quinquies, 609-octies and 609-undecies, also applies when the act is committed abroad by an Italian citizen, or against an Italian citizen, or by a foreigner in cooperation with an Italian citizen. In the latter hypothesis the foreign citizen is punishable when he commits a crime for which at least a maximum of five years' imprisonment is provided for and following request by the Ministry of Justice.</p>
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## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

#### 6.1. Please describe the current national legal framework with regard to child victims

##### **6.1.1. General framework of protection (Art. 18)**

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

MS partially transposed the Council Framework Decision 2001/220/JHA, even though it was not done expressly. In particular in the ICC, the Italian legislator applied the provisions included under Article 2 paragraph 1 of Council Framework Decision while envisaging a special protection for some categories of individuals suffering of physical or mental peculiarities, especially children and disables. It also provided the possibility for the victim to bring a civil action in the criminal proceeding and to be heard during proceedings and to supply evidence, as indicated under Article 3 paragraph 1 of the Council Framework Decision. Moreover the Legislator, according with the provisions of Article 7, has envisaged for some victims, those indicated under Articles 609 bis, 609 quater and 609 octies of the ICC, the possibility of being reimbursed of the expenses incurred as a result of their legitimate participation in the criminal proceedings.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

The competent authorities are obliged to take assistance and support measures in relation to a potential child victim from the starting of the investigations relating to the criminal offence.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

The Italian legislator has regulated this aspect, the assistance and support apply only if the victim is confirmed to be an underage.

### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art. 19 (1))?

Regarding Article 19, Article 609 decies of the ICC, as amended by Law no. 172 of 1 October 2012, ensures, in any state and grade of the proceeding, the relevant support and psychological assistance for the underage victim of certain sexual related offences, guaranteeing the presence of the parents or other suitable individuals indicated by the victim and of Associations, Foundations and No-profit organizations which have a proven experience within those fields and are enrolled with a specific register for this purpose, with the consent of the child and approved by the judiciary authority. Local institutions shall always provide support and juvenile services for the victims. Such services should be used by the judiciary Authority in any state and grade of the proceeding.

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

The ICC establishes that in the case of sexual related crimes committed by a parent, an ascendant, the tutor, a cohabitant or another person to whom the child has been held in trust, education, training, supervision or custody, the criminal proceeding will start without the need of the victim willingness to cooperate (Art. 609 septies). The ICCP provides proceedings for the removal from the family house and the suspension of the parental rights against the person suspected of guilt (Art. 282 bis and 288). It also established that the judge can order to the defendant to avoid the places usually attended by the young victim and her or his closest



relatives. Moreover the public prosecutor can request to the judge to order to provide for financial support to the cohabitants which, as a consequence of the measures imposed, are deprived of financial means (Art. 282 bis).

The Italian Civil Code reinforces those rules by providing analogous measures under Articles 330 and subsequent. It establishes the possibility of a declaration of parental right's expiration by the judge, when the parent violates or neglects the duties he/she has or abuses the relative powers with prejudice for the child. For serious reasons the judge can also resolve on the removal of the child from the family home or decide that the parent or the cohabitant who abuses or mistreats the child is removed from the home. Besides, when the conduct of the parent is not so serious to allow the declaration of the parental right's expiration but still is detrimental to the victim, the Juvenile court is also entitled to resolve upon the removal of the child from the family.

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

No.

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

Italian legal framework does not include an express and specific provision linking the actions to be taken with the individual assessment of the victim, his/her views, needs and concerns. However, the ICCP contains some provisions aimed at protecting child's specific needs. According to Article 351 paragraph 1-ter of the ICCP during the preliminary investigations concerning a sexual related offence against a child victim judiciary police has to examine victim with the assistance of psychologists. Moreover, Article 398, paragraph 5 bis, of the ICCP states that during the a very preliminary phase of the criminal proceeding where pieces of evidence are acquired before the trial (so called "*incidente probatorio*") the judge takes specific measures if it envisages certain protection needs for the victim (the hearing can be held outside the court and with assistance of qualified professionals). In addition, Article 362 paragraph 2 of the ICCP states that when the public prosecutor gets information from children it has to be assisted by psychologists or children psychiatrics.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

Yes they are. For example for the minors which were victims of those crimes the examination during the proceedings is carried out, at the request of the minor's attorney, through the use of a mirror and on a telephone system. Moreover the judge can order that the interview of the minor takes place "behind closed doors", in cases of sexual abuse or child prostitution such modality is mandatory (Articles 498 and 472 of the ICCP).

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe.

The "Biannual national plan on adoptions and actions for the safeguards of the right and development of subjects in evolutionary age" approved with Decree of the President of the Republic on 21 January 2011, provides for guidelines on therapeutic support, legal counselling and information for the non-abusing/non-harassing adults close to the child victim.

Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

No. Although it is worth mentioning that the ICCP states that when the victim is a minor, his or her rights and faculties are exercised by the parents or the tutor (Art. 90). Therefore, it might be considered that the right to receive certain information applies also to the family of the child victim.

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which.

Article 338 of the ICCP provides that in case the victim is younger than 14 years, the deadline to file the complaint expires the day when the appointing decision by the special trustee is made. The appointment is made by the judge for the preliminary investigation of the place where the victim is located, upon request by the prosecutor. The appointment can be promoted also by the Institutions that have the purpose of care, custody and assistance of the victim. The appointment of the special trustee needs to be carried out promptly, especially when the alleged

abusers are the parents, in order to guarantee an adequate procedural representation to the minor since the beginning of the preliminary investigations. To guarantee an effective safeguard and assistance of the victim, the request of appointment for the special trustee and the relative decision must be activated with extreme promptness by the services, the legal representatives of the community and by the assisting institutes which, taken into account the investigative needs and in prompt coordination with the competent authority, have to and/or can proceed with the request of appointment of the tutor as established by Article 3 of Law no. 184 of 1983.

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:

a) Available for the purpose of claiming compensation?

Yes.

b) Free of charge where the victim does not have sufficient financial resources?

Yes, Article 76 paragraph 4-ter of the Presidential Decree 115/2002, as emended by law no. 172 of 1 October 2012, provides that the child victim of the criminal offences indicated by Articles 600, 600-bis, 600-ter, 600-quinquies, 601, 602, 609-bis, 609 quater, 609 quinquies 609 octies 609-undecies of the ICC, are entitled to receive legal representation free of charge beyond the income limits established by Italian law.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

Yes, Article 392 of the ICCP establishes that, in the proceedings against the criminal offences indicated under Articles 572, 609 bis, 609 ter, 609 quater, 609 quinquies, 609 octies, 609 undecies, 612 bis, 600, 600 bis, 600 ter and 600 quater, of the ICC, also if related to the pornographic material as in Articles 600 quater.1, 600 quinquies, 601 and 602 of the ICC, the public prosecutor, also following the request of the offended person, or the person that is under investigations, can request the acquisition of the testimony of the child victim, before the trial starts. The Constitutional Court has clarified that Article 392 introduces an exception to the rule

of the acquisition in the trial of pieces of evidence that do not have anti-deferral and not-repetitive character.

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

Yes, according to Article 398 paragraph 5 bis of the ICCP in case of investigations relating to the criminal offences indicated under Articles 600, 600bis, 600ter, also if related to the pornographic material as in Articles 600 quater, 600 quinquies, 601, 602, 609 bis, 609 ter, 609 quater, 609 octies, 609 undecies and 612 bis of the ICC, the judge, if children are involved in the acquisition of the proof, establishes with decree, the place, time and the particular modalities through which the acquisition will take place, when the needs to protect the relevant individuals make it necessary and appropriate. To this end, the hearing can take place also in a place different from the court, using specialized assistance facilities, or at the place of the relevant individual.

c) Interviews with the child victim are carried out by or through professionals trained for this purpose?

Yes, according to Articles 351, 362 and 391-bis of the ICCP, in case of investigations relating to the criminal offences indicated under Articles 600, 600bis, 600ter, 600 quater, 600 quater.1, 600 quinquies, 601, 602, 609 bis, 609 quater, 609 quinquies, 609 octies, 609 undecies of the ICC, the police, the public prosecutor and the defense attorney respectively, when they have to obtain information from a child, avail themselves of the support of an expert specialized in children psychology or psychiatry.

Moreover, Article 498 paragraph 4 of the ICCP provides for particular manners of child testimony:

- Any cross examination is excluded;
- The examination is carried out by the president of the court, to whom the parties can ask to pose questions;
- In carrying out the examination, the president can rely on the help of a relative of the child or of an expert of infancy psychology.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

Not provided.

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?

According to Article 190 bis of the ICCP, in case of investigations relating to the criminal offences indicated under Articles 600 bis, first paragraph, 600 ter, 600 quater also if related to the pornographic material as in Article 600 quater.1, 600 quinquies, 609 bis, 609 ter, 609 quater, 609 quinquies and 609 octies of the ICC and the examination is relating to a child younger than 16 years, if the child has been already examined pursuant to Articles 392 and ss. of the ICCP or during the trial, a further examination is possible only if it is related to different facts or circumstances or if the parties of the proceeding deem that it is strictly necessary based on specific reasons.

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?

Yes, according to Article 609 decies of the ICC.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

Yes, relevant declarations must be documented through phonographic and audio-visual means (Article 398 paragraph 5 bis of the ICCP).

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

According to Article 472, paragraph 4 of the ICCP, the judge has discretionary power to decide that the examination of underage individuals is carried out behind closed doors and, according to its paragraph 3 bis, if the trial is related to the criminal offences indicated under Articles 600, 600 bis, 600 ter, 600 quinquies, 601, 602, 609 bis, 609 ter and 609 octies of the ICC the hearing takes always place without the presence of the public when the victim is underage. Moreover,

according to Article 33 of the Decree of the President of Republic of 22 September 1988, no. 448, proceedings against underage individuals are carried out, as a rule, behind closed doors.

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

Yes (Article 398 of the ICCP).

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

Yes (Article 114, paragraph 6 of the ICCP).

6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20?

See above.

6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

Yes, with the exception of Articles 18(3), 19 (3), 19 (5) and 20 (3d).

If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

The Italian Parliament should implement Article 18 (3), Article 19 (3) and (5) and Article 20 (3d). Regarding the implementation of Article 19 (3) and (5), albeit the actual legal framework provides a limited discipline, the Italian Parliament should provide for a more specific and dedicated regulation on the relevant aspects.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b></p>	<p><b>Article 609-decies of the ICC</b> - Communications from the Juvenile Court.                      When bringing action against one of the offences provided for in Articles 600, 600 bis, 600 ter, 600</p>

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.

#### **Article 19**

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

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.

#### **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

quinqües, 601, 602, 609 bis, 609 ter, 609 quinqües, 609 octies and 609 undecies committed against a minor, or for the offence provided for in Article 609 quater, or for the offences under Articles 572 and 612 bis whenever committed against a minor or by one of the parents of a minor against the other spouse the Public Prosecutor notifies the Juvenile Court. [...]

[...] In the cases covered by the first paragraph, actual emotional and psychological care for the child victim is ensured, at every stage and level of the procedure, by the presence of the parents or other suitable persons designated by the minor and accepted by the judicial authorities. In any case the minor is given assistance by the juvenile justice services and services set up by local authorities.

The services mentioned in the third paragraph relied upon also by the judicial authorities at each stage and level of the proceedings.

#### **Article 609 - septies ICC - bringing action**

The offences provided for in Articles 609-bis, 609-ter and 609-quater are punishable on action of the victim.

Without prejudice to the provisions of Article 597, third paragraph, the lawsuit must be brought within six months.

The lawsuit is irrevocable.

The offence are prosecuted ex-officio:

- 1) if the offence referred to in Article 609-bis is committed against a person who at the time of the event has not reached the age of eighteen;
- 2) if the offence is committed by a relative in the ascending line, parent, adoptive parent or the cohabiting partner, the guardian or other person who is entrusted with the child's care, education, instruction, supervision or custody or is in a cohabiting relationship with the child;
- 3) if the offence is committed by a public official or an individual in charge of public services while performing their duties;
- 4) if the offence is connected with other offence for which an ex officio prosecution is provided;
- 5) if the offence is committed under the assumptions referred to in Article 609-quater last paragraph.

#### **Article 330 Civil Code - Revocation of parental authority over children**

The court may revoke the parental authority when the parent violates or neglects the parental duties (Article 147 Civil Code, Article 570 ICC) or uses



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;
- (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.

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

the position of power in an abusive way, thus seriously hurting the child.

In this case, for serious reasons, the court may order the removal of the child from the family home or that the parent or the cohabiting partner responsible for mistreating or abusing the child be sent away.

**Article 333 Civil Code** - Parental conduct detrimental to the children

When the conduct of one or both parents is not such as to require the revocation under article 330, but it is nonetheless detrimental to the child, the court, according to the circumstances may adopt appropriate measures and also rule the child's removal from the family home or that the parent or the cohabiting partner responsible for mistreating or abusing the child be sent away.

These measures may be revoked at any time.

**Article 334 Civil Code** - Removal from the asset management

Whenever the assets of the minor are mismanaged, the court may establish the requirements the parents must satisfy in that respect or may remove both parents, or just one of them from the task and deprive them, in whole or in part, of the legal usufruct.

Whenever the court orders that both parents be removed from the task, a trustee is entrusted with the management of the child's assets.

**Article 282-bis ICCP** - Removal from the family home

1. Under the removal order the defendant is required to immediately leave the family home, or to not return there, and to not access it without permission of the court. Any such permission may provide for specific visiting procedures.

2. The judge, if necessary to protect the life of the victim or of the close relatives, may also require the defendant not to approach places usually frequented by the victim, including the workplace, the home of the family of origin or of the close relatives, unless necessary for purposes of work. In the latter case, the court shall prescribe specific procedure and may impose limitations.

3. The judge, at the request of the public prosecutor, may also order that an allowance be periodically paid to the cohabiting persons who, as a result of the precautionary measure, have no adequate means of support. The court shall



privacy, identity and image of child victims, and to prevent the public dissemination of any information that could lead to their identification.

determine the amount of the allowance, taking into account the circumstances and income of the individual responsible for its payment and shall establish methods and terms of payment. If necessary, the court may order that the allowance be paid directly to the beneficiary by the employer of the individual responsible for the payment by way of salary deduction. The order for the payment of the allowance has effect as an enforcement order.

4. The measures referred to in paragraphs 2 and 3 can be taken even after the measure referred to in paragraph 1, provided the latter has not been revoked or has not, however, lost effectiveness. Even if taken afterwards, however, they lose effectiveness if the measure referred to in paragraph 1 is revoked or loses effectiveness. The measure referred to in paragraph 3, if in favour of the spouse or children, loses its effectiveness also in case of order as provided for in Article 708 of the Code of Civil Procedure or of other provision of the civil court relating to the economic and financial relations between the spouses or to the child support .

5. The measure referred to in paragraph 3 may be revised if the situation of the individual responsible for the payment or of the beneficiary changes and it is revoked if the cohabitation resumes.

6. When bringing action against one of the offences referred to in Articles 570, 571, 582 (exclusively in respect of cases prosecutable ex officio or at least committed under aggravating circumstances), 600, 600-bis, 600-ter, 600-quater, 600-septies.1, 600-septies.2, 601, 602, 609-bis, 609-ter, 609-quater, 609-quinquies and 609-octies and 612, second paragraph of the Criminal Code, committed to the detriment of the close relatives or the cohabiting partner, the measure can also be adopted beyond the penalty limitations provided for in Article 280, even with the control procedures set out in Article 275-bis.

**Article 288 ICCP** - Suspension of the exercise of parental responsibility

1. Under the measure providing for the suspension of the exercise of parental responsibility the judge temporarily deprives the defendant, in whole or in part, of the parental authority.

2. When bringing action against an offence against sexual freedom, or one of the offences referred to in Articles 530 and 571 of the Criminal Code, committed against close relatives, the measure can also be adopted beyond the penalty limitations

	<p>provided for in Article 287 paragraph 1.</p> <p><b>Article 498 ICCP</b> – Direct Examination and cross-examination of witnesses.  4–ter. In proceedings against the offenses referred to in Articles 572, 600, 600-bis, 600-ter, 600-quater, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies and 612-bis of the Criminal Code, the child victim or the mentally ill adult victim is examined, upon request of the counsel, through mirror glass and intercom system.</p> <p><b>Article 90 ICCP</b> - Rights and entitlements of the victim of the offence.  1. The victim of the offence, in addition to exercising the rights and entitlements expressly granted by the law, at any stage and level of the proceedings may submit briefs and, save for proceedings before the Court of Cassation, may produce elements of evidence.  2. The child victim, the victim disqualified for infirmity of mind or incapacitated, exercises entitlements and rights through the individuals mentioned in Articles 120 and 121 of the Criminal Code.  3. Where the victim dies as a result of the offence, entitlements and rights under the law shall be exercised by the close relatives.</p> <p><b>Article 121 ICC</b> - Right of action exercised by a guardian ad litem.  If the victim is under fourteen years old or mentally ill, and no-one is entrusted with the relevant legal representation or the individual entrusted with the relevant representation is in conflict of interest, the right of action is vested in a guardian ad litem.</p> <p><b>Article 338 ICCP</b> - Guardian ad litem for the lawsuit.  1. In the case provided for in Article 121 of the Criminal Code, the lawsuit may be brought as of the day on which the guardian ad litem is notified of the appointment.  2. The appointment shall be ruled, by reasoned decree, by the judge for the preliminary investigations in the place where the victim is located, at the request of the public prosecutor.  3. The appointment may also be promoted by institutions for the care, education, custody or assistance to minors.  4. The guardian ad litem has the power to bring a</p>
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	<p>civil action in the interest of the victim.</p> <p>5. If the need for the appointment of a guardian ad litem arises after the action has been brought, the judge for the preliminary investigations or the court shall see to it.</p> <p><b>Article 3 Law 184/1983</b></p> <p>1. The legal representatives of family-type communities and of public or private welfare institutions exercise guardianship powers over the child entrusted to them, in accordance with the provisions of Chapter I of Title X of the first book of the Civil Code, until appointment of a guardian whenever the exercise of parental authority or guardianship is not allowed.</p> <p>2. In the cases provided for in paragraph 1, within thirty days from receiving a minor, the legal representatives shall apply for the appointment of a guardian. The legal representatives and the individuals who work, even on a voluntary basis, with family-type communities and public or private welfare institutions may not be appointed as such.</p> <p>3. In the event the parents resume the exercise of their parental authority, the family-type communities and the public or private welfare institutions shall request the judge supervising the guardianship to set any necessary limit or condition thereon.</p> <p><b>Article 76 D.P.R. no. 115 of 2002 as amended by law no. 171/2012</b> - Conditions for being granted legal assistance</p> <p>Paragraph 4-ter. The victim of the offences referred to in Articles 572, 583-bis, 609-bis, 609-quater, 609-octies and 612-bis and, if committed against a minor, of the offences referred to in Articles 600, 600-bis, 600-ter, 600-quinquies, 601, 602, 609-quinquies and 609-undecies of the Criminal Code, may be granted legal assistance also by way of derogation from the income limits provided for in this Decree.</p> <p><b>Article 392 paragraph 1-bis ICCP</b> - Cases</p> <p>1-bis. In proceedings against the offences referred to in Articles 572, 600, 600-bis, 600-ter and 600-quater, even if they relate to the pornographic material referred to in Article 600-quater 1, 600-quinquies, 601, 602, 609-bis 609-quater, 609-quinquies, 609-octies, 609-undecies and 612-bis of the Criminal Code, the public prosecutor, also at the request of victim, or the person under investigation may apply for a special evidence-</p>
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	<p>taking pre-trial hearing (<i>incidente probatorio</i>) in order to acquire the testimonies of a child victim or of an adult victim, even beyond the cases provided for in paragraph 1.</p> <p><b>Article 398 paragraph 5-bis ICCP</b> – Measure relating to the application for an <i>incidente probatorio</i>.  5-bis. When the investigations concern the offences provided for in Articles 572, 600, 600-bis, 600-ter, even if they relate to the pornographic material referred to in Article 600-quater 1, 600-quinquies, 601, 602, 609-bis, 609-ter, 609-quater, 609-octies, 609-undecies and 612-bis of the Criminal Code, the judge, in case minors are among the people interested in the taking of the evidence, under the order referred to in paragraph 2, shall determine the place, time and specific procedures for the <i>incidente probatorio</i>, whenever required or advisable to protect the individuals concerned. For this purpose the hearing can be held at a place other than the court and the judge can use special assistance facilities, if any, or, otherwise, the hearing shall take place at the house of the person interested in the taking of evidence. The witness statements must be fully documented by phonographic or audio-visual means. When no reproduction equipment or technical personnel is available, the judge shall have recourse to the analysis and advice of an expert witness. The examinations shall also be minuted. The transcript of the evidence reproduced is established only at the request of the parties.</p> <p><b>Article 351 paragraph 1-ter ICCP</b> – Other information (<i>informazioni sommarie</i>)  1-ter. In proceedings against the offences provided for by Articles 572, 600, 600-bis, 600-ter, 600-quater, 600-quater.1, 600-quinquies, 601, 602, 609-bis 609-quater, 609-quinquies, 609-octies, 609-undecies and 612-bis of the Criminal Code, the criminal police, when collecting information (<i>informazioni sommarie</i>) from minors, shall have recourse to the assistance of an expert in child psychology or psychiatry, appointed by the public prosecutor.</p> <p><b>Article 362 paragraph 1-bis ICCP</b> – Collecting information  1-bis. In proceedings against the offences referred to in Article 351, paragraph 1-ter, the public prosecutor, when collecting statements from minor, shall have recourse to the assistance of an expert in child psychology or psychiatry.</p>
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	<p><b>Article 391-bis paragraph 5-bis ICCP - Interview, collection of statements and information on the part of the defending counsel.</b></p> <p>5-bis. In proceedings against the offences referred to in Article 351, paragraph 1-ter, the defending counsel, when collecting information from minors, shall have recourse to the assistance of an expert in child psychology or psychiatry.</p> <p><b>Article 498 ICCP - Direct Examination and cross-examination of witnesses.</b></p> <p>4. The examination of the child witness is made by the President of the Court and concerns questions and objections raised by the parties. During the examination the President may be supported by a family member of the child or by an expert in child psychology. The President, after hearing the parties, on the assumption that the direct examination is not detrimental to the child's peace of mind shall order that the deposition continue in accordance with the provisions specified in the previous paragraphs. The order may be revoked during the examination.</p> <p><b>Article 190-bis ICCP – Evidence requirements in specific cases</b></p> <p>1. In proceedings against any of the offences referred to in Article 51, paragraph 3-bis, whenever it is required to examine a witness or one of the individuals under Article 210 and they have already made their statements during the special evidence-taking pre-trial hearing (<i>incidente probatorio</i>) or during cross-examination with the person against whom the same statements will be used or the statements have already been admitted as evidence pursuant to Article 238, the examination is only permitted if it relates to facts or circumstances other than those covered by the previous statements or if the judge or one of the parties deem it necessary based on specific needs.</p> <p>1-bis. The same provision shall apply in proceedings against offences under articles 600-bis, first paragraph, 600-ter, 600-quater, 600-quinquies, 609-bis, 609-ter, 609-quater, even if they relate to the pornographic material referred to in Article 600-quater.1 (4), 600-quinquies, and 609-octies of the Criminal Code, whenever the requested examination concerns a witness under the age of sixteen.</p>
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	<p><b>Article 472 paragraph 4 Civil Code</b> - Cases in which the proceeding takes place behind closed doors.</p> <p>4. The judge may order that the examination of minors takes place behind closed doors.</p> <p><b>Article 33 Presidential Decree no. 448/1988</b> - Court hearings.</p> <p>1. Hearings before the juvenile court are held behind closed doors.</p> <p>2. The defendant who has reached the age of sixteen may request that the hearing be public. The court shall decide, having assessed the validity of the reasons given and the opportunity to proceed in open court, in the exclusive interest of the defendant. The request cannot be accepted if there are co-defendants under the age of sixteen or if one or more of them do not allow it.</p> <p>3. The examination of the defendant is made by the President of the Court. The judges, the public prosecutor and the defence counsel may suggest the President questions or objections to be addressed to the defendant.</p> <p>4. The provisions of Articles 31 and 32 paragraph 4 shall apply.</p> <p><b>7. Article 114 paragraph 6 ICCP</b> - Prohibition of publication of acts and images</p> <p>6. It is forbidden to publish generalities and images of juvenile witnesses, victims or injured parties until they come of age. It is also forbidden to publish information that, even indirectly, may allow the identification of the minors. The juvenile court, in the exclusive interest of the minor, or the minor who has reached the age of sixteen may allow the publication.</p>
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## TOPIC 7.

*Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

**7.1.1. Obligatory take down measures (Art. 25 (1))**

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

a) Within its territory? If yes, please specify

No.<sup>13</sup>

b) Outside its territory? If yes, please specify

No.<sup>14</sup>

**7.1.2. Optional blocking measures (Art. 25 (2))**

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify

Article 14 quater of Law no. 269/1998 (as amended by Law no. 38/2006) provides that internet suppliers, in order to prevent access from websites indicated by the National Centre to Fight Online Child Pornography (the "Centre") are obliged to use filtering systems and technological solutions compliant with a decree of the Ministry of Communication. This decree, issued on 8 January 2007, so called *Decreto Gentiloni*, provides for:

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<sup>13</sup> However, thanks to Article 321 of the ICCP the public prosecutor in charge for the investigations can proceed to the sequestration of the website used to convey 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 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". This is a prevention service provided by the Italian Service Providers and the Italian "National Centre to Fight On-line Child Pornography" (<http://img.poliziadistato.it/docs/STOPPAGE.pdf>). To proceed with the removal of the site a court order addressed to the relevant Italian Service Provider would be required.

<sup>14</sup> In case of child pornography websites hosted outside Italian territory it would be possible to use the dimming via Database Source Name (DSN), however this does not appear to be regulated within the MS legal framework.

“Technical requirements of filtering tools which connectivity providers have to use in order to prevent the access to sites identified by the National Centre to Fight Child Pornography, according to the procedures required by current laws” (the “Decree”).

The Decree provides for two types of inhibition:

- A minimum level domain name
- In terms of IP address, if indicated exclusively.

The Decree also introduces appropriate oversight mechanisms to ensure security and confidentiality of the information processed and exchanged with the Centre<sup>15</sup>. The information may be known only by authorized personnel and previously communicated to the Centre. To increase the binding force of the decree, in addition to criminal liability administrative sanctions (from 50,000€ to 250,000€) are also established for connectivity suppliers that do not comply with the instructions received by the Centre.

7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

No step has been taken to implement Article 25 (1).

7.3. In your view, does the current legal framework comply with Article 25?

The current legal framework complies only with Article 25 (2).

If no, what additional measures should be taken in order to comply with Article 25?

Italian Parliament should implement Article 25 (1), introducing a legislation concerning removal measures of web pages containing or disseminating child pornography in and outside the Italian territory.

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<sup>15</sup> It is also established that the Centre provides the internet suppliers with a list of websites to which the filtering systems must be applied in order to guarantee the integrity, confidentiality and certainty of the sender of the data transmitted. The suppliers must proceed with the block of access to the indicated web pages within 6 hours from the request, communicating the relevant block to the Centre.



Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 25</b>  <b>Measures against websites containing or disseminating child pornography</b></p> <p>1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.</p>	<p><b>Article 321 ICCP – Object of preventive seizure</b></p> <p>1. When there is danger that the free availability of anything pertaining to the crime could worsen or perpetrate its consequences or make easier the commission of other crimes, upon request of public prosecutor the competent judge to pronounce the judgement shall rule the seizure of property by reasoned order. Before the criminal action the competent judge is the magistrate in charge of preliminary investigations.</p> <p>2. The judge can likewise order the seizure of the goods on which confiscation is allowed.</p> <p>2-bis. During the criminal proceedings related to the crimes provided under section I, title II, of the ICC the judge orders the seizure of the goods on which confiscation is allowed.</p> <p>3. The seizure is immediately countermanded upon request of public prosecutor or of the person concerned when the requirements of enforceability as provided under paragraph 1 are missing, even for supervened facts. During the preliminary investigations the public prosecutor shall rule by justified order that is served to those who are entitled to contest the seizure. If the concerned person claims for the revocation, the public prosecutor, reckoning that the request shall be denied even in part, delivers it to the judge, to which he produces specific requests and the elements based on his assessment. The request is sent by the following day of the deposit in the secretariat.</p> <p>3-bis. During the preliminary investigations, when it is not possible, because of the emergency, to wait for the order ruled by the judge, the public prosecutor shall rule the seizure by justified order. In the same cases, before public prosecutor's order, police officers proceed to seizure, within 48 hours they send the police statement to the public prosecutor located in the place where the seizure has been executed. If the public prosecutor does not decide the restitution of the attached property, he will request to the judge the validation and the issue of the order as provided in paragraph 1 within 48 hours as of the seizure, if it is ordered by the</p>

	<p>same public prosecutor, or as of the reception of the police statement, if the seizure has been executed by the police officers.</p> <p>3-ter. The seizure is not effective if terms set out at paragraph 3-bis are not abided by or if the judge does not promulgate the decree of validation within 10 days as of the request's reception. A copy of the decree is immediately served to the person whose goods have been sequestered.</p>
<p>2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.</p>	<p><b>Article 14 quater of Law 269/1998</b> - Use of technical instruments to block access to websites disseminating paedopornographic material          Internet providers, in order to block access to the websites notified by the Centre, are obliged to use filtering tools and relevant technological solutions in compliance with the requirements provided for by the decree issued by the Ministry of Communication in concert with the Ministry of Innovation and Technologies and after consultation with the most representative associations of internet providers.          The decree also provides for the term within which internet providers must adopt filtering tools.</p> <p><b>Ministerial Decree no. 24919 dated 8 January 2007 (Decreto Gentiloni)</b>  <b>Art.2</b> - Organizational aspects of the safety for internet access providers          Internet access providers shall adopt a model that allows the knowability and the treatment of the pertaining information only to authorized personnel, as previously communicated to the Centre. In addition, they activate protection tools in order to guarantee the safety and the privacy of the treated information.</p> <p><b>Art.3</b> – Safety of the information exchange with the centre          The Centre shall report to Internet access providers as indicated in the document provided by the Ministry of Communication the list of web sites to which are applied the filtering tools in order to guarantee the integrity, the privacy and the certainty of the sender to which the data refers.          Internet access providers have to inhibit in six hours as of the communication, giving information of the occurred black out to the Centre, according to the criteria as indicated in the first paragraph, without prejudice to the jurisdictional authority.</p>

	<p>The Centre, within 60 days as of the publication in the Official Gazette of Italian Republic of the following decree, shall indicate to Internet access providers the terms to comply with the provisions set out in paragraph 2.</p> <p><b>Art.4</b> - Levels of inhibition marked by the Centre may be inhibited at a minimum level of domain name and in terms of IP address where indicated exclusively.</p> <p><b>Art.5</b> – Technical requirements of the filtering tools Internet access providers shall install filtering tools on the basis of the technical features and, in particular, of the web part's hierarchy managed by them. Internet access providers shall inform also the centre and the Ministry of Communication about the occurred starting up of the filtering tools in compliance with the requirements as provided in the current decree within the terms as indicated in article 8.</p> <p>The inhibition function of the filtering tools is based on the block of the access' requests to levels as indicated in article 4.</p> <p>The filter works exclusively for the list of sites provided by the centre and it must meet the following requirements:</p> <ol style="list-style-type: none"> <li>a) To guarantee the impossibility to access and to modify without authorization to the list of the inhibited sites;</li> <li>b) To allow the inhibition of the signalled sites independently from the coding of the used characters;</li> <li>c) To exclude that internet access providers are authorized, to the purposes of the current decree and with respect of the cases provided by laws in force, to the processing of access data related to individual users.</li> </ol> <p>4. The inhibition's function of the filtering devices is independent, in particular:</p> <ol style="list-style-type: none"> <li>a) Of features and technologies of the system and of the resources spent by the users;</li> <li>b) Of the mark-up language used in the web pages and of the type of present files;</li> <li>c) Of the script language used for the web pages dynamically generated.</li> </ol> <p>[...]</p> <p><b>Art.7-</b> Removal of the block to a site marked by the Centre</p> <ol style="list-style-type: none"> <li>1. The Centre shall indicate to Internet access providers, in compliance with the terms set out</li> </ol>
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under article 3, the cessation of the requirements that prevent the access to the site, previously blocked.

2. Internet access providers shall remove the inhibitions within 12 hours as of the communication of the Centre.

**Art.8 – Temporary and final laws**

Internet access providers shall be provided with the filtering tools in compliance with the requirements set out in article 5 and start up respectively:

- a) Within 90 days as of the publication in the Official Gazette of Italian Republic of the current decree, the filtering tools necessary to inhibit the access to the sites identified even through the domain name as indicated in article 4;
- b) Within 150 days as of the publication in the Official Gazette of Italian Republic of the current decree, the filtering tools necessary to inhibit the access to the sites identified even through the IP address as indicated in article 4.

# ELSA LUXEMBOURG

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

In Luxembourg, the access to child pornography is a criminal offence and is criminalized by Article 384 of the *Code Pénal*<sup>1</sup> (hereinafter: CP), which states:

**Art. 384 CP**

“Anyone who has knowingly acquired, possessed or viewed print-outs, images, 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.”<sup>2</sup>

Accordingly, the criminalization of access to child pornography is conditioned upon the circumstance that this access was obtained intentionally. However, contrary to Article 5 of the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children, and child pornography<sup>3</sup> (hereinafter: the Directive), Article 384 CP does not exclude from its scope the situation when this access was committed with a right to do so, for example by competent authorities during investigation process. Concerning the constitutive element of access by means of information and communication technology, the Article 384 CP does not explicitly mention this formulation. However, the Ministry of Justice, in bill no. 6046<sup>4</sup>, explicitly referred to the consultation on the Internet. Logically, the viewing (“*consultation*”) can only be done on the Internet, since the viewing of printed or registered materials implies their detention, which falls in the scope of the “*possession*” (Article 5(2) of the Directive).

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<sup>1</sup>The name of Luxembourgish Penal Code; Code Pénal - the Law of 16 June 1879, Mém. 1879, 589.

<sup>2</sup> (fr.) : *Sera puni d'un emprisonnement d'un mois à trois ans et d'une amende de 251 à 50.000 euros, quiconque aura sciemment acquis, détenu ou consulté des écrits imprimés images, photographies, films ou autres objets à caractère pornographique impliquant ou présentant des mineurs.*

<sup>3</sup> OJ L 335 from 17 December 2011, p. 1.

<sup>4</sup> <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&id=6046>.

### 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

Article 384 CP was amended by the Law of 16 July 2011<sup>5</sup> implementing the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse<sup>6</sup> (hereinafter: the Convention) and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography<sup>7</sup>. In order to comply with the requirements of article 20 (1) f) of the Convention, the scope of Article 384 CP was extended to the consultation of child pornography materials on the Internet. The formulation of the former Article 384 CP did not incriminate consultation but only detention, which means that as long as the material was not downloaded, the person concerned could not be prosecuted.

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

Article 384 CP appears to comply with the requirements set out in the Directive. Even if Article 384 does not explicitly establish as constitutive element the circumstance that the access to pornographic materials has been obtained by means of information and communication technology, its general formulation includes this hypothesis.<sup>8</sup>

In addition, Article 384 respects, and even surpasses, the prescribed minimum period of the maximal imprisonment, namely one year.

The French term “*sciemment*” refers to both, “knowingly” and “intentionally”. In addition, as general rule, Luxembourgish criminal law requires that every offence would be committed intentionally (except for those where the law explicitly sets an exception).

The second requirement of Article 5(1) of the Directive, namely that the offence was committed without right, does not figure in Article 384. Still, this omission does not necessarily preclude Article 384 from complying with the minimum requested by the Directive. If we consider, that the Directive is giving the minimum requirements, then Article 384 satisfies the conditions since it includes the offences committed without right, as well as those committed with right.

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<sup>5</sup> Mém. no. 152 of 25 July 2011, p. 2234.

<sup>6</sup> <http://conventions.coe.int/Treaty/EN/treaties/html/201.htm>.

<sup>7</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

<sup>8</sup> As explained above.

However, if the aim of the Article from Directive is to limit the scope of application<sup>9</sup>, then Article 384 does not comply with it.

If no, what additional measures should, in your view, be taken in order to comply with Art. 5 (1) and (3)?

The condition of an unlawful access should be inserted to the wording of Article 384 CP.

1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

Article 384 CP does not include the acts of obtaining access to pornography presenting adults appearing as minors.

Provisions from Directive 2011/93 EU	Corresponding provisions from national legislation
<p><b>Article 5</b> <b>Offences concerning child pornography</b></p> <p>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.</p> <p>2. (...)</p> <p>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.</p> <p>4.(...)</p> <p>5.(...)</p> <p>6. (...)</p>	<p><b>Article 384 CP</b></p> <p>Anyone who has knowingly acquired, possessed or viewed print-outs, images, 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.</p>

<sup>9</sup> Ex. to exclude persons consulting websites in the purpose to report them to the competent authorities, or the authorities themselves during investigations.



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.	
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## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

The question of online grooming is regulated by Article 385-2 CP. Under this provision, an adult making sexual proposals, by means of an electronic communication, directed to a minor under age of 16 (the age of sexual consent in Luxembourg) or towards a person presenting themselves as such, is sanctioned with a term of imprisonment from one month up to three years and with a fine between 251 and 50,000 euros. Moreover, the second paragraph increases the upper limit of imprisonment to 5 years and fine to 75,000 euros, if the proposals have been followed by a meeting.

### 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

Concerning off-line grooming, the Luxembourgish legal framework does not seem to follow Recital 19 of the Directive. Article 385-2 CP expressly requires that the sexual proposals are made by means of electronic communication. The only provision that could possibly be invoked in the situation of off-line grooming is Article 383 CP.

### 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

Article 385-2 CP has been introduced by the Law of 16 July 2011 implementing the Convention, which in its Article 23 penalizes grooming. The wording of Article 23 is as follows:

“Each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the age set in application of Article 18, paragraph 2, for the purpose of committing any of the offences established in accordance with Article 18, paragraph 1.a<sup>10</sup>, or Article 20, paragraph 1.a<sup>11</sup>, against him or her, where this proposal has been followed by material acts leading to such a meeting.”

This Article does not refer to offline grooming, nor to the solicitation of children to provide child pornography depicting themselves. Consequently, the Law of 16 July 2011 implementing the Convention did not incriminate these offences.

In the commentaries on the bill no. 6046 the Luxembourgish Ministry of Justice made the following statement:

“The new Article 385-2 criminalizes the act of soliciting children for sexual purpose. It is a new penalisation, referred to in Article 23 of the Convention (...) and represents one of the added values of this Convention.

The solicitation for sexual purpose is more generally known under the name of “grooming”. “Grooming” (confidence building) is the preparation of a child for sexual abuse, motivated by the intent to use this child for sexual purpose. This could be adults trying to establish a trust or friendly with a child, often by pretending themselves to be a youngster, by involving the child in discussions of an intimate nature in order to expose the child gradually to material with explicit sexual content, the aim of limiting the child’s resistance or inhibitions.

The child can also be involved in the production of child pornography by sending personal compromising photos taken with a digital camera, a web-cam or a mobile-phone, which allows to the person soliciting the child to control the child by coercion. In the case where the adult organises a physical meeting, the child’s risks of being victim of sexual abuse or other types of maltreatment increases.”

#### 2.4. In your view, does this legal framework comply with Art. 6?

The Luxembourgish law complies with the requirements regarding the maximal imprisonment term (and makes it even more severe) by imposing a maximum of 3 years and 5 years if grooming is followed by a meeting. Article 385-2 paragraph 1 CP does not require “material acts leading to a meeting”<sup>12</sup> to consider the infraction consumed, the fact for an adult to make sexual proposals to a minor under 16 years already constitutes an infraction in itself. If the proposal is followed by a meeting, the term of imprisonment increases. In this scope, the Luxembourgish legal framework is more severe regarding the imprisonment and regarding the constitutive

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<sup>10</sup> “Engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities”.

<sup>11</sup> “Producing child pornography”.

<sup>12</sup> Article 6(1) of the Directive.

elements required for the infraction to be consumed. As stated in bill no. 6046, the drafters consciously diverged from Article 23 of the Convention.

Moreover, Article 385-2 penalizes also an adult making sexual proposals to a person presenting themselves as a minor under 16 years old. Here, the determining factor, which consumes the infraction, is the intentional behaviour of the adult.

However, the formulation of Article 385-2 paragraph 1 concerns exclusively “sexual proposals”, while Article 6(1) of the Directive covers “proposal [...] by an adult to meet [...] for the purpose to commit any of the offenses referred to in Article 3 (4) and Article 5(6).”<sup>13</sup> We observe that the material scope of both Articles is different, the latter being broader. The Directive only incriminates the proposal to meet made by an adult having the purpose to engage this child in a sexual activity or to produce child pornography. The Penal Code requires in its Article 385-2 paragraph 1 “sexual proposals”. It seems that the sole proposal to meet is not incriminated whatever the purpose is.

Although the Luxembourgish understanding of the offence is based on a further analysis of the reality of grooming, it diverges from the original conception of the offence set out by the Convention and the Directive. The infraction does not consist in the proposal to meet, but in the act of involving a child in discussions of a sexual content. The formulation of Article 385-2 goes even further and requires “sexual proposition” to be made to a minor.

An adult proposing to meet a child for a purpose other than of sexual nature (for example to speak about online games or other interests the child may have) is not guilty of the offence of grooming referred to in Article 385-2. While, accordingly to the Directive, this act would constitute an offence if the soliciting adult the intention to sexually abuse the child or involve it into the production of child pornography, and made material acts leading to this meeting, the Luxembourgish Article 385-2 is not applicable because the offender did not formulate any sexual proposal to the child. Even though a meeting following these proposals constitutes an aggravating circumstance, it still does not cover this situation because the meeting did not follow “sexual proposals”. The adult can only be prosecuted if he sexually abuses the child or involves it into the production of child pornography.

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

Accordingly to the comments of the drafters of the bill no. 6046, the newly introduced Article 385-2 CP is also meant to fight against the following behaviour:

“A child can also be involved in the production of child pornography by sending personal compromising photos taken with a digital camera, a web-cam or a mobile-phone, which allows an adult to threaten a child. In the case where the adult organizes a physical meeting, the child risks to be victim of sexual abuse or other types of maltreatment”.<sup>14</sup>

However, without reading this comment, one could not understand the formulation “makes sexual proposals” as including this specific behaviour.

The behaviour could fall into the scope of application of Article 384 CP as modified by the Law of 21 February 2013<sup>15</sup> relative to the fight against sexual abuse and sexual exploitation of children and relative to the modification of several provisions of the Penal Code criminalizing the acquisition, retention and viewing of child pornography. The Directive solely requires that the behaviour depicted under its Article 6(2) is punished, if the adult possess child pornography depicting the solicited child, he can be prosecuted on the basis of Article 384. However, the behaviour of solicitation the child to do so remains unpunished.

If no, what additional measures should be taken in order to comply with Art. 6?

The actual formulation of Article 385-2 leads to a situation where the sole proposal to meet a child without explicitly stating that it is for the purpose of a sexual activity or the production of pornography – although this purpose exists – remains unpunished. Therefore, the first sentence of Article 385-2 should be as follows: “The fact for an adult, for the purpose to commit the infractions provided in the Articles 372(3), 375 paragraph 2 and 383ter, to propose a meeting to a minor (...)”.<sup>16</sup>

In order to increase protection of minors, we would recommend that Recital 19, concerning off-line grooming, would be taken into consideration and would be legally enforced either by the introduction of a new Article in the Penal Code, or by amendment of the existing Article 385-2. We would recommend the formulation “by means of electronic communication” to be erased, so that both online and off-line grooming would fall within the material scope of the Article.

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<sup>14</sup> [http://www.chd.lu/wps/PA\\_RoleEtendu/FTSByteServletImpl/path=/export/exped/sexdpata/Mag/020/839/081398.pdf](http://www.chd.lu/wps/PA_RoleEtendu/FTSByteServletImpl/path=/export/exped/sexdpata/Mag/020/839/081398.pdf).

<sup>15</sup> Mém. no. 35 of 1 March 2013, p.535.

<sup>16</sup> *Le fait pour un majeur, dans le but de commettre les infractions prévues aux Articles 372(3), 375 al 2 et 383ter, de proposer une rencontre à un mineur [...].*

Another possible solution would be to change paragraph 1 in order to incriminate off-line grooming and introduce a new paragraph 2 in order to incriminate online grooming as an individual infraction or an aggravating circumstance.

The Article could read as follows:

The fact for an adult, for the purpose to commit the infractions provided in the Articles 372(3), 375 paragraph 2 and 383ter, to propose a meeting to a minor under 16 years or to a person presenting himself as such is punished by an imprisonment term of one month to three years and a fine of 251 to 50.000 euros.

This actor will be punished by a term of imprisonment of one to five years and a fine of 251 to 72.000 euros if the proposals have been followed by a meeting.

In order to comply with Article 6(2) of the Directive, we strongly recommend to introduce a new Article to the *Code pénal* or a new paragraph 4 to Article 385-2, fully respecting the requirements of the Directive.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b> <b>Solicitation of children for sexual purposes</b></p> <p>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.</p> <p>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.</p>	<p><b>Article 385-2 CP</b></p> <p>The act by an adult of making sexual proposals to a minor under 16 years or to a person presenting themselves as such by using means of electronic communication is punished by a term of imprisonment of one month to three years and a fine of 251 to 50.000 euros.</p> <p>This actor will be punished by a term of imprisonment of one to five years and a fine of 251 to 72.000 euros if the proposals have been followed by a meeting.</p> <p>No provisions.</p>

## TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

Articles 378 paragraph 2, 381 paragraph 3 and 386 paragraph 2 CP establish as an accessory punishment the disqualification arising from conviction for the offences listed in Articles 3 to 7<sup>17</sup> of the Directive. The wording of these three Articles is the same<sup>18</sup>, they just refer to three different types of illegal acts:

The court can also pronounce a lifetime prohibition, or for a maximum term of 10 years, for the exercise a professional, voluntary or social activity involving a habitual contact with minors. Every violation of this prohibition is punished by a term of imprisonment of 2 months to 2 years.<sup>19</sup>

If yes, does it cover:

**3.1.1. Professional activities involving direct and regular contact with children?**

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

Article 378 paragraph 2, 381 paragraph 3 and 386 paragraph 2 cover both professional and voluntary activities. However, they do not express a prohibition to a “direct and regular” contact, but to a “habitual” contact.

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<sup>17</sup> Except for Article 4(7), 6(2) and 7(2), which are not/not entirely incriminated in Luxembourgish criminal law.

<sup>18</sup> Except for Article 386 CP which foresees a disqualification for maximum 10 years and not for a lifetime.

<sup>19</sup> (Law 21 February 2013) *Les tribunaux pourront également prononcer une interdiction soit à vie, soit pour une durée de dix ans au plus, d'exercer une activité professionnelle, bénévole ou sociale impliquant un contact habituel avec des mineurs. Toute violation de cette interdiction est punie d'un emprisonnement de deux mois à deux ans.*

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

The Luxembourgish Penal Law provides both, a general and a specific legal framework on screening. By the Law of 29 March 2013<sup>20</sup> relative to the organization of the criminal records and to the exchange of information excerpted from the criminal records between the member states of the European Union, Luxembourg has transposed relevant provisions of the Directive.

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

In order to determine if the general legislation on screening complies with the requirements of the Directive, we will first analyse the information the criminal records contain (1), and then how the employer can access it (2).

Information registered in the criminal record

Article 10(2) of the Directive requires that the employer would have access to the information on “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 [...]”

*Existence of convictions for offenses referred to in Articles 3 to 7 of the Directive*

While the access to the “*Bulletin No. 1*” of the criminal record is exclusively reserved to the competent authorities<sup>21</sup>, the “*Bulletin No. 2*” is handed out to the person concerned, on the demand of an employer during the process of recruitment (Article 8(2))<sup>22</sup>. Article 7 paragraph 1 of the aforementioned law disposes that the sole difference between Bulletin No. 1 and 2 is that the period of probation of less than six months does not figure in the latter.

Article 1 paragraph 1 of the Law of 29 March 2013 disposes that the criminal record (Bulletin No. 1) contains the record of “criminal and correctional convictions”<sup>23</sup>. Criminal convictions are pronounced for “*crimes*” sanctioned by an imprisonment term of 5 years to life sentence. Correctional sentences are pronounced for “*délits*” sanctioned by an imprisonment term of 8

<sup>20</sup> Mém. no. 85 of 6 May 2013, p. 990.

<sup>21</sup> Article 6 of the Law of 29 March 2013.

<sup>22</sup> Article 8 of the Law of 29 March 2013.

<sup>23</sup> “*Peines criminelles ou correctionnelles*”.

days up to 5 years. As the offences listed in Article 3 to 6 of the Directive constitute “*crimes*” or “*délits*” under Luxembourgish criminal law, they fall within the material scope of present Art. 1.

#### *Existence of a disqualification*

The disqualification is considered an accessory sentence in Luxembourgish criminal law. According to Article 2(3) of the aforementioned law, the information sent to criminal record contains all both principal and accessory sentences<sup>24</sup>.

#### Access of the employer

On the basis of Article 8(2) of Law of 29 March 2013, the employer has a right, in the context of staff management or during the recruitment process, to ask an individual to provide him with the excerpt from the criminal record<sup>25</sup>.

### **3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?**

Article 9 of the Law of 29 March 2013 disposes the following:

“Every physical or moral person considering to recruit a person for professional or voluntary activities involving a 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, and provided that this element is constitutive of the offense or that is aggravates the decree.”<sup>26</sup>

Contrary to the general framework on criminal records, this Article allows for a direct access of the employer, however under the condition that the person concerned has given his consent.

The employer receives the statement of all convictions on infractions committed against minors or involving minors<sup>27</sup>. As stated in the bill no. 6418<sup>28</sup>, this includes pronounced disqualification and convictions for offences referred to in Articles 3 to 7 of the Directive that have been pronounced by foreign jurisdictions.

<sup>24</sup> “Le casier judiciaire reçoit inscription des informations suivantes: [...]”

3) les peines prononcées y compris les peines accessoires;”

<sup>25</sup> “L'employeur peut demander dans le cadre de la gestion du personnel et du recrutement du personnel la production par la personne concernée d'un extrait du casier judiciaire [...]”

<sup>26</sup> “Toute personne physique ou morale se proposant de recruter une personne pour des activités professionnelles ou bénévoles impliquant des contacts réguliers avec des mineurs reçoit, sous condition de l'accord de la personne concernée, le relevé de toutes condamnations pour des faits commis à l'égard d'un mineur ou impliquant un mineur, et pour autant que cet élément soit constitutif de l'infraction ou qu'il en aggrave la peine.”

<sup>27</sup> “Relevé de toutes condamnations pour des faits commis à l'égard d'un mineur ou impliquant un mineur.”

<sup>28</sup> <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&id=6418>.



**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

- a) Professional activities involving direct and regular contact with children?
- b) Organised voluntary activities involving direct and regular contact with children?

The wording of aforementioned Article 9 does not establish such an obligation. The decision to solicit the information on the convictions remains within the discretion of the employer.

**3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

- a) Professional activities involving direct and regular contact with children?
- b) Organised voluntary activities involving direct and regular contact with children?

Yes, as it was stated in the previous sub-point, Article 9 gives to employer possibility to request an information on “all the charges committed against minors or involving minors”.

3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

In Luxembourg information about convictions is transferred in two situations:

- Automatic transmission of convictions pronounced by Luxembourgish courts towards the Member State of the nationality of the person concerned<sup>29</sup>
- Transmission of convictions of a Luxembourgish citizen when requested by a Member State under Article 6 of the Council Framework Decision 2009/315/JHA<sup>30</sup> (hereinafter: CFD):
  - a) For the purposes of criminal proceedings (Art. 7 (1) CFD, Art. 1 (2) and Article 15 (1) of Law of 29 March 2013).

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<sup>29</sup> Article 4 Council Framework Decision 2009/315/JHA, Articles 3 and 12 of Law of 29 March 2013.

<sup>30</sup> OJ L 93 from 7 April 2009, p. 23.

- b) For any purposes other than that of criminal proceedings (Art. 7 (2) CFD, Art. 15 (2) of Law of 29 March 2013).

Article 10(3) of the Directive refers to the situations specified under point 2. b), the transmission of convictions of a Luxembourgish citizen when requested by another Member State under Article 6 CFD “with the consent of the person concerned”<sup>31</sup>. Article 7 (2) CFD requires the following:

“[...] For any purposes other than that of criminal proceedings, that central authority shall in respect of convictions handed down in the MS of the person's nationality and of convictions handed down in third countries, which have been subsequently transmitted to it and entered in its criminal record, reply in accordance with its national law.”

While the Law of 29 March 2013 is meant to implement the CFD, Article 15 and 9 implement, as explicitly stated in the bill no. 6418, Article 10 of the Directive.

**Article 15**

“(2) When a request on information excerpted from the criminal record concerning a physical person of Luxembourgish nationality [...] exercising or wishing to exercise professional or voluntary activities involving regular contacts with children is addressed by a central authority by means of the application form annexed to the present law, the attorney general of the State transfers, under the condition of the consent of the person concerned, the inscriptions of the criminal record referred to in Article 9.”<sup>32</sup>

3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

Article 11(7) CP provides a lifelong prohibition to teach and to be employed in an educational institution that the judge had to pronounce when deciding criminal convictions, namely a term of imprisonment of at least 5 years.

Articles 24 to 29 of the Law of 6 October 2009<sup>33</sup> strengthening the rights of the victims of criminal offenses, introduced the Articles 378, 381 and 386 CP providing the possibility for the courts to pronounce a prohibition (lifelong or up to 10 years) to exercise professional or social activities involving a habitual contact with children. This disqualification is only possible in the

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<sup>31</sup> Article 10 (3) of the Directive.

<sup>32</sup> “(2) Lorsqu'une demande d'informations extraites du casier judiciaire concernant une personne physique de nationalité lux [...] exerçant ou souhaitant exercer des activités professionnelles ou bénévoles impliquant des contacts réguliers avec des enfants est adressée par une autorité centrale au moyen du formulaire figurant en annexe de la présente loi, le procureur général d'Etat lui transmet, sous condition de l'accord de la personne concernée, les inscriptions au casier judiciaire visées à l'article 9”.

<sup>33</sup> Mém. no. 206 of 19 October 2009, p.3537.

particular case of offences involving minors. The sentence for the violation of this prohibition was set between 2 months and 2 years.

Articles 3, 6 and 8 of the Law of 21 February 2013, changed the scope of prohibited activities in order to comply with the Directive and consequently, the voluntary activities were added.

The provisions relative to the criminal record and the transmission of convictions have been modified by the Law of the 29 march 2013. Article 1 of this law mainly takes over the content of Article 1 of the *Règlement grand-ducal* of 14 December 1976<sup>34</sup> but orders it in a new structure. Article 2 of this law introduced the insertion to the criminal record of accessory convictions, disqualification being included. The changes that Article 7 introduced are not pertinent for the following analysis. Article 9 and 15 implement Article 10(2) and (3) of the Directive.

### 3.5. In your view, does the current legal framework comply with Art. 10?

#### Article 10 paragraph 1: disqualification

Article 378 paragraph 2, 381 paragraph 3 and 386 paragraph 2 CP cover professional and voluntary activities. However, their wording is slightly different than the one from the Directive. The Articles do not include a prohibition of a “direct and regular” contact, but of a “habitual” contact.

The omission of “direct” does not preclude the Articles from complying with the requirements of the Directive. The omission of the word “direct” can have as consequence that also an indirect contact with children is covered by the prohibition. Indirect work with children can be an administrative function where the person concerned can have access to the data of the minors.

“Habitual” instead of “regular” seems to be in conformity with the Directive<sup>35</sup>, nevertheless, these incoherence in the terminology should be reconsidered by the legislative body, especially because Article 9 of the Law of 29 march 2013 refers to “regular contacts”.

#### Article 10 paragraph 2: screening

Concerning the general framework on criminal record, the Luxembourgish legal framework complies with the Directive by entitling employers, in the context of recruitment and

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<sup>34</sup> Mém. no. 81 of 28 December 1976, p.1474.

<sup>35</sup> Since the notion of *habitual* implies regular character.

management staff, to request, with the approval of the person concerned<sup>36</sup>, information on the existence of convictions on any of the offences referred to in Articles 3 to 7 of the Directive<sup>37</sup> and the existence of a disqualification<sup>38</sup>.

Concerning the specific framework on screening in the context of recruitment for activities involving minors, Article 9 of the Law of 29 March 2013 complies with the requirements of the Directive by allowing the employer to directly request, provided the person concerned has given his consent, information about all convictions for charges committed against minors.

Article 10 paragraph 3: transmission

Article 15(2) of the Law of 29 March 2013 transposes Article 10(3) of the Directive. It complies with the latter provision by allowing the communication of the convictions for offences referred to in Article 3 to 7 of the Directive and satisfies the condition of the consent of the person concerned.

If no, what additional measures should be taken in order to comply with Art. 10?

We strongly recommend the Luxembourgish authorities to penalise the offence referred to in Article 6 (2) (solicitation of a child to provide child pornography depicting that child).

We strongly recommend the Luxembourgish authorities to harmonize their terminology by eliminating the divergences between “*contact habituel*” (Article 378 paragraph 2, 381 paragraph 3 and 386 paragraph 2 CP) and “*contacts réguliers*” (Article 9 of the Law of 29 March 2013). We recommend to analyse if the current terminology complies with the requirements of the Directive or if the wording of the Directive should be adopted.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b> <b>Disqualification arising from convictions</b></p>	<p><b>Articles 378 paragraph 2, 381 paragraph 3 and 386 paragraph 2 CP</b> The court can also pronounce a prohibition, for a lifetime or for a maximum term of 10 years, to</p>

<sup>36</sup> Article 8 paragraph 2 of 29 March 2013.

<sup>37</sup> Article 1 of the Law of 29 March 2013.

<sup>38</sup> Article 2 paragraph 1 point 3) of 29 March 2013.

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 [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.

exercise a professional, voluntary or social activity involving a habitual contact with minors. Every violation of this prohibition is punished by an imprisonment of 2 months to 2 years.

**Article 9 of the Law of 29 March 2013**

Every physical or moral person considering to recruit a person for professional or voluntary activities involving a 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, and provided that this element is constitutive of the offense or that is aggravates the decree.

**Art 3(1) of the Law of 29 March 2013**

The general advocate shall inform, as soon as possible, competent central authorities of other Member State about the convictions with regard to citizen of this Member State [...]

(3) The general advocate shall provide, on the demand of competent central authorities of Member State of nationality of convicted person, a copy of the judgment, as well as all previous decisions changing the execution of the sentences, and any other relevant documents, in order to allow this Member State to decide if these information require taking action on the territory of this State.

**TOPIC 4.**

*Victim identification*

(Article 15 (4))

#### 4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

In general, victims are identified during police investigation, based on a complaint or report that triggers the criminal procedure. First of all, the victim themselves can file complaint. Secondly, in case of any suspicion of child abuse, any person may report this fact to the police. Finally, regarding the offences committed on-line, anyone can file an anonymous public report on illegal content encountered on the Internet on a website of BEE SECURE<sup>39</sup>, which is a joint initiative of the Ministry of Economy and Foreign Trade, Ministry of Family Affaires and Integration and The National Youth Service.<sup>40</sup>

However, the Directive goes few steps further and invites Member States to take necessary measures, in order to enable the competent authorities to take initiative in investigating the pornographic materials in order to identify possible victims.

There is no specific Article that would empower Police Grand-Ducale<sup>41</sup> to analyse the child pornography materials in order to identify child victims. However, in practice, the officers investigate such materials on the basis of Articles 383 and 384 CP referring to child pornography.

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

Article 30 of the Convention, which forms part of the Luxembourgish legal order, provides the same requirements as Directive. However, no implementing steps have been taken neither by the Law of 16 July 2011, nor by the Law of 21 February 2013. Moreover, the question was even not raised in the respective bills.

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)?

For the reasons explained above, the Luxembourgish law does not comply with Article 15(4) of the Directive.

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<sup>39</sup> <https://stopline.bee-secure.lu/index.php?id=1&L=2>.

<sup>40</sup> It is also partly subsidised by the European Commission, and serves as the center of Luxembourg awareness within the European network Insafe.

<sup>41</sup> Luxembourgish Police Department.

If no, what additional measures should be taken in order to comply with Art. 15 (4)?

Since the Article was not even partially transposed, we recommend the insertion of the article to the Code of Criminal Procedure, which would explicitly empower investigative units or services to attempt to identify the victims.

## TOPIC 5.

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

### 5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

Article 3 CP establishes Luxembourg's jurisdiction when offences are committed within its territory: "The offence committed in the territory of the Grand-Duchy, by Luxembourgers or by foreigners, is punished in accordance with the Luxembourgish provisions of laws"<sup>42</sup>.

Article 7-2 CP establishes Luxembourg's jurisdiction when offences are committed partially within its territory:

**(Law of 15 July 1993)**

"Is deemed committed within the territory of the Grand-Duchy of Luxembourg every offence where one act characterizing one of its constitutive elements has been committed in the Grand-Duchy of Luxembourg"<sup>43</sup>.

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<sup>42</sup> *L'infraction commise sur le territoire du Grand-Duché, par des Luxembourgeois ou par des étrangers, est punie conformément aux dispositions des lois luxembourgeoises.*

<sup>43</sup> *(L. 15 juillet 1993) Est réputée commise sur le territoire du Grand-Duché de Luxembourg toute infraction dont un acte caractérisant un de ses éléments constitutifs a été accompli au Grand-Duché de Luxembourg.*

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

Yes, on the virtue of Article 5-1 *Code d'Instruction Criminelle*<sup>44</sup> (hereinafter: CIC):

“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 *Code pénal*, could be prosecuted and judged in the Grand-Duchy, although the act is not punished by the legislation of the country where it has been committed and the Luxembourgish authority did not receive a complaint of the offended party or a denunciation from the authority of the country where the offense was committed.”<sup>45</sup>

The material scope of this provision covers the Articles 368 to 384 CP, in consequence, Article 385-2 (the equivalent of Article 6(1) of the Directive) is excluded. Regarding the personal scope, this provision enlarges the minimum required by the Directive, since it covers not only nationals but also residents.

Article 5 CIC reads as follows:

**(Arrêté grand-ducal of 25 May 1944)**

“Every Luxembourger, who outside the territory of the Grand-Duchy, has committed a crime punished by the Luxembourgish law can be prosecuted and judged in the Grand-Duchy.”

**(Law of 31 May 1999)**

“Every Luxembourger who, outside the territory of the Grand-Duchy has committed an act which constitutes a “délit” under Luxembourgish law can be prosecuted and judged in the Grand-Duchy of Luxembourg if the act is punished under the legislation of the country where it has been committed.”<sup>46</sup>

The aforementioned Article 5 CIC is of a more general scope than Article 5-1 CIC and includes all offences.

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<sup>44</sup> Luxembourgish Code of Criminal Procedure, 4 Bull. 214bis from 9 December 1808.

<sup>45</sup> (L. 16 juillet 2011) *Tout Luxembourgeois, toute personne qui a sa résidence habituelle au Grand-Duché de Luxembourg, de même que l'étranger trouvé au Grand-Duché de Luxembourg, qui aura commis à l'étranger une des infractions prévues aux articles [...] 368 à 384 du Code pénal, pourra être poursuivi et jugé au Grand-Duché, bien que le fait ne soit pas puni par la législation du pays où il a été commis et que l'autorité luxembourgeoise n'ait pas reçu soit une plainte de la partie offensée, soit une dénonciation de l'autorité du pays où l'infraction a été commise.* (L. 26 décembre 2012).

<sup>46</sup> (Arr. gr.-d. 25 mai 1944) *Tout Luxembourgeois qui hors du territoire du Grand-Duché s'est rendu coupable d'un crime puni par la loi luxembourgeoise peut être poursuivi et jugé dans le Grand-Duché.*

(L. 31 mai 1999) *Tout Luxembourgeois qui, hors du territoire du Grand-Duché s'est rendu coupable d'un fait qualifié délit par la loi luxembourgeoise peut être poursuivi et jugé dans le Grand-Duché de Luxembourg si le fait est puni par la législation du pays où il a été commis.*



Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

No provision of the Luxembourgish legal framework seems to establish Luxembourg's jurisdiction on the basis that the offence has been committed "by means of information and communication technology accessed from its territory, whether or not based on its territory".

However, Article 7-2 CIC, through its condition that a constitutive element of infraction has been accomplished in Luxembourg, could cover this specific requirement of the Directive. Accessing information and communication technology could be a constitutive element.

Article 383ter CP (Article 5(4) and (5) of the Directive) treats the act of offering, making available and distributing child pornography materials "by any means". The fact that access is made via a network of electronic communication constitutes an aggravating circumstance. If this network is accessed from Luxembourgish territory, one constitutive element of the offence incriminated by Article 383ter paragraph 2 is accomplished and Article 7-2 is applicable.

Article 384 CP (Article 5(2) and (3) of the Directive) treats the acquisition, detention and consultation of child pornography materials. By which means, this acquisition or viewing is made, is not specified, it therefore includes means of information and communication technology. If this technology is accessed from Luxembourgish territory, one constitutive element of the offence incriminated by Article 384 is accomplished and Article 7-2 is applicable.

Article 385-2 CP (Article 6(1) of the Directive) treats the fact for an adult to make sexual proposal to a minor, by the means of electronic communication. If these means are accessed from Luxembourgish territory, one constitutive element of the offence incriminated by Article 385-2 is accomplished and Article 7-2 CIC is applicable.

Although Article 7-2 CIC does not explicitly provide that the Grand-Duchy has jurisdictional competence if offences referred to in article 383ter, 384 and 385-2 CP (Articles 5(1), (2) and 6(1) of the Directive) are committed "by means of information and communication technology accessed from its territory, whether or not based on its territory", this does not preclude this provision to satisfy the requirements of the Directive. Every time a constitutive element of an offence has been accomplished by means of information and communication technology

accessed from Luxembourgish territory, Article 7-2 applies and Luxembourg has jurisdictional competence. This applies for all the offences perpetrated by Luxembourgish criminal law.

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

As stated above, the provisions establishing Luxembourgish jurisdictional competence for offences committed by its nationals outside its territory, are Articles 5 and 5-1 CIC. Article 5 is of a general scope, but subordinates Luxembourg's competence, *inter alia*, 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.

Article 5-1 establishes a derogation to the condition that a report has to be made. However, its scope is limited to an exhaustive list of offences<sup>47</sup>, which does not include Article 385-2 (the equivalent of Article 6(1) of the Directive).

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

Article 5-1 CIC establishes a derogation to the subordination of Luxembourgish jurisdictional competence, to the condition that the acts that a national committed outside its territory, are criminal offences at the place where they were performed. As stated in the previous question, the scope of application of this provision is limited to an exhaustive list of offences<sup>48</sup>.

Article 3(4), (5) and (6), Article 4(2), (3), (5), (6) and (7) and Article 5(6) of the Directive correspond to the Articles 375, 377, 379 and 383bis CP, which fall within the scope of application of Article 5-1 CIC.

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<sup>47</sup> Articles 112-1, 135-1 to 135-6, 135-9 and 135-11 to 135-13, 163, 169, 170, 177, 178, 185, 187-1, 192-1, 192-2, 198, 199, 199bis, 245 to 252, 310, 310-1, and 368 to 384 of the Penal Code.

<sup>48</sup> *Idem*.

### 5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

Article 7-3 CIC states:

**(Law of 24 April 2000)**

“Every foreigner who, outside the territory of the Grand-Duchy will be guilty of offenses referred to in Articles 260-1 to 260-4 of the Code pénal towards a Luxembourger or a person residing in the Grand-Duchy, can be prosecuted and judged at the Grand-Duchy.”<sup>49</sup>

The scope of application of this provision excludes the offences referred to by Articles 372 to 385-2 CP (the equivalents of Articles 3 to 7 of the Directive).

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

Article 34 CP provides the criminal liability of a legal person. However, this provision is not clear concerning the question whether this responsibility is engaged if the offences committed in its name and interest were committed outside the national territory. As long as it is not otherwise stated, the principle from Article 3 CP prevails and the criminal provisions apply only to offences committed within the national territory.

c) The offender is a habitual resident (Art. 17(2)(c))?

Article 5-1 CIC treated above, establishes Luxembourg's jurisdictional competence when a person having its habitual residence in the Grand-Duchy of Luxembourg has committed abroad an offence referred to in Articles 112-1, 135-1 to 135-6, 135-9 and 135-11 to 135-13, 163, 169, 170, 177, 178, 185, 187-1, 192-1, 192-2, 198, 199, 199bis, 245 to 252, 310, 310-1, and 368 to 384 of the Penal Code.

As stated above, Article 385-2, the equivalent of Article 6(1) of the Directive, is excluded.

If no, what are in your view the prospects of your MS prevailing itself of the option provided in Article 17?

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<sup>49</sup> (L. 24 avril 2000) *Tout étranger qui, hors du territoire du Grand-Duché se sera rendu coupable d'une des infractions prévues par les articles 260-1 à 260-4 du Code pénal envers un Luxembourgeois ou une personne résidant au Grand-Duché, pourra être poursuivi et jugé au Grand-Duché.*

Although provisions covering the question about the victim or the offender, nationals or habitual residents, exist, their scope of application excludes totally or partially the offences referred to in Articles 3 to 7 of the Directive.

## 5.2. Which steps have been taken in your MS in order to implement Article 17?

Article 5 CIC was introduced by the *Arrêté grand-ducal* of 25 May 1944<sup>50</sup> and has not been modified since then. Nevertheless, it still satisfies the requirements of Article 17(1)(b).

Since its introduction by the Law of 21 June 1999<sup>51</sup> pursuing to strengthen the measures against trafficking of human beings and the sexual exploitation of children and modifying the Penal Code and the Code of Criminal Procedure, Article 5-1 has been modified by the Law of 16 July 2011 approving the Convention. In order to implement Article 25(1) e) of the Convention, the Law of 16 July 2011 enlarged the personal scope of application of Article 5-1 by inserting “every person who has his habitual residence in the Grand-Duchy of Luxembourg”<sup>52</sup>, as well as its material scope by adding the offences referred to in Articles 245 to 252, 310, 310-1, and 368 to 384 CP. Since then, Article 5-1 has not been modified.

Article 7-2 CIC, reflecting Article 17(3), was introduced by the Law of 15 July 1993<sup>53</sup> and has not been modified since then. Article 7-3 CIC, was introduced in 2000, by the Law of 24 April<sup>54</sup> and has not been modified since then either. Nor after the entry into force of the Convention, neither of the Directive.

Article 34 CP was introduced by the Law of 3 March 2010<sup>55</sup> and has not been modified since then.

## 5.3. In your view, does the current legal framework comply with Article 17?

The current legal framework only partially complies with Article 17.

Article 5-1 CIC complies with the requirements of Article 17(4) of the Directive. However, by excluding Article 385-2 CP (reflecting Art 6(1) of the Directive) of its scope of application, it

<sup>50</sup> Mém. no. 3 du 18 septembre 1944, p. 31.

<sup>51</sup> Mém. no. 98 of 26 July 1999, p. 1892.

<sup>52</sup> *Toute personne qui a sa résidence habituelle au Grand-Duché de Luxembourg.*

<sup>53</sup> Mém. no. 63 of 17 August 1993, p. 1152.

<sup>54</sup> Mém. no. 41 of 31 May 2000, p. 952.

<sup>55</sup> Mém. no. 36 of 11 March 2010, p. 614.

does not comply with Article 17 (1) b), (2) (c) and (5), even though those provisions of the Directive explicitly refer to “Articles 3 to 7“.

The optional extension of jurisdiction referred to in Article 17(2) (a) of the Directive, exists in the Luxembourgish legal framework in form of Article 7-3 CIC. However its exhaustive list of Articles that fall into its scope of application does not include any of the offences referred to in Articles 3 to 7 of the Directive.

The optional extension of jurisdiction referred to in Article 17(2) (b) of the Directive has not been implemented within the Luxembourgish legal framework.

The requirements of Article 17(3) are satisfied by Article 7-2 CIC and those of Article 17(1) a) are satisfied by the same Article 7-2 and Article 3 CIC.

#### If no, what additional measures should be taken in order to comply with Article 17?

In order to comply with Article 17(1) b), (2) c) and (5) of the Directive, we strongly recommend to include Article 385-2 CP in the material scope of application of Article 5-1 CIC.

In order to comply with Article 17(2) a), we strongly recommend to broaden the scope of application of Article 7-3 CIC by including Articles 372, 375, 377, 379, 383bis, 383ter, 384 and 385-256. However, as Article 17(2) provides optional measures, this modification is not constraining.

In order to implement Article 17(2) b) we recommend introducing a provision complying with its requirements. However, since Article 17(2) provides optional measures, this modification is not constraining.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <p>(a) the offence is committed in whole or in part within their territory; or</p>	<p><b>Article 3 CP:</b> The criminal offence committed within the territory of the Grand-Duchy, by Luxembourgers or by foreigners, is punished according to the dispositions of the Luxembourgish law.</p>

<sup>56</sup> This enumeration can change if Article 4(7) and 6(2) are implemented by a new Article in the *Code pénal*.

<p>(b) the offender is one of their nationals.</p>	<p><b>Article 7-2 CIC:</b> (Law of 15 July 1993) Is deemed committed within the territory of the Grand-Duchy of Luxembourg every offence where one act characterizing one of its constitutive elements has been committed in the Grand-Duchy of Luxembourg.</p> <p><b>Article 5-1 CIC:</b> Every Luxembourger, 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 will have committed abroad one the offenses referred to in the Articles 368 to 384 of the Code pénal, could be prosecuted and judged in the Grand-Duchy, although the act is not punished by the legislation of the country where it has been committed and the Luxembourgish authority did not receive a complaint of the offended party or a denunciation from the authority of the country where the offense was committed. (Law of 26 December 2012).</p> <p><b>Article 5 CIC:</b> (Arrêté grand-ducal of 25 May 1944) Every Luxembourger who outside the territory of the Grand-Duchy has committed a crime punished by the Luxembourgish law can be prosecuted and judged in the Grand-Duchy.</p> <p>(Law of 31 May 1999) Every Luxembourger who, outside the territory of the Grand-Duchy has committed an act which constitutes a “délit” under Luxembourgish law can be prosecuted and judged in the Grand-Duchy of Luxembourg if the act is punished under the legislation of the country where it has been committed</p>
<p>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:</p> <p>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</p> <p>(b) the offence is committed for the benefit of a legal person established in its territory; or</p>	<p><b>Article 7-3 CIC:</b> (Law of 24 April 2000) Every foreigner who, outside the territory of the Grand-Duchy will be guilty of offenses referred to in Articles 260-1 to 260-4 of the Code pénal towards a Luxembourger or a person residing in the Grand-Duchy, can be prosecuted and judged at the Grand-Duchy.</p> <p>No provision.</p>

<p>(c) the offender is an habitual resident in its territory.</p>	<p><b>Article 5-1 CIC:</b> Every Luxembourger, 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 will have committed abroad one the offenses referred to in the Articles 368 to 384 of the Code pénal, could be prosecuted and judged in the Grand-Duchy, although the act is not punished by the legislation of the country where it has been committed and the Luxembourgish authority did not receive a complaint of the offended party or a denunciation from the authority of the country where the offense was committed. (Law of 26 December 2012).</p>
<p>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.</p>	<p><b>Article 7-2 CIC:</b> (Law of 15 July 1993) Is deemed committed within the territory of the Grand-Duchy of Luxembourg every offence where one act characterizing one of its constitutive elements has been committed in the Grand-Duchy of Luxembourg.</p>
<p>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.</p>	<p><b>Article 5-1 CIC:</b> Every Luxembourger, 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 will have committed abroad one the offenses referred to in the Articles 368 to 384 of the Code pénal, could be prosecuted and judged in the Grand-Duchy, although the act is not punished by the legislation of the country where it has been committed and the Luxembourgish authority did not receive a complaint of the offended party or a denunciation from the authority of the country where the offense was committed. (Law of 26 December 2012).</p>
<p>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.</p>	<p><b>Article 5-1 CIC:</b> Every Luxembourger, 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 will have committed abroad one the offenses referred to in the Articles 368 to 384 of the Code pénal, could be prosecuted and judged in the Grand-Duchy, although the act is not punished by the legislation of the country where it has been committed and the Luxembourgish authority did not receive a</p>

	complaint of the offended party or a denunciation from the authority of the country where the offense was committed. (Law of 26 December 2012).
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## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

#### 6.1. Please describe the current national legal framework with regard to child victims

##### 6.1.1. General framework of protection (Art. 18)

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

In its report from 20 April 2009<sup>57</sup>, the European Commission, pursuant to Article 18 CFD, made following observations:

“This report presents the implementation of the framework decision by 24 (out of 27) Member States as of 15 February 2008. The Commission notes that this implementation is unsatisfactory. None transposed the framework decision in a single piece of national legislation; instead, they referred back to existing or newly adopted national provisions. Furthermore, Member States implemented certain provisions through non-binding guidelines, charters and recommendations without any legal basis. Only a few Member States adopted new legislation to cover one or more of the articles.

Consequently, the Commission encourages Member States to provide further information concerning implementation, as well as to enact and submit the relevant national legislations under preparation.”<sup>58</sup>

According to this report<sup>59</sup>, the Luxembourgish legislation existing at the time the Commission asked the Member States to provide relevant provisions, did only comply with several requirements, namely those referred to by Article 2, 3, 4(2), 6(2), 8(3)<sup>60</sup>, 9(1) and (3), 10, 11(1) of the CFD. For Article 4(3) and (4), 5, 11(2), 12, 13, 14 and 15 CFD Luxembourg did not submit

<sup>57</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009DC0166>.

<sup>58</sup> [COM(2009) 166 final – Not published in the Official Journal], quote found on [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_criminal\\_matters/jl002\\_7\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/jl002_7_en.htm).

<sup>59</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009DC0166>.

<sup>60</sup> The reduce of contact between victim and offender is granted in practice, but no legal basis sacrifices this measure.



any relevant provisions and for Articles 4(1), 8(1) and (4), 9(2) and 16 CFD Luxembourg referred to a bill that was finally not adopted at the time the Commission drafted its second report. Some requirements of the CFD, even if Luxembourg did not submit the pertinent provisions to the Commission, are satisfied by the Luxembourgish legal framework. Luxembourg complies with Article 12 of the CFD relative to cooperation between Member States by its adherence to Conventions about judicial cooperation (Schengen, Benelux, European Union, bilateral agreements) and to Agreements relative to police cooperation (Schengen, Europol, Interpol, cross-border relations and reunions). Article 13 of CFD is satisfied by the introduction of the “*Service d'Aide aux Victimes*”<sup>61</sup> (SAV) and Article 14 of CFD is satisfied by the obligation of police officers of the unit “*Protection de la Jeunesse*”<sup>62</sup> to follow specialized formations on child abuse. Concerning Article 8(4), the report of the European Commission states that the legislation of Luxembourg is of a poor level of implementation. However, Article 29 of the Law of 10 August 1992<sup>63</sup> relative to the protection of youth introduced the possibility for – it is true, not all vulnerable victims – but for minors not to witness during the audience.

In 2009, the new bill was introduced by the Ministry of Justice and on the 6th October of the same year, a new law<sup>64</sup> was adopted. According to the wording of the Ministry of Justice, in its activity report from 2009, this law was meant to strengthen the position of victims of offences and to make the Luxembourgish law in compliance with certain requirements of the aforementioned Convention.<sup>65</sup>

This law satisfies several requirements not implemented until then. Its Article 1 gives a clear definition of the notion of victim as required by Article 1 of the CFD. Article 4 inserts a new paragraph 2 to Article 9-2 CIC in order to comply with the requirements of Article 4(1) a), c) and g) and 6(1) CFD. Article 5 inserts the new paragraphs 4 and 5 to Article 23 CIC complying now with Article 4(1) d) and f) CFD. Article 20 modifies paragraph 4 of Article 190-1 CIC in order to comply with Article 5 CFD. Article 4(1) f) CFD is now implemented through Article 6 introducing a new Article 30-1 CIC. Article 3 modifies Article 8(3) CIC in order to comply with Article 8(2). Article 33 satisfies the requirements of Article 9 CFD. Since its modification by the

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<sup>61</sup> Service of help to victims.

<sup>62</sup> Protection of youth.

<sup>63</sup> Mém. no. 70 of 25 September 1992.

<sup>64</sup> Law of 6 October 2009, Mém. no. 206 of 19 October 2009.

<sup>65</sup> Activity report of the Ministry of Justice for 2009 from April 2010, page 9.

law of 5 June 2009<sup>66</sup> Article 37-1 of the Law of 10 August 1991<sup>67</sup> complies with Article 6(2) CFD.

This analysis shows that Luxembourg transposed (in several steps) most of the provisions of CFD. Few obligations remain unsatisfied.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

In Luxembourg, several measures of assistance and support are taken at different steps of the procedure.

In any case - if a complaint or a report is made to the police, if the victim directly addresses the Prosecutor or the judge of *tribunal de la jeunesse* - the “*Service Central d'Assistance Sociale*”<sup>68</sup> (hereinafter: SCAS), introduced by Article 77 of the modified Law of 7 March 1980, intervenes.

In virtue of Article 23 of the Law of 10 August 1992 the judge can ask an officer from the SCAS to proceed to an “*enquête sociale*” (social investigation) in order to provide him information about the living environment and the physical and psychological conditions of the minor.

On the basis of the information gathered during this investigation, the judge can, according to Article 7 and 13 of the same law, mandate an officer from the SCAS to provide an “*assistance éducative*”<sup>69</sup> (educational assistance) if the physical or mental health or the moral or social education or development of a minor are compromised<sup>70</sup>. In compliance with Article 14, this officer advises and controls the parents in their obligations and ensures that the well-being of minor is not endangered. At the same time, the judge can, on the basis of the same Article, order individual or family therapy if he considers those measures necessary.

However, child victims do not have to wait action from the judge of *tribunal de la jeunesse*. Under the general legislation on assistance for victims, namely Article 30-1 CIC, introduced by the aforementioned Law of 2009,

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<sup>66</sup> Loi du 5 juin 2009 portant modification: 1° de l'article 37-1 de la loi modifiée du 10 août 1991 sur la profession d'avocat; 2° du Livre premier, Titre X, Chapitre 1er du Code civil; 3° de l'article 1046 du Nouveau Code de procédure civile, Mém. no. 134 of 15 June 2009.

<sup>67</sup> Mém. no. 58 of 27 August 1991.

<sup>68</sup> Central Service of social assistance.

<sup>69</sup> Article 1 of the Law of 10 August 1992.

<sup>70</sup> Article 7 of the Law of 10 August 1992.

“the officers and agents of the *police judiciaire*<sup>71</sup> inform the identified injured person, in a language that they understands, except in cases of duly recognised material impossibility, about their right to be helped by the services of help for victims [...]”<sup>72</sup>.

The SAV is a unit of the SCAS, composed of psychologists.

According to this provision, the child victims – and victims in general – have the possibility to benefit from psychological assistance and support as soon as the offence has been recorded by the police and the victim has been identified.

Besides the *police judiciaire*, which only informs the victim of the possibility to get assistance and the *tribunal de la jeunesse*<sup>73</sup> which can assign the child victim to SCAS, another instance can intervene. Article 5 of the Law of 16 December 2008 relative to child and family help<sup>74</sup>, introduced the “*Office national de l'enfance*”<sup>75</sup> (hereinafter: ONE), which is placed under the authority of the Ministry of Family Affairs:

“[...] In the respect of the competences acknowledged to the judicial authorities by the modified Law of the 10 August 1992 relative to youth protection, ONE has the mission to look after the assignment of social help to children and young adults in distress. In any case, the intervention of the courts and tribunals overrules the intervention of ONE. In case of procedures in front of the courts and tribunals, the ONE can intervene only at the explicit demand of the judicial instances”<sup>76</sup>.

Art. 6 of the same law enumerates in which initiatives ONE intervenes:

- “To evaluate individually the resources and difficulties of children, young adults and families, which situations are considered critical by the psycho-social, scholar, medical or judicial actors;
- To organise institutional and family conciliation sessions to make children, young adults, parents and legal representatives to participate in the elaboration of socio-educative and psycho-social intervention projects;
- To motivate the child and its parents or legal representatives to participate in educational projects in the child's superior interest;
- To introduce, in case of need, for the children or young adults and their families, socio-educative and psycho-social interventions;

<sup>71</sup> “*Police judiciaire*” is one of two types (next to “*police administrative*”) of police forces in Luxembourg.

<sup>72</sup> Art. 30-1. (L. 6 octobre 2009) *Les officiers et les agents de police judiciaire informent la personne lésée, identifiée, dans une langue qu'elle comprend sauf les cas d'impossibilité matérielle dûment constatée, de son droit d'être aidée par les services d'aide aux victimes.*

<sup>73</sup> Luxembourgish Youth court.

<sup>74</sup> Mém. no. 192 of 22 Decembre 2008.

<sup>75</sup> National Children Office.

<sup>76</sup> *Il est créé un Office national de l'enfance (ONE) qui est placé sous l'autorité du ministre ayant dans ses attributions la famille, appelé «ministre» ci-après.*

*Dans le respect des compétences reconnues par la loi modifiée du 10 août 1992 relative à la protection de la jeunesse aux autorités judiciaires, l'ONE a la mission de veiller à la mise en oeuvre de l'aide sociale des enfants et des jeunes adultes en détresse.*

*Dans tous les cas, l'intervention des cours et tribunaux prime sur celle de l'ONE. En cas de procédures pendantes devant les cours et tribunaux, l'ONE ne peut intervenir qu'à la demande expresse des instances judiciaires.*

- To appoint, within any socio-educative and psycho-social interventions, a representative for the child, young adult and family's best interest, who will be charged with an orientation, coordination and evaluation of their improvement;
- To assure the follow-up of socio-educative measures and evaluate their fulfilment by concerned children;
- To prepare each semester (on the 1<sup>st</sup> of April and 1<sup>st</sup> of October) a list of children placed in institutions or a foster families, both in Luxembourg and abroad.

The ONE will examine any situation that it is called upon.

The ONE will examine all socio-educative and psycho-social interventions on its own initiative or at the request of one of the parties and at least every 12 months".<sup>77</sup>

Besides psychological and social assistance, the Luxembourgish legal framework also grants legal assistance to child victims. Article 37-1 (1) paragraph 6 of the Law of 10 August 1991<sup>78</sup> regarding the profession of lawyer provides the following:

“If the applicant is a minor involved in a judicial procedure, the benefit of the judicial assistance is accorded independently of the financial situation of his parents or persons that live with him in a domestic community.”

However, the State has the right to “require the reimbursement of its expenses for the judicial assistance” of the minor from its parents if they dispose sufficient resources. Thus, in a first instance, the legal assistance of the child victim is granted.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

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<sup>77</sup> *L'intervention de l'ONE s'effectue par les initiatives suivantes:*

- évaluer individuellement les ressources et les difficultés d'enfants, de jeunes adultes et de familles dont la situation est considérée comme critique par des acteurs des domaines psychosocial, scolaire, médical ou judiciaire;
- organiser des séances de concertation familiale et institutionnelle pour faire participer les enfants, les jeunes adultes, les parents, les prestataires anciens et futurs à l'élaboration de projets d'intervention socio-éducative et psychosociale;
- motiver l'enfant et ses parents ou représentants légaux à souscrire aux projets élaborés dans l'intérêt supérieur de l'enfant;
- valider, le cas échéant, pour ces enfants ou jeunes adultes et leurs familles, des projets d'intervention socioéducative et psychosociale;
- désigner, dans le cadre de tout projet d'intervention socio-éducative et psychosociale, un prestataire chargé, au bénéfice de l'enfant, du jeune adulte et de leur famille, d'une mission d'orientation, de coordination et d'évaluation des mesures;
- assurer le suivi des mesures d'accueil socio-éducatif et veiller à la réévaluation régulière des enfants concernés;
- dresser chaque semestre la liste des enfants vivant au Luxembourg qui, aux dates du 1er avril et du 1er octobre, sont accueillis ou placés en institution ou en famille d'accueil au Luxembourg ou à l'étranger.

L'ONE examine toutes les situations dont il est saisi.

L'ONE réexamine tout projet d'intervention socio-éducative et psychosociale, soit de sa propre initiative, soit suite à la demande d'une des parties impliquées et au moins tous les douze mois.

<sup>78</sup> Mém. no. 58 of 27 August 1991.

No specific provision within the national legal framework refers to a situation when the age of the victim is uncertain. The only provision that could be applied is Article 35(3) of the Convention.<sup>79</sup> Accordingly, the protection and assistance measures provided for children shall be accorded also in such a case, pending verification of person's age. No executive measure has been taken till now. However, the aforementioned provision seems clear and precise enough, to be directly applicable in national law<sup>80</sup>.

According to questioned authorities, in practice, the question does not arise in Luxembourg. The victim is transferred to the SCAS only when its identity is certain and clear. When it is not the case, and a person refuses or is unable to prove its identity, it may be retained on site or taken to the police station for a maximum of 4 hours, so that the personal details can be verified. Moreover, the police can order a radiography of the victim's wrist (given that the wrist of an adult is different than the wrist of a minor).

### 6.1.2. Specific assistance and support measures (Art. 19)

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art 19.(1))?

As stated above, in virtue of Article 30-1 CIC, victims are informed about their right to be assisted by the SAV. This free assistance is not limited to any duration and can last as long as needed.

If the judge of the *tribunal de la jeunesse* orders the opening of an *educational assistance* by the SCAS, the minor concerned is supported, and he and his family are under the supervision of this service until he has reached its majority (18 years). In virtue of paragraph 5 of Article 1 of the Law of 1992, the judge can, with the consent of the person concerned, extend this assistance to the age of 21 years<sup>81</sup>.

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<sup>79</sup> As it was mentioned before, on the basis of the Law of 16 July, the Convention form the integral part of Luxembourgish legal order.

<sup>80</sup> Article 37 of the Luxembourgish Constitution states that if an act of approval was adopted and published, the international convention become part of national law. The rule of "direct effect" derives from case law.

<sup>81</sup> *Toutefois, le juge de la jeunesse peut, de l'accord de l'intéressé et si l'intérêt de ce dernier l'exige, prolonger l'une ou l'autre des mesures prévues ci-dessus pour un terme ne pouvant dépasser sa vingt et unième année.*

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

Article 14(3) of the Convention, being part of the national legal order since its approval by Article II of the law of 16 July 2011, gives the possibility to remove the alleged perpetrator or to remove the victim from its family environment.<sup>82</sup>

But already before this implementation, the Luxembourgish legal framework provided those possibilities. In accordance with Article 9 and 1. 3) of the Law of 1992, the judge of the *tribunal de la jeunesse* can order the placement of child under the supervision of a reliable person or in an appropriate institution, even abroad, for their accommodation, treatment, education or professional formation.

However, according to an consulted officer of the SCAS, this measure consisting of “tearing out“ a child from its family, should always be the last measure to be considered.

In a first step, the offender is excluded from the family. The aforementioned “*enquête sociale*“ and the “*assistance éducative*“ of SCAS are ordered by the judge in order to supervise the family and ensure the minor's well-being.

In addition, the Luxembourgish legal framework grants, besides psychological and social assistance, also legal assistance to child victims. Article 41-1 of the Law of 1992, as introduced by Article 32 of the Law of 2009, provides the prosecutor or the investigating judge with the obligation to appoint an ad hoc administrator if the protection of the interests of the child victim is not completely granted by at least one of its legal representatives.<sup>83</sup>

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

The “*assistance éducative*“ is ordered by judgement. The minor's consent or willingness to cooperate have no incidence on the execution. Contrary to this, psychological assistance by the

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<sup>82</sup> Article 14 – Assistance to victims

3. When the parents or persons who have care of the child are involved in his or her sexual exploitation or sexual abuse, the intervention procedures taken in application of Article 11, paragraph 1, shall include: – The possibility of removing the alleged perpetrator; – The possibility of removing the victim from his or her family environment. The conditions and duration of such removal shall be determined in accordance with the best interests of the child.

<sup>83</sup> *Le procureur d'Etat ou le juge d'instruction, saisi de faits commis volontairement à l'encontre d'un mineur, désigne un administrateur ad hoc choisi sur la liste des avocats à la Cour publiée par les conseils de l'ordre des avocats, lorsque la protection des intérêts du mineur n'est pas complètement assurée par l'un au moins de ses représentants légaux. [...].*

SAV is not an obligatory measure. Victims can benefit from the SAV's assistance only if they wish so. However, this assistance is not conditioned by the minor's willingness to cooperate in the criminal investigation, prosecution or trial but is accessible to every person that has been victim so, accordingly to Article 4-1 CIC, those who have declared to the competent authorities having suffered a harm by reason of a criminal offence.

Concerning the legal assistance, Article 37-1 (1) paragraph 6 of the Law of 10 August 1991 states that the legal assistance is granted to minors involved in a judicial procedure. No other condition is stated. Even if the child refuses to cooperate, the benefit of legal assistance still remains.

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

The "*enquête sociale*" referred to by Article 23 of the Law of 1992 is addressed to analyse the personality and mental condition of the child as well as the particular circumstances of its social environment and to determine which measures should be taken in the interest of this child.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

Article 2(2) CFD requires that "Each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances".

Article 8(4) CFD requires that

"each Member State shall ensure that, where there is a need to protect victims - particularly those most vulnerable - from the effects of giving evidence in open court, victims may, by decision taken by the court, be entitled to testify in a manner which will enable this objective to be achieved, by any appropriate means compatible with its basic legal principles".

Article 29 (3) to (5) of the Law of 1992 provides the following:

"The Court can, in the interest of the minor, dispense the minor to appear in Court, order his absence during some or all hearings or that his audition will be done in the "Chambre de Conseil" with the sole presence of the lawyers of the parties.

The Court can at any moment, during the hearings concerning the personality of the minor, hear in the "Chambre du Conseil" the experts and witnesses, parents, guardians or other persons having the child custody.



Only the lawyers of the parties have the right to assist the hearings in the “Chambre du Conseil”. The Court can however order the minors presence if it judges it necessary.”<sup>84</sup>

Article 14(1) CFD requires that:

“Through its public services or by funding victim support organisations, each Member State shall encourage initiatives enabling personnel involved in proceedings or otherwise in contact with victims to receive suitable training with particular reference to the needs of the most vulnerable groups“.

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe.

As stated above, the judge of the *tribunal de la jeunesse* can, accordingly to Article 1 and 14 of the Law of 1992, order individual or family therapy. Additionally to this, the SAV is accessible for every person having suffered trauma, and therefore it can serve not only the child victim, but also its parents or other relatives.

Also, Article 4 of the Law of 16 December 2008 relative to ONE provides the following:

**Art. 4. The right to request assistance**

“In situations of children in distress, parents or legal representatives and the child capable of forming are entitled to request the assistance of the National Children's Office.

They participate in the elaboration of the draft socio-educational and psycho-social intervene under Article 6 below, which was developed and validated by the National Children's Office.

This project does not take effects unless it is signed by parents or legal representatives. The child's parents or legal representatives have the right to request at any time review or revocation of project intervention.”<sup>85</sup>.

This provision provides for an assistance of supervisory nature for families with educational or social problems and covers the case of child victims whose offender was a member of the family and where the other members omitted to react.

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<sup>84</sup> *Le tribunal peut, si l'intérêt du mineur l'exige, soit dispenser celui-ci de comparaître à l'audience, soit ordonner qu'il se retire pendant tout ou partie des débats, soit procéder à son audition en chambre du conseil en présence des seuls avocats des parties. Le tribunal peut à tout moment, au cours des débats, se retirer en chambre du conseil pour entendre, sur la personnalité du mineur, les experts et les témoins, les parents, tuteur ou autres personnes qui ont la garde du mineur. Seuls les avocats des parties ont le droit d'assister aux débats en chambre du conseil. Le tribunal peut toutefois y appeler le mineur lorsqu'il l'estime opportun.*

<sup>85</sup> *Droit à la demande d'aide.*

*Dans des situations d'enfants en détresse, les parents ou représentants légaux ainsi que l'enfant capable de discernement sont en droit de demander l'assistance de l'Office national de l'enfance.*

*Ils participent à l'élaboration du projet d'intervention socio-éducatif et psychosocial prévu à l'article 6 ci-après, qui a été élaboré ou validé par l'Office national de l'enfance.*

*Ce projet ne prend effet que s'il est signé par les parents ou représentants légaux et l'enfant capable de discernement. L'enfant, ses parents ou représentants légaux ont le droit de demander à tout moment le réexamen, voire la révocation du projet d'intervention.*



Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

Concerning the access to information referred to by Article 4 CFD, the relevant national provisions explicitly refer to the “victim” or the “injured person” which excludes every other person.

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which

Article 41-1 of the Law of 1992 provides that the General Prosecutor or the Investigating Judge shall appoint an ad hoc administrator if the protection of the interests of the minor is not completely granted by at least one of its legal representatives. The ad hoc administrator protects the interests of the minor and exercises, where appropriate, in latter's name the rights granted to the plaintiff.<sup>86</sup>

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)?

Article 18 of the law of 1992 provides the appointment of a lawyer - besides the case where a minor is charged with a criminal offence, - where the interest of the minor requests it. This formulation however is too vague and general and does not pose the principle of an obligatory representation by a lawyer.

Article 37-1 of the Law of 1991 grants the benefit of the judicial assistance (free allocation of a lawyer) to a minor involved in a judicial procedure independently of the financial situation of his parents or persons that live with him in a domestic community. However, this provision does not provide an automatically allocation of a lawyer, the minor is designed as “applicant”, which means that he has to address a request (in Luxembourg this is done via an application form) to the competent institution.

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<sup>86</sup> Art. 41-1 du CIC: « Le procureur d'Etat ou le juge d'instruction, saisi de faits commis volontairement à l'encontre d'un mineur, désigne un administrateur ad hoc choisi sur la liste des avocats à la Cour publiée par les conseils de l'ordre des avocats, lorsque la protection des intérêts du mineur n'est pas complètement assurée par l'un au moins de ses représentants légaux. L'administrateur ad hoc assure la protection des intérêts du mineur et exerce, s'il y a lieu, au nom de celui-ci les droits reconnus à la partie civile.»

The minor is in consequence only provided access to legal counselling and representation if he wishes so. Article 30-1 of CIC provides that the police officers have to inform the victim *inter alia* about the possibility to benefit of the judicial assistance.

Article Art. 4-1((2) and (3) CIC disposes the following: “(2) The complaint is done by written declaration, either personally or by lawyer [...]. (3) The victim has the right to be assisted or represented by a lawyer. [...]”

According to this provision, the victim has a right to be assisted by a lawyer from the moment of deposition of his complaint, which means at the very beginning of the criminal procedure.

Art. 37 of the Law of 1991 provides that if a party does not find a defendant, the “*Bâtonnier*” or, depending on the circumstances, the judge, appoints a lawyer, who cannot refuse his mandate without valid reason.

To conclude, the minor has the right to access legal counsel and representation from the very beginning of the criminal procedure. However, the nomination is not automatic and has to be initiated by the minor or his legal representatives themselves. If they don't find one, the “*Bâtonnier*” or the judge appoints one for him.

If yes, please specify if it is:

a) Available for the purpose of claiming compensation?

The lawyer has mandate to defend the interests of the child which includes compensation claim.

b) Free of charge where the victim does not have sufficient financial resources?

As stated above, Article 37-1 of the Law of 1991 grants the benefit of the judicial assistance (free allocation of a lawyer) to a minor involved in a judicial procedure independently of the financial situation of his parents or persons that live with him in a domestic community. However, the State has the right to require the reimbursement of his expenses for the judicial assistance of the minor from its parents if they dispose of sufficient resources.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

No provision treats the interview with injured persons after report. The interview with victims is only treated in the frame of a complaint brought by themselves or by their lawyer to the competent authorities. Article 38 CIC relative to the interviews with witnesses in general does not provide an obligatory time frame. In practice however, the child victim is interviewed as soon as possible in order to seal proofs.

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

No national provision provides the obligation to operate interviews with children in premises designed or adapted for this purpose. However, in practice, the unit of youth protection within the Police Grand-Ducale has a specific room adapted to interviews with children.

c) Interviews with the child victim are carried out by or through professionals trained for this purpose?

“All members of the Police Grand-Ducal, Criminal Investigation Department's of Youth Protection Section have received at least four weeks' training at the police school in Freiburg, Germany, on the prevention and treatment of sexual abuse, the special needs of children and minors, cognitive listening techniques and therapy for children. The training also included protection of children in relation to the media, pornography and staging of shows with minors.”

However a legal basis for this training is not provided.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

Also in this area, the practice complies with the requirements but is not exercised on the basis of a normative measure.

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?

Article 158-1 (4) CIC reads as follows:

“If the testimony of a witness or a minor were collected according to the procedures laid down by Articles 48-1 or 79-1, it can be carried to their sound or visual reproduction at the hearing. There shall proceed a new hearing of the witness or the minor concerned that the express decision of the court.”

Article 48-1 (4) and 79-1 (4) CIC provide that those recordings serve as evidence and that they

can be heard or viewed without the parties or experts having to move. According to paragraph (3) of both provisions this procedure of sound or audio-visual recording is obligatory for child victims of offences referred to by Article 372 to 379 CP (Article 3 and 4 of the Directive).

These provisions prevent minors of being forced to undergo several interrogations.

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?

Article 48-1 (5) CIC states that:

“Any minor referred to in paragraph 3 has the right to be accompanied by an adult of his/her choice during his/her audition, except motivated contrary decision in regard to that person taken by the prosecutor in the minors interest or for the manifestation of the truth.”<sup>87</sup>

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

This question is explained above.

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

Article 190 (2) CIC sets the general rule that the court may order non-public audience:

“(2) However, the Court can, by determining in its judgment that the publicity is dangerous for the public order and morals, order by judgment rendered in public hearing that the debates will take place in camera.”

Article 29 of the Law of 10 August 1992 provides the possibility for the Court to proceed to the audition of the minor in the “*Chambre du Conseil*” in the sole presence of the lawyers of the parties. The Court disposes of the same possibility when hearing experts and witnesses, parents, legal representatives or other persons having custody on the minor's personality.

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<sup>87</sup> *Tout mineur visé à l'alinéa 3 a le droit de se faire accompagner par la personne majeure de son choix lors de son audition, sauf décision contraire motivée prise à l'égard de cette personne par le procureur d'Etat dans l'intérêt du mineur ou de la manifestation de la vérité.*

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

As stated above, the minor's declarations recorded by sound or audio-visual measures constitute evidence and can be presented during the hearing. However, no national provision states that child victims can be heard through the use of appropriate communication technologies.

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

Yes, by Article 38 of Law of 10 August 1992:

“It is forbidden to publish or distribute in any way the proceedings of tribunaux de la jeunesse. It is the same for the publication or dissemination of all elements that are likely to reveal the identity or personality of minors prosecuted or subject to a measure provided for by this Law. However, the victims of offenses committed by minors may receive communication of the elements of the file they need to assert their right to compensation. They cannot use these items only for such purposes. Violations of this Article shall be punished with imprisonment from eight days to six months and a fine of 2,501 to 100,000 francs or one of these penalties.”<sup>88</sup>

6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify

Most of the pertinent national provisions have been introduced or modified by the Law of the 6 October 2009 implementing the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

As underlined in the report of the European Commission from 20 April 2009, the bill no. 5156 introduced by the Ministry of Justice the 20 May 2003 in order to implement, inter alia, the aforementioned CFD, was not passed as a Law. After several critics about the introduction of anonymous witness, the Government decided in 2009 to disjoint the section of strengthening of

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<sup>88</sup> *Il est interdit de publier ou de diffuser de quelque manière que ce soit les débats des juridictions de la jeunesse. Il en est de même de la publication ou de la diffusion de tous éléments qui seraient de nature à révéler l'identité ou la personnalité des mineurs qui sont poursuivis ou qui font l'objet d'une mesure prévue par la présente loi. Toutefois les victimes d'infractions commises par des mineurs peuvent recevoir communication des éléments du dossier qui leur sont nécessaires pour faire valoir leur droit à réparation. Elles ne peuvent utiliser ces éléments qu'à ces seules fins. Les infractions au présent article sont punies d'un emprisonnement de huit jours à six mois et d'une amende de 2.501 à 100.000 francs ou d'une de ces peines seulement.*

the rights of victims of criminal offences of the section of protection of witnesses. In the judicial Commission of the Parliament confirmed this decision and divided the bill no. 5156 into two, namely the bill no. 5156A and 5156B.

Bill no. 5156A was finally adopted and passed to the law of 6 October 2009 on the strengthening of the rights of the victims of criminal offences.

Several provisions already satisfied requirements of the CFD before the adoption of the aforementioned Law of 2009. Many provisions of the Law of 10 August 1992 on the protection of youth, modified later on by the aforementioned Law of 2009, complied with the requirements of the CFD. Also the Law of 10 August 1991 on the profession of lawyer modified by the Law of 5 June 2009 satisfied some requirements of the CFD, just as the Law of 16 December 2008 relative to the help to children and several provisions of the CIC.

### 6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

The Luxembourgish legal framework comply with the majority of the requirements of Article 18, 19 and 20 of the Directive.

The following requirements of the Directive have not been transposed within the national legal framework:

The obligation, provided by Article 18(3) of the Directive, to let persons where the age is uncertain benefit from assistance, support and protection measures is not granted by the Luxembourgish legislation.

The requirement of Article 19(5) of the Directive to apply Article 4 CFD on the right to receive information, to the family of the child victim is not satisfied by the relevant national provisions on communication of information which expressively limit their personal scope to the victim.

Article 20(3) a) to d) have not been transposed within the Luxembourgish legal framework. Concerning point a), no national provision establishes the obligation to proceed to the audition of the child victim in a fixed time frame. Concerning the points b) to d), the requirements provided are satisfied by practical measures, however, those are not granted by a legal basis and have no constraining character.

Article 20(5) b) has not been transposed at all.

If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

Concerning Article 18(3) of the Directive, we strongly recommend to introduce a new article to the law of 10 August 1992 on the protection of youth.

Concerning Article 19(5) of the Directive, we strongly recommend to change the personal scope of Articles 9-2, 23(4) and (5) and 30-1 CIC by including at least the parents of a minor.

Concerning Article 20(3) a) we strongly recommend to introduce a new provision to the first book of CIC regulating how and in what time-frame to proceed in case of child abuse reported by a third party or rumours.

Concerning b), c) and d) of this same article, we strongly recommend to grant the measures operated in practise by a legal basis.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b>            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.</p>	<p>No provision.</p>
<p>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.</p>	<p><b>Article 23 of the Law of 10 August 1992:</b>            The court or the judge of tribunal de la jeunesse shall arrange, if appropriate, in a study of the personality of the minor or major in the case of Article 1, last paragraph, in particular by means of a social investigation, medical examinations, psychological and psychiatric examinations, an observation of behavior and career review. It may still take notice of any person who can provide useful information.            It can at any time call the minor, who have custody, probation officers, and anyone concerned with the fate of the minor.</p>

	<p><b>Article 7 of the Law of 10 August 1992:</b> Tribunal de la jeunesse can order one of the measures enumerated in the first article or a measure of placement in an institution for children who [...] search for an income resource [...] in occupations which expose them to prostitution, to the begging, to the vagrancy or to crime, or whose the physical or mental health, the education or the social or the moral development are compromised. Tribunal de la jeunesse or the general prosecutor are informed by the father, the mother, the person with legal custody over the minor, by any officer qualified in the educational sector, in the health or the public assistance sector, by any agent of the general or local police, or by the minor himself. [...]</p> <p><b>Article 13 of the Law of 10 August 1992:</b> The minors, which were placed under the supervision of competent authorities, as well as their families, have a right to help, advice or assistance from tribunal de la jeunesse, judge or or persons working within an institution.</p> <p><b>Article 14 of the Law of 10 August 1992:</b> Anyone charged with the supervision over the minor shall stay in contact with them, and, depending on the circumstances, visit their parents, the people, the associations and the institutions, which have legal custody over them. That person examines environment and behavior of a minor, and are allowed to take appropriate decions towards him. They give reports to the judge and suggest him any measures that they find suitable. The parents receive periodically information about the situation of their children. If those who have the custody refuse the access to the residence of the minor [...] the judge can order the agents of the public force to intervene.</p> <p><b>Article 30-1 CIC:</b> The officers and agents of the police judiciaire inform the identified injured person, in a language that they understands, except in cases of duly recognised material impossibility, about their right to be helped by the services of help for victims as well as his right to obtain compensation for damages, and also their right to legal counsel as provided by the law.</p> <p><b>Article 5 of the Law of 16 December 2008 relative to child and family help:</b> [...] In the respect of the competences</p>
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	<p>acknowledged to the judicial authorities by the modified Law of the 10 August 1992 relative to youth protection, ONE has the mission to look after the assignment of social help to children and young adults in distress. In any case, the intervention of the courts and tribunals overrules the intervention of ONE. In case of procedures in front of the courts and tribunals, the ONE can intervene only at the explicit demand of the judicial instances.</p> <p><b>Article 6 of the Law of 16 December 2008 relative to child and family help:</b></p> <ul style="list-style-type: none"> <li>- to evaluate individually the resources and difficulties of children, young adults and families, which situations are considered critical by the psycho-social, scholar, medical or judicial actors;</li> <li>- to organize institutional and family conciliation sessions to make children, young adults, parents and legal representatives to participate in the elaboration of socio-educative and psycho-social intervention projects;</li> <li>- to motivate the child and its parents or legal representatives to participate in educational projects in the child's superior interest;</li> <li>- to introduce, in case of need, for the children or young adults and their families, socio-educative and psycho-social interventions;</li> <li>- to appoint, within any socio-educative and psycho-social interventions, a representative for the child, young adult and family's best interest, who will be charged with an orientation, coordination and evaluation of their improvement;</li> <li>- to assure the follow-up of socio-educative measures and evaluate their fulfillment by concerned children;</li> <li>- to prepare each semester (on the 1<sup>st</sup> of April and 1<sup>st</sup> of October) a list of children placed in institutions or a foster families, both in Luxembourg and abroad.</li> </ul> <p>The ONE will examine any situation that it is called upon.</p> <p>The ONE will examine all socio-educative and psycho-social interventions on its own initiative or at the request of one of the parties and at least every 12 months.</p> <p><b>Article 37-1 (1) paragraph 6 of the Law of 10 August 1991</b></p> <p>If the applicant is a minor involved in a judicial procedure, the benefit of the judicial assistance is</p>
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	<p>accorded independently of the financial situation of his parents or persons that live with him in a domestic community.</p> <p>the State has the right to “require the reimbursement of its expenses for the judicial assistance“ of the minor from its parents if they dispose sufficient resources.</p>
<p>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.</p>	<p>No specific legislation.</p>
<p><b>Article 19</b> <b>Assistance and support to victims</b></p> <p>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 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.</p>	<p><b>Article 30-1 CIC:</b></p> <p>The officers and agents of the police judiciaire inform the identified injured person, in a language that they understands, except in cases of duly recognised material impossibility, about their right to be helped by the services of help for victims as well as his right to obtain compensation for damages, and also their right to legal counsel as provided by the law.</p> <p><b>Article 1 paragraph 5 of the Law of 1992:</b></p> <p>Judge of the tribunal de la jeunesse can, when it is in the best interest of the person concerned, extend one of the measures provided, up to theirs 21<sup>st</sup> birthday. The measure will expire at the end of the time period, fixed together with the person concerned, or on the day of theirs 21<sup>st</sup> birthday. The judge of the tribunal de la jeunesse can at any time withdraw the measure, and has to do so on the request of the person concerned.</p> <p><b>Article 2 of the Law of 16 July 2011:</b></p> <p>The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, signed in New York on the 25th May 2000, is hereby approved.</p> <p><b>Article 7 of the Law of 10 August 1992:</b></p> <p>Tribunal de la jeunesse can order one of the measures enumerated in the first article or a measure of placement in an institution for children who [...] search for an income resource [...] in</p>

	<p>occupations which expose them to prostitution, to the begging, to the vagrancy or to crime, or whose the physical or mental health, the education or the social or the moral development are compromised. Tribunal de la jeunesse or the general prosecutor are informed by the father, the mother, the person with legal custody over the minor, by any officer qualified in the educational sector, in the health or the public assistance sector, by any agent of the general or local police, or by the minor himself. In case of sudden life or health danger, a doctor can take any necessary and appropriate medical measures, even without a consent of minor's legal representatives.[...]</p> <p><b>Article 9 of the Law of 10 August 1992:</b> On the demand of the minor, and in their best interest, Judge of tribunal de la jeunesse can undertake one of the measures provided by Article 1. Within 15 days from the hearing of the parents or other legal representatives, [...] judge is obliged to reconsider the facts and take final decision. [...]</p>
<p>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.</p>	<p>No provision.</p>
<p>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.</p>	<p><b>Article 23 of the Law of 10 August 1992:</b> The Court or the judge of tribunal de la jeunesse shall arrange, if appropriate, in a study of the personality of the minor or major in the case of Article 1, last paragraph, in particular by means of a social investigation, medical examinations, psychological and psychiatric examinations, an observation of behaviour and career review. It may still take notice of any person who can provide useful information. It can at any time call the minor, who have custody, probation officers, and anyone concerned with the fate of the minor.</p>
<p>4. Child victims of any of the offences referred to in Articles 3 to 7 shall be considered as particularly</p>	<p><b>Article 29(3) to (5) of the Law of 10 August 1992:</b> The Court can, in the interest of the minor,</p>

<p>vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA.</p>	<p>dispense the minor to appear in Court, order his absence during some or all hearings or that his audition will be done in the “Chambre de Conseil“ with the sole presence of the lawyers of the parties. The Court can at any moment, during the hearings concerning the personality of the minor, hear in the “Chambre du Conseil“ the experts and witnesses, parents, guardians or other persons having the child custody.</p> <p>Only the lawyers of the parties have the right to assist the hearings in the “Chambre du Conseil“. The Court can however order the minors presence if it judges it necessary.</p> <p><b>Article 14(1) CFD</b> requires that “Through its public services or by funding victim support organisations, each Member State shall encourage initiatives enabling personnel involved in proceedings or otherwise in contact with victims to receive suitable training with particular reference to the needs of the most vulnerable groups.</p>
<p>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.</p>	<p><b>Article 1 of the Law of 10 August 1992:</b> Tribunal de la jeunesse take custody, educational and preservation measures towards a minor. According to the circumstances, judge can:</p> <ol style="list-style-type: none"> <li>1. [...]</li> <li>2. order special educational assistance ;</li> <li>3. place minor under supervision of a responsible and worthy person or place them in a special institution, including abroad [...]</li> <li>4. [...]</li> </ol> <p><b>Article 14 of the Law of 10 August 1992:</b> Anyone charged with the supervision over the minor shall stay in contact with them, and, depending on the circumstances, visit their parents, the people, the associations and the institutions, which have legal custody over them. That person examines environment and behavior of a minor, and are allowed to take appropriate decions towards him. They give reports to the judge and suggest him any measures that they find suitable. The parents receive periodically information about the situation of their children. If those who have the custody refuse the access to the residence of the minor [...] the judge can order the agents of the public force to intervene.</p>

	<p><b>Article 4 of the Law of 16 December 2008</b>  The right to request assistance  In situations of children in distress, parents or legal representatives and the child capable of forming are entitled to request the assistance of the National Children's Office.  They participate in the elaboration of the draft socio-educational and psycho-social intervene under Article 6 below, which was developed and validated by the National Children's Office.  This project does not take effects unless it is signed by parents or legal representatives. The child's parents or legal representatives have the right to request at any time review or revocation of project intervention.</p>
<p><b>Article 20</b>  <b>Protection of child victims in criminal investigations and proceedings</b></p> <p>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.</p>	<p><b>Article 41-1 of the Law of 10 August 1992:</b>  The general prosecutor or the instruction judge, hearing the case of child victim, shall appoint an ad hoc administrator [...] anytime when the protection of a minor is not fully guaranteed by at least one of the legal representants of the minor. Ad hoc administrator shall ensure the protection and well-being of a minor, and shall represent him, when needed, in a civil trail.</p>
<p>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.</p>	<p><b>Article 18 of the Law of 10 August 1992:</b>  Minor, their parents or any other person charged with the legal custody have a right to a legal counsel of their choice. They also can ask judge to appoint them one.</p> <p><b>Article 37-1 paragraph 6 of the Law of 10 of August 1991:</b>  If the applicant is a minor involved in a judicial procedure, the benefit of the judicial assistance is accorded independently of the financial situation of his parents or persons that live with him in a domestic community.</p> <p><b>Article 30-1 CIC:</b>  The officers and agents of the police judiciaire inform the identified injured person, in a language that they understands, except in cases of duly</p>

	<p>recognised material impossibility, about their right to be helped by the services of help for victims as well as his right to obtain compensation for damages, and also their right to legal counsel as provided by the law.</p> <p><b>Article 4-1(2) and (3) CIC:</b>  “(2) The complaint is done by written declaration, either personally or by lawyer [...]  (3) The victim has the right to be assisted or represented by a lawyer. [...]”</p>
<p>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:</p> <p>(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;</p> <p>(b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;</p> <p>(c) interviews with the child victim are carried out by or through professionals trained for this purpose;</p> <p>(d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;</p> <p>(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;</p>	<p>No national provision.</p> <p>No national provision.</p> <p>No national provision.</p> <p>No national provision.</p> <p><b>Article 158-1 (4) CIC:</b>  If the testimony of a witness or a minor were collected according to the procedures laid down by Articles 48-1 or 79-1, it can be carried to their sound or visual reproduction at the hearing. There shall proceed a new hearing of the witness or the minor concerned that the express decision of the court.</p> <p><b>Articles 48-1(4) CIC and Art 79-1(4) ) CIC:</b>  Registration serves as an evidence. The original is placed in sealed container. Copies are listed and admitted. Recordings can be viewed or listened to by the parties, as provided in Article 85, and by an expert authorised by the judge without moving and place designated by the judge.</p>

<p>(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.</p>	<p><b>Article 48-1 (3) CIC and Art 79-1 (3) CIC :</b> Notwithstanding the foregoing, where a minor is the victim of acts referred to in Articles 354 to 360 , 364 , 365, 372-379 , 382-1 and 382-2 , 385, 393, 394, 397, 398-405 , 410-1 , 410-2 and 442-1 of the Criminal Code or when a minor is a fact witness referred to in Articles 393 to 397 or 400 to 401bis of the Penal Code, registration is mandatory in the manner referred to in first paragraph, unless, because of the opposition of the minor or his legal representative or, where applicable, his ad hoc administrator, to make such a record, the judge decides that there is no need to do so.</p> <p><b>Article 48-1 (5) CIC :</b> Any minor referred to in paragraph 3 has the right to be accompanied by an adult of his/her choice during his/her audition, except motivated contrary decision in regard to that person taken by the prosecutor in the minors interest or for the manifestation of the truth.</p>
<p>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.</p>	<p><b>Article 158-1 (4) ) CIC:</b> If the testimony of a witness or a minor were collected according to the procedures laid down in Articles 48-1 or 79-1, it can be carried to their sound or visual reproduction at the hearing. There shall proceed a new hearing of the witness or the minor concerned that the express decision of the court.</p> <p><b>Article 48-1 (3) CIC and Art 79-1 (3) CIC :</b> Notwithstanding the foregoing, where a minor is the victim of acts referred to in Articles 354 to 360 , 364 , 365, 372-379 , 382-1 and 382-2 , 385, 393, 394, 397, 398-405 , 410-1 , 410-2 and 442-1 of the Criminal Code or when a minor is a fact witness referred to in Articles 393 to 397 or 400 to 401bis of the Penal Code, registration is mandatory in the manner referred to in first paragraph, unless, because of the opposition of the minor or his legal representative or, where applicable, his ad hoc administrator, to make such a record, the judge decides that there is no need to do so.</p>
<p>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:</p>	<p><b>Article 190 CIC:</b> (1) The hearings are public. (2) However, the court can, if it's considered in his judgment that the publicity is dangerous for the public order and custom, order by a judgment given</p>

<p>(a) the hearing take place without the presence of the public;</p> <p>(b) the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies.</p>	<p>in public hearing that the hearing will be a closed hearing.</p> <p>(3) Every judgment is pronounced in public hearing.</p> <p><b>Article 29 of the Law of 10 August 1992 :</b>  The court may, if the minor's interest requires, or provide it to appear at the hearing, order that withdraws during all or part of the proceedings, or conduct a hearing in chambers in the sole presence of counsel of the parties.  The court may at any time during the debate, to retire in private to hear on the minor's personality, experts and witnesses, parents, tutor or other person having custody of the minor.  Only the parties' lawyers have the right to attend the hearing in private. However, the court may summon the minor when it deems appropriate.</p> <p>No national disposition.</p>
<p>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.</p>	<p><b>Article 38 of Law of 10 August 1992:</b>  It is forbidden to publish or distribute in any way the proceedings of tribunaux de la jeunesse.  It is the same for the publication or dissemination of all elements that are likely to reveal the identity or personality of minors prosecuted or subject to a measure provided for by this Act.  However, the victims of offenses committed by minors may receive communication of the elements of the file they need to assert their right to compensation. They cannot use these items only for such purposes.  Violations of this Article shall be punished with imprisonment from eight days to six months and a fine of 2,501 to 100,000 francs or one of these penalties.</p>

## TOPIC 7.

### *Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)



7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

**7.1.1. Obligatory take down measures (Art. 25 (1))**

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

a) Within its territory? If yes, please specify

In the bill no. 6408<sup>89</sup>, the Ministry of Justice stated that there is no need to implement Article 25 of the Directive for the following reasons:

“Through the Articles 31 paragraph (3) of the Code of Criminal Procedure, in the case of flagrant crime, and 66 paragraph (1) of the Code of Criminal Procedure, in the case of initiation of investigation, the authorities responsible for research and pursuit of the offences linked to child pornography already have the possibility to implement the necessary measures in order to remove illegal content when it is stored within the Luxembourgish territory.”<sup>90</sup>

Articles invoked in this excerpt, have the following wording:

**Article 31 (Law 16 June 1989)**

(1) In case of flagrant crime, the officer of the *police judiciaire* [...]

(3) Levies on the objects, documents and effects that have served to commit the crime or that were destined to commit it and those who constituted the object of the crime, just as everything that seems having been the product of the crime, and in general, everything that seems useful for the manifestation of the truth or whose utilization could affect the course of investigations and everything that could be subject to confiscation or restitution.<sup>91</sup>

**Article 66 (Law 17 March 1992)**

The investigation judge levies on the objects, documents effects and other things referred to in Article 31(3). (...) <sup>92</sup>

<sup>89</sup> <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&id=6408>.

<sup>90</sup> *Par le biais des articles 31 paragraphe (3) du Code d'instruction criminelle en cas de crime flagrant et 66 paragraphe (1) du Code d'instruction criminelle en cas d'ouverture d'une instruction, les autorités chargées de la recherche et de la poursuite des infractions liées à la pédopornographie ont déjà la possibilité de mettre en oeuvre les mesures nécessaires afin d'aboutir à la suppression des contenus pédopornographiques lorsque ces contenus sont stockés sur le territoire luxembourgeois.*

<sup>91</sup> (1) *En cas de crime flagrant, l'officier de police judiciaire [...]*

(3) (L. 17 mars 1992) *Il saisit les objets, documents et effets qui ont servi à commettre le crime ou qui étaient destinés à le commettre et ceux qui ont formé l'objet du crime, de même que tout ce qui paraît avoir été le produit du crime, ainsi qu'en général, tout ce qui paraît utile à la manifestation de la vérité ou dont l'utilisation serait de nature à nuire à la bonne marche de l'instruction et tout ce qui est susceptible de confiscation ou de restitution.*

<sup>92</sup> (1) *Le juge d'instruction opère la saisie de tous les objets, documents effets et autres choses visés à l'article 31(3). (...).*

Article 40 CIC<sup>93</sup> enlarges the scope of application of this provision to the “*délit*” that the law provides the penalty of imprisonment. Article 383ter (producing, transferring, offering, making available and disseminating child pornography) is therefore covered by the national provisions on removal of websites.

b) Outside its territory? If yes, please specify

Following the reasoning of the bill no. 6408, an implementation of the Directive regarding this subject is not required for the following reasons:

“If the websites containing or diffusing child pornography are located outside the Luxembourgish territory, the Luxembourgish judicial authorities will address an international rogatory commission to the judicial authorities legally empowered in this other State, in order to proceed to investigatory measures or to other legal actions allowing the removal of these websites.”<sup>94</sup>

This rogatory commission is operated pursuant to Article 6 Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union<sup>95</sup> and Article 1 of its additional protocol form 16 October 2001<sup>96</sup>, which both have been ratified by the Law of 27 October 2010.

### 7.1.2. Optional blocking measures (Art. 25 (2))

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify

According the bill no. 6408, an implementation of the Directive regarding this subject is not required for the following reasons:

“[...] the provisions of the Directive 2000/31/CE of 8 June 2000 on the electronic commerce who has been implemented by the Articles 60 to 62 of the modified Law of 14 August 2000 relative to electronic commerce. In the frame of these Articles that introduce a regime of specific responsibility for the intermediary service providers of information society, those are requested, from the moment on where they have actual knowledge of the illegal character of an information or activity, to act promptly by removing the illegal content or by making the access to those

<sup>93</sup> Art. 40. (L. 16 juin 1989) (L. 25 août 2006) *Les dispositions des articles 31 à 39 sont applicables, en cas de délit flagrant, dans tous les cas où la loi prévoit une peine d'emprisonnement. [...]*

<sup>94</sup> *Lorsque les pages internet contenant ou diffusant de la pédopornographie se situent en dehors du territoire luxembourgeois, les autorités judiciaires luxembourgeoises adresseront une commission rogatoire internationale aux autorités judiciaires légalement habilitées de cet autre Etat, afin de procéder à des mesures d'instruction ou à d'autres actes judiciaires permettant la suppression de ces pages internet*

<sup>95</sup> OJ C 197 of 12 July 2000.

<sup>96</sup> OJ C 326 of 21 November 2001.

impossible. This mechanism allows to achieve the intended result so that an implementation of Article 25(2) of the Directive is not required too.”<sup>97</sup>

Article 60<sup>98</sup> of the modified Law of 14 August 2000<sup>99</sup> is not relevant for this analysis. It refers to the “simple transport”, the transmission onto a communication network of information furnished by a recipient of the service or the provision of access to such a network. In this case, the service provider is not liable if he does not initiate the transmission, select the receiver of the transmission and select or modify the information contained in the transmission. This provision does not provide that he has to block or remove the information in order to prevent his responsibility to be engaged.

#### **Article 61 Form of storage so called caching**

“The provider who furnishes a service of the information society consisting in the transmission onto a communication network of information furnished by a recipient of the service is not responsible for the automatic, intermediate or temporary storage of this information done with the sole objective to make more efficient the ulterior transmission of the information on request of other recipients of the service under the condition: [...]

e) that he immediately removes the information he has stored or make access to it impossible, as soon as he has actual knowledge that the information has been removed from where it has initially been in the network, or that access to the information has been made impossible, or that an judicial or administrative authority has ordered the removal of the information or prohibited its access.”<sup>100</sup>

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<sup>97</sup> [...] le dispositif prévu par la directive 2000/31/CE du 8 juin 2000 sur le commerce électronique et qui a été transposé aux articles 60 à 62 de la loi modifiée du 14 août 2000 relative au commerce électronique. Dans le cadre de ces articles qui mettent en place un régime de responsabilité spécifique pour les prestataires intermédiaires de services de la société de l'information, ceux-ci sont tenus, à partir du moment où ils ont eu connaissance effective du caractère illicite d'une information ou activité, d'agir promptement en retirant les contenus illicites ou en rendant l'accès à celles-ci impossibles. Ce mécanisme permet d'aboutir au résultat recherché de sorte qu'une transposition de l'article 25(2) de la directive ne s'impose pas non plus.

<sup>98</sup> Art. 60. Simple transport

(1) Le prestataire de service de la société de l'information qui transmet sur un réseau de communication, des informations fournies par un destinataire du service ou qui fournit un accès au réseau de communications ne peut voir sa responsabilité engagée pour les informations transmises à condition:

a) qu'il ne soit pas à l'origine de la transmission;  
 b) qu'il ne sélectionne pas le destinataire de la transmission; et  
 c) qu'il ne sélectionne et ne modifie pas les informations faisant l'objet de la transmission.

(2) Les activités de transmission et de fourniture d'accès visées au paragraphe 1 englobent le stockage automatique, intermédiaire et transitoire des informations transmises à condition que ce stockage serve exclusivement à l'exécution de la transmission sur le réseau de communications et que sa durée n'excède pas le temps raisonnablement nécessaire à la transmission.

<sup>99</sup> Mém. no. 96 of 8 September 2000, p. 2176.

<sup>100</sup> Art. 61. Forme de stockage dite caching

Le prestataire qui fournit un service de la société de l'information consistant dans la transmission sur un réseau de communications des informations fournies par un destinataire du service ne peut pas voir sa responsabilité engagée pour le stockage automatique, intermédiaire et temporaire de cette information fait avec le seul objectif de rendre plus efficace la transmission ultérieure de l'information à la demande d'autres destinataires du service à condition: [...]

### Article 62 Hosting

(1) [...] the provider who furnishes a service of the information society consisting in the storage of the information furnished by a recipient of the service, is not responsible for the information stored on the request of a recipient of the service under the condition that : [...]

a) The provider has no actual knowledge that the activity or the information is illegal [...]

b) The provider, as soon as he has such a knowledge, immediately removes the information or makes the access to them impossible [...].<sup>101</sup>

If no, what is the current (political) position of your MS with regard to blocking, i.e. the likelihood of introducing blocking measures?

The authorities believe that there is no need to do further implementation since the national legal framework complies with all requirements set by the Directive.

7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

As stated in the bill no. 6408, the Ministry of Justice considered that the national legal framework, amended on 16 June 1989 and on 17 March 1992, already complies with the requirements of Article 25 of the Directive and did not proceed to an introduction of new provisions or the modification of existing provisions.

7.3. In your view, does the current legal framework comply with Article 25?

Articles 31 paragraph 3, 66 and 40 CIC allow the competent authorities to remove the offending websites and are therefore in compliance with the requirements of Article 25 of the Directive.

Articles 61 and 62 of the modified Law of 14 August 2000 do not provide the faculty of the authorities to block the access to the offending web pages, however, according to the Ministry of

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*e) qu'il agisse promptement pour retirer l'information qu'il a stockée ou pour rendre l'accès à celle-ci impossible, dès qu'il a effectivement connaissance du fait que l'information a été retirée là où elle se trouvait initialement sur le réseau, ou du fait que l'accès à l'information a été rendu impossible, ou du fait qu'une autorité judiciaire ou administrative a ordonné le retrait de l'information ou interdit son accès.*

<sup>101</sup> Art. 62. Hébergement.

*(1) [...] le prestataire qui fournit un service de la société de l'information consistant dans le stockage des informations fournies par un destinataire du service, ne peut pas voir sa responsabilité engagée pour les informations stockées à la demande d'un destinataire du service à condition que: [...]*

*a) le prestataire n'ait pas effectivement connaissance que l'activité ou l'information est illicite [...]*

*b) le prestataire, dès le moment où il en a une telle connaissance, agisse promptement pour retirer les informations ou rendre l'accès à celles-ci impossible. [...]*

Justice<sup>102</sup>, “the Directive leaves to the Member States the faculty to make recourse to actions like legislative, non-legislative, judicial measures or voluntary measures to achieve the intended goal.”

Article 61 and 62 satisfy the requirement that the restriction is limited to what is necessary and proportionate by providing the obligation for the providers to block the illegal information.

Even if the national law does not require to reason the restricted access to particular information, it still complies with the Directive since these blocking measures are optional.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 25</b> <b>Measures against websites containing or disseminating child pornography</b></p> <p>1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.</p>	<p><b>Article 31 CIC:</b> (L. 16 June 1989) (1) In case of flagrant crime, the officer of the police judiciaire [...] (3) levies on the objects, documents and effects that have served to commit the crime or that were destined to commit it and those who constituted the object of the crime, just as everything that seems having been the product of the crime, and in general, everything that seems useful for the manifestation of the truth or whose utilization could affect the course of investigations and everything that could be subject to confiscation or restitution.</p> <p><b>Article 66 CIC:</b> (L. 17 mars 1992) The investigation judge levies on the objects, documents effects and other things referred to in Article 31(3). [...]</p> <p><b>Article 40 CIC:</b> The provisions of Articles 31 to 39 shall apply in cases of délit, in all cases where the law provides a term of imprisonment.</p>
<p>2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the</p>	<p><b>Article 61 of the Law of 14 August 2000</b> <b>Form of storage so called catching</b> The provider who furnishes a service of the information society consisting in the transmission onto a communication network of information furnished by a recipient of the service is not</p>

<sup>102</sup> La directive laisse aux Etats membres la faculté d'avoir recours à des actions comme des mesures législatives, non législatives, judiciaires ou des mesures volontaires pour atteindre le but recherché, projet de loi n°6408, page 5.

restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.

responsible for the automatic, intermediate or temporary storage of this information done with the sole objective to make more efficient the ulterior transmission of the information on request of other recipients of the service under the condition: [...]

e) that he immediately removes the information he has stored or make access to it impossible, as soon as he has actual knowledge that the information has been removed from where it has initially been in the network, or that access to the information has been made impossible, or that an judicial or administrative authority has ordered the removal of the information or prohibited its access.

**Art. 62 of the Law of 14 August 2000**

**Hosting**

(1) [...], the provider who furnishes a service of the information society consisting in the storage of the information furnished by a recipient of the service, is not responsible for the information stored on the request of a recipient of the service under the condition that : [...]

a) the provider has no actual knowledge that the activity or the information is illegal [...]

b) the provider, as soon as he has such a knowledge, immediately removes the information or makes the access to them impossible [...].

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

Article 208A(1B) of the Criminal Code transposes Article 5 (3) of Directive 2011/93/EU. It reads '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'. The punishment, however, is imprisonment for a term from not exceeding three years.

### 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

Articles 5(1) and (3) of Directive 2011/93/EU were transposed in Article 208A (1A) of the Criminal Code (Chapter 9 of the Laws of Malta) by means of Act VII of 2010 dated 22 June 2010. The transposition was made on the basis of the final agreed upon draft of Directive 2011/93/EU and before it was published in the Official Journal.

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

Yes. We note that the Maltese legislator opted to use the term 'indecent material which shows, depicts, or represents a person under age' instead of 'child pornography'. It is submitted that the choice of the word 'indecent' as against the word 'sexual', which is repeatedly used in the definition of 'child pornography' in Article 2 of Directive 2011/93/EU, is wider in meaning. Thus, one may argue that material which is not strictly sexual or pornographic will still fall within the scope of Article 208(1B) of the Criminal Code. The only weakness we detect is that 'decency' is an evolving concept which is tied to the moral values of a community. We do not, however, envisage as likely a scenario where the moral values of the Maltese society are such that child



pornography is considered morally acceptable or decent. It is also noted that the Article 5(3) reads that the punishment for that offence is a maximum term of imprisonment of at least 1 year. While we find that the use of the words 'maximum' and 'at least' in the same phrase make it unclear whether the term is a minimum term or a capped term, from a reading of Recital 13 of Directive 2011/93/EU it is clear that the phrase refers to a maximum capped term. In this respect, Article 208A(1B) of the Criminal Code has provided a higher maximum capped term of 3 years instead of 1 year.

#### 1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

It appears that the Maltese legislator opted not to transpose Article 5 (7) of the Directive 2011/93/EU. With respect to Article 5 (8) of the Directive 2011/93/EU, although there is no express transposition of this Article, we find that it is sanctioned in the Criminal Code on the basis of the following:

- the choice of the term 'possession' without qualifications would capture situations where a producer has created material for his own use and which was not disseminated; and
- the definition of 'indecent material' under Article 208A(7) of the Criminal Code includes 'simulated representations or realistic images of a minor, even if the minor is non-existent, or of the sexual parts of a child for primarily sexual purposes'.

We are not aware of any legislative proposals or executive plans which intend to expressly transpose Article 5(7) or Article 5(8) of Directive 2011/93/EU in Maltese law.

Provisions from Directive 2011/93 EU	Corresponding provisions from national legislation
<p><b>Article 5</b> <b>Offences concerning child pornography</b></p> <p>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.</p>	<p><b>Article 208A, Criminal Code</b></p> <p>(1) [...]</p> <p>(1A) [...]</p>

<p>2. (...)</p> <p>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.</p> <p>4.(...)</p> <p>5.(...)</p> <p>6. (...)</p> <p>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.</p>	<p>(1B) 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, shall, on conviction, be liable to imprisonment for a term from not exceeding three years.</p> <p>(2) A photograph, film, video recording or electronic image shall, if it shows a person under age and is indecent, be treated for all purposes of this article as an indecent photograph, film, video recording or electronic image.</p> <p>(3) Where the offences in subarticles (1) and (1B) are committed by any ascendant by consanguinity or affinity, or by the adoptive father or mother, or by the tutor, or by any other person charged, even though temporarily, with the care, education, instruction, control or custody of the person under age shown, depicted or represented in the indecent material, or where such person under age has not completed the age of nine years or where the indecent material shows, depicts or represents a minor involved in acts of bestiality, brutality, sadism or torture:</p> <p>(a) in the case of the offence in subarticle (1), the punishment shall be of imprisonment for a term from two to nine years, and</p> <p>(b) in the case of the offence in subarticle (1B), the punishment shall be of imprisonment for a term from six months to four years, and the provisions of article 197(4) shall also apply.</p> <p>(4) [...]</p> <p>(5) [...]</p> <p>(6) In this article references to a photograph includes the negative as well as the positive version.</p> <p>(7) For the purposes of this article the expression "indecent material" includes photographs, images, audio or video recordings, digitally created or electronic images, drawings, cartoons, text and simulated representations or realistic images of a minor, even if the minor is non-existent, or of the sexual parts of a child for primarily sexual purposes.</p>
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## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

Article 208AA(1) of the Criminal Code transposes the material element of Article 6(1) of Directive 2011/93/EU word by word, and makes reference to Articles in the Criminal Code which transpose Articles 3(4), 5(2), 5(2), and 5(3) of Directive 2011/93/EU. Article 208AA(1) of the Criminal Code also establishes a term of imprisonment of between 2 and 5 years which is at least 1 year higher than the maximum capped term of Directive 2011/93/EU.

Article 6(2) of Directive 2011/93/EU is also transposed by reference to the general rule in Article 41(1) of the 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.

### 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

There is no specific provision on offline grooming in the Criminal Code. Article 208AA(1) limitedly applies where the proposal is made by means of information and communication technology. The act of proposing (where followed by material acts), on its own, is not a criminal offence under the Criminal Code, even though other provisions in the Criminal Code may, where the proposal is accompanied with violence or deceit, apply to a situation of offline grooming.

### 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

Article 6 of Directive 2011/93/EU was transposed in Article 208AA(1) of the Criminal Code by means of Act VII of 2010 dated 22 June 2010. The transposition was made on the basis of the final agreed upon draft of Directive 2011/93/EU and before it was published in the Official

Journal. The respective Articles which are referred to in Articles 6(1) and 6(2) are transposed elsewhere, namely:

- Article 3 (4) of Directive 2011/93/EU into Article 204C(1) of the Criminal Code.
- Article 5 (6) of Directive 2011/93/EU into Article 208A(1) of the Criminal Code.
- Article 5 (2) of Directive 2011/93/EU into Article 208A(1B) of the Criminal Code.
- Article 5 (3) of Directive 2011/93/EU into Article 208A(1B) of the Criminal Code.

#### 2.4. In your view, does this legal framework comply with Art. 6?

Yes Article 6(1) of Directive 2011/93/EU has been correctly transposed in the Criminal Code. It is submitted that also Article 6(2) of Directive 2011/93/EU has been correctly transposed in the Criminal Code. We make reference to Article 41(1) of the Criminal Code which makes punishable an attempt to commit the crimes prescribed in Articles 208A(1B) of the Criminal Code (that is, Articles 5(2) and 5(3)), irrespective of whether the 'overt act' was an act of solicitation or otherwise.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b> <b>Solicitation of children for sexual purposes</b></p> <p>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.</p> <p>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</p>	<p><b>Article 208AA, Criminal Code</b></p> <p>(1) Whosoever, by means of information and communication technologies, proposes to meet a person under age for the purpose of committing any of the offences in articles 204, 204A to 204D, both inclusive, and 208A, shall, where the proposal is followed by material acts leading to such a meeting, be liable on conviction to imprisonment for a term from two to five years.</p> <p>(2) The punishment for the offence in sub-article (1) shall be increased by one degree, with or without solitary confinement, in each of the following cases:</p> <p>(a) when the offender wilfully or recklessly endangered the life of the person under age;</p> <p>(b) when the offence involves violence or grievous bodily harm on such person;</p> <p>(c) when the offence is committed with the involvement of a criminal organisation within the meaning of article 83A(1);</p>

adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child is punishable.

(d) when the offender abuses of a recognised position of trust, authority or influence over the person under age.

**Article 41, Criminal Code**

(1) Whosoever with intent to commit a crime shall have manifested such intent by overt acts which are followed by a commencement of the execution of the crime, shall, save as otherwise expressly provided, be liable on conviction -

(a) if the crime was not completed in consequence of some accidental cause independent of the will of the offender, to the punishment established for the completed crime with a decrease of one or two degrees;

(b) if the crime was not completed in consequence of the voluntary determination of the offender not to complete the crime, to the punishment established for the acts committed, if such acts constitute a crime according to law.

**TOPIC 3.**

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

Malta does provide a legal framework on disqualification arising from convictions for sexual offences involving minors. Article 208B(2) of the Criminal Code 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. Article 208B(2B) provides that if this disqualification is made by a foreign court, the Maltese courts are obliged to give effect to this as if it was ordered by them.

If yes, does it cover:

**3.1.1. Professional activities involving direct and regular contact with children?**

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

Article 208B(2) is drafted as follows 'prevented from exercising activities related to the supervision of children'. No definition of the words 'activities' or 'supervision' is given by the law. It is submitted that in the absence of any qualification on the nature of the activities or supervision, Article 208B(2) also includes within its scope both professional and organised voluntary activities in which a person is supervising a child.

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

A general framework for screening is provided for in the Conduct Certificates Ordinance (Chapter 77 of the Laws of Malta). These certificates are issued by the Commissioner of Police only at the request of persons to whom they refer or upon an order of the court either ex officio or at the request of an interested party. It is usually practice for employers to ask prospective employees to produce an original copy of the conduct certificate before they are engaged. It is not common for employers to obtain it themselves from the Commissioner of Police. Although the term 'interested party' is not defined and one could argue that an employer has an 'interest' in obtaining the conduct certificate of a prospective employee, it is highly unlikely that the Commissioner of Police would accede to such a request. Therefore employers do not have a general right of access to information concerning the existence of criminal convictions when recruiting.

**3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?**

This specific framework for screening is provided for in the Protection of Minors (Registration) Act (Chapter 518 of the Laws of Mata). This Act establishes a register where the details of the

offender are registered together with an authentic copy of the relevant judgment or court decree. Any person whose name is registered on that Register is 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, whether such membership, employment or other position is against payment or otherwise. Entities (including any institution, establishment or organisation) which provide or organise any service or activity which involves the education, care, custody, welfare or upbringing of minors are obliged under this Act to make an application before the Court of Voluntary Jurisdiction for such information on a prospective employee before engaging them.

**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

b) Organised voluntary activities involving direct and regular contact with children?

Yes. The law imposes an obligation on entities (including any institution, establishment or organisation) which provide or organise any service or activity which involves the education, care, custody, welfare or upbringing of minors to make an application for information on any prospective employee or volunteer. If this is not done and a registered person is in fact engaged, that person shall be guilty of an offence and liable to either imprisonment or to a fine or both. However, employers would not know of pending cases as these would not have been registered.

**3.2.4. Do employers in your MS have a right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

a) Professional activities involving direct and regular contact with children?

b) Organised voluntary activities involving direct and regular contact with children?

No.

**3.2.5. If your MS does not foresee any legal framework on screening, would it still, in your view, be possible for an employer to request information on prior convictions without violating national legislation on privacy (or other)?**

As explained above, it is practice for employers to request prospective employees to produce an original copy of their conduct certificate voluntarily before engaging them. An employer must respect the provisions of the Data Protection Act (Chapter 440 of the Laws of Malta) when collecting and storing this information in its HR records. Such information must be collected for a specific and legitimate purpose, processed fairly and not for other purposes than for which the information is collected. It may only be processed if the person gives his clear consent or is necessary for the performance of a contract or for a purpose that concerns a legitimate interest of third parties unless this is overridden by the fundamental rights and freedoms.

**3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?**

The Data Protection Act provides that information on criminal convictions may only be processed under the control of a public authority. A complete register of criminal convictions may only be kept under its control. The transmission of data to other competent authorities in other states is dealt with by a specific department at the Attorney General's office. No specific legal provisions have been found that show that Council Framework 2009/315JHA has been implemented.

**3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?**

Steps were taken to implement the first obligation through the enactment of Article 208B of the Criminal Code. The obligation of screening was also implemented through the Protection of Minors (Registration) Act. The employers are obliged to demand information on prior criminal convictions. In practice, it is the office of the Attorney General who transmits and receives information but nothing is laid down in the law.



3.5. In your view, does the current legal framework comply with Art. 10?

See our reply to the preceding question.

If no, what additional measures should be taken in order to comply with Art. 10?

Nothing has been found on the obligation of ensuring the possibility of transmission of information between states. Malta should incorporate this Council Framework Decision<sup>1</sup> as it would facilitate more the work of the courts and also Malta would have more information on past sexual offenders who may come to Malta for employment.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b> <b>Disqualification arising from convictions</b></p> <p>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.</p> <p>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.</p> <p>3. Member States shall take the necessary measures to ensure that, for the application of paragraphs 1</p>	<p><b>Article 208B, Criminal Code</b></p> <p>(1) The following provisions shall apply to the offences under articles 204, 204A to 204D, both inclusive, and article 208A(1), (1A), (1B), 208AA and 208AB.</p> <p>(2) In addition to the punishment established for the said offences, the Court may order that the offender be temporarily or permanently prevented from exercising activities related to the supervision of children.</p> <p>(2A) Where the court makes an order under subarticle (2) such order shall be registered in any criminal record of the offender.</p> <p>(2B) Where the person convicted of any of the offences mentioned in subarticle (1) is the subject of an order as that provided for by subarticle (2) made by a foreign court the court shall order that effect shall be given to the order made by the foreign court as if it were an order made by the court under subarticle (2).</p> <p><b>Other provisions can be found in the Protection of Minors (Registration) Act.</b></p>

<sup>1</sup>This should have been implemented by April 2012.

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 [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.

## TOPIC 4.

### *Victim identification*

(Article 15 (4))

#### 4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

The Malta Police Force is the authority that controls pornographic material. There are no special units that have been established for the purpose of identifying victims of the offences mentioned in article 3 to 7 of Directive 2011/93/EU. However within the Malta police Force there are special investigative units that deal with such crimes. The Cyber Crime Unit investigates matters relating to the internet, including child pornography, child safety and 'e-stalking'. This unit is authorized to monitor internet use that may potentially produce, distribute or collect any prohibited data.

In 2008 the Cyber Crime Unit carried out an investigation (code name 'Fekruna') and successfully arrested 13 individuals who were guilty of one or more of these cyber crimes.

Malta was also a part of '*Operation Icarus*', which has been the latest major success in over 10 years of Europol supporting law enforcement agencies in Europe in their battle against child sex abuse online. The focus was centred around identifying the producers of the material, the suspects and their victims.

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

While the substantive aspect of Directive 2011/93/EU has been transposed in the Criminal Code, the procedural aspect of the same Directive has not been transposed in its entirety. While there are provisions in the Criminal Code which already give the Police specific powers of criminal investigation where information and communication technology is used (see Article 355Q of the Criminal Code), there is no comprehensive set of police powers which specifically tackles the investigation of computer crimes and sexual crimes involving children over the internet. It appears that the Police rely on a more contemporary interpretation of provisions in the Criminal Code which give them power to investigate crimes. That being said, while there is no specific authority or power for the police to be able to analyse child pornography *per se*, in our view Article 346(1) gives a general authority to the Police to conduct criminal investigations in respect of all crimes which are sanctioned by the law.

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)?

Going as far as stating that the Maltese law falls short of the minimum standard required by Article 15(4) of Directive 2011/93/EU is not correct in our view. The Cyber Crime Unit appears to be functioning effectively and efficiently in the investigation and prosecution of crimes which are sanctioned by the same Directive, including in terms of resources and technology available. That being said, it would be best practice for the Police to have specific competence and powers in relation to the criminal investigation of cyber crimes in the Criminal Code.

#### If no, what additional measures should be taken in order to comply with Art. 15 (4)?

As explained in our reply to the preceding question, it would be best practice to include specific provisions in Maltese law in relation to the criminal investigation of sexual crimes relating to children over the internet, including powers in relation to the analysis of child pornographic material and identification of victims.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 15</b> <b>Investigation and prosecution</b></p> <p>1.(...)</p> <p>2.(...)</p> <p>3(...)</p> <p>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.</p>	<p><b>Article 346, Criminal Code</b></p> <p><b>(1)</b> It is the duty of the Police to preserve public order and peace, to prevent and to detect and investigate offences, to collect evidence, whether against or in favour of the person suspected of having committed that offence, and to bring the offenders, whether principals or accomplices, before the judicial authorities.</p> <p><b>(2)</b> Notwithstanding the generality of subarticle (1), where authorised by law and in the manner so provided, the Police may delay its immediate intervention for the prevention of the commission of an offence.</p> <p><b>Article 355Q, Criminal Code</b></p> <p>The Police may, in addition to the power of seizing a computer machine, require any information which is contained in a computer to be delivered in a form in which it can be taken away and in which it is visible and legible.</p>

## TOPIC 5.

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive:

**5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

Yes. Article 208B(5)(a) of the Criminal Code specifically reads that Maltese courts shall also have jurisdiction over the said offence where only part of the action giving execution to the offence

took place in Malta. This has to be read in conjunction with Article 5(1)(a) of the Criminal Code which provides for jurisdiction 'against any person who commits an offence in Malta'.

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

Yes. Article 208B(5)(b) of the Criminal Code specifically reads that Maltese courts shall also have jurisdiction over the said offence where the offender is a Maltese national.

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

Yes. Article 208B(5)(c) of the Criminal Code specifically reads that Maltese courts shall also have jurisdiction over the said offence where the offence was committed by means of a computer system accessed from Malta notwithstanding that such computer system may be outside Malta.

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

No. There is no such qualification in either Article 5 or Article 208B(5) of the Criminal Code.

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

No. There is no such qualification in either Article 5 or Article 208B(5) of the Criminal Code.

### **5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2)):**

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

No. There is no specific ground of jurisdiction in this regard.

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

Yes. Article 208B(5)(b) of the Criminal Code specifically reads that Maltese courts shall also have jurisdiction over the said offence where the offence was committed for the benefit of a body corporate registered in Malta. It is submitted that the wording chosen by the legislator is slightly different here. A legal person may be either corporate or incorporate, therefore Article 208B(5)(b) of the Criminal Code excludes legal persons incorporate such as associations and voluntary organisation.

c) The offender is a habitual resident (Art. 17(2)(c))?

This is not clear. Article 208B(5)(b) of the Criminal Code includes offenders who are permanently resident in Malta. Article 5(1)(d) of the Criminal Code does define 'permanent residence' as someone who has a residence permit in terms of the Immigration Act (Chapter 217 of the Laws of Malta). Article 5 clearly reads that that this definition shall apply 'for the purposes of this paragraph' in the sense of paragraph (d) of Article 5(1) of the Criminal Code and cannot be applied to Article 208B(5)(b) of the Criminal Code. In any case, it is submitted that there is a notable difference in the choice of the word habitual as against the choice of the word permanent. Therefore, we are inclined to answer this question in the negative.

If no, what are in your view the prospects of your MS prevailing itself of the option provided in Article 17?

As far as we are aware there are no legislative proposals or executive plans to add further grounds of jurisdiction to Article 208B(5) of the Criminal Code.

## 5.2. Which steps have been taken in your MS in order to implement Article 17?

Please see our replies to the preceding questions, but also the table below.

5.3. In your view, does the current legal framework comply with Article 17?

Yes. As explained in our replies to the preceding questions, the Maltese legislator satisfied the minimum standard required by Directive 2011/93/EU, but also introduced (in part) the optional ground of jurisdiction in Article 17(2)(b) of Directive 2011/93/EU.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <p>(a) the offence is committed in whole or in part within their territory; or</p> <p>(b) the offender is one of their nationals.</p> <p>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:</p> <p>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</p> <p>(b) the offence is committed for the benefit of a legal person established in its territory; or</p> <p>(c) the offender is an habitual resident in its territory.</p> <p>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.</p> <p>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</p>	<p><b>Article 208B, Criminal Code</b></p> <p><b>(5)</b> Without prejudice to the provisions of article 5, the Maltese courts shall also have jurisdiction over the said offences where:</p> <p>(a) only part of the action giving execution to the offence took place in Malta; or</p> <p>(b) the offender is a Maltese national or permanent resident in Malta or the offence was committed for the benefit of a body corporate registered in Malta; or</p> <p>(c) the offence was committed by means of a computer system accessed from Malta notwithstanding that such computer system may be outside Malta; or</p> <p>(d) the offence was committed against a Maltese national or permanent resident in Malta.</p> <p><b>Article 5(1)(d), Criminal Code</b></p> <p><b>(1)</b> Saving any other special provision of this Code or of any other law conferring jurisdiction upon the courts in Malta to try offences, a criminal action may be prosecuted in Malta:</p> <p>(a) against any person who commits an offence in Malta, or on the sea in any place within the territorial jurisdiction of Malta;</p> <p>[...]</p> <p>(d) For the purposes of this paragraph "permanent resident" means a person in favour of whom a permit of residence has been issued in accordance with the provisions contained in article 7 of the of the Immigration Act;</p> <p>[...].</p>

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.

## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

#### 6.1. Please describe the current national legal framework with regard to child victims

##### 6.1.1. General framework of protection (Art. 18)

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

Yes, Malta transposed Council Framework Decision 2001/220/JHA by the introduction of separate provisions in the Criminal Code in 2003.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

Maltese law as yet does not specify any specific moment when intervention in the best interests of the child is mandatory. Furthermore, there is no obligation of mandatory reporting of child abuse or neglect under Maltese law. In practice, once a situation is reported, the Department responsible for social welfare investigates and hears the parties concerned and then advises the Minister responsible for the Family whether to issue a care order or not.



How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

The Maltese Criminal Code uses the term “under age” for the majority of the provisions transposing the above articles of the Directive and it includes someone under the age of 18 years. It makes it an aggravating circumstance if the child is less than 12 years old. It is the duty of the police or the social worker in charge of the case to check the age of the child and verify the official records.

### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art. 19 (1))?

Child victims under a care order have an interim order issued immediately and there is a 21-day period within which to investigate and decide what measures to take to assist the child. If it turns into a full care order, the child is assisted and supported until s/he becomes of age (18 years). No after care is provided under Maltese law. If the child victim is 16 years or over, a care order is currently not issued.

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

The Children and Young Persons (Care Orders) Act provides that a child victim is to be given assistance and support immediately under an interim order. A social worker is assigned to the case to assist the child psychologically. If it is found to be in the best interest of the child, the interim order is turned into a care order and the child is taken under the care and responsibility of the Minister. However, the child has no say in such decisions.

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

No, the Minister responsible for the Family issues an order for a care order, after receiving representations in writing from the Director of the Department of Social Welfare Standards. The Director would have listened to the parents or guardian and to any person deemed to be of

assistance. The law does not mention listening to the child's view with the result that the child's cooperation is not mandatory.

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

Yes, a case conference consisting of different professionals is held to discuss and form a care plan for the individual child victim. If a care order is issued, the case comes before the Children and Young Persons Advisory Board which has to advise the Minister on the best measures to adopt with every child taken into the Minister's care. A case review is held every 6 months.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

Such child victims are considered as vulnerable witnesses under Maltese law especially by the law courts. This results in extra protection such as giving evidence through video-conferencing, using a side entrance to the law courts (not used by the public), limiting the court experience to once if possible i.e. both examination-in-chief and cross-examination taking place on one day and if a child advocate is appointed, to have the sessions and report protected with confidentiality.

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe.

There is no law detailing what assistance and support is to be given to the family of a child victim. There are legal aid services, a social worker may be assigned to help the family, rehab services are available but these services are not structured under one law. Moreover, once a care order is issued and time for appeal elapses, there is no way of applying to have the care order revoked. This was considered by the ECtHR as a violation of article 8 in the case M.D. & Others vs Malta.

Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

There is no express provision in the law which grants the right to receive information to the family of the child victim. There are services such as the Department for Social Welfare

Standards, APPOGG, the police and legal aid which the family can fall upon for such information.

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))?

No, there is no such obligation under Maltese law. A child's advocate can be appointed to report on both the child's wishes and on the best interests of the child. However, such a child advocate can be appointed either by the judge or upon the request of the parents (or upon the recommendation of the mediator in separation proceedings). In practice, only the most serious of cases see the appointment of a child's advocate and this is due to a lack of human resources.

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)?

a) Available for the purpose of claiming compensation?

b) Free of charge where the victim does not have sufficient financial resources?

No, there is no such right under Maltese law as there is no Child's Act in place as yet. Juveniles appearing before the Juvenile Court are not assisted by legal counsel unless they are under a care order, in which case the lawyer engaged by the agency (i.e. APPOGG) assists the child, free of charge. Where they are the victim, either their parents engage private lawyers or else plead to the court to appoint a child's advocate. When a child's advocate is appointed, she meets with the child once (sometimes but rarely more) and then files a report.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3).

Currently Maltese law does not provide for how child victims are to be interviewed, possibly because there is no Children's Act as part of Maltese law. The following questions are going to be answered according to established practice.

Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

Child victims are interviewed by the police prior to the issuance of the charges. When the case is before the court, child victims are interviewed as early as is procedurally possible as part of the criminal inquiry. That interview is recorded and later played to the jury during trial by jury.

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

Unfortunately, no. Although a small room is used at the law courts specifically for video-conferencing, this room is very bare and not child-friendly. The only additions are some toys and puppets used there.

c) Interviews with the child victim are carried out by or through professionals trained for this purpose?

Neither the presiding Magistrate nor children's advocates nor the social workers assigned, are given specific training to address these highly sensitive cases.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

Interviews are held by a Police Inspector of the Police Station where the abuse is reported. Court interviews are conducted by the same Magistrate. There are only three advocates so the one assigned to the case, follows the case in all its stages.

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?

If the child interview is necessary for example in situations where the child victim is the only witness to the abuse, the child is interviewed by means of video-conferencing at the stage of the criminal inquiry. Examination-in-chief and cross-examination are held on the same day so that if possible only one interview takes place. The recording is used if the case goes before trial by jury so that the child is protected from revictimisation.

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?

A parent or legal guardian accompanies the child to court on the day of the interview. However, the child is interviewed alone in the room. The same applies when the child has an appointment with the child's advocate. This allows the professional to question the child and to make sure that the child was not prepared for the interview.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

Although Maltese law provides for video-conference of child witnesses or victims, it is not regulated thoroughly. The same practice has been used since 2002 as all cases used to be assigned to the same Magistrate. If such interview takes place during the criminal inquiry, it is recorded. It is the recording that is played to the jury during a trial by jury. However, there have been cases wherein the children involved were called to witness again, especially if by the time they would have become of age.

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

Article 531 of the Criminal Code is a generic article providing for actions which are "offensive to modesty" to be heard behind closed doors. Practice at the Law Courts is that such cases are always heard by the court behind closed doors, i.e. the parties and their legal counsels, the judge and deputy registrar would be present and the parents if not a party to the action.

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

The proviso to article 646(2) of the Criminal Code provides that child victims under the age of 16 are to give their testimony through video-conference from a small, separate room. The lawyers put their examination questions through a microphone but only the judge near the child can hear them through headphones. The judge puts the questions to the child and the answer

can be heard through the video-conferencing. This is recorded in case of trial by jury. The child is only present in the court room once for the identification of the perpetrator.

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

Yes, cases involving alleged child abuse are heard by the courts behind closed doors. If there are any reports about the cases in the media, names are not allowed to be used in order to protect the identity of the minor. If a child's advocate is appointed, she may request that the report she draws up with the expressions of the child will be delivered to the presiding judge sealed and not even the other parties would know of its contents. Moreover, the child does not use the common entrance to the law courts but a side entrance used only by members of the judiciary.

6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify

Agenzja Appogg provides a national supportline 'to provide, immediate and unbiased help'<sup>2</sup>. An Offender's Register<sup>3</sup> has been created imposing certain obligations on employers. When police interview minors, an adult has to be present<sup>4</sup>. Interviewing 'should preferably be carried out by the same person'<sup>5</sup>. In court, audio-visual means are used<sup>6</sup>. Such testimony can be used as evidence during proceedings. Maltese Courts also prevent the public dissemination of details; e.g. they refer to the victim as 'Omissis'.

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<sup>2</sup> Information attained from the following website <http://www.fsws.gov.mt/en/appogg/Pages/support-line-179.aspx> last accessed on 30 April 2014.

<sup>3</sup> As found in the Protection of Minors (Registration) Act, Chapter 518 of the Laws of Malta.

<sup>4</sup> Such interview has to take place 'in the presence of one of the parents, or their tutor, or in the presence of any other person, not being a member of the Police Force, who is of the same sex as the interviewed person, e.g. the person who has the effective care and custody of the young person, or a social worker'- Chapter 164 of the Laws of Malta, the Police Act, Fourth Schedule, Rule 15.

<sup>5</sup> Draft National Children's Policy, page 49.

<http://education.gov.mt/en/resources/documents/policy%20documents/draft.pdf> last accessed on 30 April 2014.

<sup>6</sup> This means that the child victim is heard in the courtroom without in reality being present. This took place in *Ir-Repubblika ta' Malta v Mario Azzopardi* [Criminal Court, 14 January 2013].

### 6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

Overall, the Maltese legal framework does comply with such articles but a major lacking is that a child advocate may only be appointed if the parents/adults representing the child, request it. Children may themselves lodge a complaint but it is the parents who have legal representation and who are to institute proceedings. An exception to this rule is with regards to teachers and others acting in *loco parentis*. Yet, again, such proceedings may only be instituted by an adult.

If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

A specific NGO should be set up. Legal representation of children is to be ensured. A child-friendly place where interrogation is to take place is to be found<sup>7</sup>. Harsher penalties and actual application thereof is suggested. The Offender's Registry has to be used more frequently without obliging the judiciary to do so since every case requires different punishments<sup>8</sup>. Ultimately, what is needed is 'an increased education and awareness programme'<sup>9</sup>. It may also be opportune to fully implement the Draft National Children's policy.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b></p> <p>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.</p> <p>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</p>	<p><b>Article 531, Criminal Code</b></p> <p>(1) The court shall hold its sittings with open doors. Nevertheless, the court may hold its sittings with closed doors in cases where it is of opinion that the proceedings, if conducted in public, might be offensive to modesty, or might cause scandal; in any such case, the court shall previously make an order to that effect stating the reasons for so doing.</p> <p><b>Article 646, Criminal Code</b></p> <p>(2) The deposition of witnesses, whether against or in favour of the person charged or accused, if taken on oath in the course of the inquiry according to law, shall be admissible as evidence:</p>

<sup>7</sup>This has already been suggested in the Draft National Children's Policy page 49.

<sup>8</sup>Such a suggestion was put forward by the authors of the ELSA for Children (Malta) report, Chapter 2.

<sup>9</sup>*Ibid.*

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.

**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 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

[...]

Provided further that where the witness is a minor under sixteen years of age and an audio and video-recording of the testimony of the minor is produced in evidence the minor shall not be produced to be examined viva voce unless the Court otherwise directs for a reason which arises after the date of the said testimony of the minor and considered by the Court to be in the interest of the administration of justice and the discovery of the truth.

**Other provisions can be found in the Children and Young Persons (Care Orders) Act.**



2001/220/JHA to the family of the child victim.

**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;
- (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.

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.

## TOPIC 7.

### *Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

#### **7.1.1. Obligatory take down measures (Art. 25 (1))**

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

a) Within its territory?

No.

b) Outside its territory?

No.

### 7.1.2. Optional blocking measures (Art. 25 (2))

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)?

No.

If no, what is the current (political) position of your MS with regard to blocking, i.e. the likelihood of introducing blocking measures?

The Cyber Crime Unit and internet service providers based in Malta have jointly introduced a child abuse internet filter which prevents Maltese internet users from accessing websites containing child pornography. A copy of the usual notice a user will receive when accessing such websites can be seen here (<http://www.mpfstopchildabuse.org/>).

7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

As far as we are aware, there are no specific provisions under Maltese law which transpose Article 25 of Directive 2011/93/EU.

7.3. In your view, does the current legal framework comply with Article 25?

No.

If no, what additional measures should be taken in order to comply with Article 25?

We would recommend specific provisions which give the Police the power to promptly remove or to temporarily or permanently block access to a website which contains 'indecent material' which is punishable by the Criminal Code. This power may well be curbed by obtaining a warrant from a Magistrate as it is custom when exercising other powers under the Criminal Code and other limitations which instil proportionality and transparency.

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

Since the entry into force of Law no. 59/2007, of 4 September<sup>1</sup>, Article 176 of the Portuguese Criminal Code (CC) establishes:

1- Whoever:

- a) Uses a minor in a pornographic show or allures him/her for such purpose;
- b) Uses a minor in a pornographic photograph, film, or recording, regardless of their support, or allures him/her for such purpose;
- c) Produces, distributes, imports, exports, discloses, exhibits or assigns, at any title or by any means, the materials provided for in the preceding paragraph;
- d) Acquires or holds materials provided for in subparagraph b) with the intent to distribute, import, export, disclose, exhibit or assign them;

is punished with imprisonment from one to five years.

2 – Whoever commits the acts described in the preceding paragraph, either professionally or with profitable intention/intent, is punished with imprisonment from one to eight years.

3 - Whoever commits the acts described in subparagraphs c) and d) of paragraph 1 using pornographic material depicting a realist representation of a minor is punished with imprisonment for not more than two years.

4 – Whoever acquires or holds the materials provided for in subparagraph b) of paragraph 1 is punished with imprisonment for not more than one year or with fine.

5- The attempt is punishable.

In accordance with Article 176 of the CC, the Portuguese Courts will hold any male or female, as long as that person is over 16 years old<sup>2</sup> criminally responsible for the attempt of or bringing about the result of one of the following five offenses<sup>3</sup>:

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<sup>1</sup> Law no. 59/2007, of 4 September, as amended by Law no. 19/2013, of 21 February, 29th amendment to the Portuguese Criminal Code, approved by Decree-Law no. 400/82, of 23 September [2013] Diário da República I 37/1096.

1. The use of a minor under 18 years old in a pornographic photograph, film, recording or show, regardless of their support, or allures him/her for such purpose;

It should be highlighted that the participation in pornographic shows<sup>4</sup> encompasses several behaviours, from the mere physical presence of a child as a passive audience member among other active actors, to contacts of sexual nature or acts of exhibitionism. However, when children under 14 years of age are involved in the aforementioned sexually relevant acts, the perpetrator commits a crime of “sexual abuse of children”, proscribed and punished in Paragraph 1 or Paragraph 2 of Article 171 of the CC, and not the crime of participation of children in pornographic shows, established in subparagraph a) of paragraph 1 of Article 176 of the CC. On the other hand, if the perpetrator engages in a pornographic conversation and/or takes a child to watch pornographic shows when the minor is under 14 years old, we apply subparagraph b) of paragraph 3 of Article 171 of the CC; now, if a minor is merely physically present in a film, and does not practice in any sexual acts, the person that makes or takes the child to do it is punished under subparagraph a) or subparagraph b) of paragraph 1 of Article 176 of the CC. Further, even if a minor between 14 and 18 years old participates in the show, film or recording, even practicing sexual acts, we apply subparagraph a) or subparagraph b) of paragraph 1 of article 176 of the CC. Unless it is about sexual abuse of dependent minors (minors entrusted to someone for education and assistance), in which you apply Paragraph 1 and Paragraph 2 of Article 172 of the CC. As such, for a more detailed description of the crime of Article 171 of the CC, please consult the section on “online grooming”, and for an explanation of Article 172 of the CC, please examine ELSA and Council of Europe, 'Final Report of the International Legal Research Project ELSA for Children' (2013).<sup>5</sup>

2. The production, distribution, importation, exportation, dissemination, exhibition or transfer, of pornographic material, at any title for any reason and by any means;

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<sup>2</sup> According to Article 19.º of the CC, the age of criminal liability, in other words, the moment from which someone can be held criminally responsible, is 16 years old.

<sup>3</sup> Paulo Pinto de Albuquerque, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, (2nd edn., Universidade Católica Editora 2010) 551, refers only four actions.

<sup>4</sup> In relation to the concept of the pornographic show and pornographic photograph, film or recording, please consult Recital 8 of Directive 2011/93/EU; Jorge de Figueiredo Dias, 'Anotação ao Artigo 171.º do Código Penal', in Jorge de Figueiredo Dias (ed), *Comentário Conimbricense do Código Penal* (Coimbra Editora 2012) vol I, 837-838; Maria João Antunes/Cláudia Santos, 'Anotação ao Artigo 176.º do Código Penal', in Jorge de Figueiredo Dias (ed), *Comentário Conimbricense do Código Penal* (Coimbra Editora 2012) vol I, 881-882.

<sup>5</sup> ELSA and Council of Europe, 'Final Report of the International Legal Research Project ELSA for Children' (2013), 1066-1067, <http://www.coe.int/t/dg3/children/news/ELSA%20FINAL%20REPORT.pdf> accessed 28 April 2014.

3. The acquisition or possession of pornographic materials with intent to distribute, import, export, disseminate, exhibit or transfer it;
4. The production, distribution, 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 representation of a minor.

This last form of child pornography is not produced with minors, but it is based on a realistic or virtual representation of them, for example, through computer animations or cartoons (Paragraph 3 of Article 176 of the CC).<sup>6</sup> Among virtual child pornography the distinction of wholly virtual child pornography where the so-called minors are a pure creation of graphic technology and, partially virtual child pornography where images or bits of images of real minors, “of living flesh”, are added, with the aid of graphic techniques, namely morphing, is made.<sup>7</sup>

In this topic, the North American Supreme Court, in the case of *John D. Aschcroft et al. v. The Free Speech Coalition et al.*, on 16 of April 2002, considered that the criminalisation of virtual child pornography is unconstitutional since it substantially limits the right of freedom of expression.<sup>8</sup> On the contrary, the Canadian Supreme Court, in the case of *R. v. Sharpe*, on 26 of January 2001, ruled that any kind of child pornography, including virtual, will bring about effects that the legal system has legitimacy to address.<sup>9</sup> Effectively, according to the study “Child Pornography and Paedophilia”, Report of U.S. Senate, Subcommittee on Child Pornography, U.S. Senate, Washington, 1986, 25% to 50% consumers of child pornography, real or virtual, commit sexual crimes with children. This conclusion was based on empirical police data which recorded apprehensions of child pornography material of almost every person convicted of sexual crimes against children and, clinical reports.<sup>10</sup>

5. The acquisition or possession of pornographic materials with no intent to distribute, import, export, disseminate, exhibit or transfer it.

It should be highlighted that the acquisition or possession of pornographic materials, with no intent to distribute, import, export, disseminate, exhibit or transfer, does not include the

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<sup>6</sup> Pedro Godinho Vaz Patto, ‘Pornografia infantil virtual’, (2010) 12 RJ 183, 183.

<sup>7</sup> Pedro Soares de Albergaria e Pedro Mendes Lima, ‘O crime de detenção de pseudopornografia infantil – evolução ou involução?’, (2010) 12 RJ 195, 214.

<sup>8</sup> Available at: <http://www.law.cornell.edu/supct/html/00-795.ZC.html> last accessed on 30 of March 2014.

<sup>9</sup> Available at: <http://scc-csc.lexum.com/scc-csc/scc-csc/fr/item/1837/index.do?r=AAAAAQAMUi4gdi4gU2hhcnBlAAAAAAAE> last accessed on 30 of March 2014.

<sup>10</sup> Pedro Godinho Vaz Patto, ‘Pornografia infantil virtual’, (2010) 12 RJ 183, 183.

pornographic materials with realistic or virtual representation of a minor (Paragraph 4 of Article 176).<sup>11</sup>

## 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

No steps have been taken in order to transpose Article 5 (1) and (3) of the Directive.

## 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

Even though no legislative measures have been taken, the existing framework, namely, Article 176 of the CC is, fundamentally, compatible with Article 5 (1) and (3) of Directive 2011/93/EU, since it criminalises the majority of the offenses enumerated in Article 5 (1), (2), (4), (5), (6) of the Directive 2011/93/EU. However, the Portuguese State has yet to take any specific measures in order to transpose Article 5 (1) and (3) complying with Recital 18 of Directive 2011/93/EU. Now, as we know, the omission of the measures demanded by the Directive corresponds to an infringement.

Effectively, in my view, the Portuguese State is not in compliance with its obligations under European Law in relation to Article 5 (1) and (3). Necessarily, Article 5 (1) and (3) and Recital 18 of the Directive 2011/93/EU demand its Member-States to criminalise the act of knowingly obtaining access of child pornography by means of information and communication technology. Recital 18 of the Directive explains:

“To be liable, the person should both intend to enter a site where child pornography is available and know that such images can be found there. Penalties should 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 offence was committed via a service in return for payment.”

In other words, the Directive aims to prohibit the conduct of those who, consciously and knowingly, access websites containing child pornography, even if they limit themselves to watch photos or videos online, that is, without downloading it. So it is not the sort of behaviour which may be punished under acquisition and possession of Paragraph 4 of Article 176 of the CC, since it involves the mere action of consulting or watching of pornographic materials. In Portugal, the act of visualization is not a crime.

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<sup>11</sup> Maria João Antunes/Cláudia Santos, 'Anotação ao Artigo 176.º do Código Penal', in Jorge de Figueiredo Dias (ed), *Comentário Conimbricense do Código Penal* (Coimbra Editora 2012) vol I, 885.



Thus, in regards to control mechanisms, the Portuguese legislation does not require Internet Service Providers (ISPs) to report suspected child pornography to law enforcement or any other mandated agency. There is however a combined project entitled *Internet Segura*<sup>12</sup> (“Safe Internet”), co-founded by the European Commission with the participation and support of the Ministry of Education, the Foundation for National Scientific Computing, Microsoft Portugal, the National Agency for Knowledge Society and the Foundation for the Dissemination of Information Technology.<sup>13</sup>

The objective of *Internet Segura* is to block illegal content on the Internet including (but not restricted to) child abuse and child pornography, and prosecute their disseminators in an effective way in conjunction with Portuguese law enforcement agencies and both national and international Internet Service Providers. It also strives to provide minors with information, guidelines, alerts regarding safe Internet usage, and even a help line and an e-mail address which children are encouraged to reach out to if they feel troubled or confused by anything they come across with on the internet.<sup>14</sup>

If no, what additional measures should, in your view, be taken in order to comply with Art. 5 (1) and (3)?

In order to give compliance to Article 5 (1) and (3) and Recital 18 of the Directive 2011/93/EU, the Portuguese State should amend Article 176 of the CC and add a Paragraph where it criminalises whoever, intentionally, obtains access to a website on the Internet which contains child pornography, with knowledge that such pornographic materials there could be found.

1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

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<sup>12</sup> Available at: <http://www.internetsegura.pt> last accessed on 30 of March 2014.

<sup>13</sup> Consult ELSA and Council of Europe, 'Final Report of the International Legal Research Project ELSA for Children' (2013), 1062, <http://www.coe.int/t/dg3/children/news/ELSA%20FINAL%20REPORT.pdf> accessed 28 April 2014.

<sup>14</sup> See ELSA and Council of Europe, 'Final Report of the International Legal Research Project ELSA for Children' (2013), 1062, <http://www.coe.int/t/dg3/children/news/ELSA%20FINAL%20REPORT.pdf> accessed 28 April 2014.

Regarding the right of every Member-State to include a reservation, which allows every member-State to not criminalise apparent child pornography, it ought to be noted that the Portuguese State did not explicitly laid down this reservation or limitation of conducts to be prohibited.

Thus, it is not unanimous the criminalization, through Paragraph 3 of Article 176 of the CC, which punishes the use of pornographic material with realistic representation of a minor, of the so called apparent child pornography, that is, pornography where the participants are above the age of consent but, because of their physical traits, they appear to be minors. It is the issue where adults perform as minors.<sup>15</sup> Some authors include this form of pornography in the concept of virtual or realistic child pornography, arguing that the determinant factor is the viewers' impression, the perception that they really are watching a minor.<sup>16</sup> So, they conclude that Paragraph 3 of Article 176 of the CC covers both forms of child pornography (virtual and apparent). On the contrary, other authors sustain that, since the pornography involves individuals who are over the age of majority, and, since one of the elements of these crimes is the victim must be a minor<sup>17</sup>, punishing such conduct as child pornography would go against the principle of legality.<sup>18</sup> Therefore, for these last authors, the criminalisation of the using of pornographic material with realistic representation of a minor (Paragraph 3 of Article 176 of the CC) covers exclusively virtual child pornography.<sup>19</sup>

This controversy is relevant due to the terminology used, in Directive 2011/93/EU, which distinguishes pornographic material which visually represents a person who appears to be a child (Subparagraph iii of Paragraph c) of Article 2 and Paragraph 7 of Article 5) and realistic or virtual images of children (Subparagraph iv of Paragraph c) of Article 2 and Paragraph 8 of Article 5).

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<sup>15</sup> Vera Lúcia Raposo, 'Da moralidade à liberdade: o bem jurídico tutelado na criminalidade sexual', in Manuel da Costa Andrade (ed), *Liber Discipulorum para Jorge de Figueiredo Dias* (Coimbra Editora 2003), 953.

<sup>16</sup> E.g., Paulo Pinto de Albuquerque, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, (2nd edn., Universidade Católica Editora 2010) 552; Pedro Soares de Albergaria e Pedro Mendes Lima, 'O crime de detenção de pseudopornografia infantil – evolução ou involução?', (2010) 12 RJ 195, 214-218.

<sup>17</sup> In accordance with Article 122.º of the Portuguese Civil Code (CivC), person below the age of 18 years old.

<sup>18</sup> E.g., Maria João Antunes/ Cláudia Santos, 'Anotação ao artigo 176.º', in Jorge de Figueiredo Dias (ed), *Comentário Conimbricense ao Código Penal* (Coimbra Editora 2012) vol I, 883-885.

<sup>19</sup> E.g., José Mouraz Lopes, *Os crimes contra a liberdade e autodeterminação sexual no Código Penal* (4th edn., Coimbra Editora 2008), 156 ss.; Ana Rita Alfaiate, *A Relevância Penal da Sexualidade dos Menores* (Coimbra Editora 2009), 120 ss.

Provisions from Directive 2011/93 EU	Corresponding provisions from national legislation
<p><b>Article 5</b> <b>Offences concerning child pornography</b></p> <p>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.</p> <p>2. (...)</p> <p>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.</p> <p>4.(...)</p> <p>5.(...)</p> <p>6. (...)</p> <p>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.</p>	<p>All Articles marked with a *, will mean that the corresponding provisions only partially match with the content of the Directive or, at least, there have been problems with its practical implementation.</p> <p><b>Article 176 * of the CC</b></p> <p>1- Whoever:</p> <p>a) Uses a minor in a pornographic show or allures him/her for such purpose;</p> <p>b) Uses a minor in a pornographic photograph, film, or recording, regardless of their support, or allures him/her for such purpose;</p> <p>c) Produces, distributes, imports, exports, discloses, exhibits or assigns, at any title or by any means, the materials provided for in the preceding paragraph;</p> <p>d) Acquires or holds materials provided for in subparagraph b) with the intent to distribute, import, export, disclose, exhibit or assign them; is punished with imprisonment from one to five years.</p> <p>2 – Whoever commits the acts described in the preceding paragraph, either professionally or with profitable intention/intent, is punished with imprisonment from one to eight years.</p> <p>3 - Whoever commits the acts described in subparagraphs c) and d) of paragraph 1 using pornographic material depicting a realist representation of a minor is punished with imprisonment for not more than two years.</p> <p>4 – Whoever acquires or holds the materials provided for in subparagraph b) of paragraph 1 is punished with imprisonment for not more than one year or with fine.</p> <p>5- The attempt is punishable.</p>

## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

The practice known as online grooming is an intentional conduct based on the solicitation of children for sexual purposes, using information and communication technologies for sexual gratification. Grooming of a child may employ different methods capable of undermining the child's sexual self-determination in order to commit some punishable criminal offenses known as sexual abuse and child pornography.

This offense is usually committed by an adult, and it takes place along a certain period of time through online conversations. During that time, the perpetrator tries to build up a trusting relationship with the child with the intention to desensitize him/her to the sexual abuse that the offender intends to commit. Once both parties achieve a comfortable level of confidence, the perpetrator will try to expose the child to pornographic or sexual online materials. In most of times, the child is not aware of the identity of the offender until a final meeting is scheduled between them or, when they both act in front of a webcam.

The Portuguese legal framework does not embody this criminal behaviour as such; neither it refers specifically to this conduct giving it a legal standard. The criminal behaviour is regarded as embodying five stages. The first two stages involve the beginning of the online relationship and its daily character. Both conducts are regarded as preparatory acts which, although not punishable in the Portuguese system according to Article 21 of the CC, may anticipate other punishable conducts or even characterise them.

In fact, stage number three is characterised by the existence of a relationship endowed with online sexual character, which leads to the final meeting (stage number 4) which results in the sexual abuse (the final stage). In this sense, the Portuguese legal order criminalizes the sexual contact made through technological means when it culminates in relevant sexual acts.

The expression “relevant sexual act” is found in a number of articles of the Portuguese criminal code (from Articles 163 to 179), although it does not provide for a definition. However, Portuguese doctrine has recognised that the relevance of a sexual act encompasses both the objectively sexual nature of the act combined with the intention of the agent that may interfere with the freedom or sexual self-determination of the victims<sup>20</sup>.

For example, an initial normal conversation between two parties may assume a sexual content once the offender starts introducing sexual topics, leading to a pornographic conversation<sup>21</sup>. A pornographic conversation includes any kind of pornographic or exchanged sensual words or oral communication between the perpetrator and a child or, between the perpetrator assisted by a third party in the presence of a child<sup>22</sup>. For example, when someone takes a child to watch a sexual act, this conduct may take the form of sexual harassment.

We may conclude that the solicitation of children for a future meeting is not sufficient to classify online grooming as an autonomous crime endowed with an independent criminalisation. Consequently, the agent may only be accused for committing that crime once the solicitation of children achieves its final goals; when the agent practices any of the acts laid down in Article 171 of the CC (Sexual abuse of a child). Grooming may be eventually classified as a preparatory act of the crime of sexual abuse if linked to the later.

With regard to sexual abuse of a child, the perpetrator may be sentenced with imprisonment from one to eight years Article 171(1) of the CC or from three to ten years if there is copulation, oral or anal sexual intercourse as stated in Article 171 (2) of the same code.

The legal provision also punishes the perpetrator who imposes himself on the minor through conversation (oral or written), exhibitions or pornographic materials (Article 171. (3) (c) which are considered to be suitable to sexually arouse the child. It is indifferent if the act is erotic or pornographic since the Portuguese law does not distinguish these concepts as far as criminalization is concerned. This solution is understandable since the victim may not even

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<sup>20</sup> Jorge de Figueiredo Dias, *Comentário Conimbricense do Código Penal* (Coimbra Editora 2012), vol. I, 45; Simas Santos, Leal Rodrigues, *Código Penal Anotado*, (Rei dos Livros), vol. II, 368.

<sup>21</sup> Carla Borjesson, Master's Thesis – *Tecnologias de Informacao e Crimes Sexuais Contra Menores*, (Universidade Católica do Porto, 2012), 46.

<sup>22</sup> Jorge de Figueiredo Dias, *Comentário Conimbricense do Código Penal* (Coimbra Editora 2012), vol. I, 840-841.

understand the content of the exhibited images due to his/her lack of maturity and the primary intention of the perpetrator is sexual gratification<sup>23</sup>.

In addition to that, the Portuguese CC criminalizes one type of grooming that may embody the stages number two and three previously described. In fact, in line with Article 176(1) (b), whoever uses a minor in a pornographic photograph, readings or films or allures him to such purpose is sentenced with imprisonment from one to five years. This sentence may be aggravated if the victim has a familiar relationship with the offender or has a tutorship or curatorship towards the later, or even if the victim is placed in a hierarchical economic or work dependence from which the offender may take advantage of such relation and commit the criminal offence. If that is the case, the sentence is aggravated by one third in their minimum and maximum limits.

Also, the sentence may be aggravated by one half in its minimum and maximum limits if the victim is less than 14 years old.

In addition, the attempt of sexual abuse against minors under the age of consent, *i.e.* of 14 years old or, over that age but under 16 years old, or minors who are under the agent's care for education and assistance between 14 and 18 years old, is always punishable since the prison sentence may exceed the initial limitation of three years (Article 22 and 23 of the CC). However, for the sexual acts of corruption established in Article 171 (3) of the CC, the attempt is not punishable.

## 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

With regard to solicitation of children for sexual purposes, that does not occur in a virtual atmosphere, the answer does not diverge from the one given to question number one, in particular: sexual abuse of children and child pornography.

The relevance of the offender's conduct is placed upon the fact that the child is still exposed to pornographic materials when the culprit resorts to offline instant message attaching questionable files to the child's email. This practice will be still considered to involve pornographic writing,

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<sup>23</sup> Jorge de Figueiredo Dias, *Comentário Conimbricense do Código Penal* (Coimbra Editora 2012), vol. I, 545.

which includes every written/drafted text suitable or adequate to sexually arouse the child<sup>24</sup> being any kind of exposition translated to alphabetic characters<sup>25</sup>.

The conducts previously described are punishable regardless if they take place in a non-virtual atmosphere, as long as they fulfil the legal requirements demanded by the criminal provisions. For example, considering pornographic material which is usually sent to the child during the online conversation, such material may be as well attached to any email while the receptor is not found “online”. Article 176 of the Portuguese CC, criminal liability may be imposed on the potential perpetrator, being at least 16 years old, who attempts or succeeds in producing, distributing, broadcasting and transferring pornographic material for any reason and by any means<sup>26</sup>.

### 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

No steps have been taken thus far to transpose Article 6 of Directive 2011/93/EU.

### 2.4. In your view, does this legal framework comply with Art. 6?

The Portuguese legal order recognises a type of grooming laid down in Article 176(1) (b), which refers to the act of incitement or alluring of a minor in order to use him in pornographic photographs, films or readings or allures him to such purpose. However, the Portuguese legal order does not refer specifically to grooming giving to the crime a legal standard. Instead, the crime needs an interpretation of other relevant and connected crimes which encompass the offense.

Consequently, the Portuguese legal order does not comply with the Directive in the sense that it does not specifically criminalise this offensive conduct. On the contrary, we may understand the fact that we are being confronted with the solicitation of children for sexual purposes according to the circumstances that lead to a specific crime.

In addition to that, the Directive starts referring to the punishment of the “intentional conduct” of grooming. The Portuguese CC and its legislator resist to criminalize the offender for the

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<sup>24</sup> Paulo Pinto de Albuquerque, *Comentário do Código Penal a luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, (2nd. Edition , Universidade Católica Editora, 2010) 538.

<sup>25</sup> Jorge de Figueiredo Dias, *Comentário Conimbricense do Código Penal* (Coimbra Editora 2012), vol. I, 45, 840-841.

<sup>26</sup> Paulo Pinto de Albuquerque, *Comentário do Código Penal a luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, (2nd. Edition , Universidade Católica Editora, 2010) 551.



attempt according to Article 21 of the CC. Such preparatory conduct or attempt may be criminalized in the context of the execution of the crime.

Undoubtedly, this conclusion poses some perplexities claiming for an answer. We may imagine that the offender may start to express his/her desire to have sexual intercourse with the minor in earlier conversations so that he can prepare himself/herself to go forward and propose the final meeting that will materialize the crime. To what extent is not the mere setting of the meeting the execution acts according to article 22 (c) of the CC?

The national legislator is also not clear about whether the setting of a meeting between the agent and the child is considered to be an execution as stated in Article 22. (c) of the criminal code. In order to reach a proper answer, the legislator needs to weigh a number of factors such as the predictability of a real meeting; common experience (behavioural patterns of the perpetrator of such kind); the content of earlier online conversations and the time period between the later and the final meeting<sup>27</sup>. However, it is important to take into consideration that unless a final meeting is arranged between the potential perpetrator and the child, it is doubtful that such earlier online conversations constitute an attempt to commit a crime, according to current legislation. In any case, there is always the possibility of punishing the perpetrator if the crimes laid down in Articles 171(3) and 176(a) of the CC are committed. Still, if the child meets the offender and the later abuses the minor using the acts prescribed in paragraph 3 (a) or (b) of the above mentioned Article 171, as a means to cause the sexual abuse, the Portuguese courts will consider that the arrangement of the previous meeting is part of the execution of the crime of sexual abuse and the agent will be convicted according to the penance specified in no 1 and 2 of the same article, already referred as well<sup>28</sup>. However, if the conditions laid down in these numbers are not fulfilled, a punishment of the conduct as an attempt may as take place. If any attempt takes place, the culprit may be punished by the autonomous crime laid down in Article 171 (3).

#### If no, what additional measures should be taken in order to comply with Art. 6?

The national legal framework should introduce the criminalisation of the online and offline grooming as an autonomous criminal conduct. Also, it may be important to clarify whether online conversations are legally relevant for criminal purposes because the law does not prohibit

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<sup>27</sup> ELSA For Children Final Report, Legal Research Project – Council of Europe, found at <http://www.coe.int/t/dg3/children/news/ELSA%20FINAL%20REPORT.pdf>, 1032 accessed on 20 April 2014.

<sup>28</sup> Jorge de Figueiredo Dias, *Comentário Conimbricense do Código Penal* (Coimbra Editora 2012), vol. I, 45, 843.



innocent interactions. The legislator should introduce a norm to clarify whether the whole process of “grooming” is criminally relevant to punish whoever engages in such practice or if an eventual perpetrator will be only condemned if he/she practices any acts capable of falling under the crimes stated in the criminal code. In case of the latter, the legislator needs to define at what moment the agent may be accused of committing such crimes.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b> <b>Solicitation of children for sexual purposes</b></p> <p>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.</p>	<p><b>*</b></p> <p><b>Article 171</b></p> <p>(1) Whoever engages into a relevant sexual act with or on a minor under 14 years of age, or leads him/her to engage into such act with another person, is punished with imprisonment from one to eight years.</p> <p>(2) If the sexual act consists of copulation, anal coitus, oral coitus or vaginal or anal introduction with parts of the body or objects, the perpetrator is punished with imprisonment from 3 to 10 years.</p> <p>(3) (b) Whoever: acts over a minor under 14 years of age, by means of a pornographic conversation, writing, show or object; is punished with imprisonment for not more than three years.</p> <p><b>Article 176</b></p> <p>(1) (b) Whoever: uses a minor in a pornographic photograph, film or recording, regardless of their support, or allures him for such purpose is punished with imprisonment from one to five years</p>
<p>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.</p>	<p><b>*</b></p> <p><b>Article 176</b></p> <p>(1)(a)(b)(d) Whoever: uses a minor in a pornographic performance or allures him for such purpose; uses a minor in a pornographic photograph, film or recording, regardless of their support, or allures him for such purpose; acquires or holds materials provided for in subparagraph b) with the intent to distribute, import, export, disclose, exhibit or assign them;</p> <p>(4) Whoever acquires or holds the materials</p>

	<p>provided for in subparagraph b) of paragraph 1 is punished with imprisonment for not more than one year or with fine.</p> <p><b>Article 176</b> (5): The attempt is punishable.</p>
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### TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1)). Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

If yes, does it cover:

**3.1.1. Professional activities involving direct and regular contact with children?**

**3.1.2. Organised voluntary activities involving direct and regular contact with children?**

Portugal, as aforementioned, has not yet transposed Directive 2011/93/EU, however we are able to find, among the national legal framework, provisions that relate with the measures envisaged in Article 10.

Article 179 of the CC provides, considering the gravity of the act and its connection with the function exercised by the offender, for the possibility of suspending his or her parental rights and responsibilities, guardianship or curatorship, as well as prohibiting the exercise of a profession, function or activity that implies having minors under the offender's responsibility, education, treatment or vigilance. This provision is only applicable to perpetrators convicted of at least one of the offences listed in Articles 163 to 176, enshrined in Chapter V (Crimes against sexual freedom and self-determination), Title I (Crimes Against Persons), Book II (Special part)

of the CC, which constitute the body of crimes against sexual freedom and sexual self-determination and include the offences referred in Articles 3 to 7 of the Directive.

Article 179 however settles a temporal limitation to the application of this child protection measure, providing that the suspension or prohibition of parental rights and of the exercise of functions may only be declared for a period between two to fifteen years. The scope of Article 179 is, thus, stricter when compared to Article 10 (1) of the Directive which refers the possibility of temporarily or permanently preventing such exercise.

When Article 179 of the CC refers to “professions, functions or activities which imply having minors under the offender’s responsibility, education, treatment or vigilance,” it is understood that it includes professional or organised voluntary activities. It would nonetheless be clearer if the law explicitly specified that. The specific legal framework adopted by Law no. 113/2009, of 17 September<sup>29</sup>, that establishes preventive measures for the protection of minors, poses the same doubt. As the law refers to the “recruitment for professions, employments, positions or activities, public or private, even if unpaid, whose exercise involves regular contact with minors”, in the cases where there is a labour contract or similar the employer is obliged to request the candidate’s criminal record. But it does not provide a solution for the cases in which the convicted person organizes himself or herself a professional or voluntary activity with children.

However, Portuguese courts do not often apply the protection measure of Article 179 of the CC due to a belief that parents can recover and children can forgive. Thus, in cases of criminal conviction of parents, the possibility of turning this measure mandatory to judges could be considered<sup>30</sup>.

In paragraphs 3 and 4 of Article 4 Law no. 113/2009, Portuguese law provides that the convicted person can request the court not to transcribe the conviction to the criminal record, as long as it is proved by psychiatric expertise that the convicted person does not represent a danger to the safety or well-being of children. This solution can create opportunities for the convicted person to escape the preventive measure and endanger children, so the possibility of eliminating or restricting it should be considered.

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<sup>29</sup> Law no. 113/2009, of 17 September, establishes protection measures for minors, as to fulfill Article 5 of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, and proceeds to the second amendment to Law no. 57/98, of 18 August [2009] *Diário da República* I 181/6620.

<sup>30</sup> Maria Clara Sottomayor, ‘O poder paternal como cuidado parental e os direitos da criança’, in *Cuidar da Justiça de Crianças e Jovens* (Almedina 2003).

The criminal records are erased 23 years after the extinction of the penalty or the safety measure, as long as no other conviction occurs meanwhile (paragraph 1 of Article 4 of Law no. 113/2009). This solution can also limit the aims pursued by the Directive, hence an extension of this period should also be taken into consideration.

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

In Portugal, a general legal framework regarding criminal identification is provided in Law no. 57/98, of 18 August<sup>31</sup> (Criminal Identification Law (CIL)). According to its Article 6, the person concerned has full access to his or her own criminal record. In Article 7 of the same law, an exhaustive list of entities are authorised to access that information, although it can only be used for criminal investigation or other enumerated specific purposes. According to subparagraph a) of this provision, introduced by Law no. 113/2009, judges and public prosecutors can access the criminal records of the offenders in order to pursue criminal investigation, to enforce penalties and to decide over a child adoption, guardianship, curatorship, foster care or custody. As employers are not short-listed as an entity with access to criminal record and identification, the request for that information in compliance with Article 10 (2) of the Directive only occurs via the person concerned.

**3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

- a) Professional activities involving direct and regular contact with children?
- b) Organised voluntary activities involving direct and regular contact with children?

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<sup>31</sup> Law no. 57/98, of 18 August as rectified by Rectification no. 16/98, of 30 September, and amended by Decree-Law no. 323/2001, of 17 December, Law no. 113/2009 of 17 September, Law no. 114/2009, of 22 September and Law no. 115/2009 of 12 October, establishes the general principles that apply to the organisation and functioning of criminal identification [1998] *Diário da República* I-A 189/4043.

Law no. 113/2009, that establishes protection measures for minors, develops in Article 2 a specific legal framework with regard to activities involving regular contact with minors. It provides for an obligation for employers to request the criminal record to the individual applying for a profession, employment, position or activity, either public or private and even if unpaid, whose exercise involves regular contact with minors, and take the information therein contained into consideration when recruiting. Therefore, both professional and organised voluntary activities should be explicitly included in this provision as the law is not clear enough. If the employer fails to demand the criminal record it will incur in an infringement punishable with a fine. Under all circumstances the employer shall guarantee the confidentiality of the information acknowledged.

As provided by Article 2 (3) of Law no. 113/2009 and Article 11 of the CIL, the content of the criminal record when requested by individuals shall also include judgments and decisions from foreign courts and namely covers:

- Convictions for offences committed under Chapter V of Title I of Book II of the CC (crimes against sexual freedom and self-determination), which includes the crimes equivalent to those referred in Articles 3 to 7 of Directive 2011/93/EU;
- Convictions for offences committed under Article 152 (domestic violence) and 152-A (maltreatment);
- Decisions imposing accessory penalties as determined by Article 152 (domestic violence) or Article 179 (inhibition of parental rights and responsibilities, guardianship or curatorship and prohibition do exercise functions that imply regular contact with children) or security measures prohibiting a certain activity; or
- Decisions that arise from, complement or enforce the above mentioned and do not have the effect of cancelling the criminal record.

### 3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

Portugal has not yet transposed Directive 2011/93/EU or Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States.

The current legal framework is based on the European Convention on Mutual Assistance in Criminal Matters from the Council of Europe<sup>32</sup> (1959) and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union<sup>33</sup> (2000), both approved and ratified.

The relevant provision in the Portuguese legislation is Article 7 (h) of the CIL, relating to the access to criminal record by third parties, which determines that official entities from other Member States of the European Union or other countries may have access to the information contained in criminal records as established by international convention or agreement, provided that the principle of reciprocity is respected. In addition, Article 10 (2) of the same law establishes that the criminal records required by third parties shall include judgements and convictions issued by foreign courts.

### 3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

As previously explained, Portugal has not taken any steps in order to implement Article 10 of Directive 2011/93/EU. The existing national legislation derives from the implementation of other relevant international instruments.

The disqualification provision regarding activities which involve regular contact with minors, under Article 179 (b) of the CC, was introduced in the 2007 reform of the Criminal Code. It was justified by the need to bring the national legislation in line with rising European and international obligations such as the Council Framework Decision 2004/68/JHA of the 22<sup>th</sup> of December 2003, on combating the sexual exploitation of children and child pornography<sup>34</sup>.

Mandatory screening for employers recruiting for a position that involves regular contact with minors was introduced by Law no. 113/2009 in order to fulfil the obligation arising from Article

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<sup>32</sup> Approved by Parliament Resolution no. 39/94, of 14 July [1994] *Diário da República* I-A 161/3786; and ratified by Presidential Decree no. 56/94, of 14 July [1994] *Diário da República* I-A 161/3786.

<sup>33</sup> Approved by Parliament Resolution no. 63/2001, of 16 October [2001] *Diário da República* I-A 240/6532; and ratified by Presidential Decree no. 53/2011, of 16 October [2001] *Diário da República* I-A 240/6532.

<sup>34</sup> Maria João Antunes, 'Crimes contra a liberdade e a autodeterminação sexual de menores' (2008) 8 RCEJ 205, 205; Maria do Carmo Silva Dias, 'Repercussões da Lei n.º 59/2007, de 4/9 nos «crimes contra a liberdade sexual»' (2008) 8 RCEJ 213, 213.

5 of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse.

As for the transmission of information on criminal records, no special national provisions were found besides a reference regarding the access to information according to international conventions in which Portugal is a contracting party, provided in Article 7 (h) of the CIL, namely the European Convention on Mutual Assistance in Criminal Matters from the Council of Europe and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.

### 3.5. In your view, does the current legal framework comply with Art. 10?

In my perspective Portugal's current legal framework does not fully comply with Article 10.

Portugal provides for protection measures for minors concerning disqualification, in accordance with Article 10 (1), including non-professional activities and suspension of parental rights and responsibilities, guardianship or curatorship. Nonetheless, it establishes a maximum limit of fifteen years for the disqualification or suspension, a temporal restriction that does not comply with the protection measures under Article 10 (1), where it is established that it can go as far as permanently preventing the offender from such exercise.

On the other hand, the national legal framework does comply with the conditions for screening criminal convictions as provided for by Article 10 (2).

An important gap in the Portuguese legal system is the absence of measures to ensure the transmission of information concerning the existence of criminal convictions as required by Article 10 (3). It lacks special provisions stating the obligation to transmit information of other country's nationals and to store all information of the country's own nationals. When access is requested by a foreign individual, there is no explicit obligation to request information on his or her criminal record to the country of nationality. The abstractness of these provisions may endanger the application of the preventive measures set forth in paragraphs 1 and 2 of Article 10 due to a loss of information regarding convictions for sexual-related offences against minors especially issued by foreign courts.

If no, what additional measures should be taken in order to comply with Art. 10?

In order to comply with Article 10, Portugal should take into consideration the following measures:

- Transpose Directive 2011/93/EU.
- Ensure that a person who has been convicted of any of the offences referred to in Articles 3 to 7 may also be permanently prevented from exercising at least professional activities involving regular contact with minors.
- Regarding the prohibition of exercising professions, functions or activities in Article 179 of the CC, explicitly include “professional or organised voluntary activities” and refer to “direct and regular contact with children”, opposed to the current wording that only considers having minors under the offender’s responsibility, education, treatment or vigilance.
- Consider the extension of the time period of 23 years for the cancellation of the criminal record, as provided by subparagraph 1 of Article 4 of Law no. 113/2009.
- Consider the elimination or restriction of the possibility to request the court not to transcribe the convictions for crimes against sexual freedom and self-determination, according to subparagraphs 3 and 4 of Article 4 of Law no. 113/2009.
- Transpose Council Framework Decision 2009/315/JHA.
- Establish a clear normative orientation for the transmission of information on convictions and disqualifications among Member States. The given framework should include, besides the obligation to transmit information on convictions of nationals from other Member States, the obligation to store all information on Portuguese nationals. Equally pressing, a criminal record requested by an individual should include all relevant information on convictions, encompassing those held by his or her country of nationality to which Portugal should necessarily request access.



Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b> <b>Disqualification arising from convictions</b></p> <p>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.</p> <p>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.</p> <p>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 [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.</p>	<p><b>*</b></p> <p><b>Article 179 of the CC</b> <b>Suspension of parental rights and responsibilities and prohibition to exercise functions</b></p> <p>Whoever is convicted of an offence established in Articles 163 to 176, considering the gravity of the act and its connection with the function exercised by the offender, may be:</p> <p>Inhibited from the exercise of parental rights and responsibilities, guardianship or curatorship; or Prohibited to exercise a profession, function or activity that implies having minors under the offender's responsibility, education, treatment or vigilance; for a period between two to fifteen years</p> <p><b>Law no. 113/2009, of 17 September</b> <b>Article 2</b> <b>Assessment of qualification in access to functions involving regular contact with minors</b></p> <p>1 - When recruiting for professions, employments, functions or activities, either public or private, even if unpaid, whose exercise implies regular contact with minors, the employer is obliged to request to the candidate his or her criminal record and to consider the information therein included to assess the candidate's qualification to exercise the position.</p> <p>2 – When requesting the criminal record, the applicant is obliged to specify its purpose, by mentioning the profession, employment, function or activity to be exercised and also indicating that its exercise involves regular contact with minors.</p> <p>3 – The criminal record requested by individuals for the purpose referred in paragraph 1 shall include a reference stating the intent to exercise functions involving regular contact with minors and shall contain, besides the information listed in Article 11 of Law no. 57/98:</p> <p>a) convictions for offences listed in Articles 152, 152-A or in Chapter V of Title I of Book II of the Criminal Code;</p> <p>b) decisions imposing accessory penalties as provided for in Articles 152 and 179 of the Criminal Code or security measures prohibiting to exercise</p>

	<p>the activity;</p> <p>c) decisions arising from, complementing or enforcing the ones indicated in the subparagraphs below and do not determine the cancellation of the criminal record.</p> <p>4 – (...)</p> <p>5 – The criminal record required by individuals for the purpose referred to in paragraph 1 shall also include the judgements issued by foreign courts equivalent to those set forth in the subparagraphs of paragraph 3.</p> <p>(...)</p> <p>11 – Under all circumstances the employer shall guarantee the confidentiality of the information acknowledged by acceding to the criminal record.</p> <p><b>Law no. 57/98, of 18 August</b></p> <p><b>Article 6</b>  <b>Access to information by the individual</b>  The concerned individual or whoever proves to do the request on his/her behalf has the right to acknowledge the information contained in his criminal record, as well as to demand its amendment or update or the elimination of unduly registered data.</p> <p><b>Article 7</b>  <b>Access to information by third parties</b>  May also access the information on criminal identification:</p> <p>(...)</p> <p>h) Official entities of Member States of the European Union, under the same conditions of the corresponding national entities, after authorisation from the Minister for Justice and for the purposes of Article 27 (3) of Directive 2004/38/EC of the European Parliament and of the Council, of 29 April 2004, as well as entities from another State as established by international convention or agreement, provided that reciprocal treatment is given to national entities.</p> <p>(...)</p> <p><b>Article 10</b>  <b>Required criminal records</b></p> <p>1 – (...)</p> <p>2 – The requested criminal records under Article 7</p>
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	<p>contain the judgements made by foreign courts, to which Article 15 is applicable.</p> <p><b>Article 11</b>  <b>Criminal records required for purposes of employment or exercise of activity</b></p> <p>1 – The criminal records required by individuals for the purposes of employment, either public or private, or for the exercise of any profession or activity depending on a public security or an authorisation or homologation from a public authority shall include:</p> <p>a) decisions ruling the dismissal from a public service or prohibiting the exercise of the public service, profession or activity;</p> <p>b) decisions arising from, complementing or enforcing or execution of the subparagraphs previously indicated and do not have the effect of cancellation of the criminal record.</p> <p>(...)</p>
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## TOPIC 4.

### *Victim identification*

(Article 15 (4))

4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

With regard to this type of criminality, there is a set of circumstances that interfere with victim identification and with the criminal investigation, especially if the Internet is used as a means to commit the crimes described in Directive 2011/93/EU.

First of all, the internet allows the access to large quantities of child pornographic material from around the world, making it instantly available at any time and everywhere, even without the need to download the material. Secondly, child pornography material can be easily obtained and traded via the Internet. In addition, these cases may involve multiple law enforcement jurisdictions when child pornography is traded via the Internet. An offender may easily possess child pornography material created from anywhere around the world.

These are mere examples of the difficulties that the Internet brings to a criminal investigation and, therefore, to the victim identification. However, even if it presents itself as a challenge and it seems impossible, it is a task of unparalleled importance.

In Portugal, the investigation of any crime takes place during a specific procedural phase designated “*inquérito*” (inquiry). During this phase, the Public Prosecutor’s Office, assisted by the criminal police department will “investigate the existence of a crime, determine its perpetrators and their responsibility, as well as discovering and gathering evidences” (see Article 262, paragraph 1, of the Portuguese Criminal Procedure Code [CPC]).

In our legal system the crimes against sexual freedom and sexual self-determination against minors have a public nature<sup>35</sup>. Therefore, as soon as there is a notice that a crime has been committed (*notitia criminis*), the Public Prosecution must open an inquiry and start an official criminal investigation<sup>36/37</sup>.

The criminal police department competent to investigate crimes of this nature is “*Polícia Judiciária*” (Judiciary Police, see Article 7, paragraph 3, subparagraph a of the Law no 49/2008, August 27<sup>th38</sup>); nevertheless, in some special cases the “*Procuradoria Geral da República*” (Republic’s General Prosecutor) may assign the investigation to another criminal police (see Article 8, paragraph 1 of the above mentioned law).

Even though the crimes we are analysing fall within the competence of investigation of the Judiciary Police, there is no specialized unit. Thus, the investigation of these crimes will be

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<sup>35</sup> The beginning of the criminal procedure may depend on some legal requirements according to the nature of the crime in question. When the crime is of public nature, such as most of the crimes here in discussion, the criminal procedure begins as soon as there is notice of the crime; When the crimes of semipublic nature the victim must make a complaint and if this complaint, otherwise, the Public Prosecution does not have the legitimacy to promote the process and begin the criminal investigation; when the crime is of private nature, such as defamation (see Article 180, of the CC) the victim must fill in a complaint and become part in the criminal procedure as an “*Assistente*” (see Articles 49 and 50 of the CPC).

<sup>36</sup> However, there is an exception to the public nature for crimes with protect this legal interest, Article 178, paragraph 2 of the CC establishes that when the crime is “sexual abuse of teenagers” (ages between 14 and 16 years old) the victim needs to fill in a complaint so that the criminal proceedings may initiate (thus this crime has a semipublic nature).

<sup>37</sup> The public nature of such crimes also implies another consequence. The public servants, who become aware of such crimes, are obliged by law to report the crime (see Article 242 CPC and Article 386 of the CC). This obligation is of extreme importance certain individuals, who are in a privileged position due to their jobs and close relation with the children such as teachers and/or doctors, , may easily become aware of abuse or neglect.

<sup>38</sup> Law no 49/2008, of 27 August 27 as amended by Law no 34/2013, of 16 May, on the Organisation of Criminal Investigation [2008], Diário da República I - A 165/6038.

conducted by the department of sexual crimes (or even of cybercrimes) of the unit geographically competent.

During the inquiry the Judiciary Police may perform searches (see Article 174 to 177 of the CPC as well as Articles 15 to 17 of the Law no 109/2009 – Cybercrime Law<sup>39</sup>) and seize objects used to commit a crime, as well as those that are the result of a crime (see article 178, of the CPC)<sup>40</sup>.

Due to the nature of the crimes in question, it is important for the criminal investigation to seize all objects (digital or otherwise, but specially digital storage devices such as computer hard drives, flash drives, PDAs, mobile phones, DVDs, CDs and tape media) which may contain pornographic material and submit them to a forensic analysis in order to substantiate the indictment and establish the personality of the offender, but especially for possible victim's identification.

In addition, the material of child pornography seized during a criminal investigation is also recorder into a DVD/CD and sent to Interpol which, after analysis, introduces them into a database<sup>41</sup> making it available to all the law enforcements worldwide and, thus, facilitating victim identification.

Unfortunately, regarding victim identification in Portugal there is not much more being done.

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

Presently, as regards to Portugal, no national implementation of Directive 2011/93/EU has been taken so far. The measures outlined above were already in the Portuguese legal framework and are not, by far, sufficient to the implementation of Article 15, paragraph 4.

Due to the nature and means used in the crimes in question it has become essential to implement specific measures to identify victims.

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<sup>39</sup> Law no 109/2009, of 15 September, Cybercrime Law [2009], I – A 179/6319.

<sup>40</sup>“Judiciary Police” may also perform telephone tapping (see Article 187 to 190, of the above mentioned law), surveillance, interception of correspondence or emails (see Article 179, of the above mentioned law), and DNA exams and forensic exams (see Article 151 to 163, of the above mentioned law), if it is important for the investigation and for the discovery of the truth.

<sup>41</sup> The International Child Sexual Exploitation image database (ICSE DB) is available through INTERPOL's secure global police communications system and uses sophisticated image comparison software to make connections between victims, abusers and places.

We cannot only try to apprehend the offender, but we also need to have in mind that the main interest of this Directive is the superior interest of the child and the children's welfare. Creating measures that would allow the identification of victims should be a major point of debate and should not be forgotten when the transposition of the Directive occurs.

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)?

Unfortunately, we cannot say that the current legal framework completely complies with Article 15, paragraph 4.

In Portugal, the identification of victims of child pornography only exists during an on-going criminal investigation. In those cases, Portugal has a criminal department competent and with the means and technology to identify victims. However, the process of victim's identification finishes here. There are no other legal measures to identify victims of such crimes.

#### If no, what additional measures should be taken in order to comply with Art. 15 (4)?

As previously explained the identification of victims is mostly done during the "inquiry". However, taking into account the best interests of the child, further steps should be taken as well. Hence, Portugal should take a more active role in identifying victims of crimes discussed here and identifying and blocking child pornography sites.

In addition to that, Portugal should create a special criminal department, with professionals with specific training, at a national level, to investigate this type of emerging criminality.

It is also vital to create a national database. Portugal should not rely only on the Interpol's database. Creating a database at national level could not only speed up the process of the victims' identification, but also it would allow a more efficient criminal investigation.

The use of covert operations to identify victims should be performed in this type of criminality. According to Article 2, paragraph b of Law no. 101/2001<sup>42</sup>, "undercover operations are admissible in the prevention and prosecution of crimes against sexual freedom and self-determination (...) where the offended are under 16 years old"<sup>43</sup>. Taking this into consideration,

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<sup>42</sup> Law no 101/2001, of 25 August, as amended by Law no 60/2013, of 23 August, on the legal framework for covert operations [2001] I – A 197/5452.

<sup>43</sup> The use of covert operations in this type of criminality is reinforced by Article 19 of the Law no 109/2009 Cybercrime Law, which states that the use of undercover agents are admissible during the "inquiry" for crimes

the use of undercover agents, *e. g.*, in *chatrooms*<sup>44</sup> and other websites could not only help to identify victims of crimes, but also offenders and block websites that potentially pose a danger to minors.

However, the use of such operations may constitute a danger to the criminal investigation and possible criminal prosecution. Under the Portuguese criminal procedure law, the evidence obtained through the use of deceptive means and/or entrapment is inadmissible in court (see Article 126, paragraph 2, subparagraph a) of CPC).

In our legal system we have two very similar figures, the “*agente encoberto*”, which is an undercover agent who does not participate in the crime itself, he is a mere informant; and the “*agente provocador*” (“*agent provocateur*”), which is an undercover agent who, with his/her actions, influences other agent to commit an offence. The first is a legitimate figure (under specific legal requirements see Article 2, and Article 3, paragraphs 3 and 4 of Law no 101/2001) and the evidence obtained by his/her action is admissible in court. However, the evidence collected by the latter is inadmissible in court.

In 1998, the Constitutional Court argued that:

“What really matters to ensure that legitimacy - the intervention of the undercover agent - is that the official criminal investigator does not induce or instigate the subject to commit a crime that, otherwise, he would not or that he would not be willing to do; on the contrary, he would just gain his trust so that he could better observe him and get information about the criminal activities that he (the alleged offender) is suspected of. And also, that the intervention of the undercover agent is previously authorized or subsequently ratified by the competent judicial authority”<sup>45</sup>.

The Supreme Court of Justice<sup>46</sup> also deliberated in this matter. In 2002, the court argued that:

“The distinction stays (between these two figures) between provoking a criminal intent which did not exist yet, from those situations in which the subject has already decided to commit and the actions of the undercover agent who only accompanies or, ultimately, sets in motion a previous decision. While the undercover agent works in an environment where the crimes have already been committed, are running or are about to occur, the agent provocateur incites, instigates others to commit the crime, thus it becomes a secondary perpetrator. It may be difficult sometimes to

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against sexual freedom and sexual self-determination of minors committed through the use of a computer information system (see Article 19, paragraph 1, subparagraph b of the Law mentioned above).

<sup>44</sup> See “*Webcam Child Sex Tourism – Becoming Sweetie: A novel approach to stopping the global rise of Webcam Child Sex Tourism*” – a Report made by an ONG – *Terre des Hommes*.

<sup>45</sup> Decision no 578/98, *Judgment of 1998*, Tribunal Constitucional (Constitutional Court).

<sup>46</sup> Process no 02P4510, Decision no 4510/2002, *Judgment of 20 February 2002*, Supremo Tribunal de Justiça (Supreme Court of Justice),

<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/e4c9177530b2c36380256d08004e5d11?OpenDocument> Accessed on 20 April 2014.



distinguish the action of an agent provocateur from the action of an undercover agent, however it is important to remember that while the agent provocateur created or reinforced the criminal resolution, the action of the undercover agent did not create the offence, and just limited to introduce himself in the organization with the aim of discovering and punishing this criminal, not acting thus to give life to the crime, but with an intention of discovery, of revelation.”

It is undoubtable that the actions of an agent provocateur are illegal, thus the evidence obtained by his/her actions are inadmissible<sup>47</sup>. However, as aforementioned, the evidence obtained by an undercover agent can be used in a court of law, so this type of operation should be used more often due to the nature of this criminality.

In my opinion, the use of undercover agents in *chatrooms* or websites, in a similar action to the sting operation used by *Terre des Hommes*<sup>48</sup>, should be considered for this type of crimes.

In my view, if the undercover agent is, for example, in a *chatroom* under an alias which suggests that they are underage, and if it is the “*alleged offenders*” who began contact with them firstly and the content of the *Chat* constituted a criminal offense, the use of this conversation as evidence and the action of this undercover agent should not be considered as an action of an agent provocateur but as one of an undercover agent. The intent and the criminal resolution already existed even if the undercover agent was not in the *Chatroom*.

In general, in Portugal, steps to identify victims are only taken once a criminal investigation is initiated, through the identification of offenders and subsequently analysis of the evidence obtained. However, in my opinion, Portugal should have a more active role in identifying the offenders and should not only rely on the notice of a crime to begin a criminal investigation for this particular aim.

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<sup>47</sup> Portugal was convicted, in 1998, by the European Court of Human Rights in the case «Teixeira de Castro v. Portugal» (Case no 44/1997/828/1034) due to the use of “*agent provocateurs*”. In the final decision, the Court stated that: “*the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug-trafficking. While the rise in organised crime undoubtedly requires that appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place that it cannot be sacrificed for the sake of expedience. (...)The public interest cannot justify the use of evidence obtained as a result of police incitement*”. Case no 44/1997/828/1034, Judgment of June 9<sup>th</sup> of 1998, of European Court of Human Rights.

<sup>48</sup> See “*Webcam Child Sex Tourism – Becoming Sweetie: A novel approach to stopping the global rise of Webcam Child Sex Tourism*” – a Report made by an ONG – *Terre des Hommes*.



Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 15</b> <b>Investigation and prosecution</b></p> <p>1.(...)</p> <p>2.(...)</p> <p>3(...)</p> <p>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.</p>	<p>Article 15 (4) and (7)*</p> <p><b>Article 262. Purpose and scope of the inquiry</b></p> <p>1 - The inquiry comprises a set of legal steps aiming at the investigation into the commission of a criminal offence, at identifying its perpetrator(s) and detecting his/their responsibility and at finding and collecting evidence for the purpose of deciding whether or not to prosecute.</p> <p>2 - Without prejudice to the exceptions covered by this Code, the denunciation on a criminal offence always leads to an inquiry.</p> <p><b>Law no. 109/2009 (Cybercrime Law)</b></p> <p><b>Article 19</b></p> <p>1 - The use of covert operations, foreseen in Law no 101/2001, of 25 August, as provided in the terms therein, in the course of the inquiry of the following crimes:</p> <p>(...)</p> <p>b) Those committed by means of a computer system, punishable with a maximum sentence of imprisonment of more than five years or, even if the sentence is inferior, and being intentional, the crimes against sexual freedom and sexual self-determination against minors or incapable (...)</p>

## TOPIC 5.

### *(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

**5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

In matters relating to criminal jurisdiction, the Portuguese system follows the principle of territoriality, where, according to which, the State may only apply its criminal law to all legally relevant facts which have occurred in their territory, regardless of who committed or against whom the offense was committed. This is justified because in the territory of the State where the crime was committed there is a need for social appeasement, to reaffirm the criminal system and to deter potential offenders. Furthermore, it is in the territory where the crime was committed that the investigation and the collection of evidence of the crime is easier and, therefore a fairer and more effective decision is assured. Figueiredo Dias<sup>49</sup> affirms that this principle also improves international harmony. This principle is enshrined in Article 4 (a) of the Criminal Code.

The criterion, adopted to determine whether Portuguese legal system should intervene, is alternative, thus, according to Article 7 (1) of the CC, a crime may be investigated and prosecuted in Portugal if the conduct or the outcome of the offense occurred in its territory. Under Article 7 (2) of the CC, the attempt to commit an offense will also be punished under Portuguese jurisdiction if the perpetrator acted in such a way that the outcome of his/her conduct occurs in the Portuguese territory.

In paragraph b) of Article 4 of the CC is stated that the Portuguese criminal law is also applicable to crimes committed aboard Portuguese ships and aircrafts. Some Portuguese authors, such as Taipa de Carvalho and Faria Costa, understand that this provision covers crimes committed aboard Portuguese military and commercial ships and aircrafts regardless if they are in international waters or airspace, or in a port or foreign airport. Others, like Eduardo Correia and Anabela Rodrigues<sup>50</sup> disagree with this interpretation. For them, the acts committed aboard Portuguese ships or aircrafts in foreign seas or airspaces or, in foreign ports or airports are considered to have been committed abroad, so Portuguese law will only be applicable if the offense was not prosecuted in the country where the act was committed.

The only exceptions accepted by Article 4 and Article 5 of the CC, are the ones which are established in an international treaty or agreement. The Portuguese criminal law becomes

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<sup>49</sup> Jorge de Figueiredo Dias, *Direito Penal, Questões fundamentais, A doutrina geral do crime, Parte Geral*, (2<sup>nd</sup>Edn, Coimbra Editora, 2007) vol I, 209§4.

<sup>50</sup> Paulo Pinto de Albuquerque, *Comentário ao Código Penal à luz da Constituição da República Portuguesa e da Convenção Europeia dos Direitos do Homem*, (2<sup>nd</sup> Edn, Universidade Católica Editora, 2010), 64(nº7).

applicable to crimes committed abroad when one of the principles of Article 5 are verified. As Germano Marques da Silva<sup>51</sup> considers, if the Portuguese criminal law is subsidiary applicable in line with article 5 of the CC, and the offense may be prosecuted in two or more foreign countries, the most favourable decision is to be applied to the offender (Article 6 (2) CC). Unless the particular situation fulfils the requisites of subparagraphs a) and b) of paragraph 1) of Article 5 (Article 6 (3) of the CC), which are situations that Portuguese criminal law is always applicable, regardless if the possible foreign punishment may be more favourable or not.

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

The Portuguese Criminal Code enshrines the principle of active and passive nationality in Article 5 (1)(b). In addition to the requirement that the perpetrator and the victim must be of Portuguese nationality, in order for a crime to become under Portuguese jurisdiction, the offender must habitually reside in Portugal at the time of the crime and he/she must be found in Portugal. In Article 6 (3) it is established the possibility to subject a Portuguese national to Portuguese criminal jurisdiction when he/she commits a crime abroad, even if in the State where the offense was committed, the conduct is not punishable or the punishment is lower than in Portugal. This measure aims to prevent a Portuguese citizen to intentionally travel abroad for the sole purpose to commit a crime against another Portuguese national. The three main requirements to apply this principle are: 1) the perpetrator habitually resides in Portugal; 2) the offender was found in Portugal; and 3) and the defendant aimed to subtract himself from Portuguese criminal law. Some authors, such as Taipa de Carvalho<sup>52</sup> consider that in order for the perpetrator's conduct to fall under Portuguese criminal jurisdiction, the Portuguese national has to move abroad with the intention to commit a crime, knowing that the offense is not punishable or the sentence is lower. However, for Paulo Pinto de Albuquerque<sup>53</sup>, it will fall under Article 6 (3) of the CC, not only preordained situations to escape the Portuguese jurisdiction but also the situation where the perpetrator takes advantage of the period that the victim is staying abroad.

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<sup>51</sup> Germano Marques da Silva, *Direito Penal Português, Introdução e teoria da lei penal, Parte geral*, (3rd Edn, Verbo Editora, 2010), 331.

<sup>52</sup> Américo Taipa de Carvalho, *Direito Penal, Parte geral, Questões fundamentais, Teoria geral do crime*, (2nd Edn, Coimbra Editora, 2008), 221 §400.

<sup>53</sup> Paulo Pinto de Albuquerque, *Comentário ao Código Penal à luz da Constituição da República Portuguesa e da Convenção Europeia dos Direitos do Homem*, (2nd Edn. Universidade Católica Editora, 2010), 67.

Article 5 (1)(e), first part is based on the criterion of the Portuguese nationality of the offender, thus establishing the principle of active nationality. So, the State either extradites a Portuguese national or it does not. When the Portuguese national is not extradited, he/she will be punished according to Portuguese criminal law, since the State, through its judicial bodies, has the duty to judge its nationals (*dedere autpunire*). This principle may only be applied if the offender is found in Portugal, the conduct is considered a crime by the law of the country where it was committed, the State does not wish to exert its punitive power, the Portuguese criminal law is applicable and the extradition request will not be granted. Some authors, such as Taipa de Carvalho, have the opinion that there is no need for an extradition request in order for this Article to be applied, while Pinto de Albuquerque understands otherwise<sup>54</sup>.

The rule is the prohibition of the extradition of national citizens but, with the Constitutional Amendment of 1997, some exceptions were established, provided they fulfil the elements described in Article 33 (3) of the Constitution of the Portuguese Republic<sup>55</sup> (CPR). According to it, the extradition requests may only be granted if there are any conditions of reciprocity stated in international treaties, between the involved States, in cases of terrorism and international organized crime and provided that the law of the requesting State enshrines guarantees of a fair and equitable process.

It seems that due to the provisions of Article 15 (1) of the CPR, foreigners and stateless persons, who live in Portugal, are treated like any other Portuguese. Under these paragraphs, the application of Portuguese criminal law only takes place when the perpetrator has not been tried in the State where the act was committed or, he/she totally or partially evaded from the fulfilment of his/her sentence (Article 6 (1) of the CC). The offense is tried according to the law of the country where it has been committed whenever it is more favourable to the offender, according to Article 6 (2) of the CC.

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

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<sup>54</sup> Paulo Pinto de Albuquerque, *Comentário ao Código Penal à luz da Constituição da República Portuguesa e da Convenção Europeia dos Direitos do Homem*, (2nd Edn. Universidade Católica Editora, 2010) 66 (nº3).

<sup>55</sup> As amended in 12.08.2005 DRE 1º Serie A Nº 155/4642.

According to Article 11 of Law no. 109/2009 (Cybercrime Law), its provisions apply only for the investigation of crimes that have been committed by means of a computer system or for crimes where it is necessary to collect digital evidence.

As we have seen, the principle of territoriality which is the basis for the application of Portuguese criminal law in its territory is established under Article 4 of the Portuguese Criminal Code. In order to answer the question of whether the crime scene is the country where the server is installed that contains the data or the country where the agent that uses the server resides we must resort to Article 7 of the Criminal Code. As aforementioned, Portuguese criminal law is applicable whether the perpetrator was in Portugal, or the server is in Portugal.<sup>56</sup>

With Law 109/2009, Portugal has established that in addition to the situations listed in the Criminal Code, the Portuguese criminal law also applies to the conducts committed by a Portuguese national, if the criminal law of any other State is not applied to him/her; committed for the benefit of legal persons established in Portuguese territory; physically practiced in Portuguese territory, but aiming computer systems located outside the territory or; aimed at computer systems located in Portuguese territory, regardless of where acts were physically performed (Article 27 CL). It should also be highlighted that Article 20ss of the CL establishes the legal framework for international cooperation, under which the competent national authorities must cooperate with foreign authorities in any investigations or procedures relating to crimes involving computer systems or digital data, as well as for the purpose of obtaining evidence of a crime in a computer support.

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

Currently, Article 178 of the CC is clear in regards to sexual crimes against minors being public offences, except Article 173, which has a semi-public nature. Being a public offense, the Public Prosecutor promotes the prosecution on its own initiative as soon as he/she receives a notice that a crime has been committed, and he/she decides, respecting the principle of legality and the

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<sup>56</sup> Pedro Dias Venâncio, *Lei do Cibercrime: anotada e comentada*, (Coimbra Editora, 2011), 137 (nº2).

interest of the victim, whether the case should be brought to trial or not (Article 48, 262 (2) and 241 CPC).

Crimes against sexual self-determination are all public, except as provided in Article 173<sup>57</sup> of the Criminal Code which is semi-public, unless it results in suicide or death of the victim (Article 178 (2) of the CC). The Public Prosecutor may only initiate and promote criminal proceedings in crimes of semi-public, if the victim or other persons who have legitimacy make a complaint (Article 113 and 178 of the CC).

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

For offenses committed abroad by Portuguese nationals or by foreigners against Portuguese individuals, subparagraph e) of Article 5 (1) of the CC states that the perpetrator, in order for his conduct to be punished under Portuguese criminal law, he/she has to:

- Be found in Portugal;
- The offense punishable at the place there it was performed, unless the foreign State does not exert its punitive powers;
- The offense constitutes a crime where extradition is admissible, but it cannot be authorized or the decision to not deliver the perpetrator comes from the execution of a European arrest warrant or any other instrument of international cooperation that binds the Portuguese State;

Although an initial assessment of Article 5 (1)(e) may lead to the conclusion that the prosecution of the offenses described in Article 17 (4) of Directive 2011/93/EU, when committed by a Portuguese national abroad, is subordinated to the condition that the acts are also considered a crime under the legislation of the foreign State where it was committed, such is not the case.

Subparagraphs (a), (b), (c) and (d) of Article 5 (1) aim to protect specific interests, and, for this reason, subparagraph (e) is only applicable if the offensive conduct does not fall on one of them.

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<sup>57</sup> Sexual acts with adolescents, minors between 14 and 16 years old.

Regardless of the nationality of the offender, Article 5 (1)(a), which aims to protect national interests, is always applicable if the perpetrator commits one of the crimes stated in this subparagraph.

Particularly relevant to Article 17 (4) of Directive 2011/93/EU, Article 5 (1)(b) of the CC, which establishes principle of active and passive nationality, states that any offense committed abroad by a Portuguese national, as long as he/she habitually resides in Portugal, against another Portuguese individual, when both the perpetrator and the victim are found in Portuguese territory, may be prosecuted in Portugal. Thus, the offense committed abroad is irrelevant, any crime committed by a Portuguese national against another, including the offenses described in Article 17 (4) of Directive 2011/93/EU may be prosecuted under in Portugal.

Both principles established in Article 5 (1)(a) and (b) do not require that the principle of dual criminality is verified<sup>58</sup>, *i.e.*, that the conduct is considered a crime by the law of the country where it was committed. For the conducts established in these two subparagraphs, the offenders will be convicted according to Portuguese Law, regardless if the sentence established in the foreign State for the crimes committed, is more favourable than in Portugal (Article 6 (3) CC)

In Article 5 (1)(c) and Article 5 (1)(d) of the CC, regardless of the nationality of the perpetrator, Portuguese jurisdiction is extended to, respectively, situations that harm universal interests or that hurt relevant interests of minors. The underlying rationale behind these provisions is to punish serious criminal behaviour that sometimes is not considered a crime in the State where the act is was performed.

According to Article 5(1) (c), if the offender is found in Portugal and cannot be extradited<sup>59</sup> and he/she committed, at least, one of the offenses established in Article 171, 172, 175 and 176, Portuguese criminal law is applicable. Thus, under Article 5 (1)(c) of the CC, the offenses of Article 3 (4) and 5(i)(ii)<sup>60</sup>, Article 4 (2)(3)(5)(6)<sup>61</sup> and Article 5 (6)<sup>62</sup> when committed by a Portuguese national.

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<sup>58</sup> Américo Taipa de Carvalho, *Direito Penal, Parte geral, Questões fundamentais, Teoria geral do crime*, (2nd Edn, Coimbra Editora, 2008), 217.

<sup>59</sup> There was either no request to extradite or it was denied.

<sup>60</sup> Since these provisions directly correspond to Article 171 and 172 of the CC.

<sup>61</sup> Since these provisions directly correspond to Article 171, 175 and 176 of the CC.

<sup>62</sup> Since this provision corresponds to Article 176 of the CC.



In Article 5 (1)(d) of the CC, where the principle of the protection of minors is referred, states that, if the victim is a minor, the perpetrator<sup>63</sup> is found in Portugal, committed one of the offenses established in Article 144, 163 and 164 of the CC and cannot be extradited or handed over by execution of an European detention warrant, his/her case may be prosecuted under Portuguese jurisdiction. Therefore, in line with Article 17 (4), the offenses of Article 3 (5)(iii) and (6)<sup>64</sup> may be punished under Portuguese criminal law when committed by a Portuguese national, abroad.

However, since Article 5 (1)(c) and (d) are not included in Article 6 (3), this means that when punished in Portugal, it will be applied the law that is more favourable to the defendant (Article 6 (2) CC). So, if an offense is not punishable in the State where the criminal conduct was performed, does that mean the Portuguese national who commits such crimes will not be punished? It may be perceived that, since a conduct is not punished in the State where it was committed, then, its sentence may be considered more favourable than the one in Portugal. In this regard, Taipa de Carvalho<sup>65</sup> states that Article 5 (1)(c) and (d) have an implicit element, *i.e.*, the conduct must also be considered a crime according to the law of the country where it was committed. However some other Portuguese authors have a different understanding, affirming that the principle of dual criminality is not required. Effectively, the only subparagraph in Article 5 (1) where the principle of dual criminality is explicitly demanded, for Portuguese individuals, is in (e). We may then infer that, only in this case, Portuguese jurisdiction will be subordinated to the condition that the acts are considered criminal offences at the place where they were performed.

In order to avoid these diverging interpretations, namely one that will go against the aim of Directive 2011/93/EU, these provisions should be clarified.

In addition, the recourse to child prostitution, as provided in Article 4(7) of Directive 2011/93/EU<sup>66</sup>, does not fit into any of the subparagraphs described above, if it is committed by a Portuguese national against a foreigner in a foreign State. Then, as previously explained, this particular criminal conduct, under Article 5(1)(e) of the CC, in order to fall under Portuguese

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<sup>63</sup> Including Portuguese nationals.

<sup>64</sup> Since these provisions directly correspond to Article 163 and 164 of the CC.

<sup>65</sup> Américo Taipa de Carvalho, *Direito Penal, Parte geral, Questões fundamentais, Teoria geral do crime*, (2nd Edn, Coimbra Editora, 2008), 226.

<sup>66</sup> Which corresponds to Article 174 of the CC.



jurisdiction, this crime must also be punished in the foreign State where it was performed. Nonetheless, under Article 5(2) of the CC, it is established that Portuguese Criminal Law is applicable to any crimes committed abroad if an International Convention that Portugal is bound to, so demands. The Lanzarote Convention, which entered into force, for Portugal, on 1 December 2012, obliges child prostitution to be punished according to Portuguese criminal law, when committed by a Portuguese national, in a foreign State (Article 25 (4) and 19 (1)(c) of the Lanzarote Convention).

### 5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

Article 5 (1)(e) second part of the Portuguese Criminal Code provides the principle of passive nationality. The purpose of this principle is to protect the interests of the Portuguese nationals for crimes committed abroad by foreigners against Portuguese citizens. It presupposes that the offender is of foreign nationality and the victim is of Portuguese nationality. Also the offender must be in Portugal, the fact is punishable by the law of the state where the crime was committed and the offender is not extradited (either because there was no request or because this was refused, unless the State does not exert its punitive power "where there is no punitive power, there can never come an extradition request", as José Osório concludes<sup>67</sup>).

By Article 15 (1) of the Constitution of the Portuguese Republic, foreigners and stateless persons residing in Portuguese territory have the same rights and duties as Portuguese citizens, thereby, this principle is also applicable to any habitual resident in Portuguese territory.

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17(2)(b))?

Article 5 (1)(g) of the Criminal Code provides that the Portuguese criminal law is applicable to acts committed by or against a legal person whose headquarters is in Portuguese territory. The application of Portuguese criminal law only takes place if the act is not judged in the country where the fact was committed and, even if Portuguese law is applicable, the offender will be

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<sup>67</sup> Paulo Pinto de Albuquerque, *Comentário ao Código Penal à luz da Constituição da República Portuguesa e da Convenção Europeia dos Direitos do Homem*, (2nd Edn. Universidade Católica Editora, 2010), 66 (n° 3).

judged according to the law of the country where the offense was committed whenever it is more favourable to the offender (Article 6 (1) and (2) of the CC).

Article 11 (2) determines legal persons and related entities, except for the State or other public legal persons and international organizations under public law, may be criminally responsible for crimes against sexual freedom and sexual self-determination of minors<sup>68</sup>.

Article 9 of the Cybercrime Law merely refers to the regime of Article 11 of the CC, which provides the specific rules of criminal liability of a legal person, therefore not establishing a specific system for cybercrimes. However, Article 11 (1) of the CC states that "except as provided in the following paragraph and in cases specified by law, only natural persons may be criminally liable." Article 27 (1)(b) of the CL also establishes that Portuguese criminal law is applicable to acts committed for the benefit of a legal person whose headquarters is in Portugal.

c) The offender is a habitual resident (Art. 17(2)(c))?

Due to the provisions of Article 15 (1) of the Constitution of the Portuguese Republic (CPR) foreigners and stateless persons who live in Portugal should enjoy the same rights and have the same duties as a Portuguese citizen. Thus, the principle of active and passive nationality fixed in article 5 (1)(b) of the Portuguese CC, where the offender is a Portuguese national and Article 5 (1)(e), first part which is based on the criterion of Portuguese nationality of the offender, stating the active nationality principle, are applicable when the offender is a habitual resident, even if they are not considered Portuguese nationals.

## 5.2. Which steps have been taken in your MS in order to implement Article 17?

Portugal has yet to take any legislative measures to transpose Directive 2011/93/EU.

## 5.3. In your view, does the current legal framework comply with Article 17?

Unfortunately the current Portuguese legal framework does not completely comply with Article 17, namely its paragraph 4, since Article 5 (1)(c) and (d) of the CC are open to interpretation, which may lead to the conclusion that a Portuguese national that commits one of the crimes

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<sup>68</sup> Maria João Antunes, 'Crimes contra a liberdade e a autodeterminação sexual dos menores', 2010, 12 RJ 153, 153 (nº1).

established in Article 17 (4), abroad, to a foreigner, is only punished under Portuguese criminal law if the conduct is also considered a crime in the place where it was performed.

Furthermore, the crime of child prostitution is not explicitly included in Article 5 (1)(c) or (d) of the CC, thus it is only punished under Portuguese criminal law, if committed by a Portuguese national, abroad, against a foreigner, when it is also a crime under the law of the foreign State.

If no, what additional measures should be taken in order to comply with Article 17?

Article 5 (2) of the CC, which establishes the obligation of the Portuguese State to punish any crime under an International Convention to which is bound to, allows the insufficiencies explained above to be surpassed. However, in order to clarify the national law and not fully rely on the Lanzarote Convention, Article 6 (3) should be amended so it includes Article 5 (1)(c) and (d) of the CC. In addition, Article 5(1)(c) of the CC should also be amended so that it is explicitly stated that crime of child prostitution established in Article 174 is also punishable, according to this provision.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <p>(a) the offence is committed in whole or in part within their territory; or</p> <p>(b) the offender is one of their nationals.</p>	<p>Article 17 (1) (a): Article 4, Article 7, Article 5 (1)(b) and (e) first part of the Criminal Code.</p> <p><b>Article 4</b> <b>Territorial applicability: General Principle</b></p> <p>Except when it is contrary to international treaties or conventions, Portuguese criminal law is applicable to acts committed:</p> <p>a) In Portuguese territory, regardless of the nationality of the perpetrator; or</p> <p>b) On board of Portuguese ships or aircrafts.</p> <p><b>Article 5</b></p> <p>1- Except when it is contrary to international treaties or conventions, Portuguese penal law is still applicable to acts committed abroad:</p> <p>(...)</p> <p>b) Against Portuguese, by Portuguese habitually residing in Portugal at the time of its perpetration, if they are found here;</p> <p>(...)</p>

	<p>e) By Portuguese, or by foreigners against Portuguese, whenever:</p> <p>D) The agents are found in Portugal;</p> <p>II) When they are also punishable by the law of the place in which they have been perpetrated, except when in that territory punitive power is not exerted; and</p> <p>III) When they are considered a crime admitting extradition and this cannot be conceded or is decided not to deliver the agent in executing the European arrest warrant or other instrument of international cooperation that links the Portuguese State.</p> <p>Article 17 (1)(b): Article 5 (1)(b) and Article 5(1)(e) second part of the CC (as provided above).</p>
<p>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:</p> <p>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</p> <p>(b) the offence is committed for the benefit of a legal person established in its territory; or</p> <p>(c) the offender is an habitual resident in its territory.</p>	<p>Article 17 (2) (a) and (c): Article 5 (1)(b) and (e) first part of the Portuguese Criminal Code, ex vi Article 15(1) of the CPR.</p> <p><b>Article 15</b>  <b>Foreigners, stateless persons, European citizens</b>          1-Foreigners and stateless persons who are found or live in Portugal enjoy the rights and have the same duties of a Portuguese citizen.</p> <p>Article 17 (2)(b): Article 9, 11 and 27(1)(b) of the Cybercrime Law and Article 5 (1)(g) and of the Portuguese Criminal Code</p> <p><b>Article 9</b>  <b>Criminal liability of legal persons and similar entities</b>          Legal persons and similar entities are criminally responsible for the crimes referred in this law in the terms and limits of liability established in the Criminal Code.</p> <p><b>Article 11</b>  <b>Scope of procedural provisions</b>          1 — With the exception of what is provided in Articles 18 and 19, the procedural provisions established in the present chapter apply to proceedings relating to crimes</p> <p>a) Provided in the present law;</p> <p>b) Committed by means of a computer system; or</p> <p>c) For which it is necessary to collect digital evidence.</p>

	<p><b>Article 27</b>  <b>Application of the Portuguese criminal law and jurisdiction of the Portuguese courts</b>  1 — In addition to the provisions in the Penal Code in matters of application of the Portuguese criminal law, and unless otherwise established in international treaties or conventions, for the purposes of this law, the Portuguese criminal law is also applicable to the facts:</p> <ul style="list-style-type: none"> <li>a) Committed by Portuguese nationals, if the criminal law of any other State is not applicable;</li> <li>b) Committed for the benefit of a legal person with headquarters in the Portuguese territory;</li> <li>c) Physically committed in the Portuguese territory, even when aiming computer systems located outside of that territory; or</li> <li>d) Which aim at computer systems located in the Portuguese territory, regardless of where those facts are physically performed.</li> </ul> <p><b>Article 5</b>  1- Except when it is contrary to international treaties or conventions, Portuguese penal law is still applicable to acts committed abroad:  (...)  g) By a legal person or against a legal person whose head office is in Portuguese territory.</p>
<p>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.</p>	<p>Article 17 (3): Article 7 of the Portuguese Criminal Code and Article 11 and 27 of the Cybercrime Law (as provided above).</p>
<p>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.</p>	<p>Article 17 (4): Article 5 (1)(c)(d)(e) and (2) Article 6 (3) of the Portuguese Criminal Code.<sup>69</sup></p> <p><b>Article 5</b>  1- Except when it is contrary to international treaties or conventions, Portuguese penal law is still applicable to acts committed abroad:  (...)  c) When regarded as a crime under the articles 159 to 161, 171, 172,175, 176 and 278 to 280, and the</p>

<sup>69</sup> Within the limits explained in this report.

	<p>perpetrator is found in Portugal and cannot be extradited or returned as result of execution of an European arrest warrant or other instrument of international cooperation that binds the Portuguese State.</p> <p>d) When regarded as a crime under articles 144, 163 e 164, being the victim a minor, since the agent is found in Portugal and cannot be extradited or returned as result of execution of an European arrest warrant or other instrument of international cooperation that binds the Portuguese State.</p> <p>e) By Portuguese, or by foreigners against Portuguese, whenever:</p> <p>I) The perpetrators are found in Portugal;</p> <p>II) When they are also punishable by the law of the place in which the acts were committed, except when in that territory punitive power is not exerted; and</p> <p>III) When they are considered a crime which admits extradition and this cannot be conceded or is decided not to deliver the perpetrator in execution of an European arrest warrant or other instrument of international cooperation that binds the Portuguese State.</p> <p><b>Article 6</b>  <b>Restrictions on application of Portuguese law</b>  2- Though Portuguese law may be applied within the terms of the previous paragraph, the act shall be tried according to the law of the country where the act has been perpetrated whenever this is more favourable to the agent. The applicable punishment is converted to that which corresponds to the Portuguese system or, if there is no direct correspondence, to that which the Portuguese law foresees for the act.  3- The regime of the previous paragraph is not applicable to the crimes proscribed in a) and b) paragraph 1, under article 5.</p>
<p>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.</p>	<p>Article 17 (5): Article 178 of the CC and 48 of the CPC.</p> <p><b>Article 178</b>  <b>Complaint</b>  1- The criminal proceedings for the crimes established in Article 163 to 165, 167 and 170, initiates upon complaint, unless committed against a minor or, death or suicide of the victim resulted from it.</p>

	<p>2 – The criminal proceedings for the crime established in Article 173 depends on prior complaint, unless the victim died or committed suicide because of it.</p> <p><b>Article 48 of the CPC</b> The Public prosecutor has legitimacy to promote a criminal procedure, with the restrictions established in Article 49 and 52.</p>
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## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

#### 6.1. Please describe the current national legal framework with regard to child victims

##### 6.1.1. General framework of protection (Art. 18)

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

Up to this moment, no legislative measures have been taken in order to transpose Council Framework Decision 2001/220/JHA of 15 March 2001 in its whole.

Before we conduct our assessment of existing national measures, as a preliminary note, it ought to be explained that, in Portugal, a victim's status, i.e. his/her rights, duties, protection and assistance measures will depend on, the crime that he/she was subject to and, the victim's willingness to actively participate in criminal proceedings or not.

For all crimes in general, which includes the offenses proscribed in Directive 2011/93/EU, in Portugal, victims can only intervene in criminal proceedings in a very limited way, as will be further analysed. This is not true however, when the crime to which the victim was subject to was domestic violence. Effectively, Law no. 112/2009 of 16 September<sup>70</sup> establishes specific rules that every law enforcement agency and, the judiciary system as a whole, have to follow in

<sup>70</sup> Law no. 112/2009 on the applicable legal regime for the prevention of domestic violence and protection and assistance of its victims [2009] DRE I 180/6550.

order to protect and assist victims of domestic violence.<sup>71</sup> The crime of domestic violence, under Article 152, encompasses a wide array of criminal conducts, including sexual offenses committed by a family member or person in a special relationship with the victim, to a particularly helpless person due to his/her age, namely a minor (Article 152 (1) and (2) CC). However, in order for this regime to be applicable, the sexual offense has to be punished under criminal provision. It is stated in Article 152 (1) that this provision will not be applicable if the offender's criminal behaviour fulfils the elements of a different criminal norm which establishes a harsher sentence than 5 years of imprisonment. Therefore if the minor falls victim of sexual harassment (Article 170 CC) or corruptive sexual acts (Article 171 (3) and 172 (2) CC) in the hands of a family member, he/she may be punished under Article 152 of the CC, and thus may benefit from the rights and protection measures establishes in Law no. 112/2009. However, most of the offenses described in Directive 2011/93/EU, under national law, are punished with a sentence harsher than 5 years, thus rendering Article 152, in principle, inapplicable and, therefore, the child victim may not benefit from the protection measures stated in Law no. 112/2009. Under this law, when a victim makes a formal complaint by presenting a denunciation to a law enforcement agency or a judicial authority<sup>72</sup>, as long as there is no strong evidence that the complaint is unfounded, the victim status has to be granted to the complainant (Article 14 of Law no. 112/2009). However if a more serious sexual offense is committed by a family member to a minor, he/she will not, in principle, unless the defendant is indicted for the crime of domestic violence and one of the sexual offenses described in Directive 2011/93/EU, the child will not be granted victim status.

Nonetheless, even when it is not possible to attribute a victim status parallel to the one granted under Law no. 112/2009 for the offenses established in Directive 2011/93/EU, there is the possibility for a victim to become an *Assistente* (Assistant). Under Portuguese Criminal Procedure Law, an Assistant is considered to be a collaborator of the public prosecutor, but since the offended person<sup>73</sup> who applies for this status has several procedural powers, he/she can be

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<sup>71</sup> Such conclusion can be reached in Article 2 (a) of the aforementioned law, where it is explained that victims, within the meaning of Law no. 112/2009, is every person who was subject to the conduct described in Article 152 of the CC).

<sup>72</sup> I.e., Public Prosecutor or Judge (Article 1 (b) CPC).

<sup>73</sup> An offended person is the holder of the interests which the law especially wished to protect with the incrimination of a conduct (Article 113 (1) CC).



categorized as a real procedural party along with the public prosecutor and the defendant (Article 68 of the CPC).<sup>74</sup>

Thus in order to conduct an assessment of the standing of victims in Portuguese criminal proceedings, particularly the standing of minors who were victims of one of the crimes described in Directive 2011/93/EU, in order to verify the conformity of existing criminal procedure rules with Council Framework Decision 2001/220/JHA (CFD 2001), three different tests have to be done:

- 1) Are the existing and general criminal procedure rights, as provided in the CPC, in line with CFD 2001, for minors who were victims of one of the crimes in Directive 2011/93/EU, but do not wish to become an Assistant?<sup>75</sup>
- 2) Are the existing and general criminal procedure rights, as provided in the CPC, in line with CFD 2001, for minors who were victims of one of the crimes in Directive 2011/93/EU who want to become an Assistant in their criminal proceedings?
- 3) Are the existing and specific criminal procedure rights, as provided in Law no. 112/2009, when the minors who were subject to one of the crimes in Directive 2011/93/EU are also, simultaneously, victims of domestic violence in accordance with Article 152 of the CC?

The right to respect and dignity enshrined in Article 2 of the Council Framework Decision 2001/220/JHA aims to ensure that State-members grant specific treatment to victims who are particularly vulnerable and to ensure they are treated with respect.

Currently, there is no specific provision which entitles the victim to respect and dignity, as provided in Article 2 (1) of CDF 2001, for minors who were victims of one of the offenses established in Directive 2011/93/EU, regardless of whether they wish to become an Assistant or not. However, there are some rules in Criminal Procedure Code which establish duties of respect and order, when the Main Hearing is being conducted in Article 324, 325 and 326 of the CPC. According to them, every person that is watching the trial has to behave in such a way that does not prejudice the order and regularity of the acts, namely, stay quiet and not make any opinions of approval or disapproval, in relation to any procedural act in course of the Main Hearing

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<sup>74</sup> Paulo de Sousa Mendes, *Lições de Direito Processual Penal* (Almedina Editora 2013), 133.

<sup>75</sup> Sometimes the child may be willing to actively participate in criminal proceedings as an Assistant, but when the minor is under 16 years old, the right to become an Assistant belongs to the child's legal representative, thus if that person does not wish to intervene, the child will not be able to act in the criminal proceedings.

(Article 324 (1) and (2)(b)(d) CPC). The defendant is bound by the same duties of conduct established in Article 324 of the CPC (Article 325 (3) (4) of the CPC). Lawyers also have to act with respect, according to Article 326 of the CPC. Nonetheless, it is generally understood that all victims have to be treated with humanity and courtesy.

Nevertheless, for minors who simultaneously are victims of domestic violence as previously explained, it is acknowledged as a general principle that, victims of domestic violence, in all instances, have to be treated with respect for their personal dignity (Article 6 (1) Law no. 112/2009).

Regarding the treatment of particularly vulnerable victims, in line with Article 2 (2) of CDF 2001, all minors, regardless if they wish to become an Assistant or not, may be granted special treatment as long as they are considered especially vulnerable witnesses (article 26 of the Portuguese Witness Protection Law<sup>76</sup> (WPL)). Paragraph 2 of Article 26 indicates, in a non-exhaustive manner, who may benefit from such status. Accordingly, a victim may be considered particularly vulnerable, due to his/her diminutive or advanced age, state of health, or because the victim will testify or give statements against his/her own family or closed social group in which he/she is in a subordinated or dependency situation (Article 26 (2) WPL). Even though age is one of the fulfilling requirements, it is not sufficient, since this status is only granted following a medical examination which will determine the victim's vulnerability.

Once this status is acknowledged by the judiciary authority, i.e. the public prosecutor, the examining judge or the judge leading the main hearing, the victim may benefit from:

- Social and/or psychological support and monitoring, depending on the needs of the victim (Article 27 WPL);
- Her/his testimony to be gathered soon after the crime has been committed and, whenever possible, the repetition of the testimony in the main hearing is to be avoided (Article 28 WPL);
- Whenever a procedural act, where the defendant may be present, is to be practiced, the judge may:

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<sup>76</sup> Law no. 93/99 of 14th July, on the system that regulates the application of measures to protect witnesses, as amended by Law no. 42/2010, of 3rd September [1999] DRE I-A 162/4386.

- a) Programme the act in such a manner that the witness does not encounter any of the parties or procedural actors (Article 29 (a) WPL);
  - b) Hear the witness through the use of videoconference and distortion measures or teleconference, from a different room inside the court building (Article 29 (b) WPL);
  - c) Be the sole person to question the witness, and only once he/she is over with the inquiry, the Presiding-judge may ask any other questions that the other judges, jurors, public prosecutor, defender, the lawyer's assistant and/or the civil party to consider necessary. So no one other than the Presiding Judge may ask questions directly to the child (Article 29 (c) WPL and 349 CPC);
- To be notified to appear in court for the sole objective to show the especially vulnerable witness the court's installation and, where the procedural act is going to be held (Article 30 WPL);
  - Temporary removal from his/her family or closed social group where the especially vulnerable victim is inserted in (Article 31 WPL);

When a minor is simultaneously a domestic violence victim and of one of the offenses described in Directive 2011/93/EU, it is acknowledged under article 6 (2) of Law no. 112/2009 that all especially vulnerable victims may benefit from specific treatment. It ought to be noted however, that Law no. 112/2009 grants this treatment, regardless of whether the minor is also considered a witness.

The right to be heard and supply evidence is enshrined in Article 3 of the Council Framework Decision 2001/220/JHA which aims to ensure that State-members safeguard the possibility for victims to be heard during proceedings and to supply evidence and, are only questioned insofar as necessary in criminal proceedings.

For minors who do wish to become an Assistant there is no specific right to be heard in Portuguese criminal proceedings. It is understood that all victims may, if they so wish, personally schedule a meeting with the public prosecutor in charge, or the competent law enforcement agency and, be heard by them. Furthermore, for the purposes of a good criminal investigation, it is also considered that the victim, namely the minor, has to be heard in order to collect evidence and ascertain the facts which are necessary for the prosecution (Article 262 CPC). Thus, since the victim, as an individual who has direct knowledge of the facts occurred to him/her is a

witness, he/she may be asked to provide statements and, then be heard and subject to questioning in the Main Hearing (Article 128 and 348 CPC). If the witness is not heard, the statements given during the investigation phase will not be taken into account in the Main Hearing, unless said statements were provided under the “statements for future memory” procedure (Article 271 and 356 (2) CPC). Particularly for victims of all crimes which interfere with their sexual self-determination, such as the offenses described in Directive 2011/93/EU, the enactment of this procedure is obligatory, as long as the victim has not yet reached the age of majority (Article 271 (2) of the CPC). So, for all minors who were victims of one of the offenses established in Directive 2011/93/EU, as long as they have not reached the age of majority in that stage of the proceedings, the judiciary authorities are obliged to hear them for these crimes in order to prosecute the perpetrator for the offense. Also, child victims are also formally heard when he/she files a complaint and writes all the relevant information in it (Article 113 (4) of the CP and 241 of the CPC).

If the victim applies to become an assistant, then he/she has the right to not testify or provide statements (Article 133 (1) b) CPC). Nevertheless, an Assistant may require to be heard and give testimony under Article 145 (1) of the CPC.

In Portuguese criminal proceedings, victims do not have a general right to supply evidence. In principle, however, there is no rule which prohibits victims to supply evidence during the investigation phase. When providing statements to the law enforcement authorities, not only may their testimony may be considered evidence it also indicate where further evidence may be obtained (Article 124, 126, 128, 132 and 348 CPC).

When the criminal proceedings reach the preliminary and/or main hearing stage, victims cannot provide any evidence. However, if the victim becomes an Assistant in the criminal proceedings, then he/she may actively intervene and supply evidence when the proceedings reach the preliminary and/or main hearing stage (Article 69 (2)(a), 287 (2) and 340 (1) CPC).

In the particular case when a minor is simultaneously a victim of one of the offenses described in Directive 2011/93/EU and domestic violence, Article 16 of Law no. 112/2009, establishes that the victim, as long as he/she applies to become an Assistant in the criminal proceedings, may collaborate with the Public Prosecutor and, therefore has a right to be heard and supply evidence.

Thus, in line, with Article 3 of CFD 2001, victims, particularly minors do have a right to be heard, although the right to supply evidence in criminal proceedings may be more limited if the victim does not become an Assistant.

Regarding the issue of victims only being questioned insofar as necessary in criminal proceedings, there is a limitation, according to Article 28 (2) of the WPL. It states that when a witness is especially vulnerable the repetition of his/her questioning should be avoided. When the case has reached the phase of the Main Hearing (Article 340 (1) of the CPC). In the investigation stage however, there is no set limit (Article 132 of the CPC), unless the victim becomes an assistant or, the “statements for future memory” procedure is enacted (Article 271 CPC). This procedure, which allows witnesses<sup>77</sup> to testify only once, is solely available for those who suffer from a serious illness, or have to move to a foreign country, or for any victim of human trafficking or crimes against their sexual self-determination (Article 271 (1) CPC). The repetition of the questioning or testimony should be avoided whenever it may cause physical or mental harm to the witness. (Article 271 (8) CPC. As explained earlier, the assistant has the right to not testify, so this specific person may refuse to be questioned regardless if he/she considers the act necessary or not (Article 133 (1) (b) CPC).

So, in line with Article 3(2) of CFD 2001, there are legislative measures which establish that authorities may only question a child victim only insofar as necessary.

Nonetheless, if a minor is simultaneously a victim of one of the offenses described in Directive 2011/93/EU and domestic violence, it is explicitly established in Article 16 (2) of Law no. 112/2009 that a victim may only be questioned insofar as is necessary for the purpose of criminal proceedings.

The right to receive information is enshrined in Article 4 of the Council Framework Decision 2001/220/JHA which aims to ensure that State-members victims in particular have access to the information they need, from their first contact with law enforcement agencies, and in a manner understandable to them.

By law, once the victim and/or assistant, has presented their complaint or denunciation to the competent authorities, the public prosecutor in charge of the case has to inform the complainant or the denunciator of the possibility to request indemnification for victims of violent crimes, or

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<sup>77</sup> Which includes victims as long as they have direct knowledge of the facts under investigation.

compensation in advance for victims of domestic violence and, the availability of public or private institutions or associations who develop activities of support for victims of crimes (Article 247 (3) CPC). Furthermore, the public prosecutor has to inform the victim of the procedural consequences of the complaint and the legal aid measures (Article 247 (2) CPC). Thus, through the activities of the institutions who work on victim support<sup>78</sup>, the right to receive information established in Article 4 (1) is guaranteed. Furthermore, victims may go as they wish to their nearest police stations and ask for information.

Under general criminal procedure rules and, in line with Article 4 (2) of CFD 2001, the victim has the right to be notified of the outcome of his/her complaint, namely if the defendant was indicted or not and why, according to Article 277 (3) and 283 (5) CPC. Under 89 (1) CPC the victim may request to consult the process at any time, unless the criminal proceedings are under legal secrecy. Regarding the right to be informed of the sentence, the victim may either be physically present in Court when the sentence is publicly read or, right after the reading, the judge supplies the sentence to the administrative services which then will provide copies of it to any procedural subject, including the victim (Article 372 (4)(5) and 373 CPC).

In harmony with Article 4 (3) of CFD 2001, under Article 91 (3)(t) of Law no. 115/2009<sup>79</sup>, the offended - which includes the victim, regardless if he/she is also an Assistant – will be notified if the perpetrator is released or evades from prison.

In regards to Article 4 (4) of CFD 2001, child victims, according to the law, will only receive information that is of extreme relevance to him/her. Only when the victim applies to become an Assistant, he/she will have to be continuously notified of more procedural acts as demanded by law, such as needed so he/she can duly practice all procedural rights that come along with the position of Assistant. However, this position is completely voluntary, thus the victim may exert his/her right to not receive this information, by not applying to become an Assistant (Article 68 CPC).

When a minor is simultaneously a victim of one of the offenses described in Directive 2011/93/EU and domestic violence, he/she has the right to be informed of all the content described in Article 4 of CFD 2001, as established in Article 15 of Law no. 112/2009.

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<sup>78</sup> Some examples of institutions which work on victim support: APAV [http://apav.pt/apav\\_v2/index.php/en/](http://apav.pt/apav_v2/index.php/en/); APC, ADDIM.

<sup>79</sup> Law no. 115/2009, of 12 October which approves the Code for the Execution of Sentences and Custodial Measures, as amended by Law no. 21/2013, of 21 February [2009] DRE I 197/7422.

Regarding communication safeguards, as explained in Article 5 of CFD 2001, there are no such safeguards for victims, even if they become Assistants. In general, as regards to their understanding of, or involvement in criminal proceedings, this task is either left to the lawyer accompanying the Assistant or, to the victim support association which is providing assistance.

If the minor is also a victim of domestic violence, then communication safeguards are guaranteed under Article 17 of Law no. 112/2009, including assistance through a translator.

It cannot be affirmed that the Portuguese Law meets the demands of Article 18 (1) of Directive 2011/93/EU, in relation to Article 5 of CFD 2001.

The right to specific assistance, namely access to advice and legal aid is enshrined in Article 6 of the Council Framework Decision 2001/220/JHA.

In Portuguese criminal proceedings, regarding the right to receive advice, the considerations made when analysing the implementation of Article 4 of CFD 2001 are fully applicable here. Particularly, in Law no. 34/2004<sup>80</sup> of 29 July, it established that, every person, regardless of their status in the proceedings has the right to receive legal advice through legal aid offices or clinics or even law associations which adhere to a legal aid programme (Article 14, 15, 16 and 18 Law no. 34/2004). Legal aid is always provided as long as the victim, regardless of his/her position in criminal proceedings and the crime to which he/she was subject to, proves that he/she does not have sufficient economic conditions (article 8, 8-A, 8-B Law no. 34/2004). In general, when a person is granted legal aid, depending on the level of protection attributed, based on his/her economic situation, he/she may be exempt from paying all justice taxes and/or lawyer, or a plan of payment especially tailored to the person in need may be granted (Article 16 (1) Law no. 34/2004).

So, it is possible to conclude that the existing provisions in Law no. 34/2004 are in line with Article 6 of CFD 2001.

Article 7 of CFD 2001 aims to ensure that all State-Members grant to all victims who have the status of parties or witnesses the possibility of reimbursement of expenses incurred as a result of their legitimate participation in criminal proceedings.

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<sup>80</sup> Law no. 34/2004, of 29 July, on the regime for the access of law and courts, as amended by Law no. 47/2007, of 28 August [2007] DRE I 165/5793.



According to Article 317 (4) of the CPC, any person regularly notified to participate in a procedural act have the possibility to request to the judge, a sum for reimbursement of any expenses made for his/her legitimate intervention. The State also provides an extra but very limited form of protection for witnesses in the form of a moratorium, i.e., when a witness finds himself/herself in a difficult economic condition due to his/her collaboration with the justice system, the State may grant a moratorium, allowing the witness to pay his/her pecuniary obligations at a different point in time (Article 31-A WPL).

In the particular case where the minor is also a victim of domestic violence, he/she can benefit from having his/her expenses reimbursed according to Article 19 of Law no. 112/2009 provided the victim incurred them due to his/her participation in the criminal proceedings.

Article 8 of CFD 2001 aims to ensure that all State-Members grant all victims who have the status of parties or witnesses ensure they benefit from a suitable level of protection.

Accordingly, regardless of whether the minor wishes to apply as an Assistant or not, he/she may benefit from several protective measures, some established in the general procedural rules while others in the Law of Witness Protection:

- All victims of crimes against their sexual self-determination and, their families or persons living in similar situation may benefit if there is serious risk against their life, physical integrity, freedom or highly valuable property, and may be granted that their identity not be revealed in the criminal proceedings (Article 16 a) and b) WPL);
- When an especially vulnerable witness is to participate in a procedural act, the competent judicial authority has to take all appropriate protective measures to ensure the honesty and spontaneity of the answers (Article 26 (1) WPL);
- If the minor is under 16 years old and, and it is believed that the presence of the defendant will affect his/her testimony in the Main Hearing, the defendant will be asked to leave the room where the hearing is taking place; (Article 352 (1) (b) CPC);
- The judge who presides a public procedural act or where the defendant may be present may also, in order to guarantee the freedom, truthfulness and spontaneity of the witness's answer may:
  - a) Programme the act in such a manner that the witness does not encounter any of the parties or procedural actors (Article 29 (a) WPL);



- b) Hear the witness through the use of videoconference and distortion measures or teleconference, from a different room inside the court building (Article 29 (b) WPL);
- c) Be the sole person to question the witness, and only once he/she is over, the Presiding Judge may ask any other questions that the other judges, jurors, public prosecutor, defender, the lawyer's assistant and/or the civil party to consider necessary. So no one other than the Presiding Judge may ask questions directly to the child (Article 29 (c) WPL and 349 CPC);

In criminal proceedings to be judged in a collective court, i.e., for crimes against the minor's sexual self-determination punishable with a sentence over five years (Article 14 (2)(b) of the CPC), the following protection measures may also be occasionally resorted to:

- The minors, rather than indicating their home address, may provide a different one (Article 20 (1) (a) WPL);
- Victims, when notified to participate in a procedural act, may stay in a an individual room or location without meeting any other parties (Article 20 (1) (c) WPL);
- Victims and their families and persons living in a similar position, and persons close to the victims may also benefit from police escorts (Article 20 (1) (d) WPL);

If it is found that the minor is also a victim of domestic violence, he/she may also benefit from the several protection measures which were described earlier. Nonetheless, it ought to be noted that Article 20 (1) of Law no. 112/2009 has exactly the same wording as Article 8 (1) of CFD 2001, thus establishing that protective measures will be assured to victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, if it is considered that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy. The following paragraphs of Article 20 clarify what particular protective measures may be resorted to:

- When it is foreseen that a victim and the defendant might meet in a procedural act, steps will be taken in order to avoid contact between each other; (Article 20 (2) Law no. 112/2009);
- Especially vulnerable victims should benefit, upon judicial decision, of any measures that may protect the victim of the effects of testifying in a public hearing; (Article 20 (3) Law no. 112/2009);

- When it is considered absolutely necessary for the protection of the victim and if he/she so consents it, due psychological and social support and protection by remote assistance will be provided; (Article 20 (4) Law no. 112/2009);
- Families and persons living in similar condition may also benefit from the aforementioned measures, along with all other protective measures established in the Witness Protection Law (Article 20 (6) Law no. 112/2009).

From the considerations made thus far, is it possible to conclude that the protection measures which minors may benefit from, victims of one of the offenses in Directive 2011/93/EU, are in line with Article 8 of the CFD 2001 and, therefore, in line with Article 18 (1) of Directive 2011/93/EU.

The right to compensation in the course of criminal proceedings is enshrined in Article 9 of CFD 2001, thus Member States must ensure that victims of criminal acts obtain compensation from the offender and, all recoverable property belonging to the victim, seized for the sake of the criminal proceedings, is returned without undue delay.

All victims in general, regardless of whether they wish to become an Assistant or not, may, in the course of criminal proceedings, request civil compensation for damages the offender caused to them (Article 71 CPC). Even if the victim, namely the minor, does not demand compensation from the offender, the judge, when the defendant is condemned for the crime committed to the victim, may nonetheless sentence the offender to pay for the damages caused (Article 82-A CPC).

In addition, victims who have suffered serious damage to their mental or physical health due to the conduct of the offender, namely behaviour which affected a minor's sexual self-determination and punishable with imprisonment for over five years (Article 1 (j) CPC) may obtain compensation in advance from the State (Article 2 of Law no. 104/2009 of 14 September) as long as he/she fulfils the following requirements:

- The damage caused permanent incapacity or a temporary, but absolute one which did not allow the victim to be able to work for 30 days – this requirement may be waived if exceptional circumstances would so justify it, when the crime committed involves a minor's sexual self-determination (Article 2 (6) Law no. 104/2009);
- The fact considerably disturbed the victim's quality of life;

- The victim did not obtain compensation under Article 71 or 82-A of the CPC;

Regarding the issue of return of property belonging to the victim, it is established in Article 178 (5) of CPC, that the owner may request to the examining judge that his/her property to be returned, however this same provision does not mention if it is to be returned with undue delay or not.

When a minor is simultaneously a victim of one of the offenses described in Directive 2011/93/EU and domestic violence, on top of the civil indemnification and the indemnification for violent crimes which were just described, the victim may also request another form of compensation in advance, which is specific to victims of domestic violence, from the State (Article 5 Law no. 104/2009), as long as the following requirements are fulfilled:

- The victim was subject to a crime of Domestic Violence within the meaning of Article 152 of the CC;
- And, due to this crime, the victim is placed in a serious economic need;

Moreover, for this particular category of victims, Law no. 112/2009 establishes that all recoverable property that is no longer needed in the criminal proceedings is to be returned to its owner immediately (Article 21 (3) Law no. 112/2009).

According to Article 10 of CFD 2001 each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure and, the agreement reached between the offender and the victim to be taken into account in criminal proceedings.

This specific article has been transposed into national law through Law no. 21/2007 of 12 July. The Portuguese criminal system however, does not allow penal mediation for any crimes which involve minors under the age of 16 or crimes against sexual freedom or sexual self-determination (Article 2 (3) (b) and (d) Law no. 21/2007).

Lastly, Article 11 of CFD 2001 determines that each Member State shall ensure that its competent authorities can take appropriate measures to minimise the difficulties faced where the victim is a resident of a State other than the one where the offence has occurred.

For all victims in general, even if they wish to become an Assistant, there is the possibility of victims to make a statement under the “declaration for future memory” procedure when they need to go abroad (Article 271 (1) CPC). However, if the victim is a minor and the crimes

described in Directive 2011/93/EU are crimes against his/her own sexual self-determination, then regardless of the nationality of the victim, the judicial authority must hear him/her under this procedure (Article 271 (2) CPC).

Under Article 5 of WPL, teleconference may be resorted to in criminal proceedings when substantial reasons would so justify it. We believe that, in principle, a foreigner needing to go back to his/her own State of residence fulfils this requirement, thus, the victim would be heard through this measure.

Lastly, all complaints or denunciations brought to a law enforcement agency in Portugal, have to be communicated to the Public Prosecutor's office in less than 10 days (Article 245 CPC).

When a minor is simultaneously a victim of one of the offenses described in Directive 2011/93/EU and domestic violence, Law no. 112/2009 provides that victims may benefit from all adequate measures deemed necessary to minimise the difficulties that may arise due to the victim's residence, especially if it may influence the organizations of the proceedings (Article 23 (1) Law no. 112/2009). Moreover, for this purpose, as described in Article 23 (2) of Law no. 112/2009, the victim, right after the offense was committed may make a statement under the "declarations for future memory" procedure and be heard through video conferencing or telephone conference calls when the victim is abroad. Article 23 (3) of Law no. 112/2009 also foresees the possibility for the victim to make a complaint in his/her own State and it then be communicated to the competent Portuguese authorities.

Thus it is possible to conclude that these existing national measures are in line with Article 11 of the CFD 2001.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

Once it is considered that the child is in danger, competent authorities intervene and start a process to promote the rights of and protect the minor at risk. The competent entities which may act in this situation, other than law enforcement agencies and judicial authorities, and their powers, are governed by the Law for the Protection of Children and Youth in Danger<sup>81 82</sup> (LPCYD).

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<sup>81</sup> Law no. 147/99 of 1 September, as amended by Law no. 31/2003 of 22 August.

The competent entities, according to the LPCYD, only have legitimacy to act if it is found that a child is in danger, and this situation was caused by the child's parents, legal representatives or guardians or, these same persons did not take adequate measures to remove the victim from the perilous situation (Article 3 (1) LPCYD). LPCYD provides some examples of situations which may be considered dangerous and justify the action of the competent entities (Article 3 (2) LPCYD):

- They are abandoned or left to fend for themselves or not taken care for;
- They are physically and/or psychological and/or sexually abused.
- They do not receive the nurturing and affection according to their age and personal condition.
- They are forced to do activities or excessive work not befitting their age, dignity and personal situation, or which are harmful to their education and physical and psychological development;
- They are exposed, in a direct or indirect way, to behaviour that affect their security or emotional balance seriously.
- They engage in behaviour, activities or consumptions that affect their health, security, training, education and development seriously, and whose parents, legal representatives or tutor, cannot handle/stop the situation.

Portuguese law explicitly establishes that once a minor under 18 years of age is victim of sexual abuse (Article 5 (a) LPCYD) they are to be provided support, assistance and protection by the competent entities. Nonetheless, it is understood that “danger” within the meaning of Article 3 of LPCYD refers to an actual and imminent situation of danger to a child's or youth's life or physical integrity (Article 5 (c) LPCYD).<sup>83 84</sup>

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<sup>82</sup> The law of Protection of Children and Young People in Danger appeals to the participation of the community, considering that the prevention of violence and the protection of children is not an exclusive task of the state, as it must engage several local social actors, involving not only local government, but also NGOs and other stakeholders. To accomplish these goals, the Commissions for Protection of Children and Young People were created. They must develop their work taking into account the modern conception of social networks; they must exist in every municipal council; they have preventive and protective goals and are required to promote the rights of children in their respective communities in a holistic developmental vision.

<sup>83</sup> Borges, Beatriz Marques, *Protecção de Crianças e Jovens em Perigo*, (2nd Edn. Almedina Editora, 2011), 30.

Depending on the degree of danger and what kind of measures have to be applied, according with the principle of subsidiarity, i.e. the prevention of violence and children's protection is first attributed to public and private institutions that hold competence in matters relating to childhood and youth in this area<sup>85</sup>. If they are unable to solve the problem, then the Commissions for the Protection of Children and Youth<sup>86</sup> are called to intervene (Article 4 (j) LPCYD). The action at these two levels must have the parent's or the child's legal representative's consent and cannot have the opposition of the child aged 12 or older. If the child is under 12 years of age, his or her opinion must be taken into account, "according to his or her capacity to understand the sense of the intervention" (Article 10 LPCYD). These entities, according to Article 35 of the LPCYD may only promote the following measures of support, assistance and/or protection:

- Support to parents;
- Support to other relatives;
- Entrust to a reliable person (a person with whom the child has developed a bond or affection);
- Support for an autonomous life;
- Foster families;
- Foster Institutions;
- Entrust to a selected person for adoption or the institution for future adoption (Law no. 31/2003, of 22 August).

Lastly, when the child is victim of a crime, law enforcement agencies and judicial authorities must act.

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<sup>84</sup> More broadly, the Court of 2nd Instance in Coimbra, in its Judgment of 22-05-2007 held that: "the concept of "danger" must be understood as an actual and imminent risk to a minor's security, health, education and development.

<sup>85</sup> Namely schools and private institutions of social solidarity (Article 5 (d) LPCYD). Beatriz Marques Borges, "Protecção de Crianças e Jovens...", *ob cit.*, 63

<sup>86</sup> These local commissions identify every child at risk; they study the concrete cases and decide the appropriate measures, such as supporting parents, other relatives, foster families or foster homes. These commissions do not have a judicial rule, but work in strict cooperation with the Department of Justice, and are accountable for the defence of children's and young people's interest and legality control.

If the child is subject to one of the offenses described in Directive 2011/93/EU however, the competent entities are obliged to inform the Public Prosecutor's Office and law enforcement agencies of such occurrence (Article 70 LPCYD) and, may even adopt any adequate measures to alleviate the dangerous situation, including with the assistance of police authorities, placing the child in temporary foster homes or other adequate place (Article 91 LPCYD).

Once criminal proceedings have started, the child may benefit from all assistance and protective measures that every victim is entitled to and provided in the Law of Witness Procedure, Criminal Procedural rules and Law no. 112/2009, as explained in the previous section. In the particular situation that the perpetrator sexually abusing the child is her/his own parent, legal guardian or, otherwise, a person residing in the same house as the child, this procedure for promotion and protection of rights, along with its specific measures of assistance and support may run in parallel with the criminal proceedings and, the child will benefit from all measures explained thus far.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

Currently, there is no provision which establishes an "age presumption" for the purposes of a child to benefit from support, assistance and or protection measures.

The competent non-judiciary entities described in LPCYD only have legitimacy to act when a child is under 18 years of age (Article 5 (a) LPCYD), so in a particular situation where a minor looks like he/she is 18 years or older and is not able to prove his/her age, then these entities may not act. Although, these same entities may always inform the law enforcement agencies or the Public Prosecutor's Office if he/she was victim of a crime (article 70 LPCYD).

Once the criminal proceedings have started, it is part of the public prosecutor's job, during the investigation stage, to ascertain the age of the victim (Article 262 CPC). Nonetheless, in order to benefit from some protection and assistance measures, according to the Witness Protection Law, the victim only needs to be in danger because of his/her contribution to proving the facts that the defendant is accused of (Article 1 and 2 (a) of WPL). Moreover, in order for the victim to benefit from the supportive, protective and assistance measures granted to especially vulnerable witnesses, even though Article 26 paragraph 2 refers to victims of diminutive age, this is only one

of the factors to be taken into account. Effectively, the status of especially vulnerable witnesses is granted upon a medical examination, not completely based on the age of the victim.

However, Portuguese law does not presume a person's age for the purpose of granting an immediate and effective protection once it is found that the alleged minor was victim of one of the offenses described in Directive 2011/93/EU.

### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art 19.(1))?

The current national framework establishes that a child victim of sexual abuse may only benefit from the assistance and support until he/she achieves the age of 18 or, 21 if the minor was already under a process for the promotion and protection of rights before he/she was 18 (Article 5 (a) LPCYD). So, the child victim will benefit from the measures of support and assistance previously explained, regardless if criminal proceedings already initiated or ended. Although, it should be highlighted that only when the sexual abuse is committed by a parent, legal guardian or someone cohabitating with child, that the protection and support measures applicable in this civil process may, in principle, be applied to the child.

However, most protective and supportive measures which were described thus far are all applied in preparation or for the purpose of adequately practicing a procedural act. As stated in Article 1 of the WPL, protection measures are applied to the point they are needed to the production of evidence and secure the testimony of witnesses, in other words, for the aims of the criminal procedure.

Law no. 112/2009 establishes some social and assistance measures which are applicable even after the proceedings have ended, such as professional training, specialized health care and benefits (Article 48, 49 and 50). Unfortunately, as previously explained, in general, the measures established in this law are restricted to victims of domestic violence, so, only in very particular circumstances that a child victim of one of the offenses established in Directive 2011/93/EU may benefit from them.



Public or private institutes or associations which work on victim support provide assistance and support measures described in Council Framework Decision 2001/220/JHA before, during and even after criminal proceedings have been terminated.

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

There are a number of specific steps taken for the protection of child who report cases of abuse within their family.

Crimes against a minor's sexual self-determination are, for the most part, currently considered public crimes in the Portuguese criminal system, that is, crimes which can be prosecuted without the victim making a formal complaint (Article 48 and 49 of the CPC and 178 (1) of the CC). Once the Public Prosecutor's Office receives the news that a public crime has been committed, it has to act and investigate and prosecute the case. However, there is but one crime of sexual abuse against minors where the legitimacy to prosecute is impaired. Effectively, if a teenager, *i.e.*, a minor between the age of 14 and 16, is sexually abused according to Article 173, the criminal proceedings can only initiate once the victim makes a formal complaint (Article 178 (2) of the CC). Sexual abuse committed by family members<sup>87</sup> is a crime if the victim is at least 18 years old, unlike when the child is abused by a stranger, then, it is only a crime if the minor is under 14 years of age (Article 171 and 172 CC).

Thus, if a child or young person is in danger, namely because he/she was victim of sexual abuse by his/her family, the non-judicial entities competent in matters relating to childhood and youth and the Commissions for the Protection of Children and Young People must report the finding to the Public Prosecutor's Office in order to start the criminal proceedings (Article 65 (2) and 70 LPCYD). This communication is mandatory (Article 242 CPC), failure to comply will entail criminal liability of the person that omitted the act (Article 386 CC).

The non-judicial entities and its commissions may only act and apply assistance and support measures upon explicit consent of the family, legal representative or *de facto* guardian (Article 9 and 36 LPCYD). Once the consent is provided these entities may resort to the measures which they find most adequate to the situation. When the family is the one responsible, they may

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<sup>87</sup> And other individuals, as provided in Article 172 of the CC.

entrust the child to a reliable person<sup>88</sup>, provide support for the child to lead an autonomous life, put the minor in a foster family or institutions or even entrust the child to a selected person for adoption or an institution for future adoption (Article 35 LPCYD). It is possible that in this case, the family won't consent the entities' intervention, but, regardless in the particular case that the family is the one abusing the child and they do not give consent for the aforementioned entities to act, then these bodies may adopt any adequate measures to remove the perilous situation and request the intervention of the court and police authorities (Article 91 (1) LPCYD). Until the Court takes action, in emergency cases, law enforcement agencies will assure the protection of the child in temporary foster homes or in other adequate places (Article 91 (3) LPCYD). The Court will then validate the measures taken by the non-judicial entities competent in matters relating to childhood and youth and the Commissions for the Protection of Children and Young People and law enforcement agencies (Article 92 LPCYD).

Once criminal proceedings have started, since the minor potentially has to provide statements against his/her own family, he/she will be considered an especially vulnerable witness and as such, if the child is still living with his/her family, the Public Prosecutor may request the judge to temporarily take the child from the abusing family (Article 26 (2) and 31 WPL).

Other than the protection and assistance measures earlier described, it ought to be mentioned that if a parent is convicted for a sexual crime, depending on the seriousness of the crime and the connection to his/her functions, his/her parental powers may be inhibited (Article 179 (a) CC).<sup>89</sup>

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

Under Article 139 (2) of the CPC, the protection of witnesses and other actors involved in the criminal procedure against threats and several forms of intimidation is regulated in a special law. Thus, the Witness Protection Law regulates what, when and which measures aimed at the protection of witnesses may be applied when their life, physical or mental integrity, liberty or property of considerable value is in danger, due to their contribution in the proving of facts that are under investigation (Article 1 WPL). The definition of "witness" under the WPL is very broad, since it grants that status to any person who may be involved in the criminal procedure, other than law enforcement and/or judicial authorities, due to possession of information or

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<sup>88</sup> A person with whom the child has developed a bond of affection.

<sup>89</sup> For more developments on this point, see the analysis of Article 10 of the Directive 2011/93/EU made above.

knowledge considered necessary for the revelation, perception or appreciation of the facts which are under investigation (Article 2 (a) WPL).

Therefore a wide array of individuals may benefit from this status, such as: victims or at least, alleged victims, regardless if they apply for the position of the party which assists the prosecutor, experts and so on. The only prerequisites is that the person to benefit from such protection has information or knowledge necessary for the pursuit of the truth and, considered that his/her or other person's life, physical or mental integrity, liberty or property of considerable value is threatened.<sup>90</sup>

When the person who fulfils the criteria to become a witness within the meaning of Article 1 and 2 (a) of the WPL is, of diminutive or advanced age, the Law considers them "especially vulnerable witnesses" and they enjoy several specific protective measures related to participation in court, if they so decide to testify or actively intervene in the criminal procedure (Article 26 (1) (2) WPL). It has been considered that children enjoy of such benefits. As "especially vulnerable witnesses"<sup>91 92</sup>, child victims are assisted and accompanied by a psychologist throughout the proceedings (Article 27 ss WPL).

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

Once criminal proceedings have started, a Joint Directive between the Commissions for the Protection of Children and Young People, and the Public Prosecutor's Office, establishes that when the former entities communicate to the judicial authorities that a minor was victim of sexual abuse, they must also provide all the information already collected under the process for promotion and protection of rights.<sup>93 94</sup> The repetition of all medical examinations and social

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<sup>90</sup> Rui Patrício, *Proteção de Testemunhas em Processo Penal*, (Almedina Editora 2004), 283. Sandra Oliveira Silva, *A Proteção de Testemunhas no Processo Penal*, (Coimbra Editora, 2007), 18.

<sup>91</sup> Children, under the Portuguese Civil Code, is every person who has yet to reach the age of 18 (Article 122 of the CivC).

<sup>92</sup> Cátia Solange Dias, *Uma Pergunta ao Sistema Penal: E os Direitos das Crianças Vítimas de Crimes Sexuais*, (Universidade Católica Centro Regional do Porto – Mestrado 2012), 37.

<http://repositorio.ucp.pt/bitstream/10400.14/11413/1/Tese%20Completa%20Final.pdf> Accessed on 30 March 2014.

<sup>93</sup> Joint Directive for the uniformization of the functional processes between the Public Prosecutor's Office and the Commissions for the Protection of Children and Young People, Available at:

<http://www.pgdlisboa.pt/docpgd/files/Directiva%20Conjunta%20PGR%20CNPCJR.pdf>, Accessed 4 April 2014.

reports involving the abused child already made, are to be avoided, unless the superior interest of the child would determine that such is necessary (Article 83 LPCYD).

As previously described, in order to ascertain whether the child may be considered an especially vulnerable witness, within the meaning of Article 26 (2) of the WPL, he or she will have to undergo some examinations. Also, according to Article 1 (4) of the WPL, every protection measure will be applied only if the specific circumstances of the case, they are considered necessary, adequate and proportional. Thus the judicial authority that will decide for the application of these measures has to assess the specific circumstances of every particular child victim.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

The current national framework only grants the status of particularly vulnerable victim under Law no. 112/2009, which is only applicable to victims of domestic violence within the meaning of article 152 of the CC, so only child victims of sexual abuse who are simultaneously victims of domestic violence may benefit from this status.

Generally, for the offenses described in Article 3 to 7 of the Directive 2011/93/EU, child victims may be granted the status of especially vulnerable witnesses under Article 26 (2) of the WPL, since children are, within the meaning of this article, persons of “diminutive age”.

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe.

As referred to in Article 1 (2) of WPL, all protection measures, which include measures of assistance established in the Witness Protection Law, may also be provided to family members, to persons in similar positions of a married couple and people who are close to the witness. The status of especially vulnerable witness may be granted to a family members or the victim, depending on their specific circumstances. Although if the family members do not have any knowledge of any facts of under investigation, and therefore, are not considered witnesses, they

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<sup>94</sup> Although in constant development, there have been some complaints that in practice, the articulation and communication between the two procedures do not always happen. See Helena Boliero, ‘A criança vítima: necessidades de protecção e articulação entre intervenções’, (2010) 12 RJ 141, 147-149.

may not benefit from the assistance and support measures established in Article 27 and 30 of the WPL. They may only enjoy protection measures to the point that is needed to assure the testimony and participation of the victim in criminal proceedings.

As a general rule however, assistance and support measures to the family of the child victim is granted through the work of public or private institutes or associations which work in victim support.

Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

As previously explained, once a formal complaint is made to the competent law enforcement agencies or public prosecutor's office, the victim has to be informed of public or private institutes or associations which work on victim support. In general, the right to receive the information as established in Article 4 of Framework Decision 2001/220/JHA<sup>6</sup> is granted through these entities. In regards to Article 4 (2)(3) and (4), at best, only receive these informations. Nevertheless, under Article 90 and 372 and 373, the family might come to know the outcome, the standing and course of the proceedings, although it does not have the right to directly receive notifications.

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which.

The child's interventions in criminal proceedings are increasingly growing, both as victims and as witnesses. Great efforts have been led for higher consideration of the child's testimony, even though it is still a work in progress.

Firstly, we can refer to the intervention of the child as a victim. The victim, or, rather, the *ofendido* (the offended), as the holder of the interests that the law specially wishes to protect, can participate in the criminal proceedings as an Assistant (Article 68 CPC).

When the child is younger than 16 years old, the right to participate as an Assistant will belong to the minor's legal representative. When there is none, this right will belong to his descendants and adoptees, ascendants and adopters, siblings and its descendants, by this order, unless any of these people has participated in the crime (Article 68 (1)(a)(c)).

In the particular situation when a mirror has no relative that can act as a legal representative, the entity or institution with protective, tutelary or educational responsibilities, if the minor was judicially entrusted to its responsibility or guardianship, may represent the child (Article 68 (1)(d)).

However, if we refer to a special representative appointed by the State, whose purpose is to accompany the child during the proceedings having in mind solely the child's interests, the Public Prosecutors' Office may not always carry that task. Furthermore, when there is person acting as a legal representative, in the terms above mentioned, that person not always act as intended by the Directive.

The Law for the Protection of Children and Youth in Danger (LPCYD) foresees that, in a procedure for promotion and protection of the child, a special attorney is appointed for the minor when the minor and his or her parents or legal representative have incompatible interests (Article 103 (2)(4) LPCYD). However, such measure is not foreseen in any other procedure.

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:

- a) Available for the purpose of claiming compensation?
- b) Free of charge where the victim does not have sufficient financial resources?

Portuguese legal system builds on the principle that any person shall have access to the law and courts to defend their legally protected rights and interests, particularly by ensuring access to legal counselling and representation (article 20 PC). Thus, no one should be prevented from defending their rights due to their social or cultural condition, or their lack of financial means. Such right is regulated in Regime for the Access of Law and Courts (RALC). The State ensures the right to legal counselling and legal representation, including for the purpose of claiming compensation, to people with insufficient financial means, i.e., a person with no objective financial resources to support the costs of the court proceedings (Article 6 RALC). This legal protection may take the form of a total or partial exemption of proceeding's costs and/or cover any lawyer fees (Article 16 RALC). The lawyer may then claim compensation for the victim if he/she so requests, as earlier explained in this report.

Victims of violent crimes are entitled to a special compensation to be paid by the State. Crimes against sexual freedom and self-determination are to be considered violent crimes, when they are punished with a prison penalty for five or more years (Article 1 (j) CPC). If the criminal conduct led to a considerable harm in the level or quality of life of the victim, and the victim did not obtain any other compensation in the course of the proceedings, he/she may obtain it in advance from the State (Article 2 of Law no. 104/2009 of 14 September<sup>95</sup>). The indemnification for violent crimes is granted by an administrative entity especially created to verify and evaluate if the individuals who apply for this form of compensation in advance fulfil every criteria demanded by Article 2, called Commission for the Protection of Victims of Crimes (Article 7 (1) (4)(a)(b)(c) Law no. 104/2009). For this special type of compensation, any public entity, including the Public Prosecutor, associations or other private entities which provide victim support may submit the request in representation of the victim, free of charge (Article 10 (4) Law no. 104/2009).

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

- 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?

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<sup>95</sup> Law no. 104/2009 of 14 September, approves the regime for the compensation to be given to the victims of violent crimes and domestic violence.



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?

During the victim's questioning, both during the investigation or the main hearing, the defendant can be ordered to leave the premises, if the declarant is under 16 years old and there are reasons to believe that the presence of the defendant could seriously harm the minor (Article 352 CPC and 29 (c) WPL).

As a general rule, the child will not be questioned again during the criminal proceedings, namely during the main hearing, when the statements for future memory measure is used (Article 271 (8) CPC). If, indeed, the child has to be questioned again, such questioning has to follow the same terms as previously analysed.

There are, however, certain difficulties with these so-called statements for future memory. Firstly, they are only mandatory in crimes against minors' sexual freedom and self-determination, and not always when a child is involved, although it can, nevertheless, be used. Secondly, although it can indeed be used in a particular process, the statements given by the child can only be considered in that particular criminal proceeding. If the child is participating in several procedures, namely criminal, civil and protection<sup>96</sup>, he or she will have to be heard again.

When a child intervenes as a witness, it is important to keep in mind that in the Portuguese legal system it is considered that the witnesses' protection is an inescapable duty of the State<sup>97</sup>, particularly when the witness is considered a especially vulnerable witness, based on the witnesses' diminutive or advanced age, state of wealth, or the fact that the testimony has to be made against a family member or a closed social group where the witness is in in a subordination or dependency condition (Articles 26 and 27 WPL).

The child victim can be considered to be an especially vulnerable witness, on the grounds of age, or when called to testify against a person of his or her own family, since in that situation, they are in need of greater protection (Article 26 (2) WPL). As soon as the authority recognizes the witness's especial vulnerability, a social worker or any other professional person trained for that purposed has to be appointed (Article 27 WPL). When necessary, an especially trained professional can provide due psychological support. The mentioned professional can accompany

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<sup>96</sup> Law no. 147/99 of 1 September (Law for the Protection of Children and Youth in Danger (LPCYD)).

<sup>97</sup> Sandra Oliveira e Silva, *A protecção de testemunhas no Processo Penal* (2007, Coimbra Editora) 17.



the witness during the procedure. The judge leading the questioning can also allow another person, chosen by the minor, to accompany him or her during the interview.

Criminal and civil proceedings do not foresee that the child is accompanied by a child of his or her choice.

It is stated that the particularly vulnerable witness shall be accompanied by a social worker or other professional specially trained for that purpose. The same shall happen during statements for future memory.

It is believed that the interviewer shall ask generic questions, allowing the minor to without restrictions and spontaneously communicate the facts<sup>98</sup>. However, Portugal did not formally adopt any protocol regarding the minor's questioning. Thus, the questioning rules that are applied to the child interview are the general rules, foreseen for any interview (Article 138 CPC), and not any specific ones.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

We shall apply to the statements for future memory the general rule that the statements given orally are always audio-visually recorded, assuring its complete reproduction (Articles 271 (6), 363 and 364 CPC).

In order for the statement given by the child to be correctly considered, it has indeed to be recorded. The statements for future memory are usually recorded, but only by audio. Since what the child says is as important as how the child reacts and the emotions that are shown, the statements should also be recorded visually<sup>99</sup>.

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

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<sup>98</sup> Carlos Eduardo Peixoto, Catarina Ribeiro and Isabel Alberto 'O Protocolo de Entrevista Forense do NICHD: contributo na obtenção do testemunho da criança no contexto português' (2013) 134 RMP 149, 158.

<sup>99</sup> Carlos Eduardo Peixoto, Catarina Ribeiro and Isabel Alberto 'O Protocolo de Entrevista Forense do NICHD: contributo na obtenção do testemunho da criança no contexto português' (2013) 134 RMP 149, 164.

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

Portugal abides by the public hearing principle (Articles 87 CPC and Article 206 PC).

However, in crimes against sexual self-determination, as a general rule, the legal procedures shall not be open to the public (Article 87 (3) CPC).

It is also admissible for the child victim to be heard in the court room without being physically present, in particular through the use of means of teleconference (Article 5 WPL), which can occur with image concealment, or voice distortion measures, or both, in order to prevent the witness from being recognized. Such statement at distance shall be taken in a public building, whenever possible in judicial, police or prison facilities that allow the implementation of the necessary technical means. Access to the premises can be limited, and the technical personnel that participate in the teleconference are obliged to make a declaration of commitment relating the non-revelation of the premises, as well as any element that can lead to the identification of the witness (Articles 7, 8 and 9 WPL). Teleconference may only be used in crimes to be judge by a collective court or by jury, and serves both to conceal and protect the witness's identity (Article 5 WPL).

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

One way to protect the witness is through concealment, applied by the court's own initiative or by request of any of the parties. It can be decided that the statements to be given in a public procedure act, or subject to contradictory can occur with image concealment, or voice distortion measures, or both, in order to prevent the witness from being recognized, if there are that facts or circumstances that show that the witness is or can be intimidated (Article 4 WPL).

The judge leading the questioning shall then avoid questions that can lead the witness to indirectly reveal his or her identity's (Article 13 WPL). Whenever he or she sees fit, the judge can notify the child's accompanist to appear before him or her, with the child, for introduction purposes only, as well as to previously show the minor the premises where the procedural act is to be done (Article 30 WPL).

The law also foresees specific protective measures that can take place along the procedure. For instance, the witness can designate a different address other than the usual residence, a specific transportation vehicle can be assigned, and police protection can be assured to both the witness and his or her family. It can also be assured that the witness does not cross paths with the defendant, by entering and/or exiting through different routes. In extreme cases, the witness can be moved to a different residence during the proceedings. These measures are temporary and exceptional, therefore only to be used when necessary (Article 20 WPL).

As for the media, it's allowed, within the legal limits, for them to access and reproduce the content of certain procedures. It is, however, forbidden, the publication, by any means, of the identification of the victims of crimes against sexual self-determination, unless the victim consents (Article 88 (1)(2)(c) CPC).

## 6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify

Portugal has yet to taken any legislative measures to formally transpose Directive 2011/93/EU is specifically mentioned. However, the existing national legal framework and mechanisms were put in place prior the drafting of the Directive.

There is no specific Law regarding the standing of a victim for the crimes described in Directive 2011/93/EU. Instead, the pertinent legal framework extends over various Laws and Decree-Laws. The core of the child's protection, both as a victim and as a witness, can be found in the Criminal Procedure Code, and in the Witness Protection Law.

## 6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

The Portuguese legal framework, as a whole, does not comply with Articles 18, 19 and 20 of Directive 2011/93/EU.

As analysed in this report, there are several rights which are either not accounted for in criminal proceedings or its use limited to a precondition to become an Assistant under criminal proceedings, so the Portuguese legislation is not completely in line with Article 18 (1).

There is no "age of presumption" and the support or assistance measures available to the child victim after the criminal proceedings has ended are scarce if non-existence. And there are no

enough measures to assist the family of the child victim, so they are left forgotten unless they act as witnesses in the criminal procedure. So, Portuguese does not comply with Article 18 (3) and, we cannot say for sure that the assistance and support measures are enough after the proceedings.

Our law only refers specifically to especially vulnerable witnesses, although an interpretation of its definition might lead the conclusion that the protection and assistance measures are not subordinated to the conclusion that the child victim needs to cooperate, it should be clarified.

In regards to the family of the victims, unless they somehow participate in the proceedings, in principle, the rights to information established in Article 4 of Council Framework Decision 2001, aim first the victim, but not the family. So we cannot say that our legislation complies with Article 19 (5) either.

Nonetheless, the Portuguese law does not refer if the child victim may or not be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person. The child, as a witness, may be authorised to be accompanied by an adult of his or her choice, if the child is considered an especially vulnerable witness. In order to comply with the Directive, this right to be accompanied should not depend on the judge's discretionary authorisation. As for the criminal or civil proceedings, there is no legal prevision.

As mentioned, the legal representative of the child may not always be a special representative as foreseen by the Directive, i.e., a special representative appointed by the competent authorities who shall have a role in accompany the child and protecting his or hers interests, when the legal representative, as such, may not be able to carry out such responsibility. Even though the Law for the Protection of Children and Youth in Danger foresees that possibility, the civil and criminal proceedings do not.

The statements for future memory are only mandatory in crimes against minors' sexual freedom and self-determination. Whenever there is a child victim, these statements should be mandatory. Also, they have to be both audio and visually recorded. Here, the Portuguese Law does not comply with the Directive, as recording those statements both audio and visually is not mandatory.

The judiciary practice in what regards the specific conditions in which the statements for future memory shall take place also vary plenty, namely in what concerns the interviews with the minor and the audio and video recording. The court facilities are not duly prepared for that end<sup>100</sup>.

Also, statements for future memory should be given as soon as possible after the criminal facts occur. However, the judiciary practice is not uniform, and the child is usually interviewed in an advanced stage of the investigation, after being already heard multiple times, either by the police, the Public Prosecutor's Office, or by any other authority<sup>101</sup>. A child victim ends up being questioned, on average, 8 times<sup>102</sup>.

That being said, Article 271 CPC has to be interpreted in accordance with the Directive, *i.e.*, compelling the statements to be given in the shortest period of time following the criminal facts occurrence, without needing to wait for the perpetrator's identification or constitution as a defendant, recorded both audio and visually, avoiding new interviews of the same victim, and, as a general rule, led by the same person. That is to say, Article 271 CPC has to be amended and optimized in order to meet the terms of the Directive.

Also, the Portuguese criminal procedure is constructed so that each phase belongs to a different judge. That means that, when the statement for future memory procedure is not used, the child may have to be heard by the examining judge in the inquiry phase and the Presiding-judge in the main hearing phase. In particular, this does not comply with the notion that it should be the same persons to conduct all interviews with the child victim. In addition, the interviews are not always conducted with the assistance of or, through trained professionals.<sup>103</sup>

Portugal also lacks professionals specifically trained for the purpose of assisting and accompanying the child's questionings.

If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

The Law should be reorganised in accordance with the Directive.

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<sup>100</sup> Rui do Carmo, 'Declarações para Memória Futura' (2013) 134 RMP 149, 165.

<sup>101</sup> Rui do Carmo, 'Declarações para Memória Futura' (2013) 134 RMP 149, 161.

<sup>102</sup> Catarina Ribeiro, *A criança na Justiça* (2009), 180 and 175.

<sup>103</sup> Carlos Peixoto, Catarina Ribeiro and Isabel Alberto, 'O Protocolo de entrevista forense do NICHHD: contributo na obtenção do testemunho da criança no contexto português' (2013) 134 RMP 149, 149.

It should be mandatory that a special representative is appointed to the child, when 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, bearing in mind the minor's interests and protection.

The way the child's interviews are conducted vary in the judiciary practice. Portugal should abide by the international protocols that exist in this matter.

Statements for future memory shall be given as soon as possible after the criminal facts occur, being that all authorities intervening in the criminal proceedings shall be so alerted. These statements given in a criminal procedure should be able to be used in a civil procedure.

Portugal should continue this line of thinking and work for the continuous installation of the technical means and coaching of personnel to assist the court in protecting the child. The statements for future memory given by the child should always be both audio and visually recorded, in facilities specially adapted for that purpose.

An autonomous law for sexual crimes should be elaborated. This law would then encompass all protection, support and assistance measures which are scattered across different Portuguese legal instruments and rights granted under Council Framework Decision 2001/220.<sup>104</sup> In this manner, every person who falls victim to a sexual offense, especially child victims of one of the crimes described in Directive 2011/93/EU, will be able to benefit from all those special measures, regardless of how they wish to intervene in criminal proceedings and if he/she is simultaneously a victim of domestic violence or not.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b></p> <p>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</p>	<p><b>Criminal Procedure Code</b>  <b>Article 1</b></p> <p>j) "Violent criminality": the conducts that are intentionally aimed against life, physical integrity, personal freedom, sexual freedom and self-determination or against a public authority, and are punishable with 5 or more years of imprisonment;</p>

<sup>104</sup> Maria Clara Sottomayor, 'Os direitos das vítimas de crimes violentos', in *Temas de Direitos das Crianças* (Almedina Editora, 2014), 264-265.

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.

#### **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 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.

#### **Article 68**

##### **Assistant**

1. Can be constituted as Assistants in the criminal procedure, besides the persons and entities to whom especial laws grant such right, the following:

a) the offended, as the holder of the interests that the law specially wishes to protect, as long as older than 16 years old;

c) if the offended dies without having renounced the complaint, the surviving spouse, providing they are not legally separated, or the person of the opposite or the same gender, who has lived with the offended in the same terms as spouses, descendants and adoptees, ascendants and adopters, or, in their absence, brothers and their descendants, unless any of them has participated in the crime;

d) if the offended is younger than 16 years old or by any reason incapable, the legal representative, and, in its absence, the persons mentioned in the previous sub-paragraph, by that order, or, in the absence of others, the entity or institution with protective, tutelary or educational responsibilities, if the minor was judicially entrusted to its responsibility or guardianship, unless any of them has helped or participated in the crime.

#### **Article 69**

2- In particular, the Assistants may:

a) Intervene in the inquiry and in the preliminary hearing, supply evidence and require any procedural acts which are deemed necessary and have knowledge of any decisions made upon such initiatives;

#### **Article 71**

The request for civil indemnification based on a crime is made in the respective criminal proceedings, only able to do it separately, before a civil court, in the situations established in the law.

#### **Article 82-A**

1- When there has been no request for civil indemnification in the criminal proceedings or separately, in the terms of Article 72 and 77, the court, when the defendant is convicted, may attribute a sum for reparation of the damage caused when particular demands of victim protection so imposes.



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 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

#### **Article 87**

3. In proceedings for crimes of human traffic or crimes against the sexual freedom and self-determination, the procedural acts occur, as a rule, without public's attendance.

#### **Article 88**

1. The media are allowed, within the legal limits, to circumstantially report the content of procedural acts that are not under legal secrecy course of the proceedings allows the attendance of the general public.

2. It is not, however, allowed, under penalty of simple disobedience:

- c) the publication, by any means, of the identity of victims from human traffic or crimes against the sexual freedom and self-determination, unless the victim consents expressly in revealing the identity or if the crime is committed through a social communication department.

#### **Article 90**

1 – Any person that reveals a legitimate interest may ask to be admitted to consult a procedural file that is not found under legal secrecy and to be provided, under his/her own expense, copy, extract, or file certificate or of part of it. The judicial authority which presides in the stage that the proceedings are in or that made the last decision in it will rule upon the request, upon decision or order.

#### **Article 131**

3. Where a person under 18 years old is called to testify on crimes against minors' sexual freedom and self-determination, that person's personality may be assessed in a forensic expertise.

#### **Article 133**

1 – The following are impeded to testify as witnesses:

(...)

- b) The persons who have constituted to be Assistants, from the moment of their constitution;

#### **Article 138**

1. The testimony is a personal act that cannot, in any circumstance, be made through a representative.

2. Witnesses shall not be asked suggestive or impertinent questions, nor any other that can



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.

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.

compromise the spontaneity and honesty of the answers.

3. The questioning shall focus, firstly, on the necessary elements to identify the witness, family relationships and interests with the defendant, the offended, the assistant, the civil party and with other witnesses, as well as on any circumstances relevant to evaluate the credibility of the statement. Subsequently, if obliged to take an oath, the witness shall do it, after which will testify in the terms of the law and subject to the legal limits.

**Article 139**

2 - The protection of witnesses and other actors involved in the criminal procedure against threats, pressure or intimidation, namely cases of terrorism, violent criminality or highly organized, is regulated in a special law.

**Article 145**

1 - The Assistant and the parties, may provide a statement, upon their own or the defendant's request or whenever the judicial authority deems convenient.

**Article 241**

The Public Prosecutor acquires notice of a crime on his/her own knowledge, through the law enforcement bodies or denunciation, in the terms of the following provisions.

**Article 245**

The denunciation/complaint filed with an entity other than the Public Prosecutor's Office is to be transmitted to it in the most short time, which may not exceed 10 days.

**Article 247**

1 - The Public Prosecutor's Office notifies the victim of the notice of the crime, whenever he/she has grounds to believe that the victim has no knowledge of it.

2 - Nevertheless, the Public Prosecutor's Office notifies the offended about his/hers rights of complaint and its procedural consequences and about the legal aid system as well.

3- Notwithstanding what is provided in Article 82-A, the Public Prosecutor's Office also informs the offended about the regime and the responsible services for the instruction of requests of compensation for victims of violent crimes, made according to the Decree-Law no. 423/91, of 30

October, and the requests for an advanced payment of compensation for victims of domestic violence, as well as the existence of public, private associations or institutions, carrying out activities in support of victims of crime.

**Article 271**

1. In the event of a witness' severe illness or travel to a foreign place, that predictably will prevent him or her from being heard during the trial, as well as in cases of victims of human traffic or crimes against sexual freedom or self-determination, the examining judge, by request of the Public Prosecutor, the defendant, the Assistant or the defendant, may proceed to his or her questioning in the course of the inquiry phase, so that such statement can be, if necessary, taken into consideration during the trial.

2. In proceedings for crimes against a minor's sexual freedom and self-determination, the questioning of the offended is always proceeded in the course of the inquiry, as long as the victim has not yet reached the age of majority.

3. The Public Prosecutor, the defendant, the defender and the Assistant's and the civil party's lawyers are communicated of the day, time and place of the hearing so that they can be present, being that the Public Prosecutor's and defender's presence is mandatory.

4. In case of paragraph 2, the hearing shall occur in an informal and reserved premise, in order to guaranty, namely, the spontaneity and honesty of the answers, being that the minor shall be assisted during the procedural act by a professional especially trained for that purpose, previously nominated.

5. The inquiry is led by the judge, after which the Public Prosecutor, the Assistant's and civil party's lawyers and the defender, by this order, can ask additional questions.

6. It is correspondingly applicable the foreseen in Articles 352, 356, 363 and 364.

7. The previous paragraph is correspondingly applicable to statements given by the Assistant and the civil party, experts and technical consulters and to confrontations.

8 – The statements provided under the previous paragraphs does not prejudice the possibility to give testimony in the Main Hearing, whenever possible and it does not harm the physical and mental health of the person who will provide it.

	<p><b>Article 277</b></p> <p>3 – The decision terminate the proceedings is communicated to the defendant, to the Assistant, to the complainant with the faculty to become an assistant and to the person who has expressed an intention to claim for damages under Article 45, as well as their legal counsel or lawyer.</p> <p>Article 283</p> <p>5 – It is applicable the established in paragraph 3 of Article 277, continuing the process when the notification procedures have revealed ineffective.</p> <p>Article 287</p> <p>2 - The application is not subject to any special formalities, but must contain, in summary, the factual and legal basis for the disagreement in relation to the indictment or the decision to not indict, as well as, whenever applicable, an indication of all acts of production of evidence that the applicant wishes the judge to conduct, of all evidence-collecting measures that have not been considered in the inquiry and all the facts, which through one or the other, it is expected to prove, being also applicable to this application by the Assistant what is provided in subparagraphs b) and c) of paragraph 3 of Article 283. No more than 20 witnesses can be listed.</p> <p><b>Article 324</b></p> <p>1 – Every person watching the Main Hearing must behave in such a way that does not prejudice the order and regularity of the acts, the independency and the freedom of action of the procedural participants and respect the dignity of the place.</p> <p>2 – The people referred in the last paragraph especially must:</p> <ol style="list-style-type: none"> <li>a) Abide to the determinations which govern the Main Hearing;</li> <li>b) Behave with composure, stay quiet, sit down and head uncovered;</li> <li>c) Not carry disturbing or dangerous objects, namely, weapons, unless, they are carried by the entities in charge of the court's security;</li> <li>d) Not express feelings or opinions, namely approval or disapproval, in regards to any procedural act in course in the Main Hearing.</li> </ol> <p>Article 325</p> <p>3 – The defendant must abide by the same code of conduct that, in accordance with the previous Article, every person that is watching the Main Hearing must comply.</p> <p>4 – If, in the course of the Main Hearing, the</p>
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defendant is disrespectful to the court, he/she is warned and, if he/she persists with such behavior, the Judge will order him/her wait for the end of the procedural act in a different room, notwithstanding the possibility to watch the last interrogation and the reading of his/her sentence and the duty to return to the room when the court deems his/her presence necessary.

**Article 326**

If the lawyers in their allegations or requests:

- a) Are disrespectful to the court;
  - b) Seek, manifestly and abusively, delay or embarrass the normal course of the proceedings;
  - c) Use injurious or defamatory expressions or needlessly violent or aggressive; or
  - d) Do, or incite to be done, commentaries, explanations over matters unrelated to the proceedings and somehow are used to clarify it;
- are adverted with civility by the President of the court; and if, after adverted, so continue, he/she may interrupt him, being applicable in this case what is established in the laws of civil procedure.

**Article 340**

1 – The court orders, on its own or upon request, the production of all means of evidence, whose knowledge that he/she deems necessary for the discovery of the truth and to the good ruling of the case.

**Article 349**

The questioning of witnesses younger than 16 years old is done only by the Presiding-judge. After that, the other judges, the jury, the Public Prosecutor, the defender, the Assistant's lawyer and the civil parties can request the Presiding-judge to ask the additional questions.

**Article 352**

1. The court orders the removal of the defendant from the court room, during the giving of statements, if:

- a) There are reasons to believe that the presence of the defendant would inhibit the deponent from telling the truth;
- b) The deponent is younger than 16 years old and there are reasons to believe that his or her hearing in the defendant's presence would seriously harm him or her;

**Article 363**

The statements given orally in the main hearing are always documented in the minutes, under penalty of nullity.

**Article 364**

1. The documentation of the statements given orally in the main hearing is done, as rule, through audio or audiovisual record, and other means, namely stenographic or transcription, or any other technical means suitable to ensure the full reproduction of the statements, are only to be used when the first mechanisms are not available.

2. When there is audio or audiovisual record, it must be noted the start and end of the record of each statement, in the minutes.

3. It is correspondingly applicable the set forth in Article 101.

**Article 372**

4 – The reading of a sentence is equivalent to the notification to all procedural subjects that are considered

5 – Right after the reading of the sentence, the president proceeds to its deposit in the administrative services. The administrative clerk inserts the date, signs the declaration of deposit and delivers copy to the procedural subjects that so request.

**Article 373**

2 – On the established date, the sentence is publicly read and deposited with the administrative services, under the terms of the previous article.

**Law no. 104/2009****Article 2**

1 – The victims who have suffered serious damage to their mental or physical health due to the conduct of the offender, committed in the Portuguese territory or on board of Portuguese ships or aircrafts, have the right to be conceded compensation in advance from the State, even if they have not constituted as an Assistant in the criminal proceedings, when the following requirements are fulfilled:

a) The damage caused permanent incapacity or a temporary, but absolute one which did not allow the victim to be able to work for at least 30 days or death;

b) The fact must have provoked a considerably

disturbance in the victim's quality and level of life or, in the case of death, of the applicant;

**Article 10**

1 – The concession for compensation in advance from the State depends on prior application submitted to the Commission by the persons referred in Article 2 and 5.

4 – The public entities, including the Public Prosecutor, the associations or other private entities that provide support to victims of crimes may file the application established in paragraph 1 by request or in representation of the victim, necessarily doing it through electronic transmission of data, within the terms of an administrative act of a Government member responsible for the area of justice.

c) Must not have obtained effective reparation for the damage in execution of a conviction in related to a request in the terms of Article 71 to 84 of the Criminal Procedure Codes or, if reasonably predictable that the delinquent and the civil responsible will not repair the damage, without being possible to obtain from other source an effective and sufficient reparation.

**Law no. 112/2009**

**Article 6 of Law no. 112/2009**

1 – To the victim it shall be assured, in all phases and instances of intervention, treatment with respect for his/her personal dignity.

2- The State assures to all especially vulnerable victims, the possibility to benefit from specific treatment, tailored to his/her situation.

**Article 15**

1 – It is guaranteed to the victims, as from their first contact with with the competent authorities for the application of the law, the access to the following information:

- (a) The type of services or organisations to which they can turn for support;
- (b) The type of support which they can obtain;
- (c) Where and how they can submit their denunciation;
- (d) What are the procedures following the denunciation and their role in connection with such procedures;
- (e) How and under what conditions they can obtain protection;
- (f) To what extent and on what terms they have access to:

	<p>(i) Legal advice or  (ii) Legal aid, or  (iii) Any other sort of advice,  (g) What are the requirements which govern the right for compensation;  (h) What are the especial defence mechanisms which he/she may use, being a resident from a different State.</p> <p>2. Always that a victim so wishes with the competent entity to the effect, and without prejudice to the regime of legal secrecy, must be assured the following information:  (a) the outcome of their complaint;  (b) relevant factors enabling them, in the event of prosecution, to know the conduct of the criminal proceedings regarding the person prosecuted for offences concerning them, except in exceptional cases where the proper handling of the case may be adversely affected;  (c) the court's sentence.</p> <p>3. It must be promoted the necessary measures to provide the victim information, when the person prosecuted or sentenced for an offence is released, within the criminal proceedings.</p> <p>5. It must be ensured to the victim, the right not to receive it, unless communication is compulsory under the terms of the applicable criminal proceedings.</p> <p><b>Article 16</b></p> <p>1- The victim who becomes an Assistant cooperates with the Public Prosecutor in conformity with the Assistant's statute in the criminal procedure.  2- The authorities may only question the victim insofar it is necessary for the aims of the criminal proceedings.</p> <p><b>Article 17</b></p> <p>1 – All necessary measures must be taken, in conditions comparable to the ones applied to the perpetrator, to minimize as much as possible communication problem, either in relation to the understanding, or in relation to the intervention of the victim as a procedural subject in the several procedural acts of the criminal proceedings.  2 – It is applicable to the situations referred in the last paragraph, the legal provisions in force for the nomination of a translator.</p> <p><b>Article 18</b></p> <p>The State assures, without costs in the situations</p>
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established in the law, that a victim will have access to legal consult and advice about his/her role in the proceeding and, if necessary, the legal aid when he/she is a procedural subjects in criminal proceedings.

**Article 19**

The victim that intervenes in the role of a subject in criminal proceedings must be provided the possibility to be reimbursed of the expenses made due to his/her legitimate participation in criminal proceedings, in terms established by the law.

**Article 20**

1 – It is assured an adequate level of protection to the victim and, if that is the case, to his/her family or persons living in a similar situation, namely in respect to security and protection of his/her private life, whenever the competent authorities consider that exist a serious threat of acts of vengeance or strong evidence that that privacy may be seriously and intentionally disturbed.

2 – The contact between victims and defendants in all places that will require their presence in a joint procedural act, namely court buildings, must be avoided, notwithstanding the application of the procedural rules of the Criminal Procedure Code.

3- To the especially vulnerable victims, it must be assured the right to benefit, by judicial decision, from testimony conditions, by any means compatible, that may protect them of the effects of providing statements in a public hearing.

4 – The judge or, in the course of the inquiry phase, the Public prosecutor, may determine, whenever it is shown paramount to the protection of the victim and obtaining his/her consent, that it will be assured psychological -social support

**Law no. 93/99**

**Article 1**

1- The present law regulates the application of protective measures for witnesses in the criminal proceedings when his/her life, physical or mental integrity, freedom or patrimonial goods of considerably high value are put in danger due to their contribution for the proof of the facts which are the object of the proceedings.

2 – The measures that the previous paragraph refers may cover the witness's family, the persons which live in a situation similar to that of a spouse and other persons that are close to him/her.

3 – It is also established the measures which aim at



obtaining, in the best possible conditions, testimonies or statements of especially vulnerable persons, namely due to his/her age, even if the danger referred in paragraph 1 does not verify.

4 – The measures established in the present law have exceptional nature and may only be applied if, in concrete, if they are considered necessary, adequate to the protection of persons and achieving the finality of the process.

#### **Article 2**

a) Witness: any person who, regardless of his/her statute under procedure law, has information or knowledge of the information necessary to reveal, perceive or appreciate facts which constitute the aim of the proceedings, of which use results in a danger for himself/herself or for others, within the terms of paragraph 1 and 2 of the previous Article.

#### **Article 5**

1. Whenever there are substantial reasons of protection that justify so, if there is an evidence to be produced in a crime that is to be submitted to a collective court or to a jury, it is admissible to resort to means of teleconference, in the procedure acts mentioned in the previous Article.

2. Teleconference may be carried out with image concealment, or voice distortion measures, or both, in order to prevent the witness from being recognized.

#### **Article 6**

1. The use of teleconference is decided by request of the Public Prosecutor's Office, the offended, the Assistant or the witness.

2. The request indicates the specific circumstances that justify the measure, and, if that's the case, the image or voice concealment.

3. The decision is preceded by the hearing of the parties that are not requesting.

#### **Article 7**

The statement or testimony to be transmitted from a distance shall occur in a public building, whenever possible in judiciary, police or prison facilities that allow the colocation of the necessary technical means.

#### **Article 8**

The court may limit the access to the facilities where the statement or testimony is to be given to the technical personnel, employees or security

members that are considered as strictly necessary.

**Article 9**

Whenever the aim is to avoid the victim to be recognized through image or voice or his or hers identity is not to be revealed, the technical personnel that intervenes in the teleconference shall be obliged to abide to a declaration of commitment of the non-disclosure of the facility or the witness identification elements, under penalty of being punished for a crime of qualified disobedience.

**Article 13**

Whenever the witness's identity is not to be revealed, the judge presiding the act shall avoid asking questions that lead the witness to indirectly give away his or her identity.

**Article 20**

1. Whenever there are substantial reasons of protection that justify so, if there is a crime that shall be submitted to a collective court or to a jury, and without prejudice to any other protective measures foreseen in this law, the witness can benefit from temporary protective measures, namely the following:

- a) Indication, in the proceedings, of a different residence other than the habitual residence or that does not coincide with the residence foreseen in the civil law;
- b) Ensured transportation in a vehicle provided by the State to participate in a procedure act;
- c) Have a room, eventually monitored and with security, in the judiciary or police facilities to where the witness has to go and in which the witness can stay without the company of other participants in the procedure;
- d) Benefit from police protection, which can be extended to family members, person that live in similar conditions to a spouse, or other person that is close to the witness;
- e) Enjoy in prison of a regime that allows the witness to be isolated from other prisoners and to be transported in a different vehicle;
- f) Alteration of the physical place of usual residence.

2. The measures foreseen in the previous paragraph are ordered by the Public Prosecutor's Office, during the inquiry stage, by his/her own initiative, by request of the witness or his or hers legal representative or by proposition of the law enforcement authorities, and later, by the judge that

presides the stage where the procedure is, by request by the Public Prosecutor's Office.

3. The judiciary authority carries out the duly diligence necessary to evaluate the need and suitability of the measure in the specific case.

4. Every three months, the judiciary authority reviews the decision, maintaining, modifying or revoking the applied measure.

**Article 26**

1 – When an especially vulnerable witness has to participate in a determined procedural act, the competent judiciary authority will assure that, regardless of the application of other measures established in this law, such act will occur in the best possible conditions, with the aim to guaranty the spontaneity and sincerity of the answers.

2 – The especial vulnerability of the witness may result from, namely, due to his/her diminutive or advanced age, state of health, or because he/she will testify or give statements against his/her own family or closed social group in which he/she is in a subordinated or dependency situation

**Article 27**

1- As soon as the especial vulnerability of the witness is perceived, the judicial authority will designate a social service technician or other person especially qualified to accompany the witness and, if that is the case, provide the necessary psychological support through a specialized technician.

2- The judicial authority that presides the procedural act may authorize the presence of the social service technician or of other accompanying person with the witness, in the course of that act.

**Article 28**

1 – During the inquiry, the especially vulnerable witness's testimony or the providing of statements should be gathered as soon as possible after the crime has occurred.

2 - Whenever possible, the repetition of the hearing of the especially vulnerable witness in the course of the inquiry should be avoided, may even be requested to record it according to Article 271 of the Criminal Procedure Code;

**Article 29**

The judge that presides to a public procedural act or subject to contradictory, in order to obtain free, spontaneous and truthful responses, he/she may :

a) Programme the acts in such a manner that the

especially vulnerable witness does not encounter any of the parties or procedural actors, namely the defendants;

b) Hear the witness through the use of teleconference or concealment measures, namely from a different place of the court's building, applying with the due adaptation what is established in Article 4 and 15;

c) Proceed to the witness's questioning, and, after that, the other judges, jurors, the Public Prosecutor, the defendant and the assistant's lawyer and the civil parties may ask additional questions.

**Article 30**

Whenever it is deemed useful, the judge presiding the public procedural act or subject to contractor may notify the person accompanying the especially vulnerable witness to bring him/her to the judge for the sole aim to introduce himself/herself and to previously be shown the rooms where the act will take place.

**Article 31**

1 - In any procedural phase, the especially vulnerable witness may be temporarily removed from the family or closed social group in which he/she may be found included.

2 - The temporary removal is decided by the Judge, upon request of the Public Prosecutor;

3 - Before deciding, the Judge carries out all the necessary diligences, summoning the especially vulnerable witness, the accompanying person and other persons deemed necessary to hear, namely the social service technician.

4 - Whenever deemed necessary, the Judge will request the support and the monitoring of the Institute for Social Reintegration.

**Article 31-A**

1 - To the witness that, due to his/her collaboration with the justice, finds himself/herself in a patrimonial situation that may render unable to fulfil his/her pecuniary obligations to the State or other public entities it may be granted a moratorium if the superior interest of achievement of justice so justifies, by joint decision of the members of the Government responsible for the areas of justice and protection, through a substantiated proposal to the Commission of Security Special Programmes.

2 - If the moratorium is granted the limitation period is interrupted.

3 - The procedure and decision in relation to the

	<p>grant of moratorium has a confidential and urgent nature.</p> <p><b>Law no. 115/2009</b>  <b>Article 91</b>  3- Notwithstanding other legal provisions, the courts for executions of sentences, due to the matter, must:</p> <p>t) Inform the offended of the release or evasion of the convict from prison, in the cases established in Article 223 and 97 of the Code for the Execution of Sentences and Custodial Measures;</p> <p><b>Law no. 147/99</b>  <b>Article 3</b>  1 - The intervention for the promotions of rights and protection of the child and the young person in danger takes place when the parents, legal representative or whoever has the <i>de facto</i> guardianship put their security, health, education or development in danger, or when that danger results from an action or omission of a third person or from the child or the young person that they did not adequately try to remove it.  2 – It is considered that a child or young person is in danger when, namely, he/she is found in one of the following situations:</p> <p>a) He/she is abandoned or left to fend for themselves or not taken care for;  b) He/she is physically and/or psychological and/or sexually abused.  c) He/she does not receive the nurturing and affection according to their age and personal condition.  d) He/she is forced to do activities or excessive work not befitting their age, dignity and personal situation, or which are harmful to their education and physical and psychological development;  e) He/she is exposed, in a direct or indirect way, to behaviour that affects their security or emotional balance seriously.  f) He/she engages in behaviour, activities or consumptions that affect their health, security, training, education and development seriously, and whose parents, legal representatives or tutor, cannot handle the situation.</p> <p><b>Article 5</b>  For the effects of the present law, it is considered:</p> <p>a) Child or young person – the person under 18 years old or a person under 21 years that requests a continuation of the intervention initiated before</p>
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	<p>achieving the age of 18.</p> <p>c) Emergency situation – the actual and imminent situation of danger for the life and physical integrity of the child or young person;</p> <p><b>Article 35</b></p> <p>The measures for promotion and protection are the following:</p> <p>a) Support to parents;</p> <p>b) Support to other relatives;</p> <p>c) Entrust to a reliable person (a person with whom the child has developed a bond or affection);</p> <p>d) Support for an autonomous life;</p> <p>e) Foster families;</p> <p>f) Foster Institutions;</p> <p>g) Entrust to a selected person for adoption or the institution for future adoption (Law no. 31/2003, of 22 August).</p> <p><b>Article 65</b></p> <p>2 – When the Commission for Protection is not settled or when it is not competent to apply the adequate measure, namely when the parents of the child or the young person express their will in relation to their consent or non-opposition to the future adoption, the entities must communicate the situation of danger directly do the Public Prosecutor.</p> <p><b>Article 70</b></p> <p>When the facts which determined the situation of peril constitute a crime, the entities and institutions referred in Article 7 and 8 must communicate them to the Public Prosecutor's Office.</p> <p><b>Article 91</b></p> <p>1 – When an actual and imminent danger for the life or physical integrity of the child or young person exists and there is opposition from the holders of the parental power or from who has <i>de facto</i> guardianship, whichever entities referred in Article 7 or Protection Commissions take the adequate measure for immediate protection and request the intervention of the court or police entities.</p> <p>2 - The police entities, immediately, inform the Public Prosecutor's office of the situations referred in the previous paragraph or, when that is not possible, as soon as the situation of impossibility ceases.</p> <p>3 – While the court's intervention is not possible, the law enforcement authorities remove the child or</p>
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young person from the danger that he/she is in and assures his/her urgent protection in a temporary foster home, in the building of the entities referred in Article 7 or in any other adequate location.

4 – The Public Prosecutor's Office, once he/she receives the communication made by one of the entities referred in the previous paragraphs, requests immediately to the competent court an urgent judicial procedure in the terms of the following Article.

**Article 103**

1. The parents, the legal representative or whoever has the *de facto* guardianship may, in any stage of the proceedings, appoint an attorney that represents him or her, or the child or young person.

2. It is mandatory that a lawyer is appointed to the child or young person when the minor's and the parent's, legal representative's or the *de facto* guardian's interests are conflicting, and also when the child or youth with the adequate maturity so requires to the court.

4. In the judicial debate it is mandatory that a lawyer is appointed to the child or youth.

Constitution of the Portuguese Republic

**Article 20**

1. To all is ensured access to the law and to the courts in order to defend their legally protected rights and interests, and justice shall not be denied to anyone due to lack of financial means.

2. All are entitled, in accordance with the law, to legal information and counselling, to legal representation and to be accompanied by an attorney before any authority.

**Article 206**

Court hearings are public, except when the court judging the cause decides otherwise, in a justified decision, to protect the personal dignity and public morality or to guarantee its normal functioning.

**Regime for the Access to Law and Courts**

**Article 1**

1. The system of access to the law and courts is meant to ensure that to none may be hampered or denied, based on the person's social or cultural condition, or due to insufficient financial means, the knowledge, use, or defence of their rights.

**Article 2**

1. The access to the law and courts is a State's responsibility, to promote, namely, through

	<p>provisions of cooperation with the institutions that represent the forensic professions.</p> <p>2. The access to the law includes legal information and legal protection.</p> <p><b>Article 6</b></p> <p>1. Legal protection takes the form of legal counselling and legal aid.</p> <p><b>Article 7</b></p> <p>1. The right to legal protection belongs to, in the terms of the present law, national and European citizens, as well as to foreigners and stateless with a title of residence valid in a European Union Member State, that prove to be in an economical insufficiency situation.</p> <p><b>Article 16</b></p> <p>1. Legal aid includes the following modalities:</p> <ol style="list-style-type: none"> <li>a) Exemption from judicial fees and further procedural costs;</li> <li>b) Appointment and payment of the lawyer's compensation;</li> <li>c) Payment of the public defender's compensation;</li> <li>d) Payment in installment of the judicial fees and further procedural costs;</li> <li>e) Appointment and phased payment of the lawyer's compensation;</li> <li>f) Payment in installments of the public defender's compensation;</li> </ol>
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## TOPIC 7.

### *Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography. Please specify with regard to:

#### **7.1.1. Obligatory take down measures (Art. 25 (1))**

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:



a) Within its territory? If yes, please specify

The Law no. 109/2009 of 15 September (Cybercrime Law - CL) has introduced general measures to tackle cybercrime<sup>105</sup>. However, in this Law there are no specific measures to deal with child pornography. This means there is an article which deals with apprehension of computer data in general, but it does not distinguish between certain types of data. Computer data is, according to the Portuguese Cybercrime Law, “any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function” – so it is explained in Article 2. Paragraph 1 of Article 16 of the same Law states that the competent judicial authorities may authorize or order the apprehension of computer data when such is found during a search made through a computer system, and it is necessary for the production of evidence. Moreover, paragraph 2 of the same article states that police entities are not obliged to request authorization to proceed with the apprehension when: 1) the search made through a computer system was considered legitimately ordered and executed in conformity with paragraph 1; 2) and when there is necessity for a expeditious apprehension, or there are grounds to believe that the computer data is particularly vulnerable to loss or modification.

Paragraph 7 of Article 16 of the CL explains the different types of apprehension that can exist. The choice between one and the other depends on what is more adequate and proportional and has to bare in mind the specific case details. Law enforcement agencies or judiciary authorities may obtain evidence through (a) apprehension of the part of the computer where its system is installed or of the part where the computer data is stored, as well as the devices necessary to read the above mentioned data, (b) making and retaining an autonomous copy of the computer data, that will be joined with the proceedings, (c) maintaining the integrity, through technological means, of the relevant computer data, without copying or removing it, (d) rendering inaccessible or removing the computer data.

Article 11 states that the evidence-collecting measures foreseen in the CL are applicable to proceedings with regards to crimes (a) punishable by this law (e.g. illegal access, illegal interception, computer-related forgery, computer-related sabotage), (b) committed through the usage of a computer system, (c) or in regards to which is necessary to collect digital evidence.

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<sup>105</sup> Portugal is part of the Council of Europe since 1976, so the State has incorporated in its legal system the Convention of Cybercrime, signed in Budapest in 2001.

Therefore it is certain that Article 16 is applicable to computer data consisting of child pornography, including websites<sup>106</sup>. These are crimes that are committed through the usage of a computer system and there is a necessity of collecting digital evidence, in order to prove the perpetration of the offence. Bearing in mind that child pornography is a crime in Portugal, as stated in Article 176 of the Portuguese Penal Code, we conclude that the Portuguese legal system provides for procedural measures which will allow the competent authorities to remove web pages containing or disseminating child pornography (Article 16 (7) (d) CL). However, there are no obligatory take down measures. The competent judicial authorities can demand the removal of these webpages but they are not obliged to, at least there is no legally mandatory removal.

From a different point of view, Decree-law no. 7/2004<sup>107</sup> of 7 January analyses the liability of private entities, namely the liability of intermediary service providers. Although there is no general obligation to monitor or to seek facts indicating illegal activity (Article 12 of Decree-law no. 7/2004), these entities have the obligation to promptly inform the competent public authorities of alleged illegal activities undertaken by recipients of their service (Article 13 (a) of Decree-law no. 7/2004). Moreover, service providers have also to promptly answer the requests made by public entities with regards to removing or denying access to specific information, when related to the prevention or termination of an infraction (Article 13 (c) of Decree-law no. 7/2004). This means that if the content relates to child pornography, public entities have the possibility to ensure its prompt removal through the service providers.

b) Outside its territory? If yes, please specify

Considering the fact that the Portuguese Cybercrime Law does not have measures especially applicable to child pornography websites, the above mentioned Law also does not distinguish between websites hosted within the Portuguese territory or abroad. There is, however, a general rule on international cooperation: Article 20 from the Portuguese Cybercrime Law states that the competent national authorities will cooperate with the competent foreign authorities in investigations concerning crimes related with computer systems or computer data, as well as

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<sup>106</sup> Ana Paula Rodrigues, 'Pornografia de menores: novos desafios na investigação e recolha de prova digital' (2011), 15 RCEJ 261, 279.

<sup>107</sup> Decree-law no. 7/2004 of 7 January on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), as well as Article 13 from Directive 2002/58/CE of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications [2004] DRE I-A 5/70.

where there is a need to collect digital evidence of a crime. Moreover, according to Article 24 paragraph 1 from the Law in analysis, the competent judicial authorities may, upon request, cooperate with foreign authorities with the search, apprehension and disclosure of computer data stored in a computer system located in Portugal, when related to crimes punishable by article 11 and when the search and seizure is legitimate in Portugal. Paragraph 3 from the Article 24 states that paragraph 1 can be applicable, with the necessary changes, to requests formulated by Portuguese authorities. It appears that foreign authorities would cooperate with Portugal and send information stored in a computer system located abroad. However, once again, there is no obligation and, the possible removal of the computer data is not established.

When it comes to the Portuguese criminal law's geographical application, there is a specific article in the CL, stating that the Portuguese criminal law is also applicable to facts perpetrated by nationals, when no other state criminal law is applicable; to facts committed for the benefit of legal persons with its headquarters in Portuguese territory; to facts perpetrated in Portuguese territory, even when aimed at computer systems located outside this territory; and to facts aimed at computer systems located in Portuguese territory, regardless of the place where the facts were physically committed (Article 27 CL). So, the take-down measures existent in Portugal can be applied outside its territory, bearing in mind that cooperation needs to exist with the foreign entities, according to Article 24 of the CL.

### **7.1.2. Optional blocking measures (Art. 25 (2))**

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify

As previously analysed, the Portuguese Cybercrime Law states that the apprehension of computer data can be made, when justifiable under Article 16 paragraph 1, through various ways. According to Article 16 paragraph 7 subparagraph (d), there is the possibility of rendering inaccessible specific computer data. So, 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, since, as previously explained, child pornography is one of the crimes which fall within the scope of Article 11, thus allowing competent authorities to resort to the measures of Article 16.

Article 25 paragraph 2 of the Directive also obliges Member States to adopt transparent procedures and provide adequate safeguards when blocking the access to such websites. As described earlier, the procedural measures of the Portuguese Cybercrime Law are applicable to child pornography but they are not specifically intended for this crime. Competent authorities may resort to one of these evidence-collecting measures for a wide array of offenses as provided in Article 11. Therefore, there is no legal regime concerning the blockage of these websites. There are, however, general rules to ensure the transparency of evidence-collecting measures and numerous safeguards to guarantee the adequacy of the mentioned measures. It has already been referred that the choice between one or another type of computer data apprehension depends on what is more adequate and proportional (Article 16 (7) CL). Also, the authorization needed to proceed with the apprehension data (Article 16 (1) CL) has to be duly substantiated (Article 97 (5) CPC), and the consequent procedural act has to be turned into written form (Article 275 (1) CPC). The decision to block the access is communicated in accordance with Article 111 paragraph 1 subparagraph c and, the decision, consultable under Article 89(1) and 90(1), all of the CPC. In all cases, there is the possibility of judicial redress according to the general rules of the Portuguese procedural criminal law (Article 399 CPC).

## 7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

No legislative measures have been taken to transpose Article 25 of Directive 2011/93/EU.

## 7.3. In your view, does the current legal framework comply with Article 25?

Taking in account what was already explained, Portugal's current legal framework does not comply with the Directive's Article 25 paragraph 1, because there are no specific measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in our territory. The existent measures are included in the Cybercrime Law and these do not specifically relate to child pornography. Moreover, the removal of the websites is not mandatory: the competent judicial authorities have the possibility to apprehend computer data, but there is no obligation to remove it online. Regarding paragraph 2, despite the fact that there are no measures especially created to combat child pornography, other measures concerning the blockage of access to websites in general can be used. When in the presence of illegal contents,

e.g., child pornography, competent authorities may resort to these measures and render the illegal contents inaccessible. Taking in consideration what has been previously explained, it is safe to conclude that the current legal framework complies with paragraph 2 from Article 25, but does not comply with its paragraph 1.

If no, what additional measures should be taken in order to comply with Article 25?

It is our opinion that there should be a specific and clear legal regime specially cut out to combat child pornography in websites. Bearing in mind that the development of such regime takes time and multiple efforts, meanwhile the Cybercrime Law should be amended to include a paragraph in Article 16 concerning child pornography: when the computer data is related to child pornography, there should be a mandatory removal from the competent authorities. It is noticeable that the police entities are instructed to remove these websites and start investigations when there is only a slight suspicion, so there are instructions and rules that bind the police in cases related to the topic in discussion. However, the legal regime should be sufficiently detailed when it comes to child pornography, and at the moment it is not.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 25</b>  <b>Measures against websites containing or disseminating child pornography</b></p> <p>1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.</p> <p>2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall</p>	<p><b>Cybercrime Law</b>  <b>Article 2</b>  <b>Definitions</b></p> <p>For the purposes of this Law:</p> <p>a) "Computer system" means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data, as well as the network that supports communication between the mentioned devices and the computer data stored, recovered or transmitted through these same devices, aimed at its functioning, usage, protection, or maintenance.</p> <p>b) "Computer data" means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;</p> <p>c) "Traffic data" means any computer data relating</p>

<p>also include the possibility of judicial redress.</p>	<p>to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service.</p> <p>d) "Service provider" means any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and any other entity that processes or stores computer data on behalf of such communication service or users of such service.</p> <p><b>Article 11</b>  <b>Scope of the procedural provisions</b>  1 – With exception to articles 18 and 19, the procedural provisions existent in this chapter are applicable to proceedings related to crimes:</p> <p>a) Punishable by this Law;  b) Committed through means of a computer system;  c) When it is necessary to gather evidence, related to the crimes, in digital support.</p> <p><b>Article 16</b>  <b>Computer data apprehension</b>  1 — When, during a search made through a computer system, computer data necessary to produce evidence is found, having in mind a truth-finding goal, the competent authorities may authorize or order the apprehension of the data.  2 — The police entities may apprehend, without previous authorisation from the competent authorities, during a search made through a computer system considered to be legitimately ordered and executed according to paragraph 1, as well as when there is necessity for an expeditious apprehension or there are grounds to believe that the computer data is particularly vulnerable to loss or modification.  (...)  7 — Apprehension of computer data, according to what is more adequate and proportional, baring in mind the specific case details, can be made namely by:</p> <p>a) Apprehension of the part of the computer where its system is installed or of the part where the computer data is stored, as well as the devices necessary to read the above mentioned data;  b) Making and retaining an autonomous copy of the computer data, that will be joined with the proceedings;</p>
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- c) Maintaining the integrity, through technological means, of the relevant computer data, without copying or removing it; or
- d) Rendering inaccessible or removing the computer data (in the accessed computer system).

**Article 20**

**Scope of the international cooperation**

The competent national authorities will cooperate with the competent foreign authorities in investigations concerning the crimes related with computer systems or computed data, as well as in case of necessity to collect digital evidence from a crime, according to the rules on transferring personal data present in the Portuguese Law 67/98 from 26<sup>th</sup> of October.

**Article 24**

**International cooperation regarding access to computer data**

1 — Upon request from a foreign competent authority, the competent authority may search, apprehend and disclose computer data stored in a computer system located in Portugal when related to crimes punishable by article 11 and when this search and apprehension would be acceptable in a similar case in Portugal

(...)

3 — What is stated in paragraph 1 is applicable, with the necessary changes, to requests formulated by Portuguese authorities.

**Article 27**

**Portuguese Criminal Law's geographical application and competence of the Portuguese Courts.**

1 - In addition to the provisions of the Criminal Code regarding geographical application of the Portuguese criminal law, unless otherwise provided by treaty or international convention, for the purposes of this Law, the Portuguese criminal law is also applicable to facts:

- a) Perpetrated by nationals, when no other state criminal law is applicable;
- b) Committed for the benefit of legal persons with its headquarters in Portuguese territory;
- c) Perpetrated in Portuguese territory, even when aimed at computer systems located outside this territory; or
- d) Aimed at computer systems located in Portuguese territory, regardless of the place where the facts were physically committed.

	<p><b>Decree-Law no. 7/2004</b></p> <p><b>Article 12</b>  <b>No general obligation to monitor from intermediary service providers.</b>  The intermediary network-service providers have no general obligation to monitor information transmitted or stored through their service, nor an obligation to actively seek facts indicating illegal activity.</p> <p><b>Article 13</b>  <b>Common duties of intermediary service providers</b>  Intermediary service providers have the obligation towards competent authorities:  to promptly inform competent public authorities of alleged illegal activities undertaken by recipients of their service;  to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements;  to promptly answer the requests made by public entities with regards to removing or denying access to specific information, when related to the prevention or termination of an infraction.  To provide, upon request, the identities of the recipients of their service.</p> <p><b>Criminal Procedural Code</b></p> <p><b>Article 89</b>  1 – During the inquiry, the defendant, the assistant, the offended, the person entitled to civil indemnification and the civil representative may consult, upon request, the process and the elements included therein, as well as obtain the corresponding extracts, copies or certificates, unless when, it is a proceeding which is found under legal secrecy, the Public Prosecutor opposes to it, since he/she considers, justifiably, that it may prejudice the investigation or the rights of procedural participants or victims.</p> <p><b>Article 90</b>  1 – Any person that reveals a legitimate interest may ask to be admitted to consult a procedural file that is not found under legal secrecy and to be provided, under his/her own expense, copy, extract, or file certificate or of part of it. The judicial authority which presides in the stage that the proceedings are in or that made the last decision in it will rule upon</p>
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	<p>the request, upon decision or order.</p> <p><b>Article 97</b> <b>Decision-making acts</b> (...) 5 – The decision-making acts are always duly substantiated and the legal or factual reasons of the decision shall be specified.</p> <p><b>Article 111</b> <b>Communication of the procedural acts</b> 1 – The communication of the procedural acts is aimed at: (...) c) the content of the undertaken act or decision made within the proceedings.</p> <p>Article 275 1- The measures of inquiry carried out in the course of the inquiry shall be turned into a written file, which may be elaborated in summary, unless it concerns a measure that the Public Prosecutor deems unnecessary.</p> <p><b>Article 399</b> <b>General principle</b> It is possible to appeal of every judgment or order made by a collective, juror or single court which are not considered explicitly unappealable by law.</p>
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# ELSA ROMANIA

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

The current legal framework in Romania is composed of the New Criminal Code entered into force on the 1st of February 2014 and of special legislation regarding the matter such legislative act number 161/2003 regarding measures to ensure transparency in the exercise of public office functions and in the business area, the prevention and sanctioning of corruption, act that was applicable at the time of the expiration of the deadline to transpose the Directive. There are other provisions on child pornography such as: legislative act number 196/2003 regarding the prevention and fight against pornography, legislative act number 678/2001 regarding the prevention and fight against human trafficking but these provisions do not refer specifically to access through means of information and communication technology so they are not of particular relevance to this topic.

### 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

Article 5(1) and (3) corresponds to the provisions of Article 51 of the legislative act number 161/2003 that incriminates child pornography through information systems, so the minimum level of protection in the matter imposed by the Directive 2011/1992 was ensured in the Romanian legislation since 2003. This article 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 an information system or a device used to store informatics data. The second paragraph of the article states that even an attempt to do so is punishable by law. The same juridical act provides a definition of "child pornography materials" in art. 35(1)(i) as:

“any material that depicts a minor having a sexually explicit behaviour or an adult presented as a minor and having a sexually explicit behaviour or images that, although do not depict a real person, simulate in a credible manner a minor having sexually explicit behaviour”,

so the scope of art. 51 is also extended to adults pretending to be minors. The phrase “information system” is also defined under the same legislation in art. 35 alin.(1)(a).

The New Criminal Code, entered into force after the 18th of December 2013, systemized the approach of this crime. Article 374 (1) states that production, owning with the intention of distributing child pornography materials, buying, stocking, exposing promoting, distributing and giving access in any way to such materials is punishable with imprisonment from 1 to 5 years. However this paragraph only refers to the circumstance in which the person obtains access to those materials in view of distributing them so it refers to a specific intent when committing the crime. The second paragraph adds that if the facts were committed through an information system or any other device used to store informatics data the punishment is imprisonment from 2 to 7 years so this constitutes an aggravating circumstance but the intent of distributing the materials has to be present as well in order for this paragraph to be applied. Obtaining access to child pornography materials through information systems or other means of electronic communication is punishable with imprisonment from 3 months to 3 years or with a fine according to paragraph 3 of the same article. Here the intent of distributing is not required. The attempt to commit such crime is punishable.

Both the New Criminal Code in Article 374 (4) and the legislative act number 161/2003 in Article 35 (1) provide similar definitions of “pornographic materials” except for the fact that the definition in the New Criminal Code excludes the category of adults pretending to be minors in pornographic materials.

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

The conduct described in Article 5(1) and (3) is criminalized in Romania as described in the previous question. From the wording of the legislation mentioned above we could deduct that access without right to child pornography materials constitutes a crime even if it is made unknowingly since the articles are silent about this topic. In this sense the national legislation has a broader margin of application than the directive.

As far as the expression “information system” goes, it is not only compatible with the wording of the directive “information and communication technology” but has a broader sense as the term is used to refer not only to the information and communication technology (ICT) that an organization uses, but also to the way in which people interact with this technology in support of business processes. As far as the criminalization of such behaviour is concerned the national legislation complies with the European standard.

The punishment for obtaining access without right to child pornography is the prescribed under art. 51 (1) of the juridical act 161/2003 is imprisonment from 3 to 12 years and the restriction of some legal rights. This juridical act was into force on the 18th of December 2013 so this was the applicable sanction.

However the punishment for obtaining such access according to the New Criminal Code that entered into force since the 1st of February 2014 is smaller than the one indicated by Article 5 (3) of the Directive “imprisonment of at least 1 year” as article 374 (3) of the New Criminal Code mentions an alternative sanction between imprisonment from 3 months to 3 years or a fine. In the case in which such access is made with the purpose of distributing the pornographic materials, the case would fall under the scope of article 374 (2) and it is sanctioned with imprisonment from 2 to 7 years and this provision is compatible with the Directive.

Giving the fact that in a case of a conflict of norms in criminal law the one who contains dispositions more favourable to the person who committed the crime, the sanction of the New Criminal Code (which is partly incompatible with the Directive) is applicable in the present. It must be clear thought, that at the moment when the deadline to transpose the provisions of the Directive expired there was no conflict of norms and the applicable sanction was imprisonment from 3 to 12 years, a sanction compatible with the provisions of the Directive.

If no, what additional measures should, in your view, be taken in order to comply with Art. 5 (1) and (3)?

The one additional measure the state should take to fully comply with the terms of the Directive is to increase the sanction for accessing child pornography materials by information systems without the intent of distribution to imprisonment of at least 1 year and to eliminate the possibility of sanction by fine.

It would also be useful for clarity and predictability for the legislator to point out exactly which sanction is applicable as this conflict of norms between the special legislation and the New Criminal Code arose.

It must be noticed that there has been a clear evolution as the former Criminal Code did not even mention the crime of obtaining access to child pornography materials by means of information and communication technology leaving that to the special legislation, but the New Criminal Code contains a special provision on the matter.

#### 1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

As the Directive leaves an option to the Member states, the Romanian legislator limited since the 1st of February the scope of application of Article 5 (1) and (3) to cases when the person depicted in child pornography materials is younger than 18 years of age at the time of depiction. If the person is 18 years old at the time of the production of those materials, the constitutive elements of the crime involving child pornography are not met as provided by the New Criminal Code.

However the legislation applicable before the 18th of December 2013 defined (as provided above) in article 35 (1)(i) child pornography as including materials with adults pretending to be minors and having a sexually explicit behaviour so at the time the scope of the prohibition of the conduct described in art 5 (1) and (3) of the Directive seemed not to be limited to persons under 18 years of age.

Provisions from Directive 2011/93 EU	Corresponding provisions from national legislation
<p><b>Article 5</b> <b>Offences concerning child pornography</b></p> <p>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.</p>	<p><b>Juridical act 161/2003 – Art. 51</b></p> <p>(1) Production in view of spreading, offering or putting for disposal for others, spreading or transmitting, obtaining for personal use or for someone else's use or obtaining access to them without right by using an information system or a device used to store informatics data constitutes a crime and is punishable with imprisonment from 3</p>

<p>2. (...)</p> <p>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.</p> <p>4.(...)</p> <p>5.(...)</p> <p>6. (...)</p> <p>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.</p>	<p>to 12 years. (2) An attempt to commit this crime is punishable by law.</p> <p><b>The New Criminal Code - Art 374.</b></p> <p>(1) The production, owning with the intention of distributing or exposing child pornography materials, buying, stocking, exposing promoting, distributing and giving access in any way to such materials is punishable with imprisonment from 1 to 5 years.</p> <p>(2) If the facts from paragraph (1) were committed through an information system or any other device used to store informatics data the punishment is imprisonment from 2 to 7 years.</p> <p>(3) Obtaining access, without right, to child pornography materials through information systems or other means of electronic communication is punishable with imprisonment from 3 months to 3 years or with a fine.</p>
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## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

Regarding to online grooming the Romanian legal framework had an evolution. At the moment when the Directive adopted by the European Parliament and the Council entered into force at 18th of December 2011, the Romanian legal framework did not present a different crime for online grooming as is defined by the Directive. But still the Romanian special legislation for criminal law gave the possibility to punish those who made proposes to children through Internet. Article 13 from Bill no. 678/2001 punishes the recruitment, transfer, transmission, host or receiving a child in order to sexually exploit him as the crime of minors' traffic. Even if this article does not clearly explain that the online grooming is punished we can deduce from the compartments presented by it that the Romanian legislator wanted to include, at that time, also

the online methods of recruiting as a possibility to commit this crime. Moreover, the tentative at this crime was also punished by the article 15 al. 1 of the same Bill.

We want to state that Romania, as State Member, did not transpose the Directive in the national law in a different bill, but we can see today some prescriptions related to the provisions of the Directive in different Bills or event in the New Criminal Code and New Criminal Procedural Code. After the 1st of February 2014, Romania has a new Criminal Code and New Criminal Procedural Code and with these changes new crimes were included by the Romanian legislator. One of them is the online grooming integrate as a separate crime in article 222 New Criminal Code which states:

“The proposals made by an adult to a child under 13 years old to meet with the only purpose to commit one of the acts established by articles 220 and 221 of this Code, inclusively when the proposal was made by means of communication at distance is punished from one month to one year of prison or fine.”

As we can see this article from the New Criminal Code offers an extensive protection because not only the proposals virtually made are punished but also any other type of proposals made by distance means of communication. So this article integrates any type of proposals even those virtually made if the special purpose is to have any type of sexual relations with a child under 13 years old. We can see a partial transposition of the article 6 from the Directive but with an extensive protection regarding the compartments punished. For the first paragraph of this article the Romanian legislation as we presented did not have a precise crime, but something that could be included as a modality to commit the crime previewed by article 13 Bill 678/2001.

In the second paragraph, the European legislator wanted to punish the attempt to commit the offences provided for in the article 5(2) and (3). That means he wanted to punish the attempt of acquisition or possession of child pornography or the attempt to knowingly obtaining access, by means of information and communication technology, to child pornography. At the moment when the Directive entered into force the Romanian legal framework had some previsions to prosecute these types of acts and mainly the child pornography. As far as we can see this paragraph is in direct correspondence with the article 51 par. 2 of the Bill 196/2003 regarding prevention and control of pornography. This article precise that

“producing with the purpose of spreading, offer or giving, transmission, acquiring for himself or for the others of pornographic materials with underage children through informatics systems or detention of pornographic materials with underage children with right in a informatics system or in mean of stockage informatics data”



is punished and at the second paragraph states very clear that “any attempt of these acts is punished too”. So we can see that at the moment when this Directive entered into force, even if it is not transposed yet in our domestic law, the Romanian legislator made punishable similar compartments. Today with the New Criminal Code not only the online grooming is punished but also any type of act that can lead to pornographic materials. Also the attempt is punished too by the Article 374 New Criminal Code which in five paragraphs defines child pornography, the type of punished compartments and clearly states at paragraph 5 that “The attempt at this crime is punished.”

As far as we can see the online grooming was integrated as an offence in our national framework not only after 2011 but it existed also before, it is true in different laws because we must keep in mind that the Ancient Criminal Code was adopted in 1968 when this type of offences was not very common neither for Romania, for the European continent.

## 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

### **Recital 19- off-line grooming**

“Solicitation of children for sexual purposes is a threat with specific characteristics in the context of the Internet, as the latter provides unprecedented anonymity to users because they are able to conceal their real identity and personal characteristics, such as their age. At the same time, Member States acknowledge the importance of also combating the solicitation of a child outside the context of the Internet, in particular where such solicitation is not carried out by using information and communication technology. Member States are encouraged to criminalize the conduct where the solicitation of a child to meet the offender for sexual purposes takes place in the presence or proximity of the child, for instance in the form of a particular preparatory offence, attempt to commit the offences referred to in this Directive or as a particular form of sexual abuse. Whichever legal solution is chosen to criminalize ‘off-line grooming’, Member States should ensure that they prosecute the perpetrators of such offences one way or another.”

The off-line grooming was incriminated in our legal framework before the adoption of this Directive from 2011. The Romanian legislator thought that some acts should be punished and by the provisions of the Article 13 Law no. 168/2001. The scope of this article was to punish some acts that in the end will lead to children traffic and children exploitation. The article precise recruitment, transfer, transportation, host or receiving with a special purpose: to exploit a child. The Romanian legislator included in this article also some preparatory acts which could help to get into contact with the child without using internet or any other means of communication. The special mobile of the offender “to exploit” the child includes also sexual exploitation, not only slavery. So the Romanian legislator extended the application of this article. The case law and the

teleological interpretation of the judges helped to have a various type of comportments punished under this article. So the Romanian legal framework incriminated the off-line grooming even before.

After the judicial changes occurred in February 2014, the criminal legislation has a new Criminal Code. The New Criminal Code entered into force with new crimes and between them the online grooming as we presented in the previous sections. But the Article 222 named "Children recruitment with sexual purposes" has two incriminations in one the off-line grooming in the first part of the article "The act of an adult to propose to a child under the age of 13 years to meet her, with the only purpose of committing one of the crimes described by the articles 220 and 221" and online grooming in the second part of the article" (...) inclusively when the proposal is made by distance ways of communication". The actual legislation punishes the online and off-line grooming with the same type of penalty: one month to one year of prison or fine. The Romanian legislator chose to give the judges an option considering the gravity of the alleged act and in the same time respected the minimum period issued by the Directive.

### 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

In the Romanian legislation does not exist a separate text of transposing the provisions of this Directive. But we consider that the articles 222 (recruitment of children for pornographic purposes) and 374 (child pornography) which are integrated in the New Criminal Code (entered into force at February 1st 2014) can represent a partial transposing of the article 6 from the Directive. We say partial because the Romanian legislator wanted to extend the protection not only to informatics, virtual means of communication, but also to any other type of distance communication.

### 2.4. In your view, does this legal framework comply with Art. 6?

I can say that the Romanian legal framework comply with the Article 6 at this moment because now we have in our national legislation a specific crime for online grooming which can be the source of next case law, even if it has a large application. And also for the off-line grooming now exists a clear prevision.

If no, what additional measures should be taken in order to comply with Art. 6?

The transposing of the Directive is also mandatory as a State Member part of the European Union. We strongly believe that having this Directive correctly transposed and with the provisions of the New Criminal Code the Romanian legal framework concerning child pornography could be much more complete and much more effective.

### TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1))

Law no. 272/2004 states in art. 97 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. This aspect refers to persons that have not finished their legal term in prison the way it has been mentioned in the conviction. The Criminal Code states in art. 66 that a person who has been convicted for a crime of a certain nature, may be restricted to undertake certain activities that link to the nature of the crime. The period in which such a person cannot carry on an activity linked to the nature of the committed crime is from one to five years. Also, it is relevant to say that the judge is the one entitled by the law to determine these complementary sanctions and their length.

Taking into consideration the terminology of the legal framework upon the subject, I can say that there is no distinction between professional activities and organised voluntary activities. Keeping this in mind I simply say: *Ubi lex non distinguit, nec nos distinguere dabemus*. I reiterate art. 66 (g) of the Criminal Code by quoting it: "The right to hold a position, to carry on a certain profession, job or undertake an activity linked to the nature of the crime". From this we understand that one can be restricted to carry on activity with children if he or she has been convicted for a crime linked to child abuse, online grooming etc.

### 3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

First of all, I mention that any person that has committed a crime will have a criminal record that will reflect the illegal facts which have been undertaken. Law no. 290/2004 is the main legal resource in this issue. Employers may have access to information regarding a potential employee, but they have to gain access to it in a lawful way. Taking these facts into consideration, I mention that an employer is not allowed to address questions regarding a criminal record to a potential employee. The employer might find himself under the provisions of art. 297 of the Criminal Code if he would not proceed to the legal way of searching one's record.

Chapter V of the Law no. 290/2004 mentions in the first section the aspects regarding the procurement of one's criminal record by the public authorities. Section two mentions the right of an individual to require his own criminal record within a certain procedure. Thus interpreting these aspects, we can understand that an employer cannot obtain such a record by asking for it directly from the rightful institution. But by asking the potential employee for this record, isn't he addressing an indirect question regarding his criminal convictions? It is a subject of debate. If a particular situation reveals the application of art. 297 of the Criminal Code, it is the case firstly described.

The legal framework that allows the employer to solicit the criminal record of a potential employee comes from the fact that some professions or activities can be carried out through annexation of the criminal record or an official statement by which the potential employee accounts that he or she has not been convicted for a infraction committed with intention. To back up my statement, I conjure Law no. 22/1969 and Law no.188/1999. There is no distinction made in the legal framework between professional activities and organized voluntary activities. Taking this into consideration I invoke the same statement: *Ubi lex non distinguit, nec nos distinguere debemus*. These aspects are applicable in the whole spectrum of situations. An employer does not have the obligation to request information regarding criminal activity of the potential employee, but he has the right to do so.

In conclusion, an employer has the right, taking into consideration his administrative and his disciplinary prerogative, to request information regarding the criminal record of a potential employee. There is not an explicit interdiction to employ people that have committed a

delinquency regarding children in the field which implies regular contact with children, but the system of accessory penalties is more than enough to assure a safe work and care environment in society.

### 3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

The situation in Romania regarding the transmission of information on criminal convictions is regulated in Law no. 302/2004. This legal framework regarding international criminal cooperation is the quintessence of the topic in debate. Article 1 states the situations in which the law is applicable. Firstly, I mention art.1 (c), which refers to transfer of procedures in criminal matters. Secondly, I mention art.1 (g), which expands the applicability of the law to other aspects than the explicitly mentioned ones. Art. 11 refers to the request addressed to a state in order to provide information regarding a person who has committed an infraction that brought prejudice to the state that requests information. Expanding the understanding of this article, I understand that the requested authority must provide all the information needed to bring the case to court.

Art. 147 mentions all the documents which can be requested by a state in order to solve a case. Art. 147 (3) mentions that a state can request documents before the actual petition for extradition. The spirit of this legal framework reflects the principle of cooperation which is needed on an European level in order to bring harmony in the Union. A state may request all the details it needs without infringing the right of the accused. Still, there is no provision regarding the public character of these documents in the state which has made the petition. Art. 171 (e) makes a direct reference to the fact that law no 302/2004 regulates all aspects regarding criminal records and the international cooperation of this aspect.

### 3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

In Romania, the three aspects regarding the regulation system of disqualification, screening and transmission of information on criminal convictions have existed before the present directive with the assistance of the framework decision 2004/68/JAI. All the aspects of article 10 find their correspondent in the national legislation, not by all means in an express way, but the legal

mechanisms assure no gaps in the system. The national legislation in Romania understands the effectiveness of the complementary system of penalties which foresees the dangerous situation that can be created by a person who is inappropriate for that certain activity. In other words, one is banned by the law to carry out an activity linked to the nature of the crime he or she has committed. The present directive comes to give a further understanding upon the delicate aspect of working with children.

### 3.5. In your view, does the current legal framework comply with Art. 10?

In my view, the current legal framework does comply with article 10. Although there are not any explicit provisions regarding professional activities and organized voluntary activities, the existing general provisions are applicable in the certain indicated cases.

## TOPIC 4.

### *Victim identification*

(Article 15 (4))

#### 4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

In our national framework, the article 15(4) is implemented in our Criminal Procedure Code. (See table below).

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

In our national framework, The Criminal Procedure Code is the only one which is implementing the victim identification. In our national Criminal Procedure Code are found the provisions of the article 15(4), accurately in the articles 132, 133, 134, 138, 139, 288, 292, 295.

4.3. In your view, does the current legal framework comply with Art. 15 (4)?

At this moment in our national framework, there is not an exact transposition of the article 15(4), but our national Criminal Procedure Code has general provisions about victim identification.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 15</b> <b>Investigation and prosecution</b></p> <p>1.(...)</p> <p>2.(...)</p> <p>3(...)</p> <p>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.</p>	<p><b>Romanian Criminal Procedure Code</b></p> <p><b>Art. 132- The objective and the object of the measurement</b></p> <p>The identification of persons or objects may be disposed in order to explain the causes of the circumstance.</p> <p>The identification of persons or objects may be disposed by the prosecutor or by the criminal investigation body, during the criminal investigation, or by court, during the criminal trial.</p> <p><b>Art.133- The preliminary hearing of the person who make the identification</b></p> <p>(1) After disposing the measurement and before the identification, the person who makes the identification must be heard about the person or the object he is going to identify.</p> <p>(2) The hearing consists in describing all characteristics of the person or the object and the circumstances. The person who makes the identification is asked if he attended before to another identification procedure of the same person or object.</p> <p><b>Art.134- The identification of persons</b></p> <p>(1) The person who will be identified is introduced with other unknown 4-6 persons with similar characteristics with those described by the person who makes the identification.</p> <p>(2) The provisions of the first paragraph are also properly applied in case of identification after photographs.</p> <p>(3) During the identification the persons who will be identified are not able to see the persons who will identify them.</p> <p>(4) The activity of identification and the statements</p>

of the person who makes the identification are recorded in a report.

(5) The report must include besides the mentions of the article 135 paragraph 2, the name, the first name and the address of the persons who were included in the identification group or whose photos were presented to the person who makes the identification, the name and the first name of the person who is identified, the order or the completion in which was disposed the identification.

**Art. 138- Basic rules**

(1) There are special methods of supervision or criminal investigation:

(a) interception of communications or any type of communication.

(a) access to a computer system.

(c) video or audio surveillance, photographs.

(d) localization and tracking by technical means.

(e) detention, surrender or postal searches.

(f) use of undercover investigators or contributors.

(g) authorized participation in certain activities.

(h) controlled delivery.

(i) obtaining data generated or processed by providers of public electronic communications or by providers of electronic communications available to the audience, other than the contents of communications, retained by them under the special law on the retention of data generated or processed by the providers of public electronic communications networks and by the providers of electronic communications available to the audience.

(2) By intercepting communications or to any type of communication means interception, access, monitoring, collection, or recording of communications by telephone, computer system or by any other means of communication.

(3) Access to a computer system means penetration in a computer system or computer data storage.

(4) Computer system means any device or group of devices interconnected or being in a functional relationship, in which one or more ensure automatic processing of data, using a computer program.



(5) Computer data means any representation of facts, informations or concepts in an appropriate form of processing in a computer system, including a capable program to determinate the execution of a function by a computer system.

(6) The video or audio surveillance and photographs mean photographing people, observation or recording conversations, movements or other assets.

(7) Locating and tracking means the use of some devices which determinate the place where are the person or the object to which they are attached.

(8) Obtaining data on financial transactions means operations that provide content knowledge of financial transactions and other operations performed or to be made by a credit institution or by other financial entities.

(9) Use of undercover investigators and collaborators means using a person with a different identity than the real one in order to obtain the data and information of committing a crime.

(10) Participating in certain authorized activities means committing an act similar to the objective side of corruption offenses, transactions, operations or any agreement about a person who is suspected of disappearing, that is a victim of human trafficking or a kidnapping.

**Art.139-Technical Supervision**

(1) Surveillance technique is disposed by the judge when following conditions are met:

(a) there is a reasonable suspicion regarding the preparation or commission of an offense , those stipulated in par. (2);

(b) measure is proportional with restriction of Rights and Fundamental Freedoms

(c) samples could not be obtained otherwise or getting them would require special difficulties that would prejudice the investigation or there is a threat to the safety of persons.

(2) Technical supervision may be ordered in the case of offenses against national security, drug trafficking, arms trafficking, human trafficking, acts of terrorism, counterfeiting or other values, counterfeit electronic payment instruments, extortion, rape, deprivation of liberty, tax evasion.

	<p>(3) The records mentioned in this chapter made by the parties or other persons are means of evidence when they are about their own calls, or communications they had with third parties. All other records may constitute evidence if they are not prohibited by law.</p> <p><b>Art.288- Ways of informing</b> The criminal investigation body is referred the complaint or denunciation, by documents signed by the organs or ex officio.</p> <p><b>Art.292- The ex officio</b> The criminal investigation body was notified ex officio if they find that was committed an offense, in any other way than those referred to in art. 289-291 and concludes a report.</p> <p><b>Art.295- Complaint</b> (1) Starting criminal action is realised only by complaint of the injured person, only in the offenses for which the law provides it is necessary a complaint. (2) The complaint is addressed to the criminal investigation body or to the attorney.</p>
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## TOPIC 5.

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

**5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

Art 8, the fourth alignment, 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.”

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

Art 9, first alignment, states that:

“The Romanian Criminal law shall apply to offences perpetrated outside Romanian borders, by a Romanian citizen or by a legal entity, if the penalty established by the Romanian law is life imprisonment or imprisonment for more than 10 years.”

The second alignment establishes that for the rest of the offences, that do not comply with the first alignment, the Romanian criminal law will be applied if the acts are regulated as infractions or the acts have been carried out in a territory that does not comply to a state’s jurisdiction.

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

Our national regulations fail to establish directly and designedly its jurisdiction when the offence is committed by means of information and communication. The second paragraph of art. 374, only regulates a higher punishment, from 2 to 7 years, for infantile pornography committed by means of information and communication technology. Because of that, we apply the general principle that is stated in art. 8.

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

Art. 10, paragraph 1, regulates the situation in which the Criminal law will be applied to offences committed outside 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 legal entity. The initiation of the criminal action against offences provided in the first paragraph shall be done solely with prior authorization

from the General Prosecutor from the Prosecutor's Office attached to the Supreme Court of Justice, only if the act is not already prosecuted in state where the offence was committed.

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory concerning the offences referred to in Article 17(4) subordinated to the condition that the acts are criminal offences at the place where they were performed?

Only when applying article 9 (Criminal Law personality) and 11 (Criminal law universality) this condition is required.

### **5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))**

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

Yes, article 10, first alignment deals with the situation in which a Romanian citizen is the victim of an offence committed by another citizen or a person without citizenship, but the situation of a habitual resident is not regulated deliberately in our New Criminal Code.

b) The offence is committed for the benefit of a legal person established in its territory (Art. 17 (2)(b))?

Yes, article 9, first alignment.

c) The offender is a habitual resident (Art. 17(2)(c))?

Yes, article 11, first alignment.

## **5.2. Which steps have been taken in your MS in order to implement Article 17?**

Our national legal framework complies with Article 17, although it does not regulate all the situations explicitly.

### 5.3. In your view, does the current legal framework comply with Article 17?

For all the reasons above, I can say that our legal framework complies with Article 17 of the Directive.

## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

### 6.1. Please describe the current national legal framework with regard to child victims

#### 6.1.1. General framework of protection (Art. 18)

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

Child protection in criminal proceedings is regulated in Law 272/2004 art. 89 and 90 on the protection of children against abuse, neglect, exploitation and all forms of violence that children are entitled to protection, have the right to report this abuses or to benefit of legal representation in criminal proceedings.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

Article 86 of Law 272/2004 provides that the parent or the legal representative of the child, the public authorities or private organizations are required to ensure the necessary conditions for victim physically and mentally rehabilitation.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

The law no. 300 of 11 July 2006 to ratify the Council of Europe Convention on Action against Trafficking in Human Beings adopted on 3 May 2005, opened for signature and signed by Romania in Warsaw on 16 May 2005 provides in article 10 that when there exists incertitude

about the victim's age, but there are reasons to believe that it is a child, shall be presumed to be a child to benefit from special protection and specialized support.

### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art 19.(1))?

In our national legislation, the layout of granting assistance and support to child victims before criminal proceedings, during the criminal proceedings and for an appropriate period after their completion is stipulated in Article 86 of Law 272/2004, paragraph 1 and 2 which states that the child's parents, the legal representative, the public authorities and the private organizations are obliged to take all measures necessary to facilitate physical and psychological rehabilitation and social reintegration of any child who is the victim of any form of neglect, exploitation or abuse , torture or punishment or cruel , inhuman or degrading treatment , and that the persons mentioned above will make the necessary arrangements for the rehabilitation and reintegration to promote health , self-respect and dignity of the child . Under Article 26 of Law 678/2001 states that victims of crime are given special protection and assistance, physical, legal and social. Article 43 of the same law states that victims of crimes under this law are entitled to receive information on judicial and administrative procedures applicable, and art. 44 certifies that the persons mentioned in article 43 have the right to legal advice required to be able to exercise their rights in criminal proceedings prescribed by law, in all phases of the trial, and to support their claims and civil claims against persons who have committed offenses under this act, in which they are involved.

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

The Law 272/2004 Article 39 mentions that if children without parental protection temporary or permanent, or children who must be protected by them just in order to protect their interests, has the right to alternative care.

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

The aspect of providing assistance and support for child victims without the condition of cooperation during trial it is required by law 678/2001 art. 26 that states that it is given specialized help for injured children without this condition. Instead, if the victim would want to enter the witness protection program, he must cooperate in the process.

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

In accordance with art. 19 paragraph 3 of this Directive, the Romanian legislation regulates that assistance and support to child victims will be made in accordance with their age and their needs in Article 26, paragraph 4 of Law 678/2001.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

The transposition of Article 19 paragraph. 4 of the Directive, according to which children victims of any of the offenses referred to in Articles 3 to 7 are considered particularly vulnerable victims pursuant to Article 2 (2), Article 8 (4) and Article 14 (1) of Decision framework 2001/220/JAI.RO 17.12.2011 Official Journal of the European Union L 335/11, is found in Article 26 of Law 678/2001 Article 5 which mentions that women victims of offenses under this law, and those who are at a high risk of becoming victims of these crimes are given a specific social protection and assistance for prevention.

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe.

According to the article 19 paragraph 5 of this Directive, European Union member states granted appropriate measures and possible assistance and support to the family of the child victim, so member states apply article 4 of Framework Decision 2001/220/JHA to the family child victim. In the Romanian legislation, this aspect is contained by the Article 8 of Law 211/2004 paragraph 1 according to which psychological counselling upon request attempted homicide victims, murder and manslaughter, as provided in Article 174-176 of the Criminal Code, striking victims of crime or other violence and bodily harm committed against family members, referred to in article 180 paragraph 1 (1) and 2 (1) and article. 181 paragraph 1 (1) of

the Criminal Code, the offense of grievous bodily harm referred to in art. 182 of the Criminal Code of intentional offenses from which have resulted serious injury to the victim, the crime of rape, sexual intercourse with a minor, sexual perversion and sexual corruption as referred to in article 218, 220, the offense of ill-treatment of minors, provided in article 218 of the new Penal Code , and for victims of offenses covered by Law no. 678/2001 on preventing and combating trafficking in persons , as amended and supplemented. Also, according to paragraph 2 of Article 8 of Law 211/2004 provides that the psychological counselling mentioned in the first article is granted only if the offense was committed in Romania or the victim is a Romanian citizen or foreign citizen who lives in Romania.

Does your MS apply Article 4 of Framework Decision 2001/220/JHA on the right to receive information, to the family of the child victim?

Romanian Legislation protects the victims of these crimes and the victims' families and their identification or address. May be offered protection if heard as a witness or injured part to the offense.

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which

The correspondent of the Article 20 paragraph 1 of the directive in the Romanian legislation is found in Act 272/2004 Article 39, Article 42 and the new Code of Criminal Procedure, Special cases of hearing the witness, Article 124, paragraph 1.2, Article 39 paragraph 1 Law 272/2004 acknowledges that any child temporarily or permanently deprived of parental protection has the right to alternative protection from a legal representative and the continuation of this case is found in article 42 paragraph 1 according to court decides with priority who will be the guardian of the minor . The new Code of Criminal Procedure, Article 124, paragraph 1, 2 says that minor hearing up to 14 years only occurs in the presence of the guardian or the legal representative or one of the parents or the entrusting institution education, and if the persons mentioned in paragraph 1 of this article can not be provided or they have the quality of the suspect, defendant, injured person, civil party , civilly responsible party or witness in the cause or reasonable suspicion exists that may influence juvenile statement , his hearing is held in the presence of a



representative of the guardianship or a relative with full exercise capacity , determined by the judicial body.

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:

a) Available for the purpose of claiming compensation?

b) Free of charge where the victim does not have sufficient financial resources?

The National legislation regulates the legal advising for the victims or the victim's family as mentioned in Act 272/2004 article 14 paragraph 1 according to which it provides assistance to persons to whom the request was committed attempted homicide, murder or manslaughter, as provided in article 174-176 of the Penal Code, an offense of grievous bodily harm referred to in article 182 of the Criminal Code , an intentional offense resulted in serious injury to the victim , a rape, sexual intercourse with a minor and sexual perversion, referred to in article 218, article 219 and article 220 of the new Penal Code , and the spouse, children and dependents of deceased persons through crimes of murder, manslaughter and aggravated murder, referred to in article 174-176 of the Criminal Code and intentional offenses which resulted in the death of the person.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

In accordance with article 20 paragraph 3 of this Directive it can be found in the Romanian legislation in Law no. 885/2010 the article 35 paragraph a) that the interviews with the child victim take place without unjustified delay after the facts have been notified authorities. This article regulates the aspect of hearing the child victim.

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

In the Law no. 885/2010 article 35 paragraph 1 b) are provided for hearing space conditions as follows: interviews with the child 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?

The aspect of hearing child victim by professionals or during their presence it is found in the national law no. 885/2010 article 35 paragraph 1 c), which provides as follows: child interviews are conducted by professionals trained for this purpose.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

The paragraph d) of Article 35 of law no. 885/2010 provides as article 20 paragraph 3 point d) of the directive, that the hearing of the child victim can be fully realized by the same person if appropriate and possible.

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?

In the next paragraph of article 35 of Law 885/2010 provides that the number of hearings should be as limited as possible, but must respects the limits required for criminal proceedings. This articles is consistent with article paragraph 3 e) of this Directive.

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?

This aspect is regulated in the Decision no. 885/2010 Article 35 point f), and in paragraph 1, 2 of the Article 124 of the new code of criminal procedure according to which: Paragraph (1) hearing child witness aged 14 years takes place in the presence of a parent, guardian or representative of the person or institution having custody of the child to the care and education; Paragraph (2): If the person in paragraph (1) may not be present or have the status of suspect, defendant, injured party, civil party, civilly responsible party or witness concerned, or there is reasonable suspicion that influence juvenile statement, his hearing is held with a representative of the guardianship authority or a relative with full legal capacity, determined by the judicial body.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

In the Romanian legislation is stipulated that all interviews with the child victim can be recorded and used later and accepted as evidence in criminal proceedings as required by article 111 paragraphs 4 and 5 of the new Criminal Procedure Code in which is mentioned that: (4) During the criminal investigation, the injured person's hearing is recorded by audio or audio-visual technical means when the prosecuting authority considers necessary or when the injured person requests it expressly and registration is possible. (5) Any person aggrieved and shall be informed at the first hearing that if the defendant will be deprived of freedom, respectively sentenced to imprisonment, it may be informed of its implementation freedom any way.

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, 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?

During the criminal trials, the hearing of the victims mentioned in Articles 3 to 7 of this Directive may be done in a closed session as provided by article 127 paragraph c) of the new Code of Criminal Procedure which provides that one of the protective measures during the trial consists of non-publication of the hearing during the hearing of witnesses and article 126 paragraph 1 point d) and Article 127 point d) according to which the hearing of the protected witness can be done without him being present in the courtroom, by audio-visual recording and transmitting distorted images and voice.

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

The Romanian State takes measures to protect privacy and identity and image of child victims by Articles 126 and 127 of the new Code of Criminal Procedure. It protects their identity by giving a nickname with whom the witness states that he agrees, witness statement will not include the actual address of his home, home to be watched and guarded, accompany the witness while travelling.

## 6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify

In Romania, we believe that we have made some progresses in the protection of victims of sexual abuse. In 2014, Romania adopted the new Criminal Code and new Criminal Procedure Code which stipulate explicitly the issues discussed above. These two codes are consistent with the newly adopted European legislation and put first the prevention and protection of children against these crimes. There is also the law 678/2001 on preventing and combating trafficking in persons, the law 272/2004 on the protection and promotion of child rights.

## 6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

In our opinion, our national legislation provides all aspects mentioned in Articles 18, 19 and 20 of this Directive, but we believe that there should be specific provisions on preventing these types of crimes. Victim assistance and support to children should be up to European levels, as there are children in villages, communes, which cannot benefit from the same assistance as those in the city. Also, we believe that an important factor is the lack of education that leads to this kind of situations. There should be multiple offenders rehabilitation centres, and centres for social reintegration of victims.

## **TOPIC 7.**

### *Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

## 7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography

By distributing pornographic materials that have as subject children under 18, the right to private life is inarguably shattered because these children can not defend themselves in any way.

The only means of protecting the above mentioned children are the measures that the State, European Union, national and international organisations can adopt and apply at the highest levels, for the best results.

In Romania there are a few child pornography websites, and at a European level, sexual abuse and exploitation of children are important problems, being estimated that somewhere between 10-20% of children are or have been sexually abused.

The state has a priority obligation in preventing and fighting exploitation of children, under whatever form it may occur (slavery, forced labour, person trafficking, sexual exploitation). Therefore it is hard to admit a levelling in the same plan of the social value of children's rights to be protected against any form of violence, physical or sexual abuse, and the social value of property and economic relationships.

## 7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

At our country's level, child pornography is regulated under the New Penal Code at Article 374 (P. 1, P.2, P.3) as well as 3 other acts: Law 678/2001, Law 161/2003 and Law 196/2003. Regulations can also be found in the dispositions of the Council Framework Decision no. 2004/68 JAI from 22 December 2003.

According to Article 374, New Penal Code P. 1:

“Production, possession for display or distribution, purchase, storage, display, promotion, distribution and provision, in any manner, of child pornography is punishable by imprisonment from one to five years.”

Paragraph 2, comes to complete the first one of the same article, so:

“If the deeds mentioned in the first paragraph have been committed through an informatic system or any other means of storing electronic data, the punishment is imprisonment from two to seven years.”

“Access without right, of child pornography through computer systems or other means of electronic communication, shall be punished with imprisonment from three months to three years imprisonment or with a fine”,

under paragraph 3 of art. 374.

According to the United Nations Convention on the Rights of the Child, ratified by Romania in 1990, provides that “every child needs protection and special care, including appropriate legal protection, before as well as after birth.”

Special Law 161/2003 of 9 October 2003, that appeared as a result of signing by the Romanian state of "The Convention on Cyber crime", lays the foundation of investigation and sanctioning of criminal offenses committed by using computers. "Convention on cyber crime" shed light on the need for criminal criminalization: illegal access to a computer system, computer fraud and child pornography on the Internet, violation of property rights and other related rights.

"Convention on cyber crime" defined in art. 9 "child pornography" 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." In the same text, the minor shall mean "any person under 18, or according to national legislation, a person who has more than 16 years."

Incrimination of explicit pornography, committed by computer, is made in Article 51 (New Penal Code), as:

"production in order to spread, providing or making available, spreading or transmitting, procuring for himself or for another child pornography (...) or possession, without right, of child pornography is punished with imprisonment from three to twelve years."

General Law No. 678/2001 "governs to prevent and combat trafficking and protect and assist the victims of such trafficking, which is a violation of individual rights and an offense to the dignity and integrity." Exploitation of a person includes "obligation to practice prostitution, pornographic representations to produce and distribute pornographic material or any other forms of pornographic materials". Therefore in Article 18, Paragraph 1, it is stipulated that:

"The act of exposing, selling or spreading, renting, distributing, manufacturing or holding to the spread of objects, films, photographs, slides, or other visual emblems representing sexual positions or pornographic, presenting or involving minors under the age of 18, or importing or delivery of such items to a carrier or distribution to sale or distribution of child pornography is an offense punishable by imprisonment from 2 to seven years."

While the second Paragraph comes in completion to the first one, incriminating the same acts with the mention that this may be committed by a person who is part of an organised group. It also stipulates that this offence is punished with imprisonment from 3 to 10 years.

The offense of child pornography by computer systems provided for in Art. 51 of Law no. 161/2003 differs from the offense of child pornography specified in art. 18 of Law no. 678/2001 because of the following aspects: the crime of child pornography by computer systems provided for in art. 51 of Law no. 161/2003 can be achieved simply by purchasing or holding no right to

child pornography, while the offense of child pornography specified in art. 18 of Law no. 678/2001 is only incriminating the possession of such material to spread; offense provided for in art. 51 of Law no. 161/2003 is exclusively committed through computer systems.

Given the great extent of this phenomenon in internet network, the legislature expressly decided incriminating child pornography, committed by electronic means, namely:

“production in order to spread, providing or making available, spreading or transmitting, procuring for himself or for another of child pornography ... or possession, without right, of child pornography. Punishment is imprisonment from 3 to 12 years. The attempt is punishable.”

Law no. 196/2003 on preventing and combating pornography, amended by Law 301/2007 and republished in the current version on the 4th of February, 2008, provides in Article 7 of (1) that:

“Persons who own pornographic sites are required to password protect them and access to them will be allowed only after the user has paid a per minute usage fee set by the creator of the site and declared to the tax authorities.”

Al (2) and (3) of the same article amends the same content on the site pornographic sites, such as: “People who performs or manages websites must clearly outline the number accessing the site in question, to be subject to tax liability under the law.” also “be prohibited making and administration site sites with paedophile character, or necrophiliac bestiality.”

National Regulatory Authority for Communications and Information Technology is the competent authority for receiving and resolving complaints about the content of these sites, and if after verifying the content, it violates any of the provisions of Article 7, the National Regulatory Authority for Communications and Information Technology can require Internet providers block access to the website in question. Non application by the internet provider within 48 hours of receipt constitutes an offense punishable by a fine of 10,000 to 50,000 RON. (Art 14).

### 7.3. In your view, does the current legal framework comply with Article 25?

Much of the current regulations, i.e. Article 374 (para. 1, para. 2, para. 3) of the new Criminal Code, Law 678/2001, Law 161/2003 and Law 196/2003, help apply and complete the directions mentioned in Directive 92/2011/UE of the European Parliament and Council of 13 December 2011 regarding sexual abuse of children and sexual exploitation of children and child pornography, so that every child is protected against any form of electronic child pornography.

These provisions respond to a global concern for combating this phenomenon, including the United Nations Protocol on the rights of children.

If no, what additional measures should be taken in order to comply with Article 25?

On the other side, I consider that the punishment (fine) applied to ISPs who refuse blocking websites containing child pornography materials is too gentle. These ISPs are usually large firms, that have a big number of subscribers and big business numbers. That is exactly why the fines that range in numbers from 10.000RON to 50.000RON can be paid with ease by these big companies, without harming their profit. Also, blocking these websites by the ISP is only partial effective. Advanced users can use a VPN to overcome the barrier imposed by the Internet Service Provider and access the website in question. Therefore blocking such a website by the ISPs is only partially effective and works only in cases of novice users.

In my opinion, increasing the fine values and even adding some other punishments such as closing the firm for a predetermined amount of time or forcing the ISPs to suspend their activity for a specific amount of time are suitable ways to punish ISPs who do not follow these regulations, that can help decrease the number of cases of child pornography related felonies on the internet medium.



# ELSA THE NETHERLANDS

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## INTRODUCTION

In March 2009, the European Commission presented the proposition of Directive 2011/93/EU on combating sexual exploitation of children and child pornography (hereinafter: the Directive or Directive 2011/93/EU). After negotiations, the final Directive was presented in 2011, which was welcomed by the Netherlands. Its foundation lays in Article 82, paragraph 2, and 83, paragraph 1 of the Treaty /on the Functioning of the European Union, on the basis of which the minimum rules concerning child pornography may be established by means of directives.<sup>1</sup>

Child abuse and exploitation exists in different ways, although we will focus on child pornography in this particular research. International cooperation seems to be a very important tool in respect to combat and prevention, since the crimes committed in this area often also have an international dimension.<sup>2</sup>

The Netherlands in particular had to deal with severe cases of child abuse and exploitation in the past years. These situations reached the news and shocked the Dutch community. On December 12<sup>th</sup> 2010, the mayor of Amsterdam made public that in a period of 4 years, 30 to 50 children at two day cares in Amsterdam were the victims of sexual abuse. The offender, who also produced and spread child pornography, was an employee at these day cares.<sup>3</sup>

According to the department of the Attorney-General, cases are becoming more violent and extreme and the victims are getting younger. The market is growing because of international possibilities, which makes the production of child pornography more lucrative, resulting in more children being at risk at becoming a victim.<sup>4</sup> Because of the previously mentioned events, before the existence of the Directive, the Netherlands had already taken measures in the field of child abuse and exploitation. An example of this is an action plan with similar goals to the Directive with a Task Force existing of involved institutions to monitor it.<sup>5</sup>

Directive 2011/93/EU is strongly based on previous treaties and directives in this area of policy. It is primarily an instrument of criminal law, but has an integral approach, also giving attention to

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<sup>1</sup> Kamerstukken II, datum, 318 08, nr.3, (MvT) (Explanatory Memorandum).

<sup>2</sup> Kamerstukken II, datum, 318 08, nr.3, (MvT) (Explanatory Memorandum).

<sup>3</sup> Gerechtshof Amsterdam 26 april 2013, ECLI:NL:GHAMS:2013:BZ8885 (High Court).

<sup>4</sup> <http://www.om.nl/onderwerpen/zeden-kinderporno> Website of the Public Office. (Last visited on 18 April 2014).

<sup>5</sup> Kamerstukken II, datum, 318 08, nr.3, (MvT) (Explanatory Memorandum).

prevention and the position of victims. With this, it handles three fields: prevention, protection and prosecution. However, since the Netherlands is also bound to the obligations deriving from earlier international judicial instruments, the legislative consequences of the Directive for the Netherlands are limited. This is why the Directive is mostly an addition to the existing Dutch legal framework.<sup>6</sup>

In this research, we have examined the Dutch legal framework in the field of child pornography and how Directive 2011/93/EU has been implemented in this system. Amongst other sources, we consulted the Directive, literature, case law and Dutch criminal law.

## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

Article 5 paragraphs 1, 3 and 7 of Directive 2011/93/EU is laid down in Article 240b of the Dutch Criminal Code.<sup>7</sup>

#### General Outline of Article 240b

The last amendments to this provision were made on 26 November 2009<sup>8</sup> to comply with Article 20 of the Treaty of Lanzarote<sup>9</sup>. This treaty was ratified by The Netherlands on 1<sup>st</sup> of March 2010 and entered into force on 1<sup>st</sup> of July 2010. The Dutch government considered this as a necessary

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<sup>6</sup> Kamerstukken II, datum, 318 08, nr.3, (MvT) (Explanatory Memorandum).

<sup>7</sup> For the exact wording, see the appendix.

<sup>8</sup> Wet van 26 november 2009, *Staatsblad*. 209,554. (Act of 26 November 2009) Important to note is that the Dutch Criminal Code entered into force the 1st of September 1886. Several amendments have been made thus far.

<sup>9</sup> Verdrag van Lanzarote, *Tractatenblad*. 2008,58:*Staatsblad*.2009,543. Treaty of Lanzarote (adopted 25 October 2007, entered into force 1 July 2010).

measure to protect children in a world where new technological methods of child abuse and exploitation rapidly develop.<sup>10</sup>

### **Analysis of the description of section 240b and comparison with Directive 2011/93/EU**

For a clear understanding of the wording of Article 240b, it is necessary to analyse the provision in the light of the case law of the Dutch courts and the applicable parliamentary papers. Here we will analyse the different elements that Article 240 b contains and we will see whether the Dutch national framework complies with the articles as set out in the Directive.

#### **Child pornography and sexual act**

Dutch national law lacks a clear definition of child pornography, as mentioned in Article 2 under c in the Directive. A 'sexual act' is instead required as an element of the offence under Article 240b. This element is widely understood by the Dutch Supreme Court. A sexual act is considered to be a depiction of a minor that expresses a sexual pose or a depiction where a minor interacts in a sexual environment. However, the pose of the minor is not decisive, to regard an image as sexual. An image that does not contain a lot of sexual elements can still be regarded to be a 'sexual act' due to the conditions or the context of the depiction which can be susceptible for sexual arousal. Decisive is whether the depiction has an obvious sexual connotation.<sup>11</sup> Next, to fall under the definition of 'sexual act', it is not crucial to have more than one minor depicted. The posing of only one minor where his or her sexual organ is shown can be sufficient to amount to 'a sexual act'.<sup>12</sup> Furthermore, it is not essential that the minor was damaged by the sexual act. Only relevant can be the situation in which a minor is engaged or the fact that the image is published to cause liability.<sup>13</sup>

The term 'sexual act' as defined in Article 240b has thus a more extensive meaning than the definition of child pornography of Article 2 of the Directive. The Dutch legislator therefore decided not to implement the wording of Article 2 of the Directive directly in Article 240b of the Dutch Penal Code.<sup>14</sup> The term 'sexual act' that currently is used to describe child pornography,

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<sup>10</sup> *Kamerstukken II* 2008/09, 31810 nr. 3 p.2 (Parliamentary Papers).

<sup>11</sup> HR 7 december 2010, ECLI:NL:HR:2010:BO6446, par. 4.1 till 4.5. (Supreme Court).

<sup>12</sup> HR 4 december 1990, NJ 1991/312. HR 22 maart 2005, ECLI:NL:PHR:2005:AS5874 (Supreme Court).

<sup>13</sup> HR 26 september 2000, ECLI:NL:HR:2000:AA7230 en HR 10 Juni 2003, ECLI:NL:PHR:2003:AF6437 (Supreme Court).

<sup>14</sup> *Kamerstukken II* 2012/2013, 33 580, nr. 3, p. 7-8. (Parliamentary Papers).

covers a wide range of conducts.<sup>15</sup> Implementing the wording of Article 2 or adapting the term 'sexual act' would, according to the legislator, narrow down the conducts that fall within the scope of Article 240b.<sup>16</sup>

By introducing the term 'sexual act', the definition of child pornography where real children are involved as contained in Article 2 is covered.

By introducing the term 'appears to be involved' in Article 240b, simulated conducts are also covered under this provision. These simulated depictions should however be realistic.<sup>17</sup>

From this we can deduce that these elements 'a sexual act' and 'appears to be involved' in Article 240b fully cover the definition of child pornography as set out in Article 2 of the Directive. However, the term 'sexual act' lacks some clarity which makes it difficult to extract the precise definition. However, the legislator found it necessary not to discard this term, because of the wide range of conducts that, due to this term, can be considered as child pornography.

### **Information and communication technology**

Article 5 paragraph 3 of the Directive contains the phrase 'by means of information and communication technology'. The wording of Article 240b refers in this context to the term 'an automated work or communication service' which must be understood as a device that can gain access to the internet.

The term 'automated work' and 'communication service' are implemented to comply with Article 20 of the Treaty of Lanzarote.<sup>18</sup> An automated work can be considered a device that is intended to store and to transfer data through electronic communication.<sup>19</sup> The term 'communication service' is defined in Article 126la and further of the Dutch Criminal Code.<sup>20</sup> However, all technologies that have access to internet can be regarded as either 'an automated work' or 'a communication service'. This provision therefore seems to comply with the meaning as set out in Article 5 paragraph 3 of the Directive.

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<sup>15</sup> HR 7 december 2010, ECLI:NL:HR:2010:BO6446, par. 4.1 till 4.5. (Supreme Court).

<sup>16</sup> *Kamerstukken II* 2012/2013, 33 580, no. 3, p. 7-8 (Parliamentary Papers).

<sup>17</sup> *Kamerstukken II* 2012/2013, 33 580, nr. 3, p. 7-8. (Parliamentary Papers).

<sup>18</sup> *Kamerstukken II* 2001/02, 27 745, nr.6, p.8,11 and 15 (Parliamentary Papers).

<sup>19</sup> *Kamerstukken II* 2008/09, 31 810, nr. 3, p.7 (Parliamentary Papers).

<sup>20</sup> Article 80 sexies of the Dutch Criminal Code.

<sup>21</sup> Article 126la and further of the Dutch Criminal Code.

## A person under 18

Paragraph 7 of Article 5 refers to the discretion of a Member State to decide whether the depicted person was in fact under eighteen years of age.

Under Dutch regulation there is no need to prove that a minor has not reached the age of eighteen yet.<sup>21</sup> The element 'evidently' is implemented to create a possibility to prosecute under the circumstances that it is difficult to prove that the depicted person is under eighteen years old. This will especially be the case when identification is not immediately possible.<sup>22</sup> It is sufficient that the minor in the image is estimated to be under the age of eighteen.<sup>23</sup>

## Knowingly obtaining access

Article 5 paragraphs 1 and 3 refer in this context to 'intentionally' and 'knowingly obtaining access'. According to recital 18 of the Directive, a person who intends to enter a website containing child pornography, should be held liable. The Directive explicitly mentions that people who do not enter these sites deliberately should not be held accountable.<sup>24</sup>

Through the amendments that were made on 26 November 2009 the phrase 'gains access by means of an automated work or by making use of a communication service' was added to Article 240b. Due to the development of information technology, one can now easily gain access to a computer or computer network without having to download any of the material onto one's own computer. By adding this phrase, it became possible to prosecute these persons for whom it could first not be proven that they actually possessed child pornography. Currently, it is sufficient to prove that one has gained access to a computer or computer networks without downloading the data onto one's own device.<sup>25</sup>

'Gaining access' in Article 240b implies that the person who tried to get access to child pornography must have had the intention to do so.<sup>26</sup> This phrase can therefore be considered to be in line with Article 5 paragraph 1 which refers to an 'intentional conduct' and the wording of

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<sup>21</sup> See also HR 6 April 2010, ECLI:NL:PHR:2010:BL8772, par.5. (Supreme Court).

<sup>22</sup> *Kamerstukken II* 1998/99, 26 690, nr.2, p.28(Parliamentary Papers).

<sup>23</sup> *Kamerstukken II* 1998/99, 26 690, nr.2 p. 28, *Kamerstukken II* 2000/01, 27 745, nr. 3, p. 4.(Parliamentary Papers).

<sup>24</sup> Recital 18 of Directive 2011/93/EU.

<sup>25</sup> *Kamerstukken II* 2008/09, 31 810, nr. 3, p.3(Parliamentary Papers).

<sup>26</sup> *Kamerstukken II* 2008/09, 31 810, nr.3, p.4.; *Kamerstukken II* 2008/09, 31 810, nr.7, p.2.*Kamerstukken I* 2008/09, 31 810, p.4.(Parliamentary Papers).

recital 18.<sup>27</sup> Watching real time data can also be considered as falling within the scope of 'gaining access'. Solely watching child pornography cannot be held punishable under Dutch law. The legislator wanted to prevent that a person who unintentionally visits a website that contains child pornography will get prosecuted.<sup>28</sup> Recital 18 of the Directive also mentions this as undesirable.<sup>29</sup> 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, Recital 18 of the Directive mentions that intention can notably be derived from these facts.<sup>30</sup> Under Dutch law intention can as well be derived 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.<sup>31</sup> Dutch national law thus fully complies with this element.

### Term of imprisonment

The maximum term of imprisonment for this offence is set on at least a year in paragraph 3 of Article 5 of the Directive.

The term 'imprisonment of up to 4 years or a fine of a maximum of €78,000' is imposed when the offence under Article 240b is committed. When the offence is committed by profession or custom, the maximum term of imprisonment is set on 8 years or a fine of up to €78,000. In Article 248 of the Dutch Penal Code provisions can be found with the terms of imprisonment in aggravating circumstances<sup>32</sup>. This provision was recently amended by law on 12 February 2014<sup>33</sup> and entered into force on 1<sup>st</sup> March 2014.<sup>34</sup> Amendments have been made to reassure the

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<sup>27</sup> Article 5 paragraph 1 Directive 2011/93/EU.

<sup>28</sup> *Kamerstukken II 2008/09, 31 810, nr.3, p.4*(Parliamentary papers).

<sup>29</sup> Recital 18 of Directive 2011/93/EU.

<sup>30</sup> Recital 18 of Directive 2011/93/EU.

<sup>31</sup> *Kamerstukken II 2008/09, 31 810, nr.3, p.4*(Parliamentary papers).

<sup>32</sup> See the Appendix.

<sup>33</sup> *Wet van 12 Februari 2014 tot implementatie van de richtlijn 2011/93/EU van het Europees Parlement en de Raad ter bestrijding van seksueel misbruik en seksuele uitbuiting van kinderen en kinderpornografie, en ter vervanging van Kaderbesluit 2004/68/JBZ van de Raad (pbEU L 335) Jaargang 2014, Staatsblad 2014, p.74.* ( Act of 12 February 2014).

<sup>34</sup> *Besluit van 12 februari 2014, houdende vaststelling van het tijdstip van inwerkingtreding van de Wet van 12 februari 2014 tot implementatie van de richtlijn 2011/93/EU van het Europees Parlement en de Raad ter bestrijding van seksueel misbruik en seksuele uitbuiting van kinderen en kinderpornografie, en ter vervanging van Kaderbesluit 200/68/JBZ van de Raad (PbEU L335) (Stb.2014,74) en het Besluit van 12 februari 2014, houdende wijziging van het Besluit justitiële en strafvordelijke gegevens in verband met de implementatie van de richtlijn 2011/93/EU van het Europees Parlement en de Raad ter bestrijding van seksueel misbruik en seksuele uitbuiting van kinderen en kinderpornografie, en ter vervanging van Kaderbesluit 004/68/JbZ van de Raad (PbEU L 335) (Staatsblad 2014, p.76.)* (Administrative order of 12 February 2014).

implementation of the Directive. The aim of this provision is to impose more severe punishments under aggravating circumstances. For the offences mentioned in Article 240b, the term of imprisonment can be increased by a third of the time of the original punishment. Paragraphs 3, 4 and 5 of Article 248 of the Dutch Criminal Code were added on 12 February 2014. Paragraph 3 and 4 provide a more severe punishment in case the offence of Article 240b is committed against a person who is vulnerable for abuse. Paragraph 5 stipulates an increase of a third of the original punishment in case the offence of Article 240b is committed with the use of violence.

The Dutch law seems to be complementary with the maximum term of imprisonment of at least a year, by introducing a term of imprisonment of up to 4 years when this offence is committed.

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

Overall, from the foregoing we can conclude that Article 240b fully complies with Article 5 paragraph 1, 3 and 7 of the Directive. By using the term 'sexual act', the Dutch government even seeks to provide a broader definition for child pornography than the Directive requires. The imposed maximum punishment is under Dutch regulation also higher than Article 5 paragraph 1 and 3 prescribes. The other elements, however, seem to be entirely consistent with the wording of the Directive.

Provisions from Directive 2011/93 EU	Corresponding provisions from national legislation
<p><b>Article 5</b> <b>Offences concerning child pornography</b></p> <p>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.</p> <p>2. (...)</p> <p>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.</p>	<p><b>Article 240b of the Dutch Criminal Code:</b></p> <p>1. 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.</p> <p>2. Those who make a profession or habit of the commission of one of the criminal offences described in the first paragraph, will be punished</p>



<p>4.(...)</p> <p>5.(...)</p> <p>6. (...)</p> <p>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.</p>	<p>with a term of imprisonment of at most eight years or a fine of the fifth category.</p>
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## TOPIC 2.

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

### 2.1. Please describe the national legal framework with regard to online grooming

#### **The Lanzarote Convention**

On 25 October 2007 in Lanzarote, Spain, the Council of Europe signed and concluded the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). The Netherlands ratified the Convention on 1st March 2010 and it came into force on July 1<sup>st</sup>.<sup>35</sup> The ratification of the Lanzarote Convention in the Netherlands gave rise to the introduction of criminal legislation concerning online grooming.

#### **Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography**

The Directive was adopted by the Parliament and Council in 2011. It replaces the Council Framework Decision 2004/86/JHA<sup>36</sup> and is strongly inspired by the Lanzarote Convention. The

<sup>35</sup> Verdrag van Lanzarote, Tractatenblad. 2008,58:Staatsblad.2009,543. Treaty of Lanzarote (adopted 25 October 2007, entered into force 1st July 2010).

<sup>36</sup> COM/2010/0094 final - COD 2010/0064.

main aim of the Commission with the Directive was to bring the level of protection in accordance with the results, that has been achieved with the Lanzarote Convention.<sup>37</sup> Since the Netherlands has already implemented the Lanzarote Convention, the legislative implications of the Directive are limited.

Therefore the Dutch Criminal Code did not need to be adapted to comply with Article 6 of the Directive.

### **Article 6, paragraph 1, of the Directive is covered by Article 248e of the Dutch Criminal Code**

Article 6, paragraph 2, of the Directive is covered by Article 45 jo. 240b and 248a of the Dutch Criminal Code.

The legal framework in the Netherlands fully complies with Article 6 of the Directive.

### **Article 6, paragraph 1, of the Directive**

Article 6, paragraph 1, of the Directive is covered by Article 248e of the Dutch Criminal Code.<sup>38</sup>

Online grooming became punishable under Article 248e of the Dutch Criminal Code 1<sup>st</sup> January 2010 after implementing the Lanzarote Convention.<sup>39</sup>

## **2.2. What is your MS position with regard to off-line grooming (see Recital 19)?**

According to an official document of the Dutch Public Prosecution Service “Grooming” occurs when an adult person actively approaches and seduces minors on internet (in particular social network and profile sites, chat rooms, newsgroups, etc.) with the ultimate purpose of committing sexual abuse or producing child pornographic material with this minor”.<sup>40</sup>

Grooming is often a long-term process. By means of frequent chat and emails the perpetrator tries to gain the child's trust with the purpose of making the child share intimacies. This way the child is prepared for sexual abuse in the real world.

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<sup>37</sup> Kamerstukken II 2008/09, 31810, nr. 3, p. 7 (Explanatory Memorandum).

<sup>38</sup> See the Appendix.

<sup>39</sup> Kamerstukken II 2008/09, 31810, 3 (Explanatory Memorandum).

<sup>40</sup> Directive on Child Pornography (Dutch Criminal Code Article 240b) (2010A025).

However, for grooming to be an offence it is not necessary that the internet contact actually leads to physical contact with the child and the perpetrator or an actual sexual act carried out by the child.<sup>41</sup>

In order to be criminally liable the perpetrators behaviour must lead to a proposal for a meeting with the child, followed by “material acts leading to a meeting”. Therefore, in order to be criminally liable the perpetrator needs to do more than only communicating with a child on internet and using sexual innuendo. It is necessary that the online communication phase results in a concrete proposal for a meeting and an action in order to realise that meeting.<sup>42</sup>

Under the Dutch regulation there is no need that the perpetrator knew that the minor has not yet reached the age of sixteen. The element “or should reasonably assume” implies that in order to come to a conviction it is enough that the perpetrator should have known that the minor did not yet reached the age of sixteen.<sup>43</sup>

Grooming is punishable by a maximum term not exceeding two years of imprisonment or a fine up to € 20.250.<sup>44</sup>

### **Article 6 paragraph 2 of the Directive**

Article 6 paragraph 2 of the Directive is covered by Article 45 in conjunction with 240b and 248a of the Dutch Criminal Code.

### **Article 240b of the Dutch Criminal Code**

This Article is explained in Topic 1.

### **Article 248a of the Dutch Criminal Code**

Certain forms of (online) grooming were already criminalised in Article 248a of the Dutch Criminal Code.<sup>45</sup> This involves situations where a minor is approached and seduced on the internet by means of gifts or promises of money or goods, abuse of dominance arising from

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<sup>41</sup> Kamerstukken II 2008/09, 31810, nr. 3, p. 6 (Explanatory Memorandum), Directive on Child Pornography (Dutch Criminal Code Article 240b) (2010A025).

<sup>42</sup> Kamerstukken II 2008/09, 31810, nr. 3, p. 6 (Explanatory Memorandum), Directive on Child Pornography (Dutch Criminal Code Article 240b) (2010A025).

<sup>43</sup> Kamerstukken II 2008/09, 31810, nr. 3, p. 9 (Explanatory Memorandum).

<sup>44</sup> Article 248e of the Dutch Criminal Code in conjunction with article 23 paragraph 4 of the Dutch Criminal Code

<sup>45</sup> See the Appendix.

actual relationships, or deceit, to adopt sexually suggestive poses or to perform indecent acts or to tolerate such acts from a third party and this can be seen on a webcam. Behaviour that does not result in the actual commission of a sexual act or the beginning of execution of such an act, fall outside the scope of Article 248a of the Dutch Criminal Code.<sup>46</sup>

In order to be criminally liable the perpetrator must know or “should reasonably assume that the minor has not reached the age of eighteen yet.

The element “or should reasonably assume” implies that in order to come to a conviction it is enough that the perpetrator should have known that the minor has not yet reached the age of eighteen yet.

The term ‘imprisonment of up to 4 years or a fine of a maximum of €20.250’ is imposed when the offence under Article 240a is committed.<sup>47</sup>

### **Article 45 of the Dutch Criminal Code**

Article 45 of the Dutch Criminal Code criminalises the attempt to commit a crime. An attempt to commit a felony is punishable where the offender’s intention manifests itself by a beginning of completion.<sup>48</sup>

Paragraph 2 of article 45 of the Dutch Criminal Code provides in a less severe in case of an attempt to commit a crime, such as in article 248a or 248b of the Dutch Criminal Code, is committed. Paragraph 2 stipulates a decrease of the original punishment of the offence. Paragraph 3 stipulates that a maximum term of imprisonment of 20 years is imposed if the original punishment is a life term imprisonment. Paragraph 4 stipulates that the additional punishments are the same for the attempt to commit a crime as for the actual crime.

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<sup>46</sup> Voorstel van wet tot uitvoering van het op 25 oktober 2007 te Lanzarote tot stand gekomen Verdrag van de Raad van Europa inzake de bescherming van kinderen tegen seksuele uitbuiting en seksueel misbruik (Trb. 2008, 58). Kamerstukken II 2008/09, 31810, nr. 3, p. 6 (Explanatory Memorandum).

<sup>47</sup> Article 248a of the Dutch Criminal Code jo. article 23 paragraph 4 of the Dutch Criminal Code.

<sup>48</sup> Caroline M. Pelsler, ‘Preparations to commit a crime, The Dutch approach to inchoate offences’, *Utrecht Law Review*, volume 4, issue 3 (December) 2008.

### 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

In the Netherlands, offline grooming amounts to the criminal offence of seduction under Article 248a of the Dutch Criminal Code. Therefore, the Netherlands does not need to take steps in order to criminalise “off-line grooming” as it is already criminalised.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b> <b>Solicitation of children for sexual purposes</b></p> <p>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.</p>	<p><b>Article 248e of the Dutch Criminal Code:</b> The person who proposes to arrange a meeting, by means of an automated work or by making use of a communication service, to a person of whom he knows, or should reasonably assume, that such person has not yet reached the age of sixteen, with the intention of committing indecent acts with this person or of creating an image of a sexual act in which this person is involved, will be punished with a term of imprisonment of at most two years or a fine of the fourth category, if he undertakes any action intended to realise that meeting.</p>
<p>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.</p>	<p><b>Article 240b of the Dutch Criminal Code:</b> 1. 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.</p> <p>2. Those who make a profession or habit of the commission of one of the criminal offences described in the first paragraph, will be punished with a term of imprisonment of at most eight years or a fine of the fifth category.</p> <p><b>Article 248a of the Dutch Criminal Code:</b> The person who intentionally induces a person, of whom he knows, or should reasonably assume, that</p>

	<p>such person has not yet reached the age of eighteen, by means of gifts or promises of money or goods, abuse of dominance arising from actual relationships, or deceit, to perform indecent acts or to tolerate such acts from him, will be punished with a term of imprisonment of at most four years or a fine of the fourth category.</p>
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### TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1))

Before one can work with children an employee needs to have a certificate of conduct based on Article 28 Judicial Data and Criminal Records Act (hereinafter named WJSG). In a certificate of conduct the Dutch Minister of Security and Justice declares that the applicant did not commit any criminal offences that would harm his working activities. According to Article 29 WSJG this decision can be seen as a decision in the sense of Article 1:3 General Administrative Law Act (AWB). The certificate of conduct is not only required for working with children. For instance, it can also be desired if one wants to be a taxi driver and it may be important to know whether someone has been convicted for drunk driving. Article 35 WJSG states that the Minister declines the application for a certificate of conduct, in case the judicial document mentions a criminal fact, when repeatedly committed, will be harmful for the activities which one wants to perform and is a risk for society. In many professions the certificate of conduct is obligatory, especially in professions where one works with children. The government makes policy rules to determine whether a certificate of conduct is obligatory or not. For the following professions the certificate of conduct is at least obligatory<sup>49</sup>:

<sup>49</sup> <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2013/02/26/regels-vog-in-de-kinderopvang-en-peuterspeelzalen.html> (Last visited on 29 April 2014) (Factsheet rules; Certificate of conduct in day care and preschool. 17-7-2013).

- Owners of a children's centre, host parent agency or day care;
- Employees of a children's centre, host parent agency or day care, 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 volunteers, the board, trainees, temporary employees etc. are obliged to have a certificate of conduct.
- Host parents;
- Persons older than 18 who are living with the host parent;
- Educators.

Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive?

If yes, does it cover:

### **3.1.1. Professional activities involving direct and regular contact with children?**

### **3.1.2. Organised voluntary activities involving direct and regular contact with children?**

The Netherlands provides a legal framework on disqualification arising from conviction for the offences listed in Articles 3-7 of the Directive. It covers all activities regarding working with children. It does not make a difference between voluntary or professional activities.<sup>50</sup> Additionally, Article 251 paragraph 2 of the Dutch Criminal Code in connection with Article 28 of the Dutch Criminal Code determines that someone who commits a crime as described in Article 240b up and to 247 and Article 248a up and to 250 (these are the crimes as described in Article 3 up and to 7 of the Directive) may be disqualified for that kind of profession.

Whether a certificate of conduct is given to the applicant depends on two variables. The first variable is if the judicial documentation, taking in account the risk for society, harms the execution of a certain job in case the crime will be repeated in that function.<sup>51</sup> Another variable is

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<sup>50</sup> <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2013/02/26/regels-vog-in-de-kinderopvang-en-peuterspeelzalen.html> (Last visited on 29 April 2014) (Factsheet rules; Certificate of conduct in day care and preschool. 17-7-2013).

<sup>51</sup> Beleidsregels VOG-NP-RP 2013 (BWBR0032949) Stcrt. 2013, nr. 5409, par. 3.2 (policy rules).

the subjective variable<sup>52</sup> which may cause that - beside the fact that there is a relevant criminal offence and therefore the first variable has been fulfilled – the interest of the needs to be considered as more important than the interest of society. The first variable can be divided in four subcategories i) judicial information ii) in case repeated iii) risk for society iv) a harm for the execution of the function/job. The criteria will be checked and if they are met then the subjective variable is taken into account. This variable can be divided in four subcategories: the completion of a criminal lawsuit; the duration of time; the amount of antecedents<sup>53</sup>. So even if there is a relevant criminal fact, still the applicant can get a certificate of conduct. For instance, if the crime was committed as a minor and there's only a small risk that it will happen again, a certificate of conduct can still be obtained.<sup>54</sup>

### 3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

The way of screening depends on the kind of job you apply for. For instance, if someone has been convicted for drunk driving, it is not necessary to deny a certificate of conduct when one wants to work with children. Therefore there are different kinds of certificates of conduct and it depends on the job which one you need. It can also occur that someone needs another certificate of conduct when switching jobs. However, since 1st March 2013, the situation around the 'certificate of conduct' has been changed with regard to working with children.<sup>55</sup> If there is a suspicion of a criminal offence or crime, the prosecutor may decide to prosecute the person, make a settlement or decide to dismiss. The information regarding the decision of the prosecutor will be send to Justis. This is a Dutch organisation that screens people and organisations and gives advice to employers for instance in respect to whether they should hire someone. The authority has access to exclusive sources, analyses the information and develops a judgment about the integrity of persons and organisations. When Justis receives this information, it decides whether the person has to be screened again. If that is the case, the employer receives a warning.

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<sup>52</sup> Beleidsregels VOG-NP-RP 2013 (BWBR0032949) Stcrt. 2013, nr. 5409, par. 3.3 (policy rules).

<sup>53</sup> Beleidsregels VOG-NP-RP 2013 (BWBR0032949) Stcrt. 2013, nr. 5409, par. 3.3 (policy rules).

<sup>54</sup> ABRvS 5 september 2012, ECLI:NL:RVS:2012:BX6537.

<sup>55</sup> Beleidsregels VOG-NP-RP 2013 (BWBR0032949) Stcrt. 2013, nr. 5409, par. 2.2 (policy rules).



The employer should ask the employee to accept for a new screening. This continued screening belongs to the new situation since 1st March 2013.

For certain jobs, especially jobs where one works with children, the certificate of conduct is obligatory. This is determined in policy rules of the government. The screening is not done by the employers themselves. The applicant needs to go to the local government to apply for a certificate of conduct. The screening will be done by an organisation called Justis<sup>56</sup>. The employers do not receive the information about the applicant of Justis, the only information they receive is whether the certificate of conduct has been provided or not. In the Netherlands, employers do not have an obligation or right to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive. However, they do this in an indirect way by requesting the certificate of conduct.

### 3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

The situation in the Netherlands with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Article 10, is as following. During the negotiations of the Directive, the Netherlands endeavoured to add a provision. This provision required Member States to request for information concerning sexual offences from the police in case the applicant wants to work with children. Article 10 paragraph 3 is an addition to 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. To implement Article 10 paragraph 3, Article 35 Judicial Data and Criminal Records Decision (hereinafter named BJSJG) is adapted. On the basis of Article 35, paragraph 1, BJSJG, it is now possible for Member States to exchange information. The criminal information does not only consist of information about convictions, but also judicial information which does not cause a conviction, but is still relevant regarding working with children.

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<sup>56</sup> Organisatieregeling Justis (BWBR0033489) Stcr. 2013, 14838 (policy rules).

3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

In conclusion, certain steps have been taken to implement Article 10 of the Directive in the Netherlands. Firstly, Article II of the implementation of the Directive<sup>57</sup> encloses measures to avoid that someone who has been convicted for the crimes as described in the Directive ,can do a job where there is contact with children on a regular basis. To avoid this, Article 28, first paragraph Criminal Code offers the penalty to exclude persons from a certain profession. When someone is convicted for a sexual offence, the judge can decide to exclude someone from his profession (Article 251 Criminal Code). Secondly, the obligations of Article 10 are represented in the certificate of conduct. In the professions where someone works with children, a certificate of conduct is obligatory. For other sectors that do not require this certificate, employers can still request a certificate of conduct. Article 10, paragraph 3, is implemented by the change of Article 35 paragraph 2 WJSG. On the basis of this Article, it is possible to exchange information between Member States about persons who are going to work with children.

3.5. In your view, does the current legal framework comply with Art. 10?

In our opinion the Netherlands did a good job in complying with Article 10 of the Directive. All aspects of the Article are implemented in the national legal framework as described above.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 10</b>  <b>Disqualification arising from convictions</b>            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.</p>	<p><b>Article 251 paragraph 2 of the Dutch Criminal Code in connection with Article 28 of the Dutch Criminal Code</b> determines that someone who commits a crime as described in Article 240b up and to 247 and Article 248a up and to 250(these are the crimes as described in Article 3 up and to 7 of the Directive) may be disqualified for that kind of profession.</p>

<sup>57</sup> National rules implementing Framework Decision 2001/220/JHA, Staatscourant 2004-80, p. 19.

<p>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.</p>	<p><b>Article 28 Judicial Data and Criminal Records Act</b></p>
<p>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 [13] when requested under Article 6 of that Framework Decision with the consent of the person concerned.</p>	<p>To implement Article 10 paragraph 3, <b>Article 35 Judicial Data and Criminal Records Decision</b> (hereinafter named BJSJG) is adapted. On the basis of Article 35, paragraph 1, BJSJG, it is now possible for Member States to exchange information. The criminal information does not only consist of information about convictions, but also judicial information which does not cause a conviction, but is still relevant regarding working with children.</p>

## TOPIC 4.

### *Victim identification*

(Article 15 (4))

4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims).

The Directive states in Article 15 (4) that a Member State should take the necessary measures to identify the victims of Article 3 to 7 of the Directive. In the Netherlands, there are 150 police officers who fight child pornography. The aim of the police officers is to find more victims and

to make sure that they will no longer be abused.<sup>58</sup> Before the end of 2014, there should be 25% more suspects delivered to public prosecution service than in 2010.<sup>59</sup> The Dutch government has implemented Article 15, paragraph 4, in policy rules. In the policy rule regarding “child pornography”, certain procedures explain how to identify the victims.

The policy rule regarding child pornography entails certain procedures on how to identify victims. When there is a suspicion of a crime as described in Article 5, paragraph 3, of the Directive and Article 240b of the Dutch Criminal Procedure Code, the police has two kinds of capacities which may lead to the confiscation of goods.<sup>60</sup> According to Article 110 of the Dutch Procedure Code, a search can be done under the management of a supervisory judge. Article 551 of the Dutch Criminal Procedure Code gives civil servants the authority to confiscate certain goods. The civil servants have access to every place where it can be expected that that such a criminal act is committed. This way, civil servants can gain access to these sources in order to identify the victims. It is important to confiscate all digital and analogue devices of the suspect which can contain important information for the investigation. By investigating the suspect's computer, the behaviour of the suspect can be analysed. Presumptions of a sexual offence can be investigated by searching the computer. Contacts can be intercepted or networks can be revealed. Due to the need to open encrypted data or to open secured devices, a designated digital expert needs to be present at the time a search takes place and should be involved during the entire investigation. Objects that may provide a reasonable suspicion of child abuse should be confiscated. In this case, it is recommended to make audio-visual recordings of the residence(s) of the suspect. This is essential to discover the crime scene of the sexual abuse or of the child pornography. Backgrounds of the depictions, residences and furniture can be compared to discover these places.

It may be essential to confiscate other materials as well. This entails devices that contain depictions or audio-visual material, which cannot directly be regarded as to fall into the scope of Article 240b Dutch Criminal Code. Nevertheless, it can be regarded as undesirable to leave the material behind with the suspect. In this regard, this entails depictions or audio visual material which may or may not have been taken secretly, which may or may not contain identified victims

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<sup>58</sup> <http://www.rijksoverheid.nl/onderwerpen/kinderporno/vraag-en-antwoord/wat-doet-de-overheid-om-kinderporno-op-internet-tegen-te-gaan.html> (last visited on 28 April 2014).

<sup>59</sup> <http://www.rijksoverheid.nl/onderwerpen/kinderporno/vraag-en-antwoord/wat-doet-de-overheid-om-kinderporno-op-internet-tegen-te-gaan.html> (last visited on 28 April 2014)

<sup>60</sup> Aanwijzing kinderpornografie (Artikel 240b) (2010A025), Stb. 2010, nr. 19121, par.4.3 and 4.4. (Policy Rules).

and which does not show a sexual act or which shows material of which it is not immediately evident whether the material contains sexual behaviour. These depictions or data are usually taken by the suspect in occasions where children usually can be found, such as streets, or on vacation. Often, it involves material, which is produced for child modelling or which can be regarded as art. It can be regarded as desirable to confiscate this material from the suspect. Whether this is desirable depends on the circumstances of the case. In this regard, circumstances such as the position of the suspect towards sexuality with children, his sexual preference, his involvement with children or the possibility to manipulate the data to punishable material. Whether such a confiscation is necessary, will be considered by the public prosecutor.

Article 36d Dutch Criminal Code stipulates that these materials can be confiscated when the public interest requires it.<sup>61</sup>

Digital investigation should comprise investigation into chats, e-mails 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 Dutch police takes care of an (inter)national information system in which information is processed in (inter)national databases, in order to combine information which makes it easier to relate certain pieces of information to each other. This information system is developed to identify victims, producers and sexual abusers.<sup>62</sup> Moreover, investigations meant for other countries can be transferred (via Interpol or Europol) to the responsible foreign authorities.

The following information needs to be shared with the responsible foreign authorities.

- All current child pornography-investigations; the identity of the suspect and the nature of the investigation need to be reported as soon as possible;<sup>63</sup>
- Child pornography imagery which had not lead to the identification of victim(s), producers and/or sexual abuser(s); the imagery and information of the investigations need to be transferred as soon as possible;<sup>64</sup>
- In case of identification of the victim(s), producer(s) and abuser(s), the imagery and information need to be reported as soon as possible;<sup>65</sup>

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<sup>61</sup> Aanwijzing kinderpornografie (Artikel 240b) (2010A025), *Stb.* 2010, nr. 19121, par 4.3 and 4.4. (Policy Rules).

<sup>62</sup> Aanwijzing kinderpornografie (Artikel 240b) (2010A025), *Stb.* 2010, nr. 19121, par. 4.3 en 4.4. (Policy Rules).

<sup>63</sup> Aanwijzing kinderpornografie (Artikel 240b) (2010A025), *Stb.* 2010, nr. 19121, par. 4.3 en 4.4. (Policy Rules).

<sup>64</sup> Aanwijzing kinderpornografie (Artikel 240b) (2010A025), *Stb.* 2010, nr. 19121, par. 4.3 en 4.4. (Policy Rules).

- Investigations to sexual abuse where imagery is produced, also when it is not sure that the material is distributed through the internet, need to be transferred as soon as possible.<sup>66</sup>

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<sup>67</sup>. 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<sup>68</sup>. They receive material through different channels which are the following:

- Requests from other countries, which give rise to new investigations.
- The division receives reports through the Internet and from The Hotline Combating Child Pornography on the Internet, which is a privately-run initiative.
- The TBI conducts his own research into images and paedophilia networks, but uses information from for instance regional police teams.
- Many reports are sent in by the Police Cyber Crime Reporting Website and give rise to investigation.<sup>69</sup>

The TBI first makes an assessment whether the materials are connected to a larger organisation, what the magnitude of the case is and whether the images were produced recently and the online environment of the suspect.<sup>70</sup>

In conclusion, Article 15, paragraph 4, is implemented in policy rules. On the one hand, police officers have certain capacities which may lead to the confiscation of goods. This may help to identify the victims. Police officers are also allowed to take other materials which cannot be considered as child pornography, but may lead to an earlier identification of victims. On the other hand certain databases have been developed by the Dutch governments to make it easier

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<sup>65</sup> Aanwijzing kinderpornografie (Artikel 240b) (2010A025), *Stb.* 2010, nr. 19121, par. 4.3 en 4.4. (Policy Rules).

<sup>66</sup> Aanwijzing kinderpornografie (Artikel 240b) (2010A025), *Stb.* 2010, nr. 19121, par. 4.3 en 4.4. (Policy Rules).

<sup>67</sup> Aanwijzing kinderpornografie (Artikel 240b) (2010A025), *Stb.* 2010, nr. 19121, par. 4.3 en 4.4. (Policy Rules).

<sup>68</sup> National Rapporteur on Trafficking in Human Beings (2011), *Child Pornography – First report of the Dutch National Rapporteur*, The Hague: BNRM 2011.

<sup>69</sup> National Child Pornography Expertise Centre, Public Prosecution Service and Police, 2010 (not publicly available).

<sup>70</sup> National Rapporteur on Trafficking in Human Beings (2011), *Child Pornography – First report of the Dutch National Rapporteur*, The Hague: BNRM 2011.

to identify victims. The information in the database is also exchanged with other countries to make the identification process easier on a wider level.

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)?

In our opinion, the Dutch legislation complies with Article 15 (4) in the sense that there is technology available to make a good database and that authorities have enough capacities to confiscate the materials that they need in order to identify the victims.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 15</b> <b>Investigation and prosecution</b></p> <p>1.(...)</p> <p>2.(...)</p> <p>3(...)</p> <p>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.</p>	<p><i>Aanwijzing kinderpornografie (Article 240b)</i> (2010A025), Stb. 2010, nr. 19121, par. 4.3 en 4.4. (Policy Rules).</p> <p><b>Implementation provisions concerning child pornography (Article 240b of the Dutch Criminal Code)</b>, 2010A025, Dutch Government Gazette, 2 December 2011, no. 19121, par.4.3 and 4.4.</p> <p><b>National Rapporteur on Trafficking in Human Beings (2011), Child Pornography</b> – First report of the Dutch National Rapporteur, The Hague: BNRM 2011.</p>

## TOPIC 5.

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

Article 17 of the Directive deals with the implementation of the Articles 3 to 7 of the Directive and the jurisdiction of the Member State in connection with the offences determined in these Articles. In Articles 3 to 7 of the Directive, the core of combating sexual exploitation of children is laid down. These Articles contain offences concerning sexual abuse, sexual exploitation, child pornography, solicitation for sexual purposes and incitement, aiding and abetting and attempt of children. In the Dutch Criminal Code, the Articles 240b, 242 until and including 250 and 273f are the codification of the criminal offences on sexual exploitation of children laid down in the Articles 3 to 7 of the Directive.

I will explain in which Articles jurisdiction of the Dutch court is determined, since Article 17 of the Directive is about jurisdiction and coordination of prosecution. In Article 2 of the Dutch Criminal Code, the principle of territoriality is filed. As follows from this principle, the Dutch Criminal Code is applicable to everyone who is guilty of any offence committed in the Netherlands. Thus the Dutch jurisdiction is established when the offence is committed in whole or in part within its territory. Additionally, when the offence is committed outside the Dutch territory, the Dutch Court has jurisdiction when the offender is a Dutch national. This follows from Article 5, paragraph 1, sub 3, of the Dutch Criminal Code. Either way, it does not matter whether or not the offence is regarded as a criminal act at the place where it was performed. As regarded by paragraph 4 of Article 17, the jurisdiction is not subordinated to the condition that the acts are criminal offences at the place where they were performed.

The Articles 5a and 5b of de Dutch Criminal Code establish a specific jurisdiction upon the criminal offences, described in the Articles 240b, 242 until and including 250 and 273f of the Dutch Criminal Code. Because of these Articles, the criminal offences laid down in the Directive enjoy a broadened jurisdiction within Dutch law. As regarded by paragraph 2, sub c, and paragraph 4 of Article 17 of the Directive, Article 5a, paragraph 1, of the Dutch Criminal code establishes jurisdiction when the offender is not a national but a habitual resident of the Netherlands. Article 5b, sub 2, of the Dutch Criminal Code establishes jurisdiction when the victim is either a national or only a habitual resident in Dutch territory. This is in accordance with paragraph 2, sub a, and paragraph 4 of Article 17 of the Directive. Article 51 of the Dutch Criminal Code makes legal persons equally suitable to be an offender of any crime just like a natural person. As follows from the jurisprudence, this clause is applicable to Article 5 of the



Dutch Criminal Code. This means, that the optional extension of the jurisdiction as given to the Member States in paragraph 2 of Article 17, is applicable for Dutch jurisdiction.

In accordance with Article 17, paragraph 3, of the Directive, jurisdiction in the Netherlands exists no matter where the information and communication technology is based. Decisive is that the information and communication technology is accessed by someone who is on Dutch territory. According to the Article containing the offence of grooming; Article 248e of the Dutch Criminal Code, there is no limitation within the Article upon whether or not the information and communication technology accessed is based on its territory. Because of the principle of territoriality that follows from Article 2 of the Dutch Criminal Code, Dutch jurisdiction is established whether the information and communication technology is based on its territory or not. As long as the criminal offence is committed on Dutch territory, there is jurisdiction because of this principle.

For the Dutch jurisdiction, a complaint is not a condition for the investigation and prosecution of the offences present in this Directive<sup>71</sup>. Therefore the jurisdiction is not subordinated to a report by the victim or a denunciation by the State where the offence was committed. This is in accordance with the condition following from Article 17, paragraph 5, of the Directive.

As follows from the Explanatory Memorandum of the implementation of the present Directive, the Dutch Criminal Code already met the requirements of implementation, barring some reinforcements.<sup>72</sup> Since Article 17 pertains to Articles 3 to 7 of the Directive, one new Article in Dutch law had to be codified. The Article that needed to be codified was Article 3, paragraph 6. The Dutch Criminal Code did not contain such an offence yet. Because of the requirements of implementation Article 3, paragraph 6, of the Directive is now present in the Dutch Criminal Code in Article 248f.<sup>7374</sup> This Article contains the offence of coercing, forcing or threatening a child, who has not reached the age of 18, into sexual activities with a third party. The person committing this offence will be punished with imprisonment of at most 10 years. This is in accordance with Article 3, paragraph 6, of the Directive which contains a term of imprisonment of at least 10 years. Because of the introduction of Article 248f in the Dutch Criminal Code, the

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<sup>71</sup> Memorie van Toelichting 31 808 (R1872), nr. 3, p. 17 (Explanatory Memorandum).

<sup>72</sup> Memorie van Toelichting 33580, nr. 3, p. 11 (Explanatory Memorandum).

<sup>73</sup> Wet van 12 februari 2014, Staatsblad 74, 2014 (Government Gazette).

<sup>74</sup> Wet van 12 februari 2014, Staatsblad 76, 2014 (Government Gazette).

implementation of Article 17 of the Directive is successfully completed. The current legal framework of the Netherlands complies in total with Article 17.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 17</b> <b>Jurisdiction and coordination of prosecution</b></p> <p>1. Member States shall take the necessary measures to establish their jurisdiction over the offences referred to in Articles 3 to 7 where:</p> <p>(a) the offence is committed in whole or in part within their territory; or</p> <p>(b) the offender is one of their nationals.</p>	<p><b>In Article 2 of the Dutch Criminal Code</b>, the principle of territoriality is filed. As follows from this principle, the Dutch Criminal Code is applicable to everyone who is guilty of any offence committed in the Netherlands. Thus the Dutch jurisdiction is established when the offence is committed in whole or in part within its territory.</p> <p>When the offence is committed outside the Dutch territory, the Dutch Court has jurisdiction when the offender is a Dutch national. This follows from Article 5, paragraph 1, sub 3, of the Dutch Criminal Code.</p>
<p>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:</p> <p>(a) the offence is committed against one of its nationals or a person who is an habitual resident in its territory;</p> <p>(b) the offence is committed for the benefit of a legal person established in its territory; or</p> <p>(c) the offender is an habitual resident in its territory.</p>	<p><b>Article 5b, sub 2, of the Dutch Criminal Code</b> establishes jurisdiction when the victim is a national or only a habitual resident in Dutch territory. This is in accordance with paragraph 2, sub a, and paragraph 4 of Article 17 of the Directive.</p> <p><b>Article 51 of the Dutch Criminal Code</b> makes legal persons equally suitable to be an offender of any crime just like a natural person. As follows from the jurisprudence, this clause is applicable to Article 5 of the Dutch Criminal Code. This means, that the optional extension of the jurisdiction as given to the Member States in paragraph 2 of Article 17, is applicable for Dutch jurisdiction.</p>
<p>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.</p>	<p><b>Article 5a, paragraph 1, of the Dutch Criminal Code</b> establishes jurisdiction when the offender is not a national but a habitual resident of the Netherlands.</p> <p><b>Article 2 Of the Dutch Criminal Code.</b></p>

<p>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.</p>	<p><b>Dutch Criminal Code</b>  <b>Article 5, paragraph 1.</b>  <b>Article 5a, paragraph 1.</b>  <b>Article 5b, paragraph 2.</b></p>
<p>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.</p>	<p><b>Article 5 paragraph 1 sub 3 Of the Dutch Criminal Code.</b></p>

## TOPIC 6.

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

#### 6.1. Please describe the current national legal framework with regard to child victims

These Articles are about the assistance, support and protection measures for child victims. The Netherlands is providing a clear and adequate legal framework where the interests of the Directive are being ensured. The principle here is that the damage suffered by the victim is not increased because of the criminal procedure. Many of the Articles which belong to this category are present for the prevention of (what is being called in sociological terms) 'secondary victimisation.' An existing number of Articles from the Dutch Criminal Procedure Code are important here.

The Articles of the Directive concerning the hearing of the victim can be realised within the existing legal framework. The Dutch law is for example placing a responsibility on the

prosecutor and judge for a correct treatment of the victim and there is the possibility to hear the victim without the presence of the suspect. A lot of Articles from the Directive seem to be formulated in such a way that there is a lot of freedom concerning the implementation for the Member States in the national legal framework.

Additionally, articles about the assistance and support measures for child victims exists, (Articles 18 and 19). In comparison with the Lanzarote Convention<sup>75</sup> there are no major differences. These measures were already provided for due to Articles 11 and 14 of the Lanzarote Convention. In this context, the role of Victim Support the Netherlands (*Slachtofferhulp Nederland*) is of great importance. Victim Support the Netherlands is an organisation which provides emotional, practical and legal support to all victims, free of charge. At last the policy rules of the Public Prosecutors Department are part of the legal framework which ensure the Articles of the Directive. Because of a decision by the Supreme Court<sup>76</sup> of the Netherlands, these policy rules are regarded as 'law' and the public prosecutors are bound by them.

### 6.1.1. General framework of protection (Art. 18)

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

The Netherlands has transposed the Council Framework Decision 2001/220/JHA of 15 March 2001 in the standing of victims in criminal proceedings. It has been in force since June 1<sup>st</sup> 2004.<sup>77</sup>

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

Following a complaint, the police is obliged to take assistance and support measures in relation to a potential child victim (Article 18, paragraph 2). The police inform the victim about the assistance and support possibilities and about the progress of the case.<sup>78</sup>

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<sup>75</sup> Verdrag van Lanzarote, *Tractatenblad*. 2008,58:*Staatsblad*.2009,543. Treaty of Lanzarote (adopted 25 October 2007, entered into force 1 July 2010).

<sup>76</sup> HR 26 april 2011, ECLI:NL:HR:2011:BP1275 (Supreme Court).

<sup>77</sup> National rules implementing Framework Decision 2001/220/JHA, *Staatscourant* 2004-80, p. 17.

<sup>78</sup> 4 Aanwijzing slachtofferzorg (2010A029), Stc. 2010, nr. 20476 (Policy Rules).

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

When there is a situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Article 18, paragraph 3), the Netherlands is bound by the Lanzarote Convention. So when the age of the victim is uncertain and there are reasons to believe that the victim is a child, the protection and assistance measures provided for children shall be accorded to him or her pending verification of his or her age, in accordance with Article 11, paragraph 2 of the Lanzarote Convention.

#### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art. 19 (1))?

The legal framework of the Netherlands concerning the commencement and duration of the assistance and support measures enables child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Article 19, paragraph 1). This is ensured by the Policy Rule investigation and prosecution concerning sexual abuse<sup>79</sup> and the Policy Rule victim support.<sup>80</sup> The support and assistance are being provided by Victim Support the Netherlands.

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

The Netherlands has taken certain specific steps for the protection of children who report cases of abuse within their family (Article 19, paragraph 1). If a minor grows up in a manner which constitutes a serious threat to him/her, the children's court judge may vest an institution for family guardianship, which will care and supervise over him or her, Article 2:254 Dutch Civil Code. The mayor has as well the authority to put a temporary interdiction for entrance in the house in case of a serious suspicion of child abuse.<sup>81</sup>

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<sup>79</sup> Aanwijzing opsporing en vervolging inzake seksueel misbruik (2010A026), Stc. 2010, 19123 (Policy Rules).

<sup>80</sup> Aanwijzing slachtofferzorg (2010A029), Stc. 2010, nr. 20476 (Policy Rules).

<sup>81</sup> Wet tijdelijk huisverbod (*Stb.* 2012, 682).

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

Assistance and support measures are not made conditional on the child's willingness to cooperate in the criminal investigation, prosecution and trial, Article 19, paragraph 2.<sup>82</sup>

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

The Netherlands provides a legal framework for an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 paragraph 3. These Articles are all individual assessments:

- If the Child Protection Board establishes that a minor is not subjected to legally required custody or that such custody is not exercised over him or her, then it shall apply to the court a provision for the exercise of custody over such a minor, Article 1:241 Dutch Civil Code .
- The district court shall appoint a guardian over all minors who are not subjected to parental authority and for whose guardianship no provisions has been lawfully made, Article 1:295 Dutch Civil Code.
- The court may appoint a foundation as referred to in Article 1 (f) of the Juvenile Care Act (*Wet op de Jeugdzorg*) as guardian, Article 1:302 Dutch Civil Code.

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

Child victims of any of the offences referred to in Articles 3 to 7 of the Directive are not explicitly considered as particularly vulnerable victims in the legal framework of the Netherlands, pursuant to Article 2, paragraph 2, Article 8, paragraph 4 and Article 14, paragraph 1 of Framework Decision 2001/220/JHA (Art 19, paragraph 4).

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe.

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<sup>82</sup> *Kamerstukken II* 2012/2013, 33 580, nr. 4 (Parliamentary Papers).

Assistance and support is also available to the family of the child victim as described in Article 19, paragraph 5. The Ministry of Justice and communities are financing the activities of Victim Support the Netherlands.<sup>83</sup>

### **6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))? If yes, please specify which.

The legal framework of the Netherlands provides an obligation to appoint a special representative for the child victim under certain circumstances, (Article 20, paragraph 1). Article 1:250 Dutch Civil Code is providing such an obligation: Where there is a conflict between the interests of the minor and the parents, the district court shall appoint a guardian ad litem or ad hoc ex officio, to represent the minor in the matter, both judicially and extra-judicially, where it considers this is necessary in the best interest of the minor. This is the case for instance when a child is contacting the court without an official petition.

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)? If yes, please specify if it is:

- a) Available for the purpose of claiming compensation?
- b) Free of charge where the victim does not have sufficient financial resources?

The child victim has access to legal counselling and legal representation, in accordance with Article 20, paragraph 2 of the Directive. Article 51c Dutch Criminal Procedure Code provides the legal framework. This is also available for the purpose of claiming compensation and is free of charge, also if the victim has sufficient financial resources.<sup>84</sup>

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3)

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<sup>83</sup> Kamerstukken II, datum, 318 08, nr.3, (MvT) (Explanatory Memorandum).

<sup>84</sup> Article 44, paragraph 4 Wet op de Rechtsbijstand, (Stb. 2012, 682).

With the Policy Rule investigation and prosecution concerning sexual abuse<sup>85</sup> and the Policy Rule auditory and audio-visual registering of hearings<sup>86</sup> is the Netherlands ensuring Article 20, paragraph 3 of the Directive:

- Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities. By Article 51a, paragraph 2 Dutch Criminal Procedure Code the public prosecutor is responsible for a correct treatment of the victim;
- Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose. There are studios especially designed for hearings with children under twelve year;
- Interviews with the child victim are carried out by or through professionals trained for this purpose. An investigator who is certified for the education of 'Hearing young or mentally retarded persons' or who is following this education is allowed to hear the child in a 'child friendly-studio';
- The same persons, if possible and where appropriate, conduct all interviews with the child victim;
- 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;
- 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. Article 51c Dutch Criminal Procedure Code gives the victim the opportunity to be accompanied by his or her legal representative.

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

Under the Policy Rule auditory and audio-visual registering of hearings<sup>87</sup> and Article 339, paragraph 1, under 1°, and Article 340 Dutch Criminal Procedure Code, the Netherlands ensures

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<sup>85</sup> Aanwijzing opsporing en vervolging inzake seksueel misbruik (2010A026), Stc. 2010, nr. 19123 (Policy Rules).

<sup>86</sup> Aanwijzing auditief en audiovisueel registreren van verhoren van aangevers, getuigen en verdachten (2010A018), Stc. 2010, nr. 11885 (Policy Rules).



that interviews with a child victim, or a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Article 20, paragraph 4).

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, 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?

Article 269 Dutch Criminal Procedure Code ensures that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that the hearing take place without the presence of the public. Article 131a Dutch Criminal Procedure Code realises that the child victim can be heard in the courtroom without being present, which will consequently be done by means of a videoconference, (Article 20, paragraph 5).

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

The Netherlands is providing measures to protect the privacy, identity and image of the child victim and to prevent the public dissemination of any information that could lead to identification of the child victims (Article 20, paragraph 6). Article 190, paragraph 1 Dutch Criminal Procedure Code determines that a judge asks the witnesses their names, age and domicile. According to Article 190, paragraph 2, it is possible that the judge-commissioner will omit the questioning of this information if there is a grounded presumption that the witness will experience inconvenience because of his testimony. The judge-commissioner can do that ex officio or on the request of the witness. A same arrangement exists under the same conditions during the investigation at assembly. Article 290, paragraph 1 Dutch Criminal Procedure Code states that the court can determine that asking for a specific kind of information under Article 290, paragraph 1 Dutch Criminal Procedure Code can be omitted. A big difference with the

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<sup>87</sup> *Aanwijzing auditief en audiovisueel registreren van verboden van aangevers, getuigen en verdachten* (2010A018), Stc. 2010, nr. 11885 (Policy Rules).

hearing with the judge-commissioner is that during the hearing of witnesses with the judge-commissioner, the presence of the suspect is an exception (Article 186a, paragraph 2 Dutch Criminal Procedure Code), the suspect during the hearing of a witness is present. The court, however, may decide that a witness can be heard without the presence of the suspect (Article 297, paragraph 3 Dutch Criminal Procedure Code). The initiative can come from the president of the court, prosecutor or the witness. Another measure entails that the victim may give the address of Victim Support the Netherlands or the police post where the accusation took place, instead of giving his real domicile name. This opportunity protects in a certain way the privacy of the victim. The fencing of the private address information of the victim can be important because this information will not be named in the minutes and dossier.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 18</b>  <b>General provisions on assistance, support and protection measures for child victims</b></p> <p>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.</p> <p>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.</p> <p>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.</p>	<p><i>Aanwijzing slachtofferzorg</i> (Stc. 2010, 20476)</p> <p><b>Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse</b>  <b>Article 11</b>  <b>(2)</b> 'Each Party shall take the necessary legislative or other measures to ensure that when the age of the victim is uncertain and there are reasons to believe that the victim is a child, the protection and assistance measures provided for children shall be accorded to him or her pending verification of his or her age'.</p>

<p><b>Article 19</b> <b>Assistance and support to victims</b></p> <p>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 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.</p>	<p><i>Aanwijzing opsporing en vervolging inzake seksueel misbruik</i> (Stc. 2010, 19123).</p> <p><i>Aanwijzing slachtofferzorg</i> (Stc. 2010, 20476).</p> <p><b>Article 2:254 BW:</b> 'If a minor grows up in a manner which constitutes a serious threat to his or her moral or mental interests or his or her health and other means for aversion of such threats have failed or, if it is foreseeable that these will fail, the children's court judge may vest an institution for family guardianship ... with the care and supervision over him or her.'</p>
<p>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.</p>	<p><i>Kamerstukken II 2012/2013, 33 580, nr. 4</i></p>
<p>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.</p>	<p><b>Article 1:241 jo 1:295 jo 1:302 BW, Article 1 (f)</b> <i>Wet op de jeugdzorg.</i></p>
<p>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.</p>	
<p>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.</p>	<p><i>Verdrag van Lanzarote, Tractatenblad. 2008, 58: Staatsblad. 2009, 543. Treaty of Lanzarote</i> (adopted 25 October 2007, entered into force 1 July 2010).</p>
<p><b>Article 20</b> <b>Protection of child victims in criminal</b></p>	<p><b>Article 1:250 Dutch Civil Code</b> The legal framework of the Netherlands provides</p>

<p><b>investigations and proceedings</b></p> <p>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.</p>	<p>an obligation to appoint a special representative for the child victim under certain circumstances, Article 1:250 Dutch Civil Code is providing such an obligation: When there is a conflict between the interests of the minor and the parents, the district court shall appoint a guardian ad litem or ad hoc ex officio, to represent the minor in the matter, both judicially and extra-judicially, where it considers this is necessary in the best interest of the minor. This is the case for instance when a child is contacting the court without an official petition.</p> <p><b>Article 1:266 BW Dutch Civil Code.</b></p>
<p>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.</p>	<p><b>Article 51c Dutch Criminal Procedure Code in connection with Article 44 paragraph 4 <i>Wet op de Rechtsbijstand</i></b></p> <p>The child victim has access to legal counselling and legal representation, in accordance with Article 20, paragraph 2 of the Directive. Article 51c Dutch Criminal Procedure Code provides the legal framework. This is also available for the purpose of claiming compensation and is free of charge, also if the victim has sufficient financial resources.</p>
<p>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:</p> <p>(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;</p> <p>(b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;</p> <p>(c) interviews with the child victim are carried out by or through professionals trained for this purpose;</p> <p>(d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;</p> <p>(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;</p> <p>(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.</p>	<p><b>Article 51a, paragraph 2 Dutch Criminal Procedure Code</b> determines that the public prosecutor is responsible for a correct treatment of the victim.</p> <p><i>Aanwijzing opsporing en vervolging inzake seksueel misbruik</i> (Stc. 2010, 19123).</p> <p><i>Aanwijzing auditief en audiovisueel registreren van verhoren van aangevers, getuigen en verdachten</i> (Stc. 2010, 11885).</p>

<p>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.</p>	<p><i>Aanwijzing auditief en audiovisueel registreren van verhoren van aangevers, getuigen en verdachten</i> (Stc. 2010, 11885)</p> <p><b>Article 339 (1) in connection with Article 340 Dutch Procedure Code</b></p> <p>Under the <i>Aanwijzing auditief en audiovisueel registreren van verhoren van aangevers, getuigen en verdachten</i> and Article 339, paragraph 1, under 1°, and Article 340 Dutch Criminal Procedure Code, the Netherlands ensures that interviews with a child victim, or a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings.</p>
<p>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:</p> <p>(a) the hearing take place without the presence of the public;</p> <p>(b) the child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies.</p>	<p><b>Article 269 Dutch Procedure Code.</b></p> <p><b>Article 131a Dutch Procedure Code.</b></p>
<p>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.</p>	<p><b>Article 190 (2) Dutch Procedure Code, Article 290 (1) Dutch Procedure Code Article 186a (2) Dutch Procedure Code Article 297 (3) Dutch Procedure Code</b></p> <p>According to Article 190, paragraph 2, it is possible that the judge-commissioner will omit the questioning of this information if there is a grounded presumption that the witness will experience inconvenience because of his testimony. The judge-commissioner can do that ex officio or on the request of the witness. A same arrangement exists under the same conditions during the investigation at assembly.</p> <p>Article 290, paragraph 1 Dutch Criminal Procedure Code states that the court can determine that asking for a specific kind of information under Article 290, paragraph 1 Dutch Criminal Procedure Code can be omitted. A big difference with the hearing with the judge-commissioner is that during the hearing of witnesses with the judge-commissioner, the presence of the suspect is an exception (Article 186a, paragraph 2 Dutch Criminal Procedure Code), the suspect during the hearing of a witness is present. The court, however, may decide that a witness can be heard without the presence of the</p>

	suspect (Article 297, paragraph 3 Dutch Criminal Procedure Code).
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## TOPIC 7.

### *Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

#### 7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography

Directive 2011/03/EU establishes two measures against websites containing or disseminating child pornography. Article 25 paragraph 1 of the Directive provides for the obligation of Member States to take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory. Article 25 (2) provides for an optional choice for the Member States regarding the blocking of such websites. Furthermore, it asks for transparent procedures and adequate safeguards to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction.

##### **7.1.1. Obligatory take down measures (Art. 25 (1))**

According to the correlation table in the Dutch correlating Directive, Article 25 (1) corresponds with the Dutch Article 125o of the Criminal Procedure Code. It states that when an automated work is searched and data regarding the criminal offence is found, the Public Prosecutor or 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. The meaning of 'an automated work' is a facility, meant to store, process or transmit data by electronic means.<sup>88</sup> A clear example is a computer or smartphone. However, the Dutch Supreme Court also included a network of computers and even automated telecommunication facilities.<sup>89</sup> As possession and public display, in this case on the internet, of child pornography is criminalised in Article 240b of the Criminal Code, the

<sup>88</sup> Artikel 80 van de wet van 3 maart 1881, Stb. 35, 1881 (Act of 3 March 1881).

<sup>89</sup> Hoge Raad 26 maart 2013, ECLI:NL:HR:2013:BY9718 (Supreme Court).

Public Prosecutor or Examining Judge can make this data inaccessible according to Article 125o of the Criminal Procedure Code and imprison the offender for a maximum of six years or impose a fine according to Article 240b of the Criminal Code.

Another way to take down websites containing or disseminating child pornography is through the middleman, Article 54a of the Dutch Criminal Code. The provider can be addressed and forced by the Public Prosecutor to give the name and address of the suspect or even to take down the child pornography. As this is a form of censorship, the law imposes a heavier demand. That is, the Public Prosecutor can only demand this if he has approval of an Examining Judge.

A Bill<sup>90</sup> has been proposed in 2013 with changes to the Dutch Criminal Code and the Dutch Criminal Procedure Code, which will make the Take Down procedure easier and clearer. It adds Article 125p to the Criminal Procedure Code. According to this Article, the Public Prosecutor can order the provider of a communication service to take all necessary and proportionate measures to make certain stored or transmitted data inaccessible as far as it is necessary to end the criminal offence or to prevent new offences. Together with the before mentioned Article 54a of the Criminal Code, the procedure to take down websites containing or disseminating child pornography will be clearer and easier. Especially since Article 54a will undergo a small change. The additional demand where the Public Prosecutor has to get approval from an Examining Judge, will be dropped. This Bill has not passed yet.

Regarding the obligatory Take Down procedure of Article 25 (1) of the Directive, there are some voluntary arrangements. In 2008, a Code of Conduct<sup>91</sup> in the field of Notice-and-Take-Down (NTC) was formed from the desire of governmental and private sector organisations to take down unlawful or unwanted information on the Internet. The idea is that if a person or organization ('the notifier') comes across unlawful content on the Internet, they can send a report to an intermediary, who will judge upon this content and remove it when considered unlawful or unwanted. According to the Code, an intermediary is a person or organization offering services in any manner relating to the storage, transmission or provision of information on the Internet. For example, an intermediary is the owner of a forum or hosts websites. After the report is sent, the Code states that the intermediary will judge whether the content was unlawful or not. If there is no doubt concerning the unlawfulness, the intermediary will

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<sup>90</sup> Wetsvoorstel Computercriminaliteit III, *Kamerstukken II* 2013, (Bill).

<sup>91</sup> Gedragscode Notice-and-take-down, versie 1.04, 9 oktober 2008 (Code of Conduct).



immediately take measures to take the content off-line. Also, in the case of a formal legal report made by the Public Prosecutor's Office, the intermediary will be obligated to immediately remove the content. For access providers that only provide access to the Internet, it is often technically impossible to remove information off the Internet. Parties can comply with the Code on a voluntary basis, but there is no formal enforcement mechanism when parties do not comply with it.

### **7.1.2. Optional blocking measures (Art. 25 (2))**

The Directive leaves measure of blocking as an optional choice for Member States. The Dutch legal framework does not provide for such a measure. In 2008, the Minister of Justice announced that internet providers will block websites containing or disseminating child pornography on the basis of a Black List, composed by the KLPD; National Police Services Agency.<sup>92</sup> However, research showed that the KLPD was not qualified to order providers to block websites. This made the agreements concerning blocking void.

In 2010, there was a new initiative of several internet providers to block websites on the basis of a black list. This initiative also did not come through. A working group was put on the matter and they eventually found that blocking of websites would be ineffective. The amount of websites containing child pornography has drastically decreased, since other services than websites are used to disseminate pictures of sexual exploitation of children, while the investigation and public attention concerning the spread of child pornography via the Internet has increased.<sup>93</sup>

At the moment, there are no other initiatives to block websites concerning child pornography. It is a controversial measure, which is considered by some as censorship and an ineffective way to combat the production of child pornography, especially because the filters are not 100% effective.

In conclusion, before the Directive, there already was a Dutch legal framework concerning the Take Down of websites containing or disseminating child pornography. The offender, who owns and publicly displays pictures, can be punished according to Article 240b of the Dutch Criminal Code. Automated work can be searched and data can be deleted according to Article 125o of the

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<sup>92</sup> 'Providers blokkeren samen kinderporno', *De Volkskrant*, 15 september 2008 (News paper Article).

<sup>93</sup> Werkgroep Blokkeren Kinderporno, 'Voortgang blokkeren kinderporno', Leidschendam, 18 november 2010 (policy rule).



Dutch Criminal Procedure Code. Another way to take down these websites is through the middleman, the internet provider. He can be addressed by the Public Prosecutor for the Take Down procedures. There are some extra requirements for this procedure, which are more lenient because of the Bill of 2013. If this Bill passes, the Public Prosecutor can directly order the provider to remove certain content. If he does not comply, he will commit a criminal offence. A similar procedure is also laid down in the Code of Conduct. Only here is it also possible for an individual to send a report to a provider, which will then take down the unlawful content. In the area of blocking measures, there have been some initiatives, but so far, a conclusion has not been reached yet. Blocking seems to be ineffective, since the filters are not 100% effective and child pornography is mostly spread through other channels than websites.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 25</b>  <b>Measures against websites containing or disseminating child pornography</b></p> <p>1. Member States shall take the necessary measures to ensure the prompt removal of web pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory.</p>	<p><b>Article 125o of the Dutch Criminal Procedure Code</b></p> <p>Article 25 (1) corresponds with Article 125o of the Dutch Criminal Procedure Code. It states that when an automated work is searched and data regarding the criminal offence is found, the Public Prosecutor or 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.</p> <p><b>Article 240b of the Dutch Criminal Code</b></p> <p>As possession and public display, in this case on the internet, of child pornography is criminalised in Article 240b of the Criminal Code, the Public Prosecutor or Examining Judge can make this data inaccessible according to Article 125o of the Criminal Procedure Code and imprison the offender for a maximum of six years or impose a fine according to Article 240b of the Criminal Code.</p> <p><b>54a Criminal Code</b></p> <p>Another way to take down websites containing or disseminating child pornography is through the middleman, Article 54a of the Dutch Criminal Code. The provider can be addressed and forced by the Public Prosecutor to give the name and address of the suspect or even to take down the child pornography.</p>

	<p><b>Code of Conduct</b></p> <p>In 2008, a Code of Conduct in the field of Notice-and-Take-Down (NTC) was formed from the desire of governmental and private sector organisations to take down unlawful or unwanted information on the Internet.</p>
<p>2. Member States may take measures to block access to web pages containing or disseminating child pornography towards the Internet users within their territory. These measures must be set by transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. Those safeguards shall also include the possibility of judicial redress.</p>	

# ELSA UNITED KINGDOM

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## 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) and Recital 18)

### 1.1. Please describe the national legal framework with regard to obtaining such access

The Protection of Children Act 1978 section 1, amended by the Criminal Justice and Public Order Act 1988 section 160 (which inserted pseudo-photographs) sets out that:

- (1) It is an offence for a person—
  - (a) To take, or permit to be taken [or to make], any indecent photograph [or pseudo-photograph] of a child; or
  - (b) To distribute or show such indecent photographs or pseudo-photographs]; or
  - (c) To have in his possession such indecent photographs or pseudo-photographs], with a view to their being distributed or shown by himself or others; or
  - (d) To publish or cause to be published any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs [or pseudo-photographs], or intends to do so.
  
- (2) For purposes of this Act, a person is to be regarded as distributing an indecent photograph [or pseudo-photograph] if he parts with possession of it to, or exposes or offers it for acquisition by, another person.

We can see from section (1)(a) above that although it is an offence to 'take' or 'make' any indecent photograph or pseudo-photographs of a child, there is no mention of it being an offence to access such photographs. However, English legislation is supplemented with case law so we must examine the cases. Since there is no definition of the words 'to make' in the Act, Otton LJ stated in *R v Bowden*<sup>1</sup> that they "must be given their natural and ordinary meaning". In this context, to make means "to cause to exist; to produce by action, to bring about": *Oxford English Dictionary*. As a matter of construction, such a meaning applies not only to original photographs but, by virtue of section 7 of the 1978 Act, also to negatives, copies of photographs and data stored on computer disc. Therefore, the downloading and/or printing of indecent

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<sup>1</sup> [2000] 1 Cr App R 438, Archbold 31 - 108a.

images from the internet are capable of amounting to the offence of 'making' the image. If someone opens an email attachment with the knowledge that it contains an indecent photograph or this will constitute making. In *R v Jayson*<sup>2</sup> an expert witness stated, "once an attachment has been opened, if it is not saved to a file or a directory, it remains on the surface of the hard disc unless and until it is deleted." If someone chooses to save an image (downloads) from the internet onto the computer's hard drive, this will also constitute 'making' under section 1 of the 1988 Act.

The issue that then arises is the court's definition of 'downloading'. By simply viewing an image on a website this image is stored on the computer's cache, "a temporary information store created automatically by an Internet browser programme when accessing a site on the Internet".<sup>3</sup> Can the image then be said to be made? It has technically been downloaded but not by the positive actions of the computer's operator. If the answer is yes, then the viewing/access to these images will constitute an offence under English law, as they will be subsequently be downloaded onto the computer's cache, constituting the offence of 'making'.

There then arises an issue of intention. This set out in Recital 18's condition of "knowingly obtaining access". A person must "intend to enter a site where child pornography is available and know that such images can be found there" but one who inadvertently accesses such a site will not commit an offence.<sup>4</sup> The *mens rea* for the offence of 'making' should be a 'deliberate and intentional act with knowledge that the image made was, or was likely to be, an indecent photograph or pseudo-photograph of a child'.<sup>5</sup>

*Atkins v DPP*, *Goodland v DPP*<sup>6</sup> out that unintended copying or storage of an image does not constitute the offence of 'making it'. Therefore if a person is unaware that there is an indecent photograph or pseudo-photograph contained in the attachment before he opens it, then the user will not be guilty of an offence as he is lacking the *mens rea* element.<sup>7</sup> By extension, if a person accesses a site that contains indecent photographs that are downloaded onto his internet cache by the browser without the prior knowledge that the images are indecent, he will not be liable.

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<sup>2</sup> [2002] EWCA Crim 683, [2003] 1 Cr App Rep 212.

<sup>3</sup> *R v Smith; Jayson* [2003] 1 Cr App R 13.

<sup>4</sup> *Atkins v DPP; Goodlands v DPP* [2000] 2 Cr App R 248 stated that knowledge was an essential ingredient of the offences of 'making' and /or possessing indecent photographs of children.

<sup>5</sup> *R v Smith; Jayson* [2003] 1 Cr App R 13.

<sup>6</sup> [2000] 2 All ER 425, [2000] 2 Cr App Rep 248, DC set.

<sup>7</sup> *R v Smith; Jayson* [2003] 1 Cr App R 13.

If the computer's operator did not know that by viewing an indecent image on his internet browser that it would be stored to a computer's cache—would he be still liable? The action seems to lack the *mens rea* of the offence - the intention to create an indecent image or cause it to exist. This issue arose in the case of *R v Jayson; Smith* where Mr. Jayson's internet browsing software automatically stored any material viewed while browsing on to a temporary Internet cache. The court held that a conviction under section 1 would be possible as the image was created in the cache. The computer operator is then said to be creating or causing the image to exist. However, this conviction is conditional on the defendant knowing the image would be automatically stored.<sup>8</sup> A computer user will not be held to have 'made' indecent images when they are saved on the computer's cache if he is unaware of the existence and the use of the cache. However, he will be in possession of them in respect to their downloading onto the computer's screen under paragraph 261 of the Criminal Justice Act 1988 – but only if he knew of the existence of the cache.

With regard to sentencing Article 5(3) requires that “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.” Section 6 of the Protection of Children Act sets out the punishment for the offences listed in section 1. Section 6(2)(a) states that a person convicted on indictment shall be liable for a term of imprisonment not exceeding ten 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 six months, to a fine of £1,000 or some other sum that has been substituted by the Act or to both.

If a person is convicted on indictment under section 160 of the Criminal Justice Act they shall receive up to five years prison time. If the person is convicted on summary conviction there will be a six-month prison sentence and/or a statutory maximum fine. Pseudo-photographs generally will be treated less seriously than real photographs and a mitigating factor is that the images are viewed but not stored. *R v Oliver*<sup>9</sup> stated that simply finding an image will be generally less serious than downloading said image. Downloading will generally be less serious than taking an original film or photograph of indecent posing or activity.

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<sup>8</sup> *R v Smith; Jayson* [2003] 1 Cr App R 13.

<sup>9</sup> [2003] 2 Cr App R (S) 15.

### 1.2. Which steps have been taken in your MS in order to transpose Art. 5 (1) and (3)?

To my knowledge there have been no positive steps taken by England towards transposing Article 5(1) or 5(3) into national law.

### 1.3. In your view, does this legal framework comply with Art. 5 (1) and (3)?

The legal framework does not comply with Article 5(1) or 5(3) as it makes no reference to the intentional 'access' of child pornographic sites but merely deals with the issue of 'making' or 'possessing' a photograph or pseudo-photograph. We can see that through the development of case law the effect of section 1 of the Protection of Children Act does, in a roundabout way, achieve the same effect as Article 5(1) but only if the computer operator is aware of the existence and the function of the internet cache. The 'making' of a photograph may achieve the same objective as Article 5(3) if convicted on indictment under section 6(2)(a) of the Protection of Children Act, as he/she shall be liable for a term of imprisonment not exceeding ten years. However, Section 6(3)(a) states that a person who is summarily convicted shall be liable to imprisonment for a term not exceeding six months. Although it is an offence to intentionally view the images on an internet browser that automatically downloads the images into the computer's cache, the law is unclear as to the liability of the computer's operator if he is unaware of the existence or function of the cache.

If no, what additional measures should, in your view, be taken in order to comply with Art. 5 (1) and (3)?

An amendment should be made to section 1 of the Protection of Children Act that sets out the liability surrounding the access to such pornographic sites that have indecent images of children if the computer's user is aware that pornographic images of children can be found there. Section 1(1)(a) should be amended to "to take, permit to be taken, to make or to access any indecent photograph or pseudo-photograph of a child". Section 160 of the Criminal Justice Act refers only to the possession of photographs or pseudo-photographs.

The summary conviction under Section 6(3)(a) should be amended to read "A person convicted summarily of any offence under this Act shall be liable (a) to imprisonment for a term not exceeding one year". The alternate option of a fine should be removed but the court may impose the fine under section 6(3)(b) upon the offender upon its discretion.

1.4. What is the status in your MS with regard to the options left to the MS to limit the scope of the prohibition of the conduct defined under paragraphs 1 and 3, pursuant to paragraph 7 of Article 5?

Since the legal framework does not comply with Article 5(1) or 5(3) and there have been no efforts to transpose the Article into English law the English legislature have not exercised their discretion with regard to the actual age of the person in an indecent image.

## **TOPIC 2.**

*Online grooming: solicitation by means of information and communication technology of children for sexual purposes*

(Article 6 and Recital 19)

2.1. Please describe the national legal framework with regard to online grooming

The relevant legislation can be found in section 15<sup>10</sup> of the Sexual Offences Act 2003<sup>11</sup> (England, Wales and Northern Ireland) and section 1<sup>12</sup> of The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005<sup>13</sup>. The respective provisions cover both online (internet and other technologies such as mobile phones) and offline grooming (“the real world”).

### **Actus Reus**

A person over 18 or over (the offender) has met or communicated with a young person under 16 on at least two occasions (Scotland: 1 occasion) and then either meets 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. The initial communication does not have to include sexual content.

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<sup>10</sup> <http://www.legislation.gov.uk/ukpga/2003/42/section/15>.

<sup>11</sup> <http://www.legislation.gov.uk/ukpga/2003/42/contents>.

<sup>12</sup> <http://www.legislation.gov.uk/asp/2005/9/section/1>.

<sup>13</sup> <http://www.legislation.gov.uk/asp/2005/9/contents>.



## Mens Rea

At the time of either the meeting or the travel with the intention of meeting a child, the offender intends to commit a relevant offence under the Sexual Offences Act 2003. This covers any offence under Schedule 3 of the Act.<sup>14</sup>

A person guilty of this offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years. The maximum sentence doubled from when the Bill was introduced.

### 2.2. What is your MS position with regard to off-line grooming (see Recital 19)?

As stated under question 1, UK legislation covers both online and offline grooming under section 15 of the Sexual Offences Act 2003 and section 1 of The Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. Therefore, please refer to question 1.

### 2.3. Which steps have been taken in your MS in order to transpose Art. 6?

The UK was one of the first European Union (EU) member states to initiate strong legislation regarding grooming offences.<sup>15</sup> UK legislation goes beyond the requirements of the Directive.

### 2.4. In your view, does this legal framework comply with Art. 6?

UK legislation does not only comply, but goes beyond the requirements set out in the Directive.

However, some scholars claim that section 15 of the Sexual Offences Act 2003 does not sufficiently define the offence and allows for one person to groom and for another person to subsequently abuse a young person. Craven, Brown and Gilchrist suggested the following definition in their review:

“A process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining the child's compliance and maintaining the child's secrecy to avoid disclosure. This process serves to strengthen the offender's abusive pattern, as it may be used as a means of justifying or denying their actions.”<sup>16</sup>

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<sup>14</sup> <http://www.legislation.gov.uk/ukpga/2003/42/schedule/3>.

<sup>15</sup> Julia Davidson, Julie Grove-Hills, Antonia Bifulco, Petter Gottschalk, Vincenzo Caretti, Thierry Pham, Stephen Webster, “Online Abuse: Literature Review and Policy Context“ Prepared for the European Commission Safer Internet Plus Programme [2011] 19, available at: <http://www.europeanonlinegroomingproject.com/wp-content/uploads/EOGP-Literature-Review.pdf>.

<sup>16</sup> Samantha Craven, Sarah Brown and Elizabeth Gilchrist, “Sexual grooming of children: Review of literature and theoretical considerations.” [2006] *Journal of Sexual Aggression*. 12(3), 287-299.

If not, what additional measures should be taken in order to comply with Art. 6?

No additional measures are required in order to comply with the Directive.

Provisions from Directive 2011/93 EU	Corresponding provisions from your national legislation
<p><b>Article 6</b> <b>Solicitation of children for sexual purposes</b></p> <p>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.</p> <p>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.</p>	<p><b>Sexual Offences Act 2003<sup>17</sup></b> <b>15 Meeting a child following sexual grooming etc.</b></p> <p>(1) A person aged 18 or over (A) commits an offence if</p> <ul style="list-style-type: none"> <li>(a) A has met or communicated with another person (B) on at least two occasions and subsequently <ul style="list-style-type: none"> <li>(i) A intentionally meets B,</li> <li>(ii) A travels with the intention of meeting B in any part of the world or arranges to meet B in any part of the world, or</li> <li>(iii) B travels with the intention of meeting A in any part of the world,</li> </ul> </li> <li>(b) A intends to do anything to or in respect of B, during or after the meeting mentioned in paragraph (a)(i) to (iii) and in any part of the world, which if done will involve the commission by A of a relevant offence,</li> <li>(c) B is under 16, and</li> <li>(d) A does not reasonably believe that B is 16 or over.</li> </ul> <p>(2) In subsection (1)</p> <ul style="list-style-type: none"> <li>(a) The reference to A having met or communicated with B is a reference to A having met B in any part of the world or having communicated with B by any means from, to or in any part of the world;</li> <li>(b) "Relevant offence" means— <ul style="list-style-type: none"> <li>(i) An offence under this Part,</li> <li>(ii) <i>Omitted (2.2.2009)</i></li> <li>(iii) Anything done outside England and Wales which is not an offence within sub-paragraph (i) but would be an offence within sub-paragraph (i) if done in England and Wales.</li> </ul> </li> </ul> <p>(3) <i>Omitted (2.2.2009)</i></p>

<sup>17</sup> <http://www.legislation.gov.uk/ukpga/2003/42/contents>.

	<p>(4) A person guilty of an offence under this section is liable</p> <p>(a) On summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;</p> <p>(b) On conviction on indictment, to imprisonment for a term not exceeding 10 years.<sup>18</sup></p> <p><b>Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005<sup>19</sup></b></p> <p><b>1 Meeting a child following certain preliminary contact</b></p> <p>(1) A person ("A") commits an offence if</p> <p>(a) Having met or communicated with another person ("B") on at least one earlier occasion, A</p> <p>(i) Intentionally meets B;</p> <p>(ii) Travels, in any part of the world, with the intention of meeting B in any part of the world; or</p> <p>(iii) Makes arrangements, in any part of the world, with the intention of meeting B in any part of the world, for B to travel in any part of the world;</p> <p>(b) At the time, A intends to engage in unlawful sexual activity involving B or in the presence of B</p> <p>(i) During or after the meeting; and</p> <p>(ii) In any part of the world;</p> <p>(c) B is</p> <p>(i) Aged under 16; or</p> <p>(ii) A constable;</p> <p>(d) A does not reasonably believe that B is 16 or over; and</p> <p>(e) At least one of the following is the case</p> <p>(i) The meeting or communication on an earlier occasion referred to in paragraph (a) (or, if there is more than one, one of them) has a relevant Scottish connection;</p> <p>(ii) The meeting referred to in sub-paragraph (i) of that paragraph or, as the case may be, the travelling referred to in sub-paragraph (ii) of that paragraph or the making of arrangements referred to in sub-paragraph (iii) of that paragraph, has a relevant Scottish connection;</p> <p>(iii) A is a British citizen or resident in the</p>
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<sup>18</sup> <http://www.legislation.gov.uk/ukpga/2003/42/section/15>.

<sup>19</sup> <http://www.legislation.gov.uk/asp/2005/9/contents>.

	<p>United Kingdom.</p> <p>(2) In subsection (1) above</p> <p>(a) The reference to A's having met or communicated with B is a reference to A's having met B in any part of the world or having communicated with B by any means from or in any part of the world (and irrespective of where B is in the world); and</p> <p>(b) A meeting or travelling or making of arrangements has a relevant Scottish connection if it, or any part of it, takes place in Scotland; and a communication has such a connection if it is made from or to or takes place in Scotland.</p> <p>(3) For the purposes of subsection (1)(b) above, it is not necessary to allege or prove that A intended to engage in a specific activity.</p> <p>(4) A person guilty of an offence under this section is liable</p> <p>(a) On summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;</p> <p>(b) On conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine or both.</p> <p>(5) Subsections (6A) and (6B) of section 16B of the Criminal Law (Consolidation) (Scotland) Act 1995 (c. 39) (which determines the sheriff court district in which proceedings against persons committing certain sexual acts outside the United Kingdom are to be taken) apply in relation to proceedings for an offence under this section as they apply to an offence to which that section applies.</p>
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### TOPIC 3.

*Disqualification arising from convictions, screening and transmission of information concerning criminal records*

(Article 10 and Recitals 40-42)

### 3.1. Please describe the national legal framework with regard to disqualification arising from conviction (Art. 10 (1))

The United Kingdom has framework in place to prevent people convicted of certain offences from working with children. The Safeguarding Vulnerable Groups Act 2006 (SVGA 2006), as amended by the Protection of Freedoms Act 2012, is the main legislative instrument by which it is decided who is or is not eligible to work with children. Upholding the safeguards installed in the Act is now the purpose of the Disclosure and Barring Service (DBS), which was set up in December 2012 after the previous body, the Independent Safeguarding Authority was merged with the Criminal Records Bureau. (Note, section 1 and schedule 1 of the SVGA 2006 set up a body called the Independent Barring Board, but this was renamed the Independent Safeguarding Authority in 2009 by virtue of section 81 of the Policing and Crime Act 2009).

The SVGA 2006 provided for the creation of two barred lists, one for the protection of children (the Children's Barred List) and one for the protection of vulnerable adults (the Adults' Barred List). These lists contain the names of people who are prohibited from working with (on a voluntary or professional basis) children and/or vulnerable adults.

Section 3 SVGA 2006 provides:

**Barred persons**

- (1) A reference to a person being barred from regulated activity must be construed in accordance with this section.
- (2) A person is barred from regulated activity relating to children if he is—
  - (a) Included in the children's barred list;
  - (b) Included in a list maintained under the law of Scotland or Northern Ireland, which the Secretary of State specifies, by order as corresponding to the children's barred list.

Part 1 of Schedule 3 SVGA 2006 determines inclusion in the Children's Barred List. A person can be included on the Children's Barred List in two ways. For those convicted of or cautioned for the most serious offences against children and who are deemed to always be a threat to children in any circumstance, automatic inclusion on the Children's Barred List is possible, without the person in question having the right to make representations as to why he or she should not be included in the list. This process is detailed in Section 1 of Part 1 of Schedule 3 to the SVGA 2006. Other people who have been convicted of or cautioned for offences against children and who are deemed to pose a serious risk to children, but not in every conceivable case, are added to the Children's Barred List according to Section 2 of Part 1 of Schedule 3 to

the SVGA 2006, but are then given the right to make representations to the DBS as to why they should be removed from the list.

The criteria applicable to Sections 1 and 2 of Part 1 of Schedule 3 to the SVGA 2006 are found Regulations 3 and 4 (respectively) of Part 2 of the Safeguarding Vulnerable Groups Act (Prescribed Criteria and Miscellaneous Provisions) Regulations 2008. Before this legislation, people prevented from working with children were identified by reference to a variety of different measures. These regulations seek to provide one list, and so compile the criteria for previous preventative measures into a single set of criteria leading to inclusion on the Children's Barred List. For a full list of offences that result in addition to the Children's Barred List, with and without the possibility of representations, see the tables in Annex 1.

Article 10 of the Directive requires Member States to prevent persons from working with children if they have been convicted of any of the offences in Articles 3 to 7 of the Directive. As evidenced by the extensive list of offences which can result in addition to the Children's Barred List, it appears that convictions for all offences found in Articles 3 – 7 of the Directive result in the individual being barred from working with children on both a voluntary and involuntary basis.

Once a person is added to the Children's Barred List, they are prohibited from working or volunteering in regulated activities. Regulated activities are defined by Part 1 of Schedule 4 to the SVGA 2006 as:

- (2) An activity is a regulated activity relating to children if—
  - (a) It is carried out frequently by the same person or the period condition is satisfied,
  - (b) It is carried out in an establishment mentioned in paragraph 3(1),
  - (c) It is carried out by a person while engaging in any form of work (whether or not for gain),
  - (d) It is carried out for or in connection with the purposes of the establishment, and
  - (e) It gives that person the opportunity, in consequence of anything he is permitted or required to do in connection with the activity, to have contact with children.

Does your MS provide a legal framework on disqualification arising from conviction for the offences listed in Arts. 3-7 of the Directive? If yes, does it cover:

### **3.1.1. Professional activities involving direct and regular contact with children?**

- 2 (1) The activities referred to in paragraph 1(1) are—

- (a) Any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children;
- (b) Any form of care for or supervision of children, unless the care or supervision is merely incidental to care for or supervision of persons who are not children;
- (c) Any form of advice or guidance provided wholly or mainly for children, if the advice or guidance relates to their physical, emotional or educational well-being;
- (d) Any form of treatment or therapy provided for a child;
- (e) Moderating a public electronic interactive communication service which is likely to be used wholly or mainly by children;
- (f) Driving a vehicle, which is being used only for the purpose of conveying children and any person supervising or caring for the children pursuant to arrangements made in prescribed circumstances.

People added to the Children's Barred List are also prohibited from working in the following establishments by paragraph 3 of Part 1 of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006.

### **3.1.2. Organised voluntary activities involving direct and regular contact with children?**

- 3 (1) The establishments referred to in paragraph 1(2) and (10) are—
  - (a) An educational institution which is exclusively or mainly for the provision of full-time education to children;
  - (b) An establishment which is exclusively or mainly for the provision of nursery education (within the meaning of section 117 of the School Standards and Framework Act 1998 (c. 31));
  - (c) A hospital which is exclusively or mainly for the reception and treatment of children;
  - (d) An institution which is exclusively or mainly for the detention of children;
  - (e) A children's home (within the meaning of section 1 of the Care Standards Act 2000 (c. 14));
  - (f) A home provided in pursuance of arrangements under section 82(5) of the Children Act 1989 (c. 41);
  - (g) Relevant childcare premises.
  
- (2) Relevant childcare premises are any part of premises on which a person carries on—
  - (a) Any form of childcare (within the meaning of section 18 of the Childcare Act 2006 (c. 21)) in respect of which he must be registered under that Act;
  - (b) Any form of such childcare in respect of which he may be registered under that Act, whether or not he is so registered;
  - (c) Any form of day care (within the meaning of section 79A of the Children Act 1989 (c. 41)) in respect of which he must be registered under that Act.

Furthermore, Paragraph 4 of Part 1 of Schedule 4 to the Safeguarding Vulnerable Groups Act provides that people on the Children's Barred List are prohibited from occupying the following positions:

**Establishments**

- 3(1) The establishments referred to in paragraph 1(2) and (10) are—
- (a) An educational institution which is exclusively or mainly for the provision of full-time education to children;
  - (b) An establishment which is exclusively or mainly for the provision of nursery education (within the meaning of section 117 of the School Standards and Framework Act 1998 (c. 31));
  - (c) A hospital which is exclusively or mainly for the reception and treatment of children;
  - (d) An institution which is exclusively or mainly for the detention of children;
  - (e) A children's home (within the meaning of section 1 of the Care Standards Act 2000 (c. 14));
  - (f) A home provided in pursuance of arrangements under section 82(5) of the Children Act 1989 (c. 41);
  - (g) Relevant childcare premises.
- (2) Relevant childcare premises are any part of premises on which a person carries on—
- (a) Any form of childcare (within the meaning of section 18 of the Childcare Act 2006 (c. 21)) in respect of which he must be registered under that Act;
  - (b) Any form of such childcare in respect of which he may be registered under that Act, whether or not he is so registered;
  - (c) Any form of day care (within the meaning of section 79A of the Children Act 1989 (c. 41)) in respect of which he must be registered under that Act.

Furthermore, Paragraph 4 of Part 1 of Schedule 4 to the Safeguarding Vulnerable Groups Act provides that people on the Children's Barred List are prohibited from occupying the following positions:

**Positions**

- 4 (1) The persons referred to in paragraph 1(9) are—
- (a) Member of the governing body of an educational establishment mentioned in section 8(5);
  - (b) Member of a relevant local government body;
  - (c) Director of children's services of a local authority in England;
  - (d) Director of adult social services of a local authority in England;
  - (e) Director of social services of a local authority in Wales;
  - (f) Chief education officer of a local authority in Wales;
  - (g) Charity trustee of a children's charity;
  - (h) Member of the Youth Justice Board for England and Wales;
  - (I) Children's Commissioner or deputy Children's Commissioner appointed under Part 1 of the Children Act 2004 (c. 31);
  - (j) Children's Commissioner for Wales or deputy Children's Commissioner for Wales;
  - (k) Operator of a database established in pursuance of section 12(1)(a) or (b) or 29(1)(a) or (b) of the Children Act 2004;
  - (l) Member of a Local Safeguarding Children Board established under section 13 or 31 of that Act;
  - (m) Member or chief executive of the Children and Family Court Advisory and Support Service;
  - (n) A deputy appointed in respect of a child under section 16(2)(b) of the Mental Capacity Act 2005 (c. 9);



(o) Member, chief executive or member of staff of IBB.

(2) For the purposes of sub-paragraph (1)(b), a person is a member of a relevant local government body if—

(a) He is a member of a local authority and discharges any education functions, or social services functions, of a local authority;

(b) He is a member of an executive of a local authority which discharges any such functions;

(c) He is a member of a committee of an executive of a local authority which discharges any such functions;

(d) He is a member of an area committee, or any other committee, of a local authority, which discharges any such functions.

(3) Any reference in sub-paragraph (2) to a committee includes a reference to any sub-committee, which discharges any functions of that committee.

(4) A charity is a children's charity if the individuals who are workers for the charity normally include individuals engaging in regulated activity relating to children.

(5) An individual is a worker for a charity if he does work under arrangements made by the charity; but the arrangements referred to in this sub-paragraph do not include any arrangements made for purposes, which are merely incidental to the purposes for which the charity is established.

(6) For the purposes of sub-paragraph (1)(k), a person is the operator of a database if he—

(a) Establishes or maintains the database, or

(b) Otherwise, exercises any function in relation to the management or control of the database.

(7) In this paragraph—

“Area committee” has the same meaning as in section 18 of the Local Government Act 2000 (c. 22);

“Charity” and “charity trustee” have the same meanings as in the Charities Act 1993 (c. 10);

“Education functions”, in relation to a local authority, means any functions with respect to education which are conferred on the authority in its capacity as a local education authority;

“Executive”, in relation to a local authority, has the same meaning as in Part 2 of the Local Government Act 2000;

“Local authority” has the same meaning as in the Education Act 1996 (c. 56);

“Social services functions”, in relation to a local authority, has the same meaning as in the Local Authority Social Services Act 1970 (c. 42).

In summary then, the range of offences covered by Articles 3 – 7 of the Directive are encompassed by the wide range of offences which result in inclusion on the Children's Barred List, which leads to an individual being prohibited from working with children in the above mentioned regulated activities, in relevant establishments and in certain positions. This applies whether the work is voluntary or professional, as the UK legislation makes no distinction when preventing people on the Children's Barred List from working with children.

3.2. Please describe the national legal framework with regard to access by employers to information concerning the existence of criminal convictions when recruiting (screening) (Art. 10 (2))

**3.2.1. Does your MS provide a general legal framework for screening? If yes, please describe the conditions for screening**

Employers can submit applications to the Disclosure and Barring Service (DBS) in order to find out information regarding a successful job applicant. Some employers can register as a registered organization if they carry out more than 100 checks per year. If an employer is not a registered organization, they cannot directly submit requests to the Disclosure and Barring Service, but must use an umbrella body.

**3.2.2. Does your MS provide a specific legal framework on screening with regard to activities involving direct and regular contacts with children?**

There are three levels of DBS check that can be carried out (descriptions taken from government guidance):

Standard DBS Check

The standard check is available for duties, positions and licenses included in the Rehabilitation of Offenders Act (ROA) 1974 (Exceptions) Order 1975, for example, 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.

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, for example, regularly caring for, training, supervising or being solely in charge of children, specified activities with adults in receipt of health care or social care services and applicants for gaming and lottery licenses.

An enhanced level certificate contains the same PNC information as the standard level certificate but also includes a check of information held locally by police forces.

#### Enhanced with a Barred List Check

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

An enhanced level certificate with barred list check(s) 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.

### **3.2.3. Do employers in your MS have an obligation to demand information on the existence of prior criminal convictions for the offences listed in Article 3-7 of the Directive, when recruiting a person for:**

- a) Professional activities involving direct and regular contact with children?
- b) Organised voluntary activities involving direct and regular contact with children?

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 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 therefore 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 organizers 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 activity.

### 3.3. What is the situation in your MS with regard to the transmission of information on criminal convictions, pursuant to paragraph 3 of Art. 10?

The United Kingdom has set up a body in compliance with the council framework decision 2009/315/JHA of 26 February 2009 on the organization and content of the exchange of information extracted from the criminal record between Member States. This body is called the United Kingdom Central Authority for the Exchange of Criminal Records. It sends information regarding the conviction of nationals of other Member States in the UK and receives notifications of convictions of UK nationals in other Member States.

The United Kingdom has gone further than outlined in the council framework decision and has also set up a system of criminal records checks specifically relating to the protection of children. This is called the International Child Protection Certificate (ICPC) and is a criminal records check for UK nationals or non-UK nationals resident in the UK who are seeking work with children overseas. The ICPC was set up by a joint initiative between the Child Exploitation and Online Protection (CEOP) Centre and the ACPO Criminal Records Office (ACRO). It reveals any convictions or reasons why an individual should not work with children, as well as providing a full conviction history, including any foreign criminal records where available. Schools and organizations overseas can register with the ICPC scheme in order to request an ICPC check as part of recruitment of UK nationals or UK residents.

### 3.4. Which steps have been taken in your MS in order to implement Art.10, with regard to each of the three obligations described (disqualification, screening, transmission of information on criminal convictions)?

The United Kingdom had already implemented a number of provisions relating to the disqualification, screening and transmission of information on criminal convictions prior to the Directive, and therefore there are no transposing provisions as such.

The Protection of Freedoms Act 2012 amended the Safeguarding Vulnerable Groups Act 2006 in order to make the protections more proportionate, scaling back the activities that were designated regulated activities and removing the category of controlled activity, reducing the numbers of people caught by the need for criminal records checks. It also introduced more rigorous relevancy tests in order to protect privacy where criminal records or information held

by the police was irrelevant to the position applied for. Given the extensive legislation for safeguarding children against people with convictions for offences against children, it does not seem the UK government felt it necessary to create provisions to specifically transpose Article 10 of the Directive.

### 3.5. In your view, does the current legal framework comply with Art. 10?

The current legal framework in the UK does comply with Article 10. Not only does the legal framework comply with the minimum standards of Article 10, preventing people with convictions for the offences specified in the Directive from working with children on a professional basis, but the UK legislation goes further than this and prevents those individuals from working with children on a voluntary basis as well.

Checks available to employers are detailed and extensive, allowing them to make informed decisions about their employees. Furthermore, where the employer is a regulated activity provider and the employee will come into close contact with children, the checks are legally required and will provide the employer with the necessary information to protect the children in his or her care. Regulated activity providers who put children at risk by knowingly employing someone barred from working with children are guilty of an offence.

Finally, with regards to the sharing of information regarding criminal convictions, not only is the UK committed to sharing general criminal conviction information as a participant in the European Criminal Records Information System scheme, but it has gone further to protect the wellbeing of children, by setting up its own system of checks for UK nationals and UK residents wishing to work with children overseas.

## **TOPIC 4.**

### *Victim identification*

(Article 15 (4))

#### 4.1. Please describe the national legal framework with regard to victim identification (means and measures in order to identify victims)

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).<sup>20</sup>

The NCPE is required to develop policing doctrine, including practice advice, in consultation with ACPO, the Home Office and the Police Service. Chief officers to shape police responses to ensure that victims, children and the general public experience consistent levels of service should use practice advice produced by the NCPE. The implementation of all practice advice will require operational choices to be made at a local level in order to achieve the appropriate police response.

In the practice advice, it explains that section 1B(1)(a) of the Protection of Children Act 1978 enables police officers and others legitimately engaged in the prevention, detection or prosecution of crime to possess indecent images of children in the course of their duties. Section 46 of the Sexual Offences Act 2003 recognises that such copies may be necessary for those working to prevent, detect or investigate a crime.<sup>21</sup>

Moreover, in accordance with the ACPO Good Practice Guide for Computer Based Electronic Evidence, Version 3, HTCUs also maintain links with similar facilities in other police forces, Force Intelligence Bureaus (FIB's) 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.<sup>22</sup>

#### **Information and reports from members of the public**

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<sup>20</sup> Page 8,

[http://www.kent.police.uk/about\\_us/policies/n/documents/CENTREX\\_Investigating\\_Indecent\\_images\\_of\\_children.pdf](http://www.kent.police.uk/about_us/policies/n/documents/CENTREX_Investigating_Indecent_images_of_children.pdf) Accessed on 20/04/2014.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

Reports of indecent images of children on the internet may be received from members of the public either by telephone, email or in person. Where digital or printed copies of indecent images of children accompany these reports, these should be seized.

In all cases a detailed statement should be obtained. It will assist those who investigate the offence if the following information is included in the statement:

- The identity of any other material witnesses;
- The name of the internet service provider (ISP) or mobile telephone service provider in the case of images received through a telephone;
- If known, the web address, name of the chat room or online group through which the image was found or received;
- Any passwords or other procedure required to gain access to the website;
- If known, the identity of the person who sent the image;
- In the case of emails, the sender's email address or the screen name used by the sender while in a chat room;
- The reason for any delay in reporting the incident to the police (this will assist investigators to determine if the person reporting has committed any offence in relation to the image).

Seized images should be placed in a sealed envelope to prevent accidental viewing and stored in a secure location. Thereafter access to the material should be recorded. If investigators are unsure how to package and store computer disks, mobile telephones, electronic organisers or other seized items containing the digital image, they should seek advice from their force HTCUC or a supervisor.

The computer or other device that received the indecent images of children may contain additional evidence that can only be recovered through specialist digital examination and this should be arranged with the HTCUC if appropriate.<sup>23</sup>

## Hi-Tech Crime Unit Support

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<sup>23</sup> Page 12,

[http://www.kent.police.uk/about\\_us/policies/n/documents/CENTREX\\_Investigating\\_Indecent\\_images\\_of\\_children.pdf](http://www.kent.police.uk/about_us/policies/n/documents/CENTREX_Investigating_Indecent_images_of_children.pdf) Accessed on 20/04/2014.

Officers undertaking day to day policing activities such as searching offenders or premises on unrelated matters may discover evidence of possession, collection or distribution of indecent images of children.

Relevant material could include printed pictures from a computer, handwritten notes referring to children's ages, internet chat room names, magazines relating to children and legal and academic material concerning paedophilia. There may also be indications of an interest in children, which may not seem in keeping with the suspect's circumstances, for example, a single person with no child relatives who keeps a playroom for no apparent reason.

Investigators should be aware of devices, in addition to discs, that have been developed to store digital media. These devices include: watches, pen drives (storage devices which can look like key fobs), wireless storage to remote devices such as printers or personal data assistants or certain mobile telephones.

If officers are unsure about handling these devices and the images are suspected to be stored on a computer or other storage device, they should seek advice on methods of seizure from the HTCUC. In other circumstances the images or digital media upon which they are stored should be seized and packaged in a sealed envelope and stored in a secure location, see the ACPO Good Practice Guide for Computer Based Electronic Evidence, Version 3.

In the majority of cases, an investigation concerning indecent images of children on the internet will begin with the allocation of an intelligence package. An intelligence package will be generated either by POLIT or the force HTCUC. The level of detail in each package will be variable.

Once the package has been allocated, officers should constantly assess new information generated by the investigation to ascertain if it indicates that the child, the suspect or the location can be identified. If this is the case, officers should investigate the offence in accordance with the guidance contained in the ACPO Guidance on Investigating Child Abuse.

### **Search Strategy**

It is likely that those who download indecent images of children from the internet may take some steps to conceal their activities from others living or working in the same premises. They may also adopt strategies to conceal material in the event of a police search.



Investigators undertaking searches should be aware of the various media on which indecent images of children can be saved and the ways in which storage media may be concealed. One example could be a compact disc containing indecent images of children disguised as a music compact disc within a collection. There is also the possibility that a concealed computer with a wireless connection to the internet may be used to distribute or access images.

Searches for evidence should, therefore, be meticulously planned and carried out in conjunction with members of the HTCUC. The HTCUC know the technical opportunities used to conceal such material. They also have intelligence on concealment methods adopted by suspects in other cases. If there is a suggestion that concealment methods may have been used by the suspect, the use of Police Search Advisor (Pulsar) trained officers should be considered at this stage. Those who download indecent images of children from the internet may also possess such images on video, DVD or in printed format. Search strategies should, therefore, include such material.

Where indecent images of children are subsequently recovered from seized material, investigators from the HTCUC will try to establish the identity of victims, offenders and locations shown in them. They will be assisted in this if the interiors of all searched premises have been video recorded or photographed during the search and photographs of children which are not indecent (e.g., a school photographs) have been copied. A digital photograph taken of the original in situ will be adequate for this purpose.

Encryption software allows incriminating text and images to be encoded. Encoded images or text cannot be recovered during the digital examination phase without the passwords. Investigators are advised to obtain passwords or pass phrases at an early stage from anyone who may have knowledge of them, although there is no statutory power to make such a demand. Where a suspect cannot or will not provide the required password or pass phrase, investigators may be able to use key words based on the suspect's lifestyle, hobbies or interests to access incriminating images and text.

Passwords or pass phrases may also be recorded in other locations associated with the suspect. Examples could include passwords used at their place of work or recorded within traditional or electronic diaries. Digital examination of an encrypted file(s) may include the use of specialist

examiners to obtain the password or pass phrase. Without this information, accessing encrypted files is difficult to achieve, if not impossible.<sup>24</sup>

## **Seizure Powers**

Where investigators suspect that indecent pictures of children are stored in a computer or on storage media and it is not reasonably practical for it to be examined in the place where it is found, section 50 of the Criminal Justice and Police Act 2001 permits a police officer to seize bulk material and examine it in another location. The packaging, removal and storage of seized computers and computer media should be carried out under the guidance of investigators from the HTCUC.

## **Digital Evidence Recovery**

### Developing a strategy

Following the initial evidence-gathering phase of the investigation, an evidence recovery strategy should be developed with the HTCUC to maximise the amount of evidence recovered from the seized material. The investigating officer or senior investigating officer is responsible for recording the agreed evidence recovery policy in the case papers, usually in the form of a policy file entry.

The purpose of this strategy should be to:

- Recover indecent images of children;
- Recover evidence linking the suspect to the images;
- Identify the origin of those images;
- Identify victims, offenders or locations from those images;
- Identify others who may have been involved in their production, possession and distribution;
- Identify others who may have been or who are still involved in the abuse of children.

The strategy should cover the following:

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<sup>24</sup> Page 17,  
[http://www.kent.police.uk/about\\_us/policies/n/documents/CENTREX\\_Investigating\\_Indecent\\_images\\_of\\_children.pdf](http://www.kent.police.uk/about_us/policies/n/documents/CENTREX_Investigating_Indecent_images_of_children.pdf) Accessed on 20/04/2014.

- The physical conditions under which seized material is to be stored if there is to be any delay before its submission to the HTCUs;
- The timescales for examination;
- The extent of the examination. All of the material seized should be examined to reveal the full extent of the suspect's offending behaviour, including any evidence of the physical abuse of children. The decision to carry out a partial examination of the material should only be taken following consultation with supervisors and the reasons for the decision recorded in the policy file;
- How the disclosure of potential evidence, which has not been digitally examined but has been classed as unused material, will be made in accordance with the Criminal Procedure and Investigations Act 1996;
- How other non-digital material is to be examined (e.g. video tapes and written material);
- Briefing procedures to ensure that the investigating officer, the HTCUs and any others involved in the examination of non-digital material share information during the examination process.

The examination itself should be carried out in accordance with the ACPO principles described in the Good Practice Guide for Computer Based Electronic Evidence, Version 3.0. These principles must be adhered to by all HTCUs.

#### Assessment of recovered images

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 the information coming into the enquiry, to establish whether a victim, offender or location can be identified. Where an individual or location can be identified appropriate action should be taken.

When assessing an image to identify victims, offenders or locations, investigators should be mindful that while virtual or collectors create pseudo images, indecent images are of real children.

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 which are 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.<sup>25</sup>

In addition, it is important to consider legislation concerning the sharing of information in order to facilitate the identification of victims.

### Children Act 1989

Firstly, it is essential to consider the Children Act 1989. An enquiry into a child who is sexual abused or exploited is initiated under section 17<sup>26</sup>, where it requires a local authority to undertake an enquiry of a child who is in need. Moreover, Section 47<sup>27</sup> of the Children Act 1989 places a duty on local authorities to make enquiries where they have cause to suspect that a child may be at risk of suffering significant harm. Furthermore, the following authorities must assist the local authority with the enquiries if required, for instance by providing relevant information:

- Any local authority;
- Any local education authority;
- Any housing authority;
- Any health authority;
- Any person authorised by the Secretary of State;

Section 27<sup>28</sup> enables the authority to request the help of one of the authorities listed above in the exercise of any of their functions under Part 3 of the Act.<sup>29</sup> Those authorities requested for help must co-operate so far as it is compatible with their own statutory duties and does not unduly prejudice the discharge of any of their functions.

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<sup>25</sup> Page 22-23,

[http://www.kent.police.uk/about\\_us/policies/n/documents/CENTREX\\_Investigating\\_Indecent\\_images\\_of\\_child\\_ren.pdf](http://www.kent.police.uk/about_us/policies/n/documents/CENTREX_Investigating_Indecent_images_of_child_ren.pdf) Accessed on 20/04/2014

<sup>26</sup> Children Act 1989, c.41, s.17

<sup>27</sup> Children Act 1989, c.41, s.47

<sup>28</sup> Children Act 1989, c.41, s.27.

<sup>29</sup> Children Act 1989, c.41. Part III.

In general, where authorities are requested for help under enquiries under section 17 or 47, they may be asked to:

- Provide information about a child, young person or their family where there are concerns about a child's well-being, or to contribute to an assessment under section 17 or a child protection enquiry;
- Undertake specific types of assessments as part of core assessment or to provide a service for a child in need;
- Provide a report and attend a child protection case conference.

The Act does not require information to be shared in breach of confidence but an authority should not refuse a request without considering the relative risks of sharing information, if necessary without consent, against the potential risk to a child if information is not shared.<sup>30</sup>

#### Children Act 2004

Moreover, section 10<sup>31</sup> of the Children Act 2004 places a duty on the children's services authority to make arrangements to promote co-operation between itself and relevant partner agencies to improve the well-being of children in their area in relation to:

- Physical and mental health, and emotional well-being;
- Protection from harm and neglect;
- Education, training and recreation;
- Making a positive contribution to society;
- Social and economic well-being.

The relevant partners must co-operate with the local authority to make arrangements to improve the well-being of children. The relevant partners are;

- District councils;
- The police;

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<sup>30</sup> Para 5.2-5.5,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277835/information\\_sharing\\_further\\_guidance\\_on\\_legal\\_issues.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277835/information_sharing_further_guidance_on_legal_issues.pdf). Accessed 20/04/2014.

<sup>31</sup> Children Act 2004, c.31, s.10.

- The Probation Service;
- Youth offending teams (YOTs);
- Strategic health authorities and primary care trusts;
- Connexions;
- The Learning and Skills Council.

This statutory guidance for section 10 of the Act states good information sharing is the key to successful collaborative working. Arrangements under this section should ensure information is shared for strategic planning purposes and to support effective service delivery. It also states these arrangements should cover issues such as improving the understanding of the legal framework and developing better information sharing practice between and within organisations.<sup>32</sup>

Section 11<sup>33</sup> places duties on a range of organisations and individuals to ensure their functions, and any services that they contract out to others, are discharged having regard to the need to safeguard and promote the welfare of children. It also includes the police, including police and crime commissioners and the chief officer of each police force in England and the Mayor's Office for Policing and Crime in London.<sup>34</sup>

Their duty to safeguarding and promoting the welfare of children must include, above all, arrangements which set out clearly the process for sharing information, with other professionals and with the Local Safeguarding Board (LSCB).<sup>35</sup>

The police can hold important information about children who may be suffering, or likely to suffer, significant harm, as well as those who cause such harm. They should always share this information with other organisations where this is necessary to protect children. Similarly, they can expect other organisations to share information to enable the police to carry out their duties.

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<sup>32</sup> Para 5.6-5.9,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277835/information\\_sharing\\_further\\_guidance\\_on\\_legal\\_issues.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277835/information_sharing_further_guidance_on_legal_issues.pdf). Accessed 20/04/2014.

<sup>33</sup> Children Act 2004, c.31, s.11.

<sup>34</sup> Page 47,

<http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Working%20Together%202013.pdf> Accessed 20/04/2014.

<sup>35</sup> Page 48,

<http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Working%20Together%202013.pdf> Accessed 20/04/2014.

Offences committed against children can be particularly sensitive and usually require the police to work with other organisations such as local authority children's social care. All police forces should have officers trained in child abuse investigations.<sup>36</sup>

According to section 14(a) which was inserted by section 8 of the Children, Schools and Families Act 2010, the LSCB can require a person or body to comply with a request for information. This can only take place where the information is essential to carrying out LSCB statutory functions. Any request for information about individuals must be 'necessary' and 'proportionate' to the reasons for the request. LSCBs should be mindful of the burden of requests and should explain why the information is needed.<sup>37</sup>

#### Local Government Act 2000

Part 1<sup>38</sup> of the Local Government Act 2000 gives local authorities powers to take any steps which they consider are likely to promote the well-being of their area or the inhabitants of it.

Section 2<sup>39</sup> gives local authorities 'a power to do anything which they consider is likely to achieve any one or more of the following objectives':

- The promotion or improvement of the economic well-being of their area;
- The promotion or improvement of the social well-being of their area;
- The promotion or improvement of the environmental well-being of their area.

Section 2(5)<sup>40</sup> makes it clear that a local authority may do anything for the benefit of a person or an area outside their authority, if the local authority considers that it is likely to achieve one of the objectives in Section 2(1)<sup>41</sup>.

Section 3<sup>42</sup> is clear that local authorities are unable to do anything (including sharing information) for the purposes of the well-being of people – including children and young people - where they

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<sup>36</sup> Page 51,

<http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Working%20Together%202013.pdf> Accessed 20/04/2012.

<sup>37</sup> Page 64,

<http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Working%20Together%202013.pdf> Accessed 20/04/2014.

<sup>38</sup> Local Government Act 2000, c.22, Part I.

<sup>39</sup> Local Government Act 2000, c.22, s.2.

<sup>40</sup> Local Government Act 2000, c.22, s.2 (5).

<sup>41</sup> Local Government Act 2000, c.22 s.2 (1).

are restricted or prevented from doing so on the face of any relevant legislation, for example, the Human Rights Act, the Data Protection Act or by the common law duty of confidentiality.<sup>43</sup>

### Crime and Disorder Act 1998

Section 17<sup>44</sup> establishes the duty of a local authority (as defined by the Local Government Act 1972<sup>45</sup>); a joint authority; a police authority; a national park authority; and the Broads Authority. It applies to the London Fire and Emergency Planning Authority from July 2000 as amended by the Greater London Authority Act 1999<sup>46</sup> and to all fire and rescue authorities with effect from April 2003, by virtue of an amendment in the Police Reform Act 2002<sup>47</sup>.

Under this section, these authorities have the duty to provide a wide and varied range of services to and within the community in order to reasonably prevent crime and disorder.

Section 115<sup>48</sup> provides any person with a power but not an obligation to disclose information to responsible public bodies (e.g. police, local and health authorities) and with co-operating bodies (e.g. domestic violence support groups, victim support groups) participating in the formulation and implementation of the local crime and disorder strategy).

The police have an important and general common law power to share information to prevent, detect and reduce crime. Other public organisations that collect information may not have previously had the power to share it with the police and others. Section 115 establishes the power of any organisation to share information with the police authorities, local authority (including parish and community councils), Probation Service and health authority (or anyone acting on their behalf) for the purposes of the Act.

This ensures that information may be shared for a range of purposes covered by the Act, for example for the functions of the crime and disorder reduction partnerships and YOTs (Young

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<sup>42</sup> Local Government Act 2000, c.22, s.3.

<sup>43</sup> Para 5.32-5.34,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277835/information\\_sharing\\_further\\_guidance\\_on\\_legal\\_issues.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277835/information_sharing_further_guidance_on_legal_issues.pdf). Accessed 20/04/2014.

<sup>44</sup> Crime and Disorder Act 1998, c.37, s.17.

<sup>45</sup> Local Government Act 1972, c.70.

<sup>46</sup> Greater London Authority Act 1999, c.29.

<sup>47</sup> Police Reform Act 2002, c.30.

<sup>48</sup> Crime and Disorder Act 1998, c.37, s.115.



Offender teams), the compilation of reports on parenting orders, anti-social behaviour orders, sex offender orders and drug testing orders.<sup>49</sup>

### Guidance from the Government

'Working Together to Safeguard Children – A guide to inter-agency working to safeguard and promote the welfare of children'<sup>50</sup>, provides authorities with guidance regarding sharing of information. The guidance came into effect from 15 April 2013 and it provides that where professionals need to share information, they must consider their legal obligations and whether they have a duty of confidentiality. Where such a duty exists, the professional may lawfully share information if consent is obtained or if there is a public interest of sufficient weight. Where there is a clear risk of significant harm to a child, the public interest test will almost certainly be satisfied. Lack of consent to share information is irrelevant where there is a clear concern about a risk of harm to the child or young person.<sup>51</sup>

The guidance is issued under:

- Section 7 of the Local Authority Social Services Act 1970, which requires local authorities in their social services functions to act under the general guidance of the Secretary of State
- Section 11(4) of the Children Act 2004 which requires each person or body to which the section 11 duty applies to have regard to any guidance given to them by the Secretary of State; and
- Section 16 of the Children Act 2004, which states that local authorities and each of the statutory partners must, in exercising their functions relating to Local Safeguarding Children Boards, have regard to any guidance given to them by the Secretary of State.

The statutory guidance should be followed by local authority Chief Executives, Directors of Children's Services, LSCB Chairs and senior managers within organisations who commission and provide services for children and families, including social workers and professionals from health

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<sup>49</sup> Para 5.37-5.46,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277835/information\\_sharing\\_further\\_guidance\\_on\\_legal\\_issues.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277835/information_sharing_further_guidance_on_legal_issues.pdf). Accessed 20/04/2014.

<sup>50</sup><http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Working%20Together%202013.pdf>. Accessed 20/04/2014.

<sup>51</sup> Para 119, [http://www.cps.gov.uk/consultations/csa\\_consultation.html](http://www.cps.gov.uk/consultations/csa_consultation.html). Accessed 20/04/2014.

services, adult services, the police, Academy Trusts, education and the voluntary and community sector who have contact with children and families. Furthermore, all relevant professionals should read and follow this guidance so that they can respond to individual children's needs appropriately.<sup>52</sup>

The guidance explains how it is important that fears surrounding sharing information must not stand in the way of the need to promote the welfare and protect the safety of children. In order to ensure the effective safeguarding arrangements;

- All organisations should have arrangements in place which set out clearly the process and the principles for sharing information between each other, with other professionals and with the LSCB; and
- No professional should assume that someone else will pass on information which they think may be critical to keeping a child safe. If a professional has concerns about a child's welfare and believes they are suffering or likely to suffer harm, then they should share the information with local authority children's social care.

#### Crown Prosecution Service (CPS): Guidelines on Prosecuting Cases of Child Sexual Abuse

Finally, the CPS has established guidelines on prosecuting cases of child sexual abuse. It is important to highlight the duties of third party material sharing and information sharing protocols from local authorities which facilitate the identification of victims.

Investigators are under a duty to pursue all reasonable lines of enquiry, whether these point towards or away from a suspect. Reasonable lines of enquiry may include enquiries as to the existence of relevant material in the possession of a third party, for example, the Local Authority.

If the third party declines or refuses to allow access to it, the matter should not be left. If, despite any reasons put forward by the third party, it is reasonable to seek production of the material or information and the requirements of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 are satisfied, then prosecutors should apply for a witness summons requiring a representative of the third party to produce the material to the court.

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<sup>52</sup> Para 6-7,

<http://webarchive.nationalarchives.gov.uk/20130401151715/https://www.education.gov.uk/publications/eOrderingDownload/Working%20Together%202013.pdf> Accessed 20/04/2014.

Third party material should be sought at an early stage, preferably pre charge, and sufficient time should be set aside to receive and process third party material, especially in particularly large or complex cases. The material may contain information that could enhance and strengthen the prosecution case.

#### Protocol with the Local Authority

Prosecutors and investigators should handle requests for Local Authority material in accordance with any applicable local or national protocol. The protocol will ensure that the Local Authority makes disclosure to the police and CPS to the full extent permitted by law (taking into account the common law of confidentiality, the Data Protection Act 1998 and the Family Procedure Rules 2010, see Annex E). The Local Authority will make all relevant material available to the police at the earliest opportunity, or provide reasons why certain material (listed but not described) is not being made available, for example because it is related to Family Court proceedings. The 2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings is available here.

The police will take copies of all relevant Local Authority material which will then be scheduled for the CPS on the schedule of sensitive unused material. Where any of the material meets the Criminal Procedure and Investigations Act test for disclosure to the defence, the prosecutor should consult with the Local Authority before disclosure is made. There may be public interest reasons which justify withholding disclosure to the defence and which would require the issue of disclosure of the information to be placed before the court. However, following the decision of the House of Lords in the case of *R v H & C*<sup>53</sup>, applications for public interest immunity will be rare. Prosecutors should make disclosure in summarised or redacted form where this is possible.

#### 4.2. Which steps have been taken in your Member State in order to implement Article 15 (4)?

It is clear that legislation and guidance already exists regarding the process and powers of local authorities and investigative units in analysing data and sharing information in order to facilitate the identification of victims.

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<sup>53</sup> *R v H & C* [2004] 2 AC 134.

It could be suggested that whilst there has been no specific implementation of legislation with regards to complying with Article 15(4), there are a number of policies, which 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;

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

The first policy target is to enhance efforts to identify victims and ensuring that they receive the necessary assistance, support and protection. The operational goal of the UK 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) have an Image Analysis and Victim Identification Team consisting of specialist investigators who are experienced in identifying child victims of crime from digital intelligence products. The team are holders of the UK'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. UK law enforcement officers have access to the ICSEBD through the file sharing system set up by VID. A requirements paper on what tools are required for a National and Local solution to assist in image analysis has been sent to two leading companies in this field, and one has incorporated this into a free legal enforcement programed which is used by the Police Forces across the UK and globally.

The report claims CEOP will deliver specialist training to police officers across the UK 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.<sup>54</sup>

#### 4.3. In your view, does the current legal framework comply with Art. 15 (4)?

In conclusion, it could be suggested that the United Kingdom already had legislation and guidance in facilitating victim identification for investigative units. Furthermore, in order to comply with Article 15(4) it can be noted that through the participation in the Global Alliance against child sexual abuse online, the UK has taken steps in order to comply with Article 15(4).

In addition, it can be concluded that the current legal framework in the United Kingdom complies with Article 15(4), yet it could be recommended that the UK implements an additional measure of creating an Act which collates the already established guidance and legislation on the process victim identification. Currently there are several Acts, policies and guidelines on the process of victim identification; however by implementing a singular Act, this would bring clarity and organisation, which would aid the local authorities in their investigations.

## TOPIC 5.

*(Extraterritorial) jurisdiction*

(Article 17 and Recital 29)

5.1. Please describe the national legal framework with regard to (extraterritorial) jurisdiction for offences referred to in Articles 3-7 of the Directive

### **5.1.1. Obligatory grounds and modalities of jurisdiction for all offences listed in the Directive (Art 17(1a and b), (3) and (5))**

Does your MS establish its jurisdiction where the offence is committed in whole or in part within its territory (Art. 17(1)(a))?

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<sup>54</sup> Pages 1-2, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/global-alliance-against-child-abuse/docs/ga-commitments-201308/ga\\_commitment\\_-\\_united\\_kingdom\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/global-alliance-against-child-abuse/docs/ga-commitments-201308/ga_commitment_-_united_kingdom_en.pdf) Accessed 20/04/2014.

Article 17 of the Directive 2011/93 aims to combat what is commonly called “sex-tourism”. In other words, what is asked to the Member States is to ensure that their rules of jurisdiction allow the prosecution of those who travel to destinations where the laws on combatting sexual abuse of children are less restrictive in order to avoid prosecution for child sexual offences. The UK has one of the harshest legislation in the EU for these type of offences, with e.g. a high age of sexual consent (16), so the ensuring extraterritorial jurisdiction in that area would be a further step in combatting sexual exploitation of that vulnerable category of victims.

Does your MS establish its jurisdiction where the offence is committed outside its territory but the offender is one of its nationals, (Art. 17(1)(b))?

The actual legal instrument that deals with the jurisdiction of child sexual offences committed in England and Wales is section 72 of the Sexual Offences Act 2003 (SOA), named “offences outside the United Kingdom”. This section was modified by the Criminal Justice and Immigration Act 2008 and also by the Sexual Offences (Northern Ireland) Order 2008 that repealed the section for Northern Ireland, restricting its applicability to England and Wales. It is an exceptional rule in UK law bearing in mind that extraterritorial jurisdiction is not common in that country.

Does your MS establish its jurisdiction where the offence referred to in Article 17(3) is committed by means of information and communication technology accessed from its territory, whether or not based on its territory (Art. 17(3))?

The British general ground of criminal jurisdiction is that the offence is committed within the UK, so paragraph 1(a) of article 17 of the Directive is fulfilled. However, the Directive requires an extension of jurisdiction based on many more elements of the offence.

Is your MS jurisdiction based on the nationality of the offender for offences committed outside the territory subordinated to the condition that the prosecution can only be initiated following a report by the victim or a denunciation by the State where the offence was committed (Art. 17(5))?

Paragraph 1(b) triggers the nationality of the offender. In the SOA, paragraph (1) of section 72 establishes the jurisdiction of England and Wales over acts committed abroad by UK nationals, if

those acts would constitute a sexual offence if committed in England and Wales. The definition of a "UK national" is given in paragraph (9) and covers all kinds of British citizens.

### **5.1.2. Obligatory grounds and modalities of jurisdiction for specific offences listed in the Directive (Art. 17 (4))**

Before 2008, there was a requirement of the act constituting also an offence in under the law in force in the country of commission, but the Criminal Justice and Immigration Act 2008 removed this dual criminality rule. Also, there is no rule requiring that the victim or a denunciation by the state where the offence was committed shall only initiate the prosecution following a report. Therefore, the current national legal framework correctly fulfils paragraphs 1(b), 4 and 5 of the Directive. Moreover, the section 72(3) of the SOA, which also establishes the possibility of prosecuting a person who was not a UK national when the act was done but meets the nationality condition when the proceedings are brought, strengthens the protection in the UK. This provision unfortunately lacks clarity, and is subjected to the dual criminality rule, but shows a strong commitment to extend jurisdiction as far as suitable

### **5.1.3 Optional extension of jurisdiction for all offences listed in the Directive (Art. 17(2))**

Does your MS establish its jurisdiction where:

a) The victim is a national or a habitual resident in its territory (Art. 17(2)(a))?

The directive also proposes the Member States to extend jurisdiction when the victim is a national or habitual resident. In the House of Commons European Committee (session 2010-2012), when they were discussing the draft of the directive before it was adopted, they pointed out that the directive would require significant changes to UK law, among them extraterritorial jurisdiction that includes the nationality of the victim. The final text of the Directive that was adopted makes this extension only optional, so the UK is not obliged to implement this, and actually doesn't seem to be doing so.

c) The offender is a habitual resident (Art. 17(2)(c))?

Another optional extension of jurisdiction would focus on the habitual residence of the offender (Art. 17(2)(c) of the Directive). This is implemented by section 72(2) of the SOA. It is however

subordinated to the dual criminality rule, but the burden of proof belongs to the offender (s. 72(6)).

## 5.2. Which steps have been taken in your MS in order to implement Article 17?

Up to that point, England and Wales didn't really need to make changes to their legislation in order to implement the Directive. But to my mind, the main problem arises with article 17(3) of the Directive, which sets obligatory jurisdiction where the offence is committed by means of information and communication technology accessed from its territory, whether or not based on its territory, and specially concerning the actual issue of online grooming. Indeed, whereas nothing is said in section 72 of the SOA, section 15 penalises "Meeting a child following sexual grooming etc.". The section itself regulates in paragraph 2(a) its territorial application by stating "the reference to A (Offender) having met or communicated with B (victim under age) is a reference to A having met B in any part of the world or having communicated with B by any means from, to or in any part of the world". The government explanatory notes add that "the travel to the meeting itself must at least partly take place in England or Wales or Northern Ireland", as the *actus reus* of the offence in the travelling (a step showing the intent to commit the offence). This has been interpreted as allowing law enforcement agencies to arrest someone who has groomed a child and then travels abroad in order to meet him, when he tries to board transportation (which now also applies when the child is the one traveling to the meeting). Nevertheless, with modern technology, it is possible to access means of communication, such as internet, of a territory from another territory, which means that for example the offender could have groomed the child through a UK server, without physically being in the UK, so without travelling through the UK. There is therefore no jurisdiction that implements article 17(3) of the directive.

The offences to which section 72 applies are listed in schedule 2. Schedule 2 covers a wide range of sexual offences, from the SOA itself (such as sexual abuse of a child, sexual activities when abuse is made of a recognized position of trust or to a person with a mental disorder, abuse of children through prostitution or child pornography, sexual grooming), but also from the Protection of children Act 1978 (taking, distributing, possessing and advertising indecent photographs of children) and from the Criminal Justice Act 1988. Read in detail, this schedule, in my opinion, covers all the offences listed in the Directive, except the incitement, which is dealt



with in Sexual Offences (Conspiracy and Incitement) Act 1996 and is not expressly mentioned in ch.2. Moreover, it has been extended in 2008 to offences committed to young persons (under 18).

Northern Ireland has an analogous provision: article 76 of the Sexual Offences (Northern Ireland) Order 2008/1769. This article copied the wording of the SOA but also states directly which are the offenses to which it applies, and expressly refers to the attempt and conspiracy, as well as aiding and abetting, counselling or procuring the commission of the offense.

In Scotland, the jurisdiction is settled in s. 55 of the Sexual Offences (Scotland) Act 2009 asp 9 (Scottish Act). The provision is also very similar to the SOA, although it doesn't contain the provision on the possibility to prosecute those who fulfil the nationality/residency requirements at the time of the proceedings. The incitement to commit an offence outside the UK is dealt with in s.54.

### 5.3. In your view, does the current legal framework comply with Article 17?

Overall, the UK ability to prosecute sex offenders which travel abroad is broad and covers most situations triggered in the Directive, to the extent aforementioned. Perhaps the grooming provision should be revised, and there should be an express mention of the incitement in sch. 2 of the SOA. But the main problem is a practical one: those procedures are expensive, complex and bureaucratic, and very often unknown. Therefore, special attention should be drawn to it, and it is important that cooperation and information sharing between authorities from different jurisdictions is improved, and that the legal assistance processes and the extradition mechanisms are facilitated.

## **TOPIC 6.**

### *Assistance, support and protection measures for child victims*

(Articles 18, 19, 20 and Recitals 30, 31, 32)

#### 6.1. Please describe the current national legal framework with regard to child victims

## Introduction

Throughout this paper, reference will be made to numerous soft-law guidance papers initiated by the Secretary of State. For example, the Code of practice for victims of crime 2013

The legal basis for these papers:

### Domestic Violence, Crime, and Victims Act 2003

This provision compels the Secretary of State to issue a code of practices as to how victims are treated in the criminal justice system, and under public bodies in general. S.32(1)

This has led to the most recent guidance paper; Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2013

### Bodies that must adhere to such minimum standards

The Criminal Cases Review Commission, The Criminal Injuries Compensation Authority, The Crown Prosecution Service, The First-tier Tribunal (Criminal Injuries Compensation), Her Majesty's Courts and Tribunals Service, Her Majesty's Prison Service, National Offender Management, Service (NOMS), The Parole Board, Police and Crime Commissioners, All police forces in England and Wales, the British Transport Police and the , Ministry of Defence Police, Providers of probation services, hereafter referred to as probation trusts, The UK Supreme Court, Witness Care Units, Youth Offending Teams

These codes do not *in themselves* have legally binding status in criminal or civil courts. S.34(1)

However, such failure may and has been used as evidence in light of other proceedings. S.34(2)

Lastly, The Secretary of State may from time to time revise such codes S.33(8)

Such codes will therefore be referenced given their quasi-judicial stature, as well as forming a good framework for conduct by state bodies and as an illustration of how compliant the United Kingdom is with Articles 18, 19, and 20.

### **6.1.1. General framework of protection (Art. 18)**

Has your MS transposed Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings?

No. In England and Wales the Council Framework Decision 2001/220/JHA has not been transposed. Rather, the 2001 Decision has been repealed and replaced by Directive 2011/93/EU, which England and Wales has implemented.

From what point in time are competent authorities in your MS obliged to take assistance and support measures in relation to a potential child victim (Art. 18 (2))?

Relevant European Legislation:

**Art. 18(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 that a child might be subject to any of the offences referred to in Articles 3 to 7”.

Response:

Section 104 Sexual Offences Act 2003: This section allows for two ways in which a sexual prevention order may be made and thus protect a potential or actual child victim; it stresses the point time at which a child undergo assistance and support

Firstly by direct court of a magistrates **S.104(1)(b)**

If the court is satisfied that “the defendant’s behaviour since the appropriate date makes it necessary to make such an order, for the purposes of protecting the public or any particular members of the public from serious sexual harm from the defendant.”

Secondly, upon application by a chief officer to a magistrates court in his relevant police area:

The officer must believe that he is a qualifying offender, that is that before or after the application he has committed a sexual offence at least twice. **S.104(5)(a)**

The officer must believe that the person has given reasonable cause for the application to be made. **S.104(5)(b)**

The same process will then be undertaken by the court as proceeded under **S.104(1)(b)**

Section 123 Sexual Offences Act 2003: This section discusses the grounds and effects for a sexual prevention order and thus the criteria under which a child is protected, and how far this domestic legislation must comply with Art.18(2)

A court will hand down a sexual prevention order if, having been satisfied that they have committed a prohibited act twice either before or after the application **S.123(3)**

- (a) engaging in sexual activity involving a child or in the presence of a child;
- (b) causing or inciting a child to watch a person engaging in sexual activity or to look at a moving or still image that is sexual;
- (c) giving a child anything that relates to sexual activity or contains a reference to such activity;

Such prohibited acts accord with the crimes listed in Art.3 2001/220/JHA:

However, such an order will only be given if, in light of establishing that they have committed such acts, they present a danger to the child and this child needs protection generally or from the defendant **s.123(4)(b)**.

Such a restriction order will last for a fixed period of no less than two years **S.123(5)(b)**.

Such an order will be subject to a proportionality test; the order must contain terms and restrictions restricting defendant to the extent necessary and only necessary to protect the child. **S. 123(6)**.

How does your MS treat the situation where the age of a person subject to an offence referred to in Articles 3 to 7 of the Directive is uncertain but there is reason to believe that the person is a child (Art. 18 (3))?

England and Wales has implemented the presumption set out in Article 18(3) of Directive 2011/93/EU. The presumption on the age of the victim is implemented in the revised Code of Practice for Victims of Crime 2013.

In Chapter 3, Part B of the Code “Children and Young People Duties on Service Providers for Children and Young People”, paragraph 1.4 state that:

“Where the age of a victim is uncertain and there are reasons to believe that the person is under 18 years of age, service providers should presume that person to be under 18 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.”

### **6.1.2. Specific assistance and support measures (Art. 19)**

Does the legal framework in your MS concerning the commencement and duration of the assistance and support measures enable child victims to exercise the rights set out in Framework Decision 2001/220/JHA, and the Directive (Art. 19 (1))?

Framework Decision 2001/220/JHA laid down three explicit rights to be transposed within the legislation of the EC's Member States pursuant to the obligations laid down in Art. 19(1).

Broadly, these are

- The right to receive information Art. 4.
- The right to protection Art. 8.
- The right to compensation Art. 9.

The compliance of domestic U.K law will now be discussed in relation to these three rights individually.

*1. The right to information: Art. 4 2001/220/JHA*

The right to information is adequately provided for.

Main entitlement: Assigned a representative from the witness care unit.

1.1. The right to information for the child victim when reporting the Crime

**Code of practice for victims of crime, Oct 2013. Ch 3, S.1.6**

Children who report a crime are entitled to:

- a clear explanation of what happens next;
- a local or national leaflet or website address with information for victims of crime, within 5 working days (Monday to Friday) of reporting the crime. This will include information about people you can talk to if you are upset and need support and how you can get in touch with them;
- talk to the police to help you work out what support you need. This is called a “needs assessment”;

Victims Services are engaged: their contact details are sent to organisations under these services within two working days. This organisation is responsible for detailing what support is available to the child.

1.2. The right to information for the child during the Proceedings and investigations

**Code of practice for Victims of Crime; Chapter 3 Paragraph 1.11; Paragraph 1.19**

They are entitled to be told about the following by the Witness Care Unit within 1 working day of the Witness Care Unit receiving the information from the court:

- The date, time and place of any court hearings, the court's decision and what should happen next. They also be told what this means for you and what they need to do;
- Whether the suspect has been released on bail or kept in custody and what this means for them;
- Breaching their bail conditions before their hearing. If the police decide not to place the suspect before the court; the police should inform them and tell them why.
- Receive information about what is happening and discuss with the police how often they will contact them;

This is a legal obligation on the witness care unit.

1.3. The right to information for the child at the end or alteration of proceedings

Direct Communication with Victims:<sup>55</sup>

The CPS must inform victims of and give reasons for decisions to:

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<sup>55</sup> Available at [http://www.cps.gov.uk/legal/d\\_to\\_g/direct\\_communication\\_with\\_victims\\_/](http://www.cps.gov.uk/legal/d_to_g/direct_communication_with_victims_/).

- Discontinue a charge and proceed on another.
- Substantially alter a charge.
- Discontinue all proceedings.
- Offer no evidence in all proceedings.

A letter should therefore be sent to the victim in the following circumstances:

- When the CPS decides not to prosecute but does not hold during a charging consultation (see above).
- When a charge is discontinued or withdrawn.
- When no evidence is offered and the charge is dismissed.
- When a charge has been discharged section 6 (1) on our application because there is insufficient evidence or it is not in the public interest to proceed.
- When a charge has been discharged at committal because we are unable to proceed and a decision is then taken not to recharge the offence.
- When the Crown Court orders that a charge lie on file.
- When there is a substantial alteration to a charge.

An assessment should be made of the age and understanding of the child. Prosecutors should refer to the file to ascertain the level of parental/carer involvement.

## *2. The right to protection: Art.8 Framework Decision 2001/220/JHA*

The right to protection is adequately provided for.

### **S.16 Youth Justice and Criminal Evidence Act 1999 ("YJCA")**

A witness is eligible for special assistance if they are aged under eighteen years old S.16 (1)(A) (amended S.98 Coroners and Justice Act 2009).

or;

### **S.17 YJCA 1999**

A witness may be eligible for special measures on grounds of fear or distress over testifying.

For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings. S.17(1).

Any witness of a sexual offence will be eligible for special measures in relation to those proceedings. S.17(4).

It is then up to the discretion of the court to decide whether or not a special measure direction is given.

The court will consider whether the granting of special measures will improve the quality of such evidence. S.19.

Therefore a combined reading of S.16 (1)(A) and S.17(4) makes child victims, who will be witnesses of sexual offences, eligible for special measures which accommodates Art. 8 2001/220/JHA.

However, the ultimate decisions as to whether such measures rest in the hands of judges.

The substance of these measures are found in the same piece of legislation.

**Screens. S.23**

Screens may be made available to shield the witness from the defendant.

**Live-Link S.24**

A live link enables the witness to give evidence during the trial from outside the court through a televised link to the courtroom. The witness may be accommodated either within the court building or in a suitable location outside the court;

**As amended by the Coroners Act 2009;**

The court may also direct that a person specified by the court can accompany the person when giving evidence by live link. This person could be, for example, a volunteer from Victim Support or the Witness Service from a more specialised support service such as the NSPCC or an ISVA.

**Evidence given in Private S.25**

This involves the exclusion from the court of members of the public and press (except for one named person to represent the press) in cases involving sexual offences of intimidation other than accused.

**Removal of wigs and gowns S.26**

**Video-recorded interview S.27**

A video-recorded interview with a vulnerable or intimidated witness before the trial may be admitted by the court as the witness's evidence-in-chief.

**Examination of witness through an intermediary S.29**

An intermediary may be appointed by the court to assist the witness to give their evidence at court. They can also provide communication assistance in the investigation stage approval for admission of evidence so taken is then sought retrospectively. The intermediary is allowed to explain questions or answers so far as is necessary to enable them to be understood by the witness or the questioner but without changing the substance of the evidence;

The Witness intermediary scheme was set up by the Ministry of Justice's Better Trials Unit to implement the intermediary special measure and through the WIS operated a national database,

the intermediary register, of registered intermediaries, recruited, selected, trained and accredited by the Ministry of Justice, to assist prosecution and defence witnesses.

**Aids to Communication S.30**

Aids to communication may be permitted to enable a witness to give best evidence whether through a communicator or interpreter, or through a communication aid or technique, provided that the communication can be independently verified and understood by the court.

*3. The Right to Compensation: Art. 9 2001/220/JHA*

Relevant Legislation: Criminal Injuries Compensation Act 1995.

Relevant provision: S.11 (1) Criminal Injuries Compensation Scheme 2012.<sup>56</sup>

The Right to Compensation is provided for, but there may be one cause for concern.

This Scheme provides a variety of compensatory tariffs for an array of harm inflicted towards sexually abused children Annex E, part B pp. 69-70.

Where a person has sustained a mental injury as a result of a sexual assault, they will be entitled to an injury payment for whichever of the sexual assault or the mental injury would give rise to the highest payment under the tariff [34].

Is the sexual offences formed a pattern of abuse, payment will be made with regard to the offences collectively in regard to this pattern, not accumulatively as separate identifiable offences. Unless an individual crime by itself comes to more than the rest of the abusive behaviour in which case the amount eligible will be for the isolated incident. Annex E – Part B n. 6

3.1. Grounds for withholding compensation:

An award under this Scheme will be withheld unless the incident giving rise to the criminal injury has been reported to the police as soon as reasonably practicable. In deciding whether this requirement is met, particular account will be taken of;[22] The age and capacity of the applicant at the date of the incident.

An award will be withheld unless the applicant has cooperated as far as reasonably practicable in bringing the assailant to justice [23] – this potentially conflicts with Art. 19(2)

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<sup>56</sup> Available at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243480/9780108512117.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf).



If we are to understand assistance as support as including measures before, during and after the trial, then question may remain as to this provisions which provides for the ability to withhold compensation on the premise of cooperation.

### 3.2. Additional measures and soft-law initiatives regarding the right to compensation

Relevant Legislation: Crown Prosecution Service (witness etc. allowances) reg. 1088.

The victim is entitled to be paid any expenses the crown prosecution service has decided are due to if the victim has attended court to give evidence not later than 10 working days after the crown prosecution service has received a correctly completed claim form.

#### **Code of Practice for Victims of Crime 1.52-1.53**

If the incident or incidents were reported to the police before the victim turned 18 and no-one made a claim for the victim, the CICA will accept a claim as long the victim makes it before they turn 20.

If the incident or incidents happened before the victim turned 18, but it was not reported to the police at the time, the CICA will consider the claim if it is made within two years of when the incident was first reported to the police.

Are any specific steps taken in your MS for the protection of children who report cases of abuse within their family (Art. 19 (1))?

Yes. Assessments are taken to see if immediate protection and urgent action is required. A needs-based assessment is undertaken. Further to this, an assessment is subsequently taken to see if the child is likely to suffer significant harm.

Procedurally, as much is done as possible to ensure that criminal and family courts complement each other and place are undertaken with the child's interests taken into account.

Are assistance and support measures in your MS made conditional on the child victim's willingness to cooperate in the criminal investigation, prosecution and trial (Art. 19 (2))?

No. There is ample support for the alleged victim including pre-trial therapy and counselling regardless of their cooperation.

This question has been placed further down, because most of the material present in the previous answers already answer this question.

e.g. The right to protection, and information answered in question 1 above all provide firm indications that cooperation for assistance and support is not required.

However, we have expressed doubts above about the right to compensation.

Does your MS legal framework provide an individual assessment of the specific circumstances of each particular child victim to be undertaken, as described in Article 19 (3)?

Broadly speaking, yes. There are guidelines on the matter in which certain needs to have to be assessed, and this is asserted by various forms of legislation.

**S.44 Children and Young Persons Act 1933;**

Every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from undesirable surroundings.

The UN Convention on the Rights of the Child states: "When adults or organisations make decisions which affect children they must always think first about what would be best for the child". Art. 3.

The U.K is a Contracting State to this treaty having come into force in the United Kingdom on the 15<sup>th</sup> January 1992.

**S. 10 & 11 Childrens Act 2004**

These provisions read together and place a statutory duty on agencies to co-operate to safeguard and promote the welfare of children.

This includes local policing body S.11 (1)(h).

This also includes, Local authorities (a), Strategic Health Authorities (c), and NHS trusts(f) &(g).

Pursuant to S.11, guidance paper; working together to safeguard children 2013 was drafted. A child protection plan must be constructed. This plan should, along with other requirements, "describe the identified needs of the child and what therapeutic services are required". [5.82]

**The CPS guidance Provision of Therapy for Child Witnesses Prior to a Criminal Trial Sections 4.3, 4.4, 6.5.**

Clear that the best interests of the victim or witness are the paramount consideration in decisions about therapy. There is no bar to a victim seeking pre-trial therapy or counselling and neither the police nor the CPS should prevent therapy from taking place prior to a trial.

*Special Measures*

**[S.16 and S.17 YJCEA 1999**

All child victims of crime are automatically eligible for the enhanced services provided to vulnerable victims of crime and are therefore subject to a needs-based assessment.

Furthermore, this 'unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection' .17(4)YJCEA 1999].

However measures will not automatically be available at trial. An application for special measures needs to be made by the party calling the witness. The decision as to whether the special measure applied for is granted is a matter for the court.

It is therefore an individual assessment, as to whether he is eligible for rights to protection, if it is proven that providing special measures will improve the quality of the information given to the court S.16 YJCEA 1999]

**Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2013;**

Are child victims of any of the offences referred to in Articles 3 to 7 of the Directive considered as particularly vulnerable victims in your MS, pursuant to Article 2(2), Article 8(4) and Article 14(1) of Framework Decision 2001/220/JHA (Art 19(4))?

Yes. Refer to Answer 1 which addresses those provisions generally.

Does your MS take measures to provide assistance and support to the family of child victim, when the family is in its territory, as described in Article 19 (5)? If yes, please describe.

The list of information that a child is entitled to, under Q.1 is also available for their parents or guardians....No further details regarding the specific rights and responsibilities of family members, presuming they are not also the defendant.

**Code of Practice for Victims of Crime;**

Family members are entitled to the same right to information ...unless they are a suspect in connection with the crime or if it is considered not to be in their best interests. A suspect is someone who the police believe may be involved in the crime. **Chapter 3, para 1.2.**

Whether or not is in their best interests will be undertaken subject to a S.47 order or S.17 order of the Children's Act 1989, which determines the safety and wellbeing of a child in their domestic residence.

**6.1.3. Specific protection measures in criminal investigations and proceedings (Art 20)**

Does the legal framework of your MS provide an obligation to appoint a special representative for the child victim under certain circumstances, (Art. 20(1))?

No. There is not a relevant provision in the English Legal Framework.

Does the legal framework of your MS provide access for the child victim, without delay, to legal counselling and legal representation (Art. 20.2)?

a) Available for the purpose of claiming compensation?

b) Free of charge where the victim does not have sufficient financial resources?

No. There is not a relevant provision in the English legal framework either for claiming compensation or free of charge.

Please describe your MS legal framework regarding interviews with child victims as foreseen in Article 20 (3). Does your MS legal framework establish that:

a) Interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities?

Yes. In the guide “Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures”, issued by the Ministry of Justice (“ABE”).

Chapter 2 paragraph 2.37 provides for:

“A strategy discussion between the police and the social services should consider whether it is appropriate to make an application for an Emergency Protection Order under section 44 Children Act 1989 and to seek a direction from the court under section 44(6)(b) for an interview to be carried out as part of an assessment of the child.”

S.44 Children Act 1989 refers to orders for emergency protection of children. Under paragraph 6(b) “...the court ...may give such directions (if any) as it considers appropriate with respect to— the medical or psychiatric examination or other assessment of the child.”

b) Interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose?

Yes. In the guide ABE, it provides that:

“the location should be quiet enough to avoid a situation in which background noise is likely to interfere with the quality of the sound on an visual or audio record and free from interruptions, distractions, and fear and intimidation, so the interview and witness can concentrate fully on the task in hand – the interview.” CH2, [2.206]

c) Interviews with the child victim are carried out by or through professionals trained for this purpose?

Yes. In ABE it provides that:

“Specialist training should be developed to interview witnesses with particular needs. This should include interviewing child witnesses, traumatised witnesses and witnesses with a mental disorder, learning disability or physical disability impacting on communication. Such training should include working with intermediaries.” Ch2, [1.30].

“... Provided both the police officer and social worker have been adequately trained to interview child witnesses in accordance with the guidance set out in this document, there is no reason why either should not lead the interview. The decision as to who leads the interview should depend on who is able to establish the best rapport with the child. In circumstances where a social worker leads the interview, the police should retain their responsibility for the criminal investigation by ensuring that the interview is properly planned and that the police officer has an effective role in monitoring the interview...Similarly, where a police officer leads the interview, the local authority should retain their duty to make enquiries under Section 47 of the Children Act 1989 by ensuring that the interview is properly planned and that the social worker has an effective role in monitoring the interview.” **Ch2, [2]**.

S.47 Children Act 1989 sets out the precondition of Local Authority's duty to investigate.

d) The same persons, if possible and where appropriate, conduct all interviews with the child victim?

Yes. As mentioned above in answer (C), it seems that it is possible for the same person to conduct all the interviews where appropriate.

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?

Yes. In ABE it provides that:

“These sessions might be separated by a matter of hours or, if necessary, could take place over a number of days. When this occurs, care must be taken to avoid repetition of the same focused questions over time, which could lead to unreliable or inconsistent responding in some witnesses and interviews being ruled inadmissible by the court.” Ch 2, [2.214].

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?

Yes. In the Code of Practice for Victims of Crime it provides that:

“If the police require a child to be interviewed, they must ensure that they fulfil the duties outlined in Section 1 of Chapter 2, Part B, paragraphs 1.5 to 1.6. This includes allowing the child to be accompanied by an adult of their choice to help provide emotional support, unless it is in their best interests not to be accompanied by this person.” **Ch3, Section A, 1.10.**

Does the legal framework of your MS ensure that all interviews with a child victim, or where appropriate, a child witness may be audio-visually recorded and that such audio-visually recorded interviews may be used as evidence in criminal court proceedings (Art. 20 (4))?

Yes. Under section 21 of the Youth Justice and Criminal Evidence Act 1999:

(c) A “relevant recording”, in relation to a child witness, is a video recording of an interview of the witness made with a view to its admission as evidence in chief of the witness.

....

(3) The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements—

(a) It must provide for any relevant recording to be admitted under section 27 (video recorded evidence in chief); and

(b) It must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link...”

Does the legal framework of your MS ensure that in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7 of the Directive, it may be ordered that:

a) The hearing take place without the presence of the public?

Yes. The Crown Prosecution Service in its official website provides for Special measures according to which:

“evidence given in private, (available for some vulnerable and intimidated witnesses): exclusion from the court of members of the public and the press (except for one named person to represent the press) in cases involving sexual offences or intimidation by someone other than the accused;”<sup>57</sup>

b) The child victim be heard in the courtroom without being present, in particular through the use of appropriate communication technologies?

Yes. According to Youth Justice and Criminal Evidence Act 1999 for evidence to be given by live link. Section 24 (Evidence by live link) of the Act provides that:

(1) A special measures direction may provide for the witness to give evidence by means of a live link.

(2) Where a direction provides for the witness to give evidence by means of a live link, the witness may not give evidence in any other way without the permission of the court.

...

(8) In this Chapter “live link” means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the persons specified in section 23(2)(a) to (c).

<sup>57</sup> [http://www.cps.gov.uk/legal/s\\_to\\_u/special\\_measures/](http://www.cps.gov.uk/legal/s_to_u/special_measures/).

Also section 23 of the Act is related to Screening witness from accused. Under this section there can be a direction for the witness "...while giving testimony or being sworn in court, to be prevented by means of a screen or other arrangement from seeing the accused." (s.23(1)).

(2) But the screen or other arrangement must not prevent the witness from being able to see, and to be seen by—

- (a) The judge or justices (or both) and the jury (if there is one);
- (b) Legal representatives acting in the proceedings; and
- (c) Any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.

Does the legal framework of your MS provide measures to protect the privacy, identity and image of the child victim; and to prevent the public dissemination of any information that could lead to identification of the child victims (Art. 20 (7))?

Yes. The Children and Young Persons Act 1933 provides for the protection of privacy, identity and image of the child victim. Specifically, ss. 39 & 49 deal with this matter.

**S. 39 Power to prohibit publication of certain matter in newspapers**

(1) In relation to any proceedings in any court . . . the court may direct that—

- (a) No newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person...or in respect of whom the proceedings are taken, or as being a witness therein;
- (b) No picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.

(2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding [F157]level 5 on the standard scale].

**S. 49 Restrictions on reports of proceedings in which children or young persons are concerned**

(1) The following prohibitions apply (subject to subsection (5) below) in relation to any proceedings to which this section applies, that is to say—

- (a) no report shall be published which reveals the name, address or school of any child or young person concerned in the proceedings or includes any particulars likely to lead to the identification of any child or young person concerned in the proceedings; and
- (b) no picture shall be published or included in a programme service as being or including a picture of any child or young person concerned in the proceedings.

(2) The proceedings to which this section applies are—

- (a) Proceedings in a youth court;
- (b) Proceedings on appeal from a youth court (including proceedings by way of case stated);
- (c) Proceedings in a magistrates' court under Schedule 2 to the Criminal Justice and Immigration Act 2008 (proceedings for breach, revocation or amendment of youth rehabilitation orders);

(d) Proceedings on appeal from a magistrates' court arising out of any proceedings mentioned in paragraph (c) (including proceedings by way of case stated).

(3) The reports to which this section applies are reports in a newspaper and reports included in a programme service; and similarly as respects pictures.

(4) For the purposes of this section a child or young person is "concerned" in any proceedings whether as being the person against or in respect of whom the proceedings are taken or as being a witness in the proceedings.

## 6.2. Which steps have been taken in your Member State in order to implement Articles 18, 19, 20? If yes, please specify

### **Article 18 (3)**

England and Wales implemented the presumption set out in Article 18(3) of Directive 2011/93/EU. The presumption on the age of the victim is implemented in the revised Code of Practice for Victims of Crime 2013.

### **Article 19**

Pursuant to S.32 Domestic Violence, Crime, and Victims Act 2003; Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2013 was adopted.

The Key aims of this code was to chiefly address some of the problems brought up in the Government's 2013 consultation paper improving for victims of crime, CP8/2013<sup>58</sup>.

It is important to note that issues of child sex-abuse were politically charged in the United Kingdom given the recent 'Saville Scandal.'

Operation Yewtree was undertaken in which it probed the true extent of the allegation, and within a year 600 allegations had accumulated, with 450 allegations and 214 formal crimes linked to Saville.<sup>59</sup>

Relevant to Article 19, this brought under scrutiny the public institutions charged with ensuring that the rights of victims in procedural manners were afforded justice. The Consultation paper listed above, listing as some of its main concerns, included;

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<sup>58</sup> Available at [http://ico.org.uk/~media/documents/consultation\\_responses/MoJ-Improving-the-Code-of-Practice-for-Victims-of-Crime-consultation-March-2013.ashx](http://ico.org.uk/~media/documents/consultation_responses/MoJ-Improving-the-Code-of-Practice-for-Victims-of-Crime-consultation-March-2013.ashx).

<sup>59</sup> Giving Victims a Voice: Joint Report into Sexual Allegations made against Jimmy Saville. Available at <https://www.nspcc.org.uk/globalassets/documents/research-reports/yewtree-report-giving-victims-voice-jimmy-saville.pdf>.



- Victims, who must attend court as witnesses, and need practical help to do so, receive the help and support they need upon arrival.
- Victims who want to complete a Victim Personal Statement are to have the opportunity to do so and can expect it to be considered by the court.
- Vulnerable and intimidated victims will be supported to feel safe and protected.

The problem was not with the legislation or lack of it, it was how such measures underneath it were being applied in practice.

In March 2013 the CPS had no policy relating specifically to child sexual exploitation.

### Results

As a result, in the guidance paper which has been referred to heavily in this report,

- There is now a separate section dedicated entirely to Young Persons again under 18. [Chapter 3].
- There have also been measures to make the rights of a child more widely available and digestible in the form of documents specifically aimed at them with less jargon and technicalities.
- The prosecution guidelines for child sex abuse, there is now a section which seeks to dispel common myths surrounding children which typically place doubt in the jury's minds.

### **Article 20**

Pursuant to S.32 Domestic Violence, Crime, and Victims Act 2003; Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2013 was adopted.

Except for paragraphs (1) and (2) all other conditions set out in the Article are met by the legal framework of England and Wales, all the necessary measures in the Article are met by the legal framework of England and Wales. All the necessary measures are set out in the Guides issued by the Ministry of Justice, the CPS, and relevant statutory legislation.

6.3. In your view, does the current legal framework comply with Articles 18, 19, 20?

**Article 18**

Yes, as Art. 18(3) has been transposed in the Domestic law, Art. 18 is fully transposed.

**Article 19**

Art. 19(1):

Right to information: yes.

Right to protection: yes.

Right to compensation: partially.

Art. 19(2): Partially

Grounds for withholding compensation:

An award under this Scheme will be withheld unless the incident giving rise to the criminal injury has been reported to the police as soon as reasonably practicable. In deciding whether this requirement is met, particular account will be taken of;[22] The age and capacity of the applicant at the date of the incident.

An award will be withheld unless the applicant has cooperated as far as reasonably practicable in bringing the assailant to justice [23] – this potentially conflicts with Art. 19(2)

If we are to understand assistance as support as including measures before, during and after the trial, then question may remain as to this provisions which provides for the ability to withhold compensation on the premise of cooperation.

Art. 19(3): Yes

Right to protection: S.17(4) & ss.23-29 YJCA 1999.

Right to information: Witness care unit is under various legal obligations.

Right to compensation: Partially, term above makes it uncertain.

Art. 19(4): Yes

S.17(4) YJCA 1999 & Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2013.

Art. 19(5): Partially/Unknown

**Code of Practice for Victims of Crime;**

They are entitled to the same right to information ...unless they are a suspect in connection with the crime or if it is considered not to be in their best interests. A suspect is someone who the police believe may be involved in the crime. Chapter 3, para 1.2.

Whether or not is in their best interests will be undertaken subject to a S.47 order or S.17 order of the Childrens Act 1989.

If no, what additional measures should be taken in order to comply with Articles 18, 19, 20?

**Art. 19 - no**

Support and assistance for vulnerable victims is not conditional during and before the trial. In terms of compensation it depends upon whether or not this is interpreted as support and assistance, as well as the considerations of 'reasonably practicable.'

However it would be perverse to hold in that in cases of children who have suffered significant harm, physiologically and physically, compensation was denied because assistance was not given. Let alone in traumatising cases of sexual offences.

This is the general view of the professional community.

**Art. 20 - no**

Regarding paragraphs (1) and (2) of Article 20, which impose a requirement for a special representative of a child in criminal proceedings and a legal representation and counselling also free of charge when the victim lacks the necessary financial resources respectively, there is no specific measure in the legal framework in England and Wales which provides for any of these measures. Under the Children Act 1989 local authorities have certain duties to promote the welfare of children in need but it seems that the law has to be amended in such a way so as to meet the two requirements of paragraph (1) and (2) of the Article.

## TOPIC 7.

### *Measures against websites containing or disseminating child pornography*

(Article 25 and Recitals 46 and 47)

#### 7.1. Please describe the national legal framework with regard to websites containing or disseminating child pornography

In England and Wales,<sup>60</sup> the legal framework regarding to child sexual abuse content is constructed by different pieces of legislation, particularly, the Protection of Children Act 1978 (Section 1) and the Sexual Offences Act 2003 (Sections 45 and 46). In addition, the Memorandum of Understanding concerning Section 46 of Sexual Offences Act 2003, the Police and Justice Act 2006 (Section 39 and Schedule 11), the Criminal Justice and Immigration Act 2008 (Sections 69 and 70), and the Coroner and Justice Act 2009 are relevant legislations to tackle child pornography.<sup>61</sup>

In general terms, in England and Wales child abuse is illegal. Section 1 of the Protection of Children Act 1978 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 the age of 18.<sup>62</sup> Moreover, simple possession by individuals is proscribed by the Criminal Justice Act 1988. Pseudo-photograph are defined by the 1978 Act as “an image, whether made by computer-graphics or otherwise howsoever, which appears to be a photograph.”<sup>63</sup>

The word pseudo-photograph was incorporated to the Act by influence of the Criminal Justice and Public Order Act 1994. Furthermore, the Criminal Justice and Immigration Act 2008

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<sup>60</sup> This research is focused on England and Wales, however, in some parts UK is mentioned. This is mainly because some key organisations on the issue here explored are UK-based, therefore, its work is located on UK territory. Moreover, different governmental initiatives presented in this work are planned to be introduced at UK level. Notwithstanding this clarification, in Scotland, the Civic Government Act of 1982 (Sections 52, 52 A and B) makes an offence to take, permit to be taken, distribute, show, publish or possess indecent photograph of child (similar to England and Wales legislation), hence It is important to take the above legislation also in mind in the evaluation of an UK's legal framework.

<sup>61</sup> For a summary of the main provision of these legislations see <https://www.iwf.org.uk/hotline/the-laws/child-sexual-abuse-content>> (accessed 28 April 2014).

<sup>62</sup> Article 1 para 1, Protection of Children Act (1978).

<sup>63</sup> Section 7 (Interpretations), Protection of Children Act (1978).

extended its definition from an indecent photograph to include a tracing or other images derived from a photograph or pseudo-photograph. In this sense, Part 2, Chapter 2 of the Coroners and Justice Act 2009 'extended the law proscribing the possession of child pornography to include non-photographic images such as cartoons, drawings and computer-generated images.'<sup>64</sup> With regard to material hosted on internet, as contained in Article 25 of Directive 2011/93 /EU on combating sexual exploitation of children and child pornography (hereinafter the Directive), England and Wales have taken different measures in order to protect children of online sexual exploitation.

In England and Wales, internet service providers (ISPs) have to remove or disable access to unlawful activity or information, hence, child pornography. The Electronic Commerce Regulation of 2002, which implements the E-Commerce Directive, in its provision 19 (Hosting) establishes that an information society service provider has to act expeditiously to remove or to disable access to the unlawful information once they have been made aware of it.<sup>65</sup>

Please specify with regard to:

### 7.1.1. Obligatory take down measures (Art. 25 (1))

Does your MS legal framework provide for measures concerning removal of web pages containing or disseminating child pornography (take down measures), hosted:

With the existing laws, England and Wales have created a system of child protection against pornography. In these sense, taking down measures are conducted by a coordinated work of the National Crime Agency (NCA) and the Child Exploitation and Online Protection Centre (CEOP Command), both law enforcement actors, and the Internet Watch Foundation (IWF). The IWF is an UK-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.<sup>66</sup>

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<sup>64</sup> House of Commons Culture, Media, and Sport Committee, Online Safety, Sixth Report of Session 2013-14 Vol I (13 March 2014) 9 <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcmds/729/729.pdf>.

<sup>65</sup> Article 19 (a) (ii), Electronic Commerce Regulation (2002).

<sup>66</sup> OFCOM; "Site Blocking" to reduce online copyright infringement': A review of sections 17 and 18 of the Digital Economy Act (2010) Available at <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> (accessed 12 March 2014) 37.

The role of IWF is fundamental. They work to disrupt the availability of child sexual abuse content on websites by notifying CEOP of this hosted content and sending a notice to the ISP's, making them aware of the unlawful material so they can take it down. This coordinated system has been implemented for taking down material hosted within the UK through a 'report process'. In a general view, this report allows anyone that stumbled across internet with material that could be considered child pornography to fill an online report available on the IWF website ([www.iwf.org.uk](http://www.iwf.org.uk)). Once the report is received, the IWF assess the information within the existing law; if the content it is considered child sexual abuse, the IWF will remit the information to the relevant hosting company and law enforcement bodies, which are the responsible to take down the illegal content, and to initiate an investigation on the offence respectively.<sup>67</sup> This coordinate procedure applies also to material hosted outside England and Wales, but with some differences. Have in mind that as IWF is a UK-based organisation, its labour includes report from all UK's territory.

a) Within its territory? If yes, please specify

When a child sexual abuse content is found to be hosted in England and Wales (UK in general), the IWF will inform CEOP Command. The CEOP and IWF will assess the information and after a confirmation on the illegality of the content is given, the IWF will notify the hosting provider who will remove the content from its servers. The removal of the content could take 60 minutes approximately after receiving the notification from the IWF. The process is called 'Notice and Takedown'.<sup>68</sup>

b) Outside its territory? If yes, please specify

When it comes to material hosted abroad, a similar procedure applies. When the IWF has information about pornographic child material hosted outside, they need to contact the hotlines

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<sup>67</sup> IWF assess the material reported as illegal with respect to the levels detailed in the Sentencing Council's Sexual Offences Definitive Guideline. 'The section on Indecent Photographs of Children (page 75) outlines the different categories of child sexual abuse imagery:

Category A: images involving penetrative sexual activity; images involving sexual activity with an animal or sadism

Category B: images involving non-penetrative sexual activity.

Category C: other indecent images not falling within categories A or B.

These categories for Image Assessment are effective from 1 April 2014 and replace the previous levels 1 – 5 which were contained within the guidance issued in April 2007 by the Sentencing Guidelines Council.' IWF web site 'Assessment Levels' <https://www.iwf.org.uk/hotline/assessment-levels> (accessed 3 April 2014).

<sup>68</sup> House of Commons Culture, Media, and Sport Committee, Online Safety, Sixth Report of Session 2013-14 Vol I (13 March 2014) 15.

and law enforcement agencies of the specific country, particularly through the International Association of Hotlines (INHOPE). Latter, 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 procedural steps that the country has implemented.

### 7.1.2. Optional blocking measures (Art. 25 (2))

England and Wales have implemented blocking measures to tackle online child pornography. Once an abusive child sexual content has been reported to IWF and respectively to the CEOP, the content is assessed to verify its illegality and further removal. While the content is being removed, the IWF will add the uniform resource locator (URL) to an 'URL list' (updated twice a day) which is informed to ISPs for them to block access to the access. The URLs stay on the list until they are removed at source.<sup>69</sup>

Does your MS legal framework provide for measures concerning blocking of access to web pages containing or disseminating child pornography towards Internet users within its territory (blocking)? If yes, please specify.

The blocking URL list is managed by 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 European Union. As it was 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 on the national laws and judicial system of each country, but in the meantime, the IWF will seek the block of the URL within the England and Wales's territory (and UK in general).<sup>70</sup>

If no, what is the current (political) position of your MS with regard to blocking, i.e. the likelihood of introducing blocking measures?

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<sup>69</sup> OFCOM; "Site Blocking" to reduce online copyright infringement': A review of sections 17 and 18 of the Digital Economy Act (2010) Available at <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> (accessed 12 March 2014) 37.

<sup>70</sup> URL blocking is limited in its value as it can only block web traffic, not remove the content at source so protecting effectively victims.

The government has taken the issue of child pornography seriously, particularly during the last years. On June 2013, the Prime Minister David Cameron hosted a meeting to discuss how to rid internet child abuse from internet gathering different stakeholders such as internet search engines, ISPs providers, IWF, the National Society for the Prevention of Cruelty to Children (NSPCC), and the NCA. In the meeting, 'attendees agreed action to block child abuse search results worldwide... and a series of further steps to help remove child abuse from the internet.'<sup>71</sup>

## 7.2. Which steps have been taken in your MS in order to implement Article 25? Please specify with regard to the different aspects of Art. 25 (take down, blocking)

England and Wales have shown political willingness to rise the debate of internet child pornography. Since 2008 several meetings have been carried out by governmental authorities with the internet providers and internet search engines sector, as well with organizations dedicated to child protection such as IWF and NSPCC.

In September 2008, the UK Council on Child Internet Safety (UKCCIS) was launched as watchdog entity to protect children for harmful web content, cyber-bullying and any other threat that children could suffer coming from internet.<sup>72</sup>

In June 2013, a meeting for tackling illegal images of child sexual abuse content was held by the Secretary of State for Culture, Media and Sport (DCMS summit). The summit counted with the participation of IWF, CEOP, internet service providers, search engines, mobile operators and social media companies.<sup>73</sup> In the DCMS summit, it was pointed out the relevant role of the industry to tackle child sexual abuse content available on internet ("zero tolerance agreement"), and the willingness of the government to be a leader in the world fight against child sexual abuse. In this context, it was agreed that the IWF, working in cooperation with the CEOP, will have increased its role, being now mandated to actively seek out illegal images of child abuse on internet. With this new proactive role, the IWF will not have to wait the illegal material is reported, but rather will be allow to actively search the content and seek its block and removal.

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<sup>71</sup> Prime Minister's Office Communique, 'Internet Safety Summit' (18 November 2013), <https://www.gov.uk/government/news/internet-safety-summit-at-downing-street-communicue> (accessed 12 March 2014).

<sup>72</sup> BBC News, "Children's web watchdog launched", 29 September 2008, <http://news.bbc.co.uk/1/hi/education/7638492.stm> (accessed 15 march 2014).

<sup>73</sup> Yahoo, Google, Microsoft, Twitter, Facebook, BT, BSkyB, Virgin Media, TalkTalk, Vodafone, O2, EE and Three, IWF and CEOP.



Moreover, the work of the IWF-CEOP will be supported by a £1 million founding provided by the main UK's ISPs (Virgin Media, BSkyB, BT and TalkTalk).<sup>74</sup>

Additionally to this initiative, it was agreed that all relevant organizations should have, by the end of June 2013, to operate with 'splash pages'. Splash page is an image that appears while navigating on internet. In this context, when someone is trying to enter a web site that has been already blocked by the IWF, a warning sign or message should appear warning that the page contains indecent or illegal content. Furthermore, the industry agreed to report to the Culture Secretary within a month, on how they can contribute with the proactive approach agreed on the meeting.<sup>75</sup>

On July 2013, the Prime Minister David Cameron give a speech to the NSPCC announced a range of measures to combat child abuse images. The PM announced that existing database would be linked across police forces with the objective to create a unique single database of illegal images which will allow a more effective work in tracking paedophiles.<sup>76</sup>

In November 2013, the Prime Minister hosted a Summit on Internet Safety with the participation of IWF, NCA, NSPCC, and representatives of ISPs and major search engines. The aim of this summit was to seek 'measures to block child abuse search results; remove child abuse images from the internet; and bring offenders to justice.'<sup>77</sup>

On blocking measures, it was agree:

- Google had implemented changes to prevent child abuse results against 100,000 unique searches worldwide;
- Microsoft had prevented all child abuse images, videos and pathways from Bing and Yahoo! searches of blacklist terms supplied by the National Crime Agency;

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<sup>74</sup> Press Release, Department for Culture, Media and Sport 'Tackling illegal images - new proactive approach to seek out child sexual abuse content' (18 June 2013) <<https://www.gov.uk/government/news/tackling-illegal-images-new-proactive-approach-to-seek-out-child-sexual-abuse-content>> (accessed 12 March 2014).

<sup>75</sup> Press Release, Department for Culture, Media and Sport 'Tackling illegal images - new proactive approach to seek out child sexual abuse content', (18 June 2013) <<https://www.gov.uk/government/news/tackling-illegal-images-new-proactive-approach-to-seek-out-child-sexual-abuse-content>> (accessed 12 March 2014).

<sup>76</sup> Prime Minister's Office, Prime Minister Speech "The internet and pornography: Prime Minister calls for action" (22 July 2013) < <https://www.gov.uk/government/speeches/the-internet-and-pornography-prime-minister-calls-for-action>> (accessed 21 March 2014).

<sup>77</sup> Jon Woodhouse, Internet – Protecting children – Commons Library Standard Note 06527 (21 March 2014) <http://www.parliament.uk/briefing-papers/SN06527/internet-protecting-children> (accessed 1 April 2014) 8.

- Google and Microsoft had implemented warning messages which appear whenever people use blacklist child abuse search terms; on Google searches, this means warning messages appearing against 13,000 search terms.<sup>78</sup>

On removing child abuse images,

'Google and Microsoft welcomed the national database of child abuse images being set up by the Government as this would enable the removal of child abuse images and any copies of them across the internet. Google and Microsoft also agreed to take part in a joint work programme between the search engines, the IWF and CEOP, to tackle peer-to-peer networks.'<sup>79</sup>

In addition, future actions will agreed:

- Search engines continuing to develop and improve capabilities to prevent child abuse search results;
- An online UK-US taskforce to identify and target paedophiles using the 'hidden internet' (or 'dark web') to view and share child abuse images;
- An international summit next year ([www.childinternetsafety.co.uk](http://www.childinternetsafety.co.uk)), hosted by the Government, bringing together governments, charities, law enforcement, and industry representatives; the summit will focus on protecting victims of online child abuse.<sup>80</sup>

### 7.3. In your view, does the current legal framework comply with Article 25?

In my opinion, England and Wales have complied with Article 25 of Directive 2011/93/EU in concordance with Recital 47 of the Directive that states:

“[t]he measures undertaken by Member States in accordance with this Directive in order to remove or, where appropriate, block websites containing child pornography could be based on various types of public action, such as legislative, non-legislative, judicial or other. In that context, this Directive is without prejudice to voluntary action taken by the Internet industry to prevent the misuse of its services or to any support for such action by Member States.”

In this sense, they have chosen a voluntary approach, seeking a cooperative work between governmental agencies, industry and organised civil society. The government has taken various steps towards tackling child sexual abuse, including take down and blocking measures, albeit that the latter is considered a temporary measure until the content is removed at source.

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> Jon Woodhouse, Internet – Protecting children – Commons Library Standard Note 06527 (21 March 2014) <http://www.parliament.uk/briefing-papers/SN06527/internet-protecting-children> (accessed 1 April 2014) 8 and 9.

Blocking measures deserves a particular attention. This issue was strongly debated during the negotiations of the Directive, which is confirmed by the voluntarily basis of these actions. England and Wales have accepted that the blocking online images and videos containing child sexual abusive content is acceptable to fight against their distribution, contrary to other countries that have been reluctant to block measures as it can cause problems of censorship.

### If no, what additional measures should be taken in order to comply with Article 25?

Despite the compliance and commitment with the removal and blocking measures of child sexual abusive content on internet, i.e. Article 25 of the Directive in question, still national further steps could be taken in order to strengths and maximise the combat against child sexual exploitation.

With its new proactive role, the IWF will need more staff in order to ensure the fulfilment of its new task, i.e. search, block and remove child illegal content on internet. The staff must be prepared to deal with the search of possible illegal content on internet. In this sense, it is important that they are trained as to assess correctly if the content is illegal or not. The above may help to decrease the apprehensions of censorships that have risen in some sectors.

A further analysis on the powers that police forces have could be beneficial in order to ensure that they have the correct and enough tools to investigate and prosecute offenders. Moreover, it could also be beneficial to analyse the possibility to give more funds in order to trained police officers and to add experts on child protection into the police work.<sup>81</sup>

An active inter-State cooperation may be also a good way to fight against child pornography. Much of the illegal content is hosted abroad, so the removal at source will depend of the efficiency of international legislations. Cooperation and partnerships with other countries and industry, mainly outside European Union, might seem an approach that could bring positive result.

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<sup>81</sup> Jim Gamble, the former Chief Executive of the Child Exploitation and Online Protection Centre (CEOP) and now Chair of City and Hackney Safeguarding Children Board claimed that this could be done through investing £1.5m a year to pay for 12 regional child protection experts, supported by twelve training coordinators who could recruit and train volunteers in every police force in the UK; these undercover officers would work to identify, locate and rescue children used for abusive images. Jim Gamble, "Online child abuse – the real problem is the people", ITV News, 18 November 2013 <http://www.itv.com/news/2013-11-18/government-must-ask-are-they-doing-enough-on-internet-safety/> (accessed 23 March 2014).

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