
NGO POSITION PAPER

Draft Directive on combating the Sexual Abuse, Sexual Exploitation of Children and Child Pornography

23 September 2010

Save the Children

Missing Children Europe

European NGO Alliance for Child Safety Online (eNACSO)

ECPAT

National Society for the Prevention of Cruelty to Children (NSPCC)

CONTENTS

1. INTRODUCTION
2. THE ROLE OF THE EU: OBLIGATIONS TOWARDS CHILDREN'S RIGHTS, LEGAL BASIS AND THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY
3. ANALYSIS AND RECOMMENDATIONS ON THE DRAFT DIRECTIVE
4. ANNEXES

1. NGO JOINT POSITION ON BLOCKING

2. REMOVAL AND BLOCKING: CHILD PROTECTION AND FUNDAMENTAL RIGHTS

3. PROPOSALS FOR AMENDMENTS TO ARTICLE 21

ECPAT - ECPAT International works for the elimination of child prostitution, child pornography and the trafficking of children for sexual purposes. It seeks to ensure that children everywhere enjoy their fundamental rights free and secure from all forms of commercial sexual exploitation. **Contact:** Theo Noten, t.noten@ecpat.nl, Katlijn Declercq, katlijndeclercq@ecpat.be www.ecpat.net

eNACSO, The European NGO Alliance for Child Safety Online is a network consisting of children's rights NGOs from across the EU working for a safer online environment for children. Our Mission is to promote and support actions at national, European and international level to protect children and promote their rights in relation to the Internet and new technologies. Our work is based on the 1989 UN Convention on the Rights of the Child (UNCRC) and the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography. eNACSO is funded by the European Commission's Safer Internet Programme. **Contact:** Morten Hjorth Jahnsen, MHJ@redbarnet.dk www.enacso.eu

Missing Children Europe is the European Federation for Missing and Sexually Exploited Children. It groups 24 organisations in 16 EU member countries and in Switzerland which are active in the fight against child disappearances and sexual abuse and exploitation of children. **Contact:** Francis Herbert, Francis.Herbert@missingchildreneurope.eu www.missingchildreneurope.eu

NSPCC – The NSPCC is the UK's leading NGO specialising in child protection. The NSPCC aims to end cruelty to children by seeking to influence legislation, policy, practice, attitudes and behaviours for the benefit of children and young people. This is achieved through a combination of service provision, lobbying, campaigning and public education. **Contact:** Naureen Khan, Naureen.Khan@NSPCC.org.uk www.nspcc.org.uk

Save the Children's vision is a world in which every child attains the right to survival, protection, development and participation. We are 29 national organisations working in 120 countries worldwide. As the world's leading independent organisation for children, Save the Children's mission is to inspire breakthroughs in the way the world treats children, and to achieve immediate and lasting change in their lives. In Europe, 13 national Save the Children work together to promote children's rights in EU measures and action. **Contact:** Olivia Lind Haldorsson, olivia.lind@savethechildren.be, Dieter Carstensen dc@redbarnet.dk, Cristiana di Paoli Cristiana@savethechildren.it www.savethechildren.net/brussels

1. INTRODUCTION

This position paper has been produced by a coalition of leading children's rights and child protection NGOs from 21 EU Member States¹ with a purpose of informing the discussions in the European Parliament and between the Member States on the Proposal for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography ('Directive Proposal').

This paper is based on our substantial practice experience of working on issues relating to child sexual abuse and sexual exploitation across the EU. This includes organisations that work with child victims of sexual abuse, offenders as well as working with children and young people who have been sexually harming other children.

Child sexual abuse and exploitation are violations of the UN Convention on the Rights of the Child (ratified by all EU member states), and can have far reaching and devastating implications on the health and development of the abused child. While International law sets high standards for protection of children against sexual abuse, national law, justice and protection systems often fail to protect children adequately.

Research shows that sexual abuse of girls and boys takes place in all settings – in the home, at school, in the community, in institutions and in work places – and in all parts of the world, including in Europe.²

In this regard, we welcome the Directive Proposal as an *important opportunity* to improve existing EU legislation and cross-border cooperation to protect children from sexual abuse, sexual exploitation and child abuse images. We urge the European Parliament and the Member States to consider the EU's obligations towards protecting children's rights by adopting legislation that will protect children. This paper contains our key recommendation, which we believe will strengthen existing EU legislation, particularly in relation to improved cross-border cooperation around protecting children from sexual abuse and exploitation, catching up with developments, in particular in the online environment and focus measures related to the prevention of sexual crimes against children rather than the punishment of crimes against children.

Brussels 23 September 2010

¹ See page 2 for information and contact details

² See e.g. UN Study on Violence against Children

2. THE ROLE OF THE EU: OBLIGATIONS TOWARDS CHILDREN'S RIGHTS

Under Article 3 of the UN Convention on the Rights of the Child, the “best interest of the child” must be the central principle in all legal instruments protecting children’s rights, including the legislation to combat child sexual abuse and exploitation and child abuse images.

Therefore, the EU has an obligation³ to determine the impact of all relevant measures on children’s rights. In the area of justice, freedom and security, children’s rights are clearly of direct and immediate relevance, in particular as regards measures concerning asylum, immigration, trafficking and sexual abuse and exploitation. The implications of the decisions made in terms of the Directive proposal must therefore be carefully assessed, to determine their impact on children’s rights. This must also be a key guiding principle for Member States when they implement each article of the Directive, integrating the best interests of the child into national legislation and action relating to children.

The European Court of Human Rights has established the primacy of the protection of rights over other concerns in relation to child sexual abuse:

*“Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives”*⁴

To ensure that the EU fully acts on its obligations towards children’s rights, it must identify when EU action will be more effective at EU level than action at national level. Where the EU and Member States share powers, the EU should adopt measures where the scale and effect of the action requires EU measures rather than measures at Member State level. Clearly, where an EU-wide response to a situation affecting children brings added value, the EU should act. From our work, we know that some aspects of child sexual abuse and exploitation have European or international dimensions, and can no longer only be effectively tackled by individual governments acting alone. There is an urgent need for improved EU cooperation to protect children from sexual abuse and exploitation to complement and add value to national actions.

The EU must also consider the most appropriate means to achieve children’s rights. This may include issuing guidelines, supporting practical measures through funding and other means. The measures may also include legally binding instruments (regulations, directives and decisions)

³ All EU Member States have ratified the UN Convention on the Rights of the Child. The European Court of Justice has expressly recognized the need to respect children’s rights and requires EU law to take due account of the UN Convention on the Rights of the Child (See e.g., Case C-540/03 European Parliament v. Council of the European Union [2006] ECR 5769). The Lisbon Treaty provides that protecting the rights of children is an objective of the EU, both internally and in its relations with the wider world. The EU Charter of Fundamental Rights clearly reaffirms the EU’s commitment to human rights and, within that content, expressly to the rights of the child (Article 24).

⁴ European Court of Human Rights of 2nd of December 2008 (case of K.U. v. Finland, Application no 2872/02)

where Treaty competence allows it. In relation to third countries, they can range from political declarations of support to funding regional or third country action. We recommend that the Directive should be accompanied by exchange of best practice on the implementation of some of its provisions, and where appropriate non-binding common guidelines or minimum standards which can assist Member States in developing their national systems in a way which best protects children.

Our legal advisers have carefully assessed the measures proposed against the legal basis for the Directive Proposal⁵, and have found that they are relevant and justified. The EU has a broad power to act to tackle offences concerning the sexual abuse and exploitation of children and child abuse images. We concur with the view that the proposed Directive fully respects the principles of subsidiarity⁶ and proportionality⁷.

5 The legal basis for the Draft Directive is Article 82(2) and 83(1) TFEU. Article 82(2) TFEU states: “To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.”

Article 83(1) TFEU states: “The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. [...] These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. [...]”

6 The Directive Proposal says the following on subsidiarity: “Child sexual exploitation and sexual abuse has a considerable cross-border dimension, which is most evident in child pornography and child sex tourism, but also appears in the need to ensure that children in all Member States should be protected from offenders from all Member States, who can travel easily. This requires EU action, notably to follow up on Council Framework Decision 2004/68/JHA and Council Decision 2000/375/JHA,¹ as the objective of effectively protecting children cannot be sufficiently achieved by Member States, either at central level or at regional or local level. Action by the European Union can better achieve the objectives of the proposal for the following reasons.

The proposal will further approximate the substantive criminal law of Member States and rules on procedure, which will have positive impact on the fight against these crimes. Firstly, it is a way of avoiding a criminal preference for committing acts in Member States which have less severe rules; secondly, shared definitions make it possible to promote the exchange of useful common data and experience and to promote comparability of data; and thirdly, international cooperation is made easier. The proposal would also improve the protection of child victims. This is a humanitarian imperative and also a condition for victims to provide evidence necessary to prosecute offences. The effectiveness of prevention measures across the EU will be enhanced as well. The proposal therefore complies with the subsidiarity principle.”

7 The Directive Proposal says the following on proportionality: “This Directive confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose, taking into account the need for accuracy of criminal legislation.” In terms of proportionality it is also worth highlighting that:

- The offences relating to child sexual abuse and sexual exploitation require intentional conduct. The offences relating to obtaining access to child abuse images also require actual knowledge on the part of the offender.
- The measures on disqualification are necessary to ensure that child abusers do not merely move from one country to the next to operate below the radar of national legislative checks;
- The measures to protect victims are proportionate to the abuse that such children have suffered and to ensuring that the victims are able to give proper testimony in the course of a trial. The sanctions allow a large degree of discretion to the courts;

3. ANALYSIS AND RECOMMENDATIONS ON THE DRAFT DIRECTIVE

This section presents our analysis of, and the specific recommendations in relation to the measures proposed in the Draft Directive.

Article 2. Definitions

2 (a). We fully support article 2 (a) “‘child’ shall mean any person below the age of 18 years”; which is based on the UN Convention on the Rights of the Child, article 1⁸, ratified by all Member States. The definition of ‘child’ should not be confused with “age of consent”, which varies considerably between Member States.

2 (b) and (d). We strongly recommend that the term “child pornography” is replaced by “child abuse images”, or “child abuse material” throughout the Directive Proposal, in order to fully reflect the criminal and protection context. Along the same lines, we also recommend that “pornographic performance” (2 d) is replaced by a more appropriate term, which reflects the abusive character of these “performances”.

Child pornography and/or performances always involve sexual abuse of a child, and, therefore, constitute evidence of a crime committed against a child. Recital 3 of the Draft Directive recognizes the link between the definition of “child pornography” and child sexual abuse.⁹

Comment

In this context, we would like to emphasise that no specific exception should be inserted in the proposal for “artistic expression” as this is already a much abused term used by creators of child abuse content to excuse the posting of abusive images. The definition of “child pornography” specifically requires the depiction of a child engaged in real or simulated “sexually explicit conduct” or the depiction of a child’s sexual organs for “primarily sexual purposes”. An image of a child which is not “sexually explicit” or “primarily for sexual purposes” would not fall within

➤ The measures to remove or block access to websites can only be taken if they are found to contain illegal images constituting child pornography following a properly established procedure which allows for judicial review where appropriate. These measures are necessary to protect the public from criminal activities and children from abuse.

⁸ “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

⁹ “Child pornography, which consists of images of child sex abuse, [authors emphasis] and other particularly serious forms of sexual abuse and sexual exploitation of children are increasing and spreading through the use of new technologies and the internet”.

the offence. There is no question that legitimate personal photographs, medical and/or scientific documents or artistic images would be illegal.¹⁰

Serious forms of child sexual abuse and exploitation currently not covered by EU legislation that would be criminalized by the Directive Proposal encompass child sexual exploitation in travel and tourism. Whilst this is clearly recognized in the explanatory memorandum, the Directive Proposal fails to provide a definition of child sexual exploitation in travel and tourism. To address this problem, it is important that States agree on a common definition and harmonise their legislation accordingly. We therefore propose that child sexual exploitation in travel and tourism is explicitly defined “as the sexual exploitation of children by a person or persons who travel from their usual environment¹¹ to a destination where they have sexual contact with children”. This would allow States to punish child sexual exploitation by any individual who does not normally live in the location where the abuse takes place, including domestic and international travellers.

Article 3 - 5. Offences concerning sexual abuse and exploitation

Sanctions

We support Recital 6 of the Draft Directive, which states that sanctions should be “effective, proportionate and dissuasive”. We would also like to stress the importance of intervention programmes, and welcome article 20 of the proposed Directive (for further comments see below).

Terminology

We recommend the terms “pornographic performance” (4) and “child pornography” (5) are replaced with more appropriate terminology (see above).

Article 3 and Age of Consent

We recognize that the Directive is not the place to regulate or harmonise the age of consent across the EU, however, it should be noted that the differences between Member States (ranging from 13 to 17 years) might hamper harmonization and generate age-related discrimination within the EU.

In order to avoid inconsistencies in the Directive, for example in relation to the exemptions on consensual sexual activities between peers (see below) we recommend that the Directive adopts

¹⁰ We here refer to paragraph 142 of the Explanatory Report of the Lanzarote Convention which stresses that the wording “for primarily sexual purposes” is formulated to address such concerns: “Such images are governed by national standards pertaining to bodily harm, or the classification of materials as obscene or inconsistent with public morals. Therefore, material having an artistic, medical, scientific or similar merit, that is where there is absence of sexual purposes, does not fall within the scope of this provision. ...”

¹¹ Based on the UNWTO definition of tourist, 1997.

language used in the Lanzarote Convention and instead refers to “legal age for sexual activities” rather than “age of consent”.

Article 5

We welcome article 5, especially article 5(3) which establishes “knowingly obtaining access to child abuse material” as an offence.

The reference to “knowingly” in article 5(3) eliminates the risk of criminalisation of accidental access of child abuse images. In order to establish an offence, evidence would have to be presented in court proving that access was obtained knowingly, effectively excluding the accidental viewer from criminal liability.

Comment

We do not support non-application to occasional viewers, if it can be proved that access was obtained knowingly.¹² Where there is knowledge, then it is irrelevant whether a person accessed the child abuse image once or on a repeated basis. Reference to payment is also irrelevant. To require repeated viewing would, in essence, create a de minimis threshold and essentially a viewer could avoid prosecution by simply viewing each child abuse image once. Moreover, such an approach would be in violation of children’s right to privacy and protection as well as the principle of the best interest of the child.

We therefore strongly recommend that the EU follows the approach stipulated in the CoE Convention at Article 20(1)(f) and refrains from making reference to “repeated access” or payments.

In order to deter the conduct in the first place, it should be specified that it is an offence to “knowingly attempt to access or possess child abuse images”. It could be clarified in the recitals that evidence for this offence may include attempting to circumvent any technology preventing access to such websites or acquiring technology which hides viewing patterns in order to access illegal sites.

¹² See explanatory report to article 20 Lanzarote Convention: “to be liable the person must both intend to enter a site where child pornography is available and know that such images can be found there. [...] The intentional nature of the offence may notably be deduced from the fact that it is recurrent or that the offences were committed via a service in return for payment”.

Article 6 – Solicitation

The Draft Directive article 6 is an important step to ensure protection of children against child sexual abuse, sexual exploitation and child abuse images. We are however very concerned that this provision only protects children under the “age of consent”, leaving a large number of children of varying age (some as young as 13 years old) unprotected against grooming across Europe.

We are in particular concerned that reference is made to “age of consent” in relation to article 5 (6) on production of child pornography, which protects all persons under the age of 18. In essence, the proposed Directive provides a loophole in that any child below the age of eighteen but above the age of consent in their country could be the victim of such solicitation, although the activity itself is a criminal offence.

We therefore strongly recommend that reference to age of consent is deleted in article 6, at the very minimum in relation to article 5(6). It is suggested that the exemption for conduct between peers be extended to solicitation rather than an outright exemption simply because the age of consent has been reached. See further our recommendations under Article 8 below.

Article 7 - Instigation, aiding and abetting, attempt and preparatory offenses

In relation to the organisation of child sex tourism, it must be recalled that actors facilitating the sexual abuse and exploitation of a child includes not only those who arrange travels (such as tour operators and travel agencies) but also a number of intermediaries which provide other services (such as hotels, hostels, tour guides, translation services etc.). It is therefore recommended to rephrase Article 7(3) (b) to punish “The organization of travel **and/or other** arrangements with the purpose of committing any of the offences referred to in Articles 3 to 6”.

We also believe that States should set the bar higher and criminalise even the acts preceding the actual commission of sexual offences with children, e.g. the simple making of travel arrangements for that purpose. Punishing the intent to commit offences related to child sexual exploitation in travel and tourism serves to strengthen preventive measures and stop travelling offenders before they act upon their malevolent intents. In light of this, we propose that Art. 7 includes the following additional par. 7.4: “Member States shall take the necessary measures to ensure that intent to travel with the purpose of having sexual intercourse with a child is punished where this has been followed by material acts leading to a meeting, regardless of the actual sexual abuse and exploitation of the child”.

Article 8 – Consensual sexual activities between peers

Article 8 introduces an important exemption to the offences governed by the proposed Directive, however the current text does not provide sufficient clarity as to its scope and limitations.

We therefore recommend that the Directive Proposal is amended according to the approach taken in the Lanzarote Convention, which includes the exemptions in relation to consensual sexual activities between peers directly in the relevant articles (18.3 on child abuse and 20.3 on child pornography):

[new] Article 3 (6) *“The provisions of article 3(2) and 3(3) are not intended to govern consensual sexual activities between children who have reached the legal age for sexual activities or between children and persons who are close in age and degree of psychological and physical development or maturity, insofar as the acts did not involve any abuse”*

The current reference to “consensual” sexual activities in article 8 poses a problem in relation to article 3 in that it is questionable how a child under “the age of consent” can engage in “consensual” sexual activities. In order to avoid inconsistencies we recommend that the Directive adopts language used in the Lanzarote Convention and refers to “legal age for sexual activities” rather than “age of consent” in article 3 (see also above).

[new] Article 4 (12) *“The provisions of article 4(2) and 4(4) are not intended to govern consensual sexual activities between children who have reached the legal age for sexual activities or between children and persons who are close in age and degree of psychological and physical development or maturity, insofar as the acts did not involve any abuse”*

[new] Article 5 (7) *“The provisions of article 5(2), 5(3) and 5(6) are not intended to govern consensual sexual activities between children who have reached the legal age for sexual activities or between children and persons who are close in age and degree of psychological and physical development or maturity, insofar as the acts did not involve any abuse”*

We strongly recommend that the exemption does not cover article 5(4) and 5(5).

[new] Article 6.2 *“The provisions of article 6 are not intended to govern solicitation of consensual sexual activities between children who have reached the legal age for sexual activities or between children and persons who are close in age and degree of psychological and physical development or maturity, insofar as the acts did not involve any abuse”*

Article 10 - Disqualifications

It is imperative that Member States require that the criminal record of candidates for a position or activities involving children are checked prior to the offer of employment, through pre-employment checks. Otherwise, the requirement only relates to the publication of a criminal list

without any requirement that the list is actually checked. While it may not be possible to insist on mutual exchange of such information between the relevant authorities as the current legal basis may not support this, it should still be possible to require candidates to be vetted in order to ensure the mutual recognition of judicial decisions in this respect (in line with Article 82 TFEU).

We recommend that it is clarified that necessary measures include pre-employment checks. The following proposal should conform to the legal base of the Directive:

“Member States shall require authorities to ensure that candidates for professions working with children and/or persons involved in regular activities with children do not hold a criminal record including offences in relation to the offences governed by article 3-8 of this Directive. Where applicable, the criminal record of any Member State in which the candidate was resident for more than two years should be checked.”

This proposal would also bring the Draft Directive in line with Article 5(3) of the Lanzarote Convention. The limitation on residence of two years would ensure that the requirement to check the records of other Member States is proportionate as any person who lived in another Member State and served a sentence for such an offence is likely to be caught while students and short term stays would be excluded.

We believe that sex offenders registers should also be put in place with limitations on high risk convicted offenders from leaving their countries. This would allow more rapid apprehension of re-offenders while preventing the crime by deterring existing and future offenders. We therefore recommend that title of Art. 10 be expanded to include “Disqualifications and other measures” and that a new Art. 10.5 is added as follows: “Member States may consider adopting other measures in relation to perpetrators, such as the registration of persons convicted for offenses referred to in Articles 3 to 7 in sex offenders registers”.

Article 12 - Sanctions on legal persons

The sanctions on legal persons should include confiscation of any material depicting child abuse images or confiscation of any equipment being used to facilitate the production, distribution or dissemination of child pornography contrary to Articles 5(4) - (6) of the Draft Directive.

In accordance with articles 27.3 (a) and 27.5 of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Member States should additionally provide for the seizure and confiscation of “the proceeds derived from such offences”. They may also establish that the proceeds of crime or property confiscated can be allocated to a special fund in order to finance prevention and assistance programmes for victims of offenses covered by this Directive.

Article 13 – Non Prosecution

Article 13 must ensure that children who are involved in unlawful activities as a consequence of being subjected to those offences are not prosecuted or imposed penalties on.

A child victim should not be considered as capable of consenting to prostitution or participation in child abuse images. Criminal liability rests solely with the perpetrator regardless of any purported “consent” from the victim. Consequently, the provision should be changed to ensure that Member States shall not prosecute “child victims”. This would not prevent a child who perpetrates a crime against another child from being prosecuted as the child in this context is not a “victim”.

Article 14 - Investigation and Prosecution

We recommend that the Directive clearly states that investigations should be carried out “bearing in mind the best interests and the rights of the child at all times”, in accordance with article 30(1) of the Lanzarote Convention. In addition, Member States should ensure that investigations are conducted “promptly and without any unjustified delay” pursuant to Article 30(3) of the Lanzarote Convention.

The proposed measures in relation to victim identification are particularly welcome. We strongly support article 14(4). It is important that Member States provide the necessary financial and human resources to ensure that the units, once established, become fully operational and effective. We therefore suggest that the language is strengthened by including reference to “enable and *support* investigative units...”.

While the current legal basis may not support co-ordination between the Member States’ police authorities, it may still be possible to strengthen the provision pursuant to Article 82 (2)(a) TFEU relating to admissibility of evidence. This could be achieved by stating that child abuse images sent by the authorities of one Member State to the authorities of another EU Member State for the purpose of victim identification or an application for blocking / removal or prosecution will be admissible as evidence. This should be extended to images sent by international organizations such as Interpol to authorities in EU Member States.

We also recommend that further steps are taken to ensure identification of victims, including ensuring that investigative units may take ownership of investigations referred to in article 5 and 6 regardless of whether the nationality of the victim and/or perpetrator of the offence, or country in which the offence has taken place, has been established.

Article 16 - Jurisdiction

Legal advice confirms that it is not possible to opt out of the measures relating to jurisdiction and that they therefore must be removed in article 16.

We recommend that the last paragraph of article 13 of the proposal for a revised Framework Decision to combat child sexual abuse, sexual exploitation of children and child pornography, regulating cases of conflicting jurisdiction and the need to cooperate and centralize proceedings in single Member State is reinserted.

Article 17-19 – Assistance, support and protection measures for victims

Article 17

In order to ensure that the rights of victims are fully ensured, we recommend that elements set out in Article 30 of the CoE Convention are adopted by the Draft Directive. In particular, the following principles should be added to Article 17 (or possibly Article 19):

- (i) informing child victims of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein as well as the outcome of their cases;
- (ii) ensuring, at least in cases where the victims and their families might be in danger, that they may be informed, if necessary, when the person prosecuted or convicted is released temporarily or definitively;
- (iii) protecting the privacy of child victims, their identity and their image and by taking measures in accordance with internal law to prevent the public dissemination of any information that could lead to their identification;
- (iv) providing for their safety, as well as that of their families and witnesses on their behalf, from intimidation, retaliation and repeat victimisation;
- (v) ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact.

Article 18

Solid national child protection and child friendly judicial systems constitute the very foundation of protecting children against the crimes governed by the Directive Proposal.¹³ We therefore recommend that Directive Proposal should be amended to ensure that child protection systems and multi-disciplinary systems are put in place in each Member State.

The following amendments to article 18 of the Directive Proposal, inspired by the Lanzarote Convention as well as the Proposal for a Directive on preventing and combating trafficking in human beings, and protecting victims (COM(2010)95 final), would better ensure appropriate assistance and support to victims:

1. **[new]** 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 an indication that the child might have been subject to an offence referred to in articles 3 to 7.
2. **[new]** Member States shall take the necessary measures to ensure that a child has access to information about its rights, in particular in relation to assistance and support, as soon as competent authorities have an indication that the child might have been subject to an offence referred to in articles 3 to 7.
3. Member States shall take the necessary measures to ensure that the specific actions to assist and support victims in the short and long term, in their physical and psychosocial recovery, 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. **[new]** Member States shall take the necessary measures to establish effective child protection systems and multidisciplinary structures to ensure the necessary assistance and support to victims in the short and long term, whether through the provision of specially trained personnel within its public services or through recognition and funding

¹³ Child protection systems are comprehensive approaches to the protection of children from abuse, neglect, exploitation and violence and to the fulfilment of children's rights to protection. The foundations of such systems are the state's human rights obligations to children that include:

- Preventing violence, abuse, exploitation and neglect, responding effectively when it occurs and providing necessary treatment, rehabilitation and compensation to child victims.
- Acquiring knowledge about the root causes of child protection failures and the extent of abuse, neglect, exploitation and violence against children in all settings.
- Developing appropriate policies and regulations, interventions for prevention and response, and ways to measure progress.
- Encouraging the participation of girls and boys, their parents, caregivers and community members, and international and national NGOs and civil society.

Crucially, child protection systems are systems - made up of a set of components that, when properly coordinated, work together to strengthen the protective environment around each child. These components include a strong legal and policy framework for child protection, adequate budget allocations, multi-sectoral coordination, child-friendly preventive and responsive services, a child protection workforce, oversight and regulation, robust data on child protection issues, etc.

of victim support organisations, including non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.

5. 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.
6. Member States shall take measures, where appropriate and possible, to provide assistance and support to the victim's family. In particular, Member States shall, where appropriate [**remove "and possible"**], apply article 4 of Council Framework Decision 2001/220/JHA to the family, regardless of whether a criminal investigation or proceedings have been instituted.

We welcome the reference to the Framework Decision on the standing of victims in criminal proceedings. In this context, we would like to emphasise that it is important that assistance and support is not exclusively linked to criminal proceedings (before, during and/or after). Protection and assistance must also include e.g. measures for victims who are *presumed* being abused or exploited. For instance, article 14.1 encourages initiatives to ensure suitable training for personnel involved in proceedings or *otherwise in contact with victims*.

Article 19

Based on our extensive experience working with child victims, we have identified a number of important appropriate measures to protect victims in criminal investigations and proceedings that are missing from article 19.

A provision should be added at the start of Article 19 stating that children shall be informed of their rights. Article 31(1) of the Lanzarote Convention provides a useful precedent.

We further recommend that a provision is included to ensure that the best interest of the child is a primary consideration in criminal investigations and proceedings. It is also important to ensure that investigations are conducted promptly and without unjustified delay.

The following amendments to article 19 will better ensure that victims are protected in criminal investigations and proceedings:

1. **[new]** Member States shall take the necessary measures to inform victims of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the charges, the general progress of the investigation or proceedings, and their role therein as well as the outcome of their cases.
2. **[Previous 18.1]** Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate time after criminal proceedings in order to enable them to exercise the rights set forth in

Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings and in this Directive.

3. **[new]** Member States shall take the necessary measures to ensure that criminal investigations and proceedings are carried out in the best interest of the child.
4. **[new]** Member States shall take the necessary measures to ensure that investigations are conducted promptly and without unjustified delay.
5. **[new]** Member States shall take the necessary measures to ensure that investigations and criminal proceedings do not aggravate the trauma experienced by the child.
6. **[new drawing on article 13 of FD 2001/220/JHA]** Each Member State shall, in the context of investigations and proceedings, apply article 13.1 and 13.2 of Framework Decision 2001/220/JHA
7. **Article 19.2 – 19.5**

Statutes of Limitation

Child victims of sexual abuse are often unable, for many different reasons, to report and/or disclose information about the offences that have been perpetrated against them. We therefore believe that it is essential Member States take the necessary measures to extend the statute of limitations for initiating proceedings to a period of time which is sufficient to starting a proceeding *after* the victim has become an adult. This period of time should be long enough to allow victims to file a complaint and authorities to bring prosecution for the offences concerned. Such a provision could be formulated on the basis of article 33 of the Lanzarote Convention.¹⁴

Helplines

The Directive should include a provision to ensure that Member States take the necessary measures to establish child helplines. Such a provision could be inspired by the Lanzarote Convention article 13, e.g. “Each Member State shall take the necessary legislative or other measures to encourage and support the setting up of information services, such as telephone or Internet helplines, to provide advise to callers, even confidentially or with due regard for their anonymity”.

¹⁴ Article 33 – Statute of limitation “Each Party shall take the necessary legislative or other measures to ensure that the statute of limitation for initiating proceedings with regard to the offences established in accordance with Articles 18, 19, paragraph 1.a and b, and 21, paragraph 1.a and b, shall continue for a period of time sufficient to allow the efficient starting of proceedings after the victim has reached the age of majority and which is commensurate with the gravity of the crime in question”.

Article 20 - Intervention programmes or measures

We recommend that the Directive provides that “each Member State shall ensure or promote the development of partnerships or other forms of cooperation between the competent authorities, in particular health-care services and the social services, and the judicial authorities and other bodies responsible for following the persons to implement preventative intervention programmes”.

Article 21

We endorse the sentiments expressed in Article 21, but believe that it can be strengthened by ensuring that the following elements are reflected:

1. Deletion of child abuse images at source is the primary objective of policy;
2. All Member States should be required to put in place arrangements to ensure that any child abuse images found online within their jurisdiction are expeditiously notified to the owner or manager of the device where the image is housed linked to a requirement that it should be deleted within six hours of notification;
3. All Member States should be required to ensure that they have arrangements in place to ensure that any child abuse images identified in any other jurisdictions, whether inside the EU or not, are notified to the appropriate agencies within that jurisdiction within six hours of being identified;
4. In relation to any child abuse images identified on servers outside of their own jurisdiction each Member State shall ensure that they have arrangements in place which will block access to such images;
5. Member states shall ensure that the means by which the list of web addresses to be blocked is to be compiled and maintained within a Member State shall be publicly stated, shall be the subject to independent scrutiny and, if necessary, to judicial review. Once an image has been deleted at source the address should be expeditiously removed from the blocking list;
6. Wherever possible the owner or publisher of any image which is to be blocked shall be notified and given information about how to appeal against inclusion on a list of blocked sites;
7. Any internet users attempting to reach an address which is on a blocking list prepared pursuant to these provisions shall be advised of the reason why they cannot connect to that address.