



July 2022

## Public consultation on EU Directive 2011/93/EU on combatting sexual abuse and sexual exploitation of children and child pornography

### Submission of ECPAT International in consultation with ECPAT members in the EU

[ECPAT International](#) is a global network of civil society organisations working towards the vision of ending the sexual exploitation of children. With over 30 years of experience in engaging with and managing multi-stakeholder processes and alliances across national, regional and global levels; ECPAT is considered to be at the helm of all issues and manifestations pertaining to the sexual exploitation of children. With a Secretariat based in Bangkok (Thailand), driving strategic direction, producing key research and working on global advocacy; together with the on-the-ground efforts of [122 members](#) in 104 countries, the network approach bridges local communities, governments and the private sector; offering a global approach combined with customised national actions.

This submission aims to complement ECPAT response to the public consultation's survey to evaluate and assess the impact of [EU Directive 2011/93/EU on combatting sexual abuse and sexual exploitation of children and child pornography](#). It is presented as a list of concise recommendations to revise the Directive. We invite the reader to look through publications from ECPAT International and relevant ECPAT members for further in-depth analysis:

- [ECPAT International](#)
- [ECPAT Austria](#) (Austria)
- [ECPAT Belgium](#) (Belgium)
- [National Network for Children](#) (NNC) (Bulgaria)
- [Neglected Children's Society](#) (Bulgaria)
- [Tartu Child Support Center](#) (Estonia)
- [Save the Children Finland](#) (Finland)
- [ECPAT France](#) (France)
- [ECPAT Germany](#) (Germany)
- [Association for the Social Support of Youth](#) (ARSIS) (Greece)
- [Hintalovon Child Rights Foundation](#) (Hungary)
- [ECPAT Italy](#) (Italy)
- [ECPAT Luxembourg](#) (Luxembourg)
- [Defence for Children - ECPAT Netherlands](#) (Netherlands)
- [Empowering Children Foundation](#) (Poland)
- [Centro Integrado de Apoio Familiar \(CIAF\)](#) (Portugal)
- [Salvati Copiii - Save the Children Romania](#) (Romania)
- [The Federacion de Asociaciones para la Prevencion del Maltrato Infantil \(FAPMI\) - ECPAT Spain](#) (Spain)
- [ECPAT Sweden](#) (Sweden)
- [ECPAT Norway](#) (Norway - member of the European Economic Area Agreement)

For any enquiries, please contact ECPAT International Communication Team at [communications@ecpat.org](mailto:communications@ecpat.org) or ECPAT International Regional Coordinator for the EU, Isaline Wittorski, at [isalinew@ecpat.org](mailto:isalinew@ecpat.org).

## New areas

- The Directive should take into account **innovation in information and communication technologies** (ICTs) including the emergence of artificial intelligence (AI), augmented reality (AR), virtual reality (VR) and the metaverse, the adoption of end-to-end encryption, the use of digital currencies, use of darknet and peer-to-peer, live online child sexual abuse. At the same time, the Directive should acknowledge that the boundary between sexual exploitation and abuse of children committed with or without the use of information and communication technologies ('online' and 'offline') is often blurred in practice.<sup>1</sup>
- In line with the European Commission's proposal for a Regulation to prevent and combat child sexual abuse, the Directive should align the obligations regarding the detection, reporting, removal of online child sexual exploitation and abuse (CSEA).
- The Directive should address, in a clear and nuanced way, the complexity of **peer-on-peer abuse or sexual offending by minors**, including where child sexual abuse material (CSAM) is produced.
- The Directive should address, in a clear and nuanced way, the complexity of self-generated sexual material by children as the fastest growing category of CSAM found on the open web, including in determining the level of consent and coercion.
- The provisions of the Directive should be **aligned with the provisions of more recent / upcoming EU instruments**, including the Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, the EU's Audiovisual Media Services Directive (AVMSD), the General Data Protection Regulation (GDPR), the Digital Services Act (DSA), the Artificial Intelligence Act (AI) and the proposed proposal for a Regulation to Combat and Prevent Child Sexual Abuse (notably concerning terminology, obligations imposed on providers of information society services, age of consent).

## Article 2 - Definitions

Definitions need to be **clearer and up to date**.

- Revise the outdated and harmful use of child prostitution, child pornography and child sex tourism as recommended by Luxembourg Guidelines<sup>2</sup>. In particular:
  - Revise terminology of child pornography by 'child sexual abuse material' (CSAM) as recommended by Luxembourg Guidelines<sup>3</sup> and ensure it covers text and audio as well as videos and images.
  - Include definition and specific criminalisation of live online child sexual abuse, as recommended by Luxembourg Guidelines<sup>4</sup> and recent ECPAT France Report<sup>5</sup>, acknowledging the severity of this offence. While the Directive criminalises 'pornographic performances', this terminology does not appropriately reflect the gravity of the offence and its definition does not appropriately cover the scope of live online child sexual abuse. Among others, live online child sexual abuse is not necessarily 'aimed at an audience' but can result from the trafficking of children for sexual purposes. The notion of 'attending' may provoke misconception regarding the passivity of the offenders who may take an active role by requesting and/or directing

---

<sup>1</sup> Interagency Working Group, [Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse](#) ("Luxembourg Guidelines"), ECPAT International and ECPAT Luxembourg, Luxembourg, 28 January 2016, p. 28.

<sup>2</sup> Interagency Working Group, [Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse](#) ("Luxembourg Guidelines"), ECPAT International and ECPAT Luxembourg, Luxembourg, 28 January 2016.

<sup>3</sup> Luxembourg Guidelines, above.

<sup>4</sup> Luxembourg Guidelines, above.

<sup>5</sup> ECPAT France, [Deep Dive into the Phenomenon of Live Online Child Sexual Abuse and Exploitation: How to better protect children?](#), May 2022, in particular p. 31 and ff.

the sexual abuse of children, by paying in order to engage in such activity, or by grooming and/or sexually extorting children with the aim of sexually abusing them.<sup>6</sup>

- Include the definition and criminalisation of sexual extortion of children, as recommended by the Luxembourg Guidelines<sup>7</sup>.
- Review the definitions to ensure they cover all forms of sexual abuse and exploitation of children facilitated with or without **the use of information and communication technologies**. The definitions should reflect the technological developments, including the emergence of artificial intelligence (AI), augmented reality (AR), virtual reality (VR). Following the approach of the Council of Europe, these definitions should be formulated, where possible, in a technology-neutral manner, leaving room for the emergence of new technologies.<sup>8</sup>
- Revise the use of binary his/her to include **gender fluid identities**, i.e. they or their. This is especially important for translations of the Directive in languages which use gendered nouns (e.g. French, Spanish and Italian translation all use only masculine nouns/articles to refer to the offender and to the child).

### Articles 3 and 4 - Penalties

- Address **discrepancies in terms of suggested penalties** based on whether the child victim is below or above the **age of sexual consent**. At the moment, for all crimes included in the Directive, different penalties are suggested depending on whether the child is below or above the age of sexual consent (article 3 - offences concerning sexual abuse; article 4 - offences concerning sexual exploitation). Crimes of sexual abuse and sexual exploitation should protect all children below 18 equally: even though adolescents have agency to consent to sexual activity (with peers), they cannot consent to be sexually exploited or abused.<sup>9</sup> At the same time, consensual activity between adolescents, with no element of coercion, abuse of trust or dependency between the participants, should be protected from unnecessary prosecution (see below, Article 8).
- Address **discrepancies in terms of suggested penalties for online versus offline abuse**: Suggested penalties associated with CSAM/OCSEA crimes are lower in proportion to in-person abuse, perpetuating the idea that online crimes are “victimless” crimes. The penalty suggested for the possession of CSAM is lower than the one for distribution: this does not consider the role that possession has on demand nor the additional trauma caused to the child portrayed in the material. ECPAT does not necessarily recommend for penalties to be higher, but the Directive should clearly indicate how online crimes, including live online child sexual abuse, are not a less severe form of abuse. A first concrete step would be for the possession of CSAM to be treated equally to other CSAM crimes (distribution etc.).

### Article 5 - Offences concerning child pornography

- Revise Article 5.7. to remove the discretion left to Member States and require them to criminalise 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. Harmonisation among Member States on this point is essential to ensure legal certainty for the classification of child sexual abuse material in the framework of the upcoming Regulation to prevent and combat child sexual abuse.
- Revise Article 5.8. to remove the discretion left to Member States and require them to equally criminalise pornographic material as referred to in Article 2(c)(iv) (realistic images) produced

---

<sup>6</sup> Ibid. p. 32.

<sup>7</sup> Luxembourg Guidelines, above.

<sup>8</sup> Council of Europe Committee of Ministers, [Guidelines to Respect, Protect and Fulfil the Rights of the Child in the Digital Environment](#), para. 74.

<sup>9</sup> Along the same line, see UNICEF, [Legislating for the digital age: Global guide on improving legislative frameworks to protect children from online sexual exploitation and abuse](#) (“UNICEF Global Guide 2022”), New York, 2022, p. 58.

and possessed by the producer solely for his or her private use. Realistic images falls under the definition of child sexual abuse material and should be criminalise as such.

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

- **Enlarge the definition to criminalise the solicitation of children for sexual purpose**, whether child sex offenders intend to meet offline or not, whether the actual meeting/sexual abuse takes place or not, and whether the criminal offence is carried out to a child or through a third party - as recommended per the Lanzarote Committee opinion adopted in 2015<sup>10</sup>, the Luxembourg Guidelines<sup>11</sup> and and recent ECPAT France Report on live online child sexual abuse<sup>12</sup>. The Directive should indeed criminalise solicitation of children may occur with no intention to sexually abuse the child in-person but online, for example by asking the child to share self-generated sexual content. There is no reason why the definition of solicitation of children for sexual purposes should be limited to acts where a physical, in-person meeting has been attempted and/or occurred.
- Remove the clause which requires the existence of material acts leading to the meeting in order to prove the crime.

#### Article 8 - Consensual sexual activities

- Seek **harmonisation regarding age of sexual consent**. Variation across Member States creates a difference in protection of children with no justification. Children should have the same rights and protection across EU Member States.
- Remove the discretion left to Member States in Article 8 and ensure the law **protects children from unnecessary prosecution**, as recommended notably by CRC Committee<sup>13</sup>, the Lanzarote Committee's Opinion of 2019<sup>14</sup> and UNICEF 2022 Global guide<sup>15</sup>. In particular, *"adolescents who are close in age, maturity and development should not be criminalized for consensual and non-exploitative sexual activity, provided that there is no element of coercion, abuse of trust or dependency between the adolescents, regardless of whether or not it is facilitated by the use of ICTs"*.<sup>16</sup> Currently, Article 8 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 pornography
  - Article 5(6) production of child pornography

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

---

<sup>10</sup> Committee of the Parties to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (T-ES), [Opinion on Article 23 of the Lanzarote Convention and Its Explanatory Note](#), 23 June 2015, Paragraph 17.

<sup>11</sup> Luxembourg Guidelines, above, Point H.3.

<sup>12</sup> ECPAT France, [Deep Dive into the Phenomenon of Live Online Child Sexual Abuse and Exploitation: How to better protect children?](#), May 2022, in particular p. 98.

<sup>13</sup> CRC Committee General Comment No. 20, 2016, para. 40; CRC Committee, Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, CRC/C/156, 10 September 2019, para. 73.

<sup>14</sup> Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, [Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children](#), Adopted on 6 June 2019.

<sup>15</sup> UNICEF, [Legislating for the digital age: Global guide on improving legislative frameworks to protect children from online sexual exploitation and abuse](#) ("UNICEF Global Guide 2022"), New York, 2022, p. 56.

<sup>16</sup> Ibid.

### Article 9 - Aggravating circumstances

- Include in the list of **children with particular vulnerabilities**, LGBTQ children and children who are seen as not conforming to conventional norms relating to sexual orientation, gender identity and expression (SOGIE).
- Include a general **non-discrimination clause**, in line with Article 21 of the EU Charter.

### Article 10 - Disqualification arising from convictions

- Ensure that the functioning of existing **mechanisms to centrally register offenders** of crimes of child sexual exploitation and abuse are guided by human and children's rights.
- Revise Article 10(1) to cover not only professional activities but also voluntary activities (as for Article 10(2)). ECPAT recommends that the national legislations should prohibit convicted sex offenders to hold positions in both public and private settings involving or facilitating direct contact with children. This prohibition should include national and non-national offenders and refer to staff, consultants and volunteers.
- Revise Article 10(2) which currently *entitles* employers to conduct **background checks** for professional or voluntary activities to *require* employers to conduct such background checks.

### Article 14 - Non-prosecution or non-application of penalties to the victim

- Remove the discretion left to EU Member States and require them not to prosecute or impose penalties on child victims of any crimes of sexual abuse or exploitation: replace "are entitled no to prosecute or impose penalties" by "do not prosecute or impose penalties" following the recommendations of the Lanzarote Committee<sup>17</sup> and UNICEF Global Guide 2022.<sup>18</sup>

### Article 15 - Investigation and prosecution

- Require Member States to remove **statutory limitations** for the prosecution of all offences of sexual exploitation and abuse of children.
- Require Member States to ensure that children alleged as, accused or convicted of a crime are handled in accordance with **child-friendly justice principles and procedure**.
- *Article 15(3) - Investigation tools:*
  - Include reference to psychological forensic experts.
  - Include investigation tools specific to child sexual abuse facilitated by ICTs - including the technological tools which will be listed by the EU Centre to prevent and combat child sexual abuse online in line with the European Commission's proposed Regulation.<sup>19</sup> The Directive should acknowledge the specific needs of law enforcement authorities in terms of expertise, resources, technologies as well as criminal procedure rules to investigate CSEA facilitated by ICTs.<sup>20</sup>
- *Article 15(4) - Victim identification:* Include reference to the need for European and international cooperation. Specialised capacity in victim identification is needed.

### Article 16 - Reporting suspicion of sexual abuse or sexual exploitation

- Enlarge the requirements imposed on reporting mechanisms and require **visible, clear as well as simple, child-friendly and gender sensitive reporting mechanisms**, including for online

---

<sup>17</sup> See notably Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, [Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children](#), Adopted on 6 June 2019.

<sup>18</sup> UNICEF Global Guide 2022, above.

<sup>19</sup> See also the recommendations regarding procedures and methods of investigation of online CSEA, in UNICEF Global Guide 2022, above, pp 113 and ff.

<sup>20</sup> See notably UNICEF Global Guide 2022, above, pp. 113 and ff.

CSEA, in every Member States - as recommended by survivors.<sup>21</sup> Confidentiality is only one element required for appropriate reporting mechanisms.

- Require Member States to adequately resource such mechanisms and ensure they provide good quality care and support.
- Encourage Member States to diversify mechanisms for children to disclose concerns, seek help and formally make reports as well as to increase information and awareness about reporting mechanisms and available support services when harms occur.
- Strongly encourage the adoption of the **Barnahus model**, as child-friendly centres for abuse victims.
- Ensure the existence of reporting mechanisms for **online child sexual abuse materials** in every Member States, their ability to analyse such materials and to conduct proactive search.

#### Article 18 - General provisions on assistance, support and protection measures for child victims

#### Article 19 - Assistance and support to victims

- Ensure assistance and **support to victims are provided as soon as a report is made**. Article 19 refers to assistance “before the criminal proceedings” while not specifying the starting point. Once reports are made, children should receive age-appropriate information about the processes to be followed and their rights throughout. These rights must be the paramount consideration when proceeding with investigations and court processes.
- Ensure **trauma sensitive and gender sensitive care** and services for victims. While it is essential to tackle CSA of girls, the Directive should also address the systematic gaps in meeting the needs of boys subjected to CSA and to better consider children who are seen as not conforming to conventional norms relating to sexual orientation, gender identity and expression (SOGIE). Gender norms make boys invisible when it comes to questions of sexual abuse and exploitation, and boys are not seen as vulnerable or at risk, affecting both prevention and how response services are carried out. The taboos around the ideas of sex and sexuality see boys as participatory actors in sexual exploitation, meaning that situation of exploitation or abuse are perceived as part of the normal process of sexual exploration of boys, making in turn disclosure even more difficult. These realities disproportionately affect SOGIE children.<sup>22</sup>
- Update the article based on the provisions of the Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

#### Article 21 - Measures against advertising abuse opportunities and child sex tourism

#### Article 20 - Protection of child victims in criminal investigations and proceedings

- Ensure **trauma sensitive and child-friendly procedures**. Once reports are made, children should receive age-appropriate information about the processes to be followed and their rights throughout. These rights must be the paramount consideration when proceeding with investigations and court processes.<sup>23</sup>
- Efforts should be made to avoid re-victimisation by ensuring psychological support and confidentiality standards at all stages of the justice process and provision of support services.<sup>24</sup>

#### Article 22 - Preventive intervention programmes or measures

(See below comments on offender prevention and rehabilitation under Article 24).

---

<sup>21</sup> See ECPAT International & WeProtect Global Alliance, [Child sexual exploitation and abuse online: Survivors' Perspectives](#), 2022.

<sup>22</sup> For further recommendations on this issue, see [ECPAT Global Boys Initiative](#).

<sup>23</sup> See ECPAT International & WeProtect Global Alliance, [Child sexual exploitation and abuse online: Survivors' Perspectives](#), 2022.

<sup>24</sup> Idem.



### Article 23 - Prevention

- Elaborate more the necessity of trauma informed preventative measures. While the Directive is quite clear in requiring preventive awareness campaigns and educational programmes, much more remains to be done in terms of implementation. Besides, such programmes should address the specific risk in the online environment related to CSEA, safe online practices and available support and reporting mechanisms.<sup>25</sup> Specific training, information campaigns and open dialogues between communities, caregivers, and young people should be promoted.
- Require Member States to request **Child Safeguarding Policies** for organisations working directly with children as the key-standard for preventing harm against children and ensuring appropriate response if harm occurs.
- Require Member States to ensure regular training (instead of simply ‘promoting’ them) as considered by Article 23(3) and enlarge the **recipients of training** to cover any person working in contact with children, including teachers, staff in schools, health workers and all those providing psychosocial support. These trainings should cover the opportunities and risks in relation to CSEA facilitated by ICTs.

### Article 24 - Intervention programmes or measures on a voluntary basis in the course of or after criminal proceedings

- **Strengthen offender prevention and rehabilitation.** It is important to shift the narrative away from vilification and stereotypes towards a more nuanced understanding of the pathways to offending and the documented success of therapy and support programmes.<sup>26</sup> Member States should ensure public health messaging and targeted stakeholder education to foster a culture of prevention.
- Make rehabilitation programmes mandatory for all offenders. At present, Article 24(3) states that suspects and offenders *may have* access to intervention programmes.
- Encourage **alternatives to imprisonment.** As requested by principles of criminal law, criminal sanctions, and detention in particular, should be considered as the ultimate sanction. Young sex offenders, in particular, should benefit from a more diverse penal system.

### Article 25 - Measures against websites containing or disseminating child pornography

- Update to align with European Commission proposed Regulation on Child Sexual abuse, including mandatory reporting and mandatory blocking to web pages.

---

<sup>25</sup> Idem. See also UNICEF Global Guide 2022, above, pp. 160 and ff.

<sup>26</sup> Several successful and innovative projects exist, including Protect Children Finland ‘[ReDirection](#)’, the Stop It Now campaign available in several EU Member States or the EU website ‘[HelpLinks.eu](#)’.