

Statement on the revision of EU Directive 2011/93/EU

Freiburg, 10th May 2024 - ECPAT Germany welcomes the proposed changes of the European Commission to Directive 2011/93/EU “on combating the sexual abuse and sexual exploitation of children and child sexual abuse material”. While many adaptations are satisfactory from a children rights perspective, there are some aspects where we still see necessity of improvement.

Article 2 – Definitions

- We appreciate the adaptation of the terminology in accordance with the Luxembourg guidelines. However, we see the term ‘child sexual abuse performance’ as the definition for livestreaming of child sexual abuse critical. The term ‘performance’ does not reflect the severity of the actual crime. Furthermore, the term ‘aimed at an audience’ can be misleading as it may result from the trafficking of children for sexual purposes. The definition should reflect, that the offenders who are watching remotely often do **play an active part in the sexual abuse** by e.g. giving instructions on what kind of sexual abuse they want to see. Moreover, we recommend using the term “sexual violence against children” as violence includes all the different forms of offences. Additionally, the term *abuse* suggests that there is a use of children, however, children are not objects. We would suggest the following amendment:

(5) ‘→live online sexual violence against children← ~~child sexual abuse performance~~’ means the →live transmission← ~~a live exhibition aimed at an audience of →sexual violence against children← ~~child sexual abuse~~, including by means of information and communication technology, →to other natural and/or legal persons watching remotely← of:~~

- (a) a child engaged in real or simulated sexually explicit conduct; or*
- (b) the sexual organs of a child for primarily sexual purposes;*

- Additionally, we are missing a definition of the crime of **sexual coercion and extortion**, which is an increasing offence in the criminal area of sexual violence against children. It is of utmost importance to include this definition to hold member states accountable to criminalise this offence. Therefore, we suggest adopting the following definition into the directive, in accordance with the Luxembourg Guidelines:

‘Sexual coercion and extortion’ means the blackmailing of a person by using self-generated images of that person to extort sexual favours, money, or other benefits from her/him under the threat of sharing the material beyond the consent of the depicted person.



- We welcome the inclusion of **Art. 2.3(e)** which defines ‘any material, regardless of its form, intended to provide advice, guidance or instructions on how to commit sexual violence against children or sexual exploitation or child solicitation’ (also referred to as ‘paedophile’ manuals) as a criminal offence.

Articles 3 & 4 – Offences concerning sexual abuse and exploitation

- There is no evident reasoning why penalties should differ for non-consensual sexual activities based on whether the child is above or below the age of sexual consent. Even though children that have reached the age of sexual consent and can consent in general to sexual activities (with peers) they **cannot consent to abuse/violence or exploitation**. Therefore, all children under the age of 18 should be **protected equally** from crimes of sexual violence and exploitation and not feel that if they are above a certain age the crime is less severe, thus leading to a lower penalty.
- We appreciate the inclusion of a definition of sexual consent.

Article 5 – Offences concerning child sexual abuse material

- We support the **decriminalisation of reporting hotlines and platforms** for sexual violence against children that are recognised and authorised by the Member States for this task. The inclusion of allowing for pro-active search for reporting hotlines/platforms is a step in the right direction, however in the current definition included in the revised directive this is supposed to be solely based on existing reports which may lead to difficulties and does not allow to find unknown material of sexual violence against children.

Article 6 – Solicitation of children for sexual purposes

- We welcome the **broadening of the definition**, making clear that the meeting between the offender and the child can take place either online or offline. However, it is unclear for us why the article is narrowing the role of potential offenders down to being adults. If a person under the age of 18 is soliciting other children for the purpose of committing any of the offences referred to in Article 3(4), (5), (6) and (7) and Article 5(6) this needs to be punishable as well, of course under juvenile criminal law. Whereas it is important to protect children from unnecessary prosecution it is equally important to acknowledge and accordingly prosecute children under juvenile law who do become offenders. Therefore, we suggest changing ‘adult’ to ‘natural and/or legal person’.
- We see it critical that in **Art. 6.1(a)** the necessity of a material act following the solicitation of a child remains.



We welcome the inclusion of **Article 7 – Solicitation of sexual abuse** and **Article 8 - Operation of an online service for the purpose of child sexual abuse or sexual exploitation**. In particular Art. 8 is a necessary addition, as it criminalises the provision of online infrastructures that enable exchange and encouragements between perpetrators.

Article 10 – Consensual sexual activities

(previously Article 8)

- We advise the **harmonisation of the age of sexual consent** among member states to ensure the same protection of all children across the EU.
- We highly urge to revise this article and **remove leaving it to the discretion of member states**. It is of utmost importance to protect children from unnecessary prosecution. The Article leaves it to the Member States to decide whether the following acts apply to consensual sexual activities between peers/in the context of a consensual relationship where the child has reached the age of sexual consent in so far as the acts did not involve any abuse or exploitation:
 - Article 3(2) witnessing sexual activities;
 - Article 3(4) engaging in sexual activities with a child;
 - Article 4(4) attending pornographic performances involving a child;
 - Article 5(2) acquisition or possession of child sexual abuse material;
 - Article 5(6) production of child sexual abuse material

Member States should not be granted discretion in these cases but should be required to **ensure the law protects children from unnecessary prosecution**.

Article 11 – Aggravating circumstances

(previously Article 9)

- The list of aggravating circumstances lacks the inclusion of **enhanced vulnerability** of LGBTQI+ children and children who are seen as not conforming to conventional norms relating to sexual orientation, gender identity and expression. We highly urge to include this into Art. 11.
- Whereas the revised article amends the inclusion of ‘the use or threat of using a weapon’, as well as ‘causing the victim to take, use or be affected by drugs, alcohol or other intoxicating substances’ it does not include **the sharing or threat of sharing sexually explicit material beyond the consent of the depicted person** which we see as a shortcoming in the revision. Thus, we recommend including the following subparagraph:

(k) the offence was committed by threatening to share sexually explicit material beyond the consent of the depicted person, regardless of whether the depicted person shared those pictures consensual or not or whether they were obtained or created previously without the knowledge of the depicted person.

Article 12 - Disqualification arising from convictions

(previously Article 10)

- We appreciate that under the revised version employers will be required to conduct background checks. However, we advise to also **extend this to volunteers** working for institutions, organisations, or companies when they are working directly with children.

Article 15 - Non-prosecution or non-application of penalties to the victim

- The formulation ‘(...) are entitled not to prosecute or impose penalties on child victims of sexual abuse and sexual exploitation (...)’ leaves it to the discretion of the Member States whether they prosecute or apply penalties to child victims or not. We highly urge to **remove discretion** in this case as it is crucial to **protect child victims from any prosecution or penalties** for criminal activities they have committed during the abuse or exploitation situation. We propose the following amendment:

Member States shall, in accordance with the basic principles of their legal systems take the necessary measures to ensure that competent national authorities ~~are entitled~~ →do← not to prosecute or impose penalties on child victims of sexual ~~abuse~~ →violence← and sexual exploitation for their involvement in criminal activities, which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 4(2), (3), (5) and (6), and in Article 5 (4), (5) and (6).

Article 16 - Investigation and prosecution and limitation periods

(previously Article 15)

- We highly support that the article now states that the prosecution of offences is not dependent on a report or accusation being made by the victim or his or her legal representative.
- Whereas we do acknowledge that the revised directive at least requires states to enlarge the period of the statute of limitation we highly recommend to **completely remove the statutory limitations** for the prosecution of offences of sexual violence against children and exploitation.
- The article is lacking any regulation on **child-friendly justice principles and procedures**, as well as **victim identification**. We see this as a huge shortcoming as it is very important to ensure child-friendly justice across all EU member states equally to e.g. protect children from further or re-traumatization.
- The inclusion of **Art. 16.4** is important as it widens the scope of investigative tools for the prosecution by requiring member states to not only provide enough resources and staff but also allow access to investigative mechanisms also used for organized crime.

As defined in the explanatory part of the proposed revision this is meant to e.g. encourage Member States to use methods like honeypot investigations.

Article 18 - Reporting of child sexual abuse or sexual exploitation

- We very much appreciate the inclusion of this new article as it is essential that **reporting mechanisms for victims are easily accessible**. Furthermore, specifying that it needs **child-friendly** reporting mechanisms is crucial. However, we see the missed opportunity of not only defining that reporting should be available in a child-friendly language, but also in different, **widely spoken languages** to assure equal accessibility for all children.
- We would advise to **provide guidelines and/or minimum standards** to Member States for the purpose of harmonisation and accessibility for children.

Article 19 - Jurisdiction and coordination of prosecution

- We welcome the added **Art. 19.6** that emphasizes the importance of cross-border cooperation and strengthening the role of Eurojust as a cooperation partner and intermediary in offences.

Article 21 - Assistance and support to victims

- We especially appreciate the inclusion of **Art. 21.2** and **Art. 21.3** holding the Member States accountable to provide appropriate care and accommodation (where necessary) for victims.
- We support the broadened definition of the role of the EU-Centre under this directive as defined in the new **Art. 21.9** and **Art 21.10**.

Article 23 - Victim's right to compensation

- We strongly advise to **remove statutory limitations** on a victim's right to compensation.

We highly support the inclusion of **Article 25 - Multi-agency and multi-stakeholder coordination and cooperation** as this is crucial for successful prosecution of criminal offences that fall within the scope of this directive, as well as for victim support.

We positively acknowledge the change of terminology in **Article 26** of 'child sex tourism' and would recommend an additional change to the term: '~~the sexual abuse~~ → **sexual violence against** ← **and sexual exploitation of children in travel and tourism**' which is in accordance with the Luxembourg Guidelines.

Article 28 – Prevention



- We appreciate that the changes in **Art. 28.1** hold member states accountable to conduct and support public awareness campaigns as part of their prevention strategy.
- **Art. 28.4** establishes that all community settings need to adapt child protection policies, however it does not consider online social spaces as community settings. We see this as a huge shortcoming and would strongly advise to revise this part. When we look at e.g. digitalization of schools it is of utmost importance to **address online dimensions specifically**.

We welcome the inclusion of **Article 31 – Data collection** since it is to have comparable data that adheres to the same standards across Member States in order to evaluate, further develop and improve the strategy on combating and preventing sexual violence against children.

Additional Remarks:

- The inclusion of point (33) on providing a framework for the cooperation with financial institutions and other service providers is very much needed.
- We welcome the inclusion of the refusal of entry into a country for child sex offenders which is stated under point (42) in the first part of the proposed directive.
- We strongly agree and support point (56) which states that child sexual abuse material should not be construed as expression of opinion and that Member States should use their best endeavours to cooperate with third countries in seeking to secure the removal of such content from servers within their territory. Often the defence of ‘expression of opinion’ or ‘art’ is used by offenders who create fictive child sexual abuse material, in particular AI-generated child sexual abuse material.

ECPAT Deutschland e.V.

The Working Group for the Protection of Children against Sexual Exploitation - ECPAT Deutschland e.V. is a nationwide association of 25 organizations, aid agencies and advice centres. ECPAT is active in the fields of politics, justice, business and education and, in cooperation with (non-)governmental partner organizations, carries out measures and projects to raise awareness among the professional public, to develop preventive measures and to create the legal basis for the protection of children from sexualized violence, sexual exploitation and human trafficking. The specialist unit was founded in 2001 and is part of the international ECPAT network based in Bangkok/Thailand.

Further information can be found at www.ecpat.de.

Contact for questions and further informationen

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