

## AGE OF CONSENT AND NON PROSECUTION OF CHILDREN FOR CONSENSUAL ACTIVITIES WITH PEERS

*ECLAG Memo 2 on the proposed Child Sexual Abuse Directive*  
October 2024

ECLAG welcomes and supports the [EC proposed recast of Directive 2011/93/EU of February 2024 on Sexual Abuse and Exploitation of Children](#) and **call for important amendments to ensure all children up to the age of 18 are protected from sexual exploitation and abuse, irrespective of the age of consent.** In particular, we ask to:

### 1. Require the same penalties for sexually abusing a child below or above the age of consent

- The age of consent is a legal threshold that determines when an individual is considered legally capable of agreeing to sexual activity. However, **even if a child is above the age of consent, they can still be subjected to abuse or exploitation.**
- **The age of consent is therefore irrelevant when determining the penalties for acts that fall within the scope of sexual abuse and exploitation.** The abuse or the rape of a child should not carry a lower penalty simply because the child is above the age of sexual consent. Abuse is abuse; rape is rape - whether or not the child is above the age of consent is simply irrelevant. **The crime lies in the abuse and exploitation of the child, not in the child's legal capacity to consent.**
- In addition, lower penalties for the sexual exploitation and abuse of a child above the age of consent undermines **States' obligation to protect all children up to the age of 18**, as emphasised by international bodies such as the UN CRC Committee,<sup>1</sup>
- The children's age should rather be added as an **aggravating circumstance** on the ground of **vulnerability** due to their young age (*Article 11*).

→ See our amendments to Articles 3, 4 and 11.

### 2. Criminalise all forms of exploitation and abuse of children up to 18 years old

- The Directive should ensure that **children above the age of consent are protected:**
  - **from non-consensual sexual activities with a peer** and;
  - **from sexual activities with a person who is not a peer** and to which they cannot consent.

---

<sup>1</sup> See notably UN Committee on the Rights of the Child (CRC), [General Comment No. 20 \(2016\) on the Implementation of the Rights of the Child During Adolescence](#), para. 40.

- The current proposal fails to protect children in these circumstances and needs to be amended.

→ See our amendments to Article 3.

### 3. Protect children from being prosecuted for consensual activities with peers

- ECLAG welcomes the **definition of peers** (*Article 2*). However the Directive **leaves it to Member States’ to decide** whether the list of crimes applies or not to consensual activities between peers, including the sharing of intimate content. (*Article 10*).
- As recommended by the United Nations Committee on the Rights of the Child on multiple occasions<sup>2</sup>, the Lanzarote Committee Opinion of 2019<sup>3</sup> and the UNICEF Global Guide 2022<sup>4</sup> children must be protected from **prosecution for consensual and non-exploitative sexual activity with their peers**, provided that there is no element of coercion, abuse of trust or dependency between them. Along the same line, the Lanzarote Convention<sup>5</sup> provides that the criminalisation of engaging in sexual activities with a child does not intend to govern consensual sexual activities between minors.
- The protection of children from prosecution should apply to consensual sexual activities **among peers only**. The imbalances of power between a child above the age of consent and an adult or a person who is too old to be considered a peer make it more challenging for children to object to certain acts. Adults hold more maturity, and authority, which can lead to manipulation or coercion, making consent difficult. This dynamic creates an unequal and potentially harmful relationship, where the child is vulnerable to exploitation, even if it seems consensual.
- Children use technology to explore and express their sexuality, which may involve generating and sharing sexually suggestive or explicit content of themselves. Both the UN Committee on the Rights of the Child<sup>6</sup> and the Lanzarote Committee<sup>7</sup> have stated that children should **not be criminally liable when they possess or share sexually explicit content of themselves** or

<sup>2</sup> See : UN CRC, General Comment No. 13 (2011) on the Right of the Child to Freedom from All Forms of Violence, para 25 (a); UN CRC, [General Comment No. 20 \(2016\) on the Implementation of the Rights of the Child During Adolescence](#), para. 40: ‘States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.’; UN CRC, General Comment No. 24 (2019) on children’s rights in the child justice system, para 12; UN CRC, 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>3</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>4</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. 58 ‘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>5</sup> Council of Europe, Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, 12 July 2007, CETS No: 201.

<sup>6</sup> UN CRC Committee, [General comment No. 25 \(2021\) on children’s rights in relation to the digital environment](#), para 118: ‘Self-generated sexual material by children that they possess and/or share with their consent and solely for their own private use should not be criminalized.’

<sup>7</sup> Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, [Implementation report, The protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies](#), adopted on 10 March 2022.

another child (when the depicted child provided his/her informed consent), as long as the sharing is **voluntary** and intended for **private** use. It is crucial to distinguish this voluntary and consensual sharing from the distribution of child sexual abuse material.<sup>8</sup> (*Article 5(10)*)

- Criminalising the consensual exchange of intimate content among peers **stigmatises children**. Sexting can be seen as a natural progression of a romantic relationship, when consensual and among peers. The criminalisation can also prevent children from seeking help in dealing with risks of abuse or from reporting cases of child sexual abuse and exploitation to practitioners or law enforcement.
- Accordingly, **the Directive should remove Member States' discretion to criminalise consensual activities between peers** (Article 10) and ensure, as the Lanzarote Convention does, that the list of crimes does not apply to consensual activity between peers who are close in age, maturity and development.

→ See our amendments to Article 10.

#### 4. Include a 'yes is yes' definition of consent

- ECLAG welcomes the Commission's definition of 'non-consensual sexual act' (*Article 3 (9)*) and 'consensual activities' (*Article 10 (5)*). **To ensure children's protection from sexual abuse**, it is indeed crucial that **the Directive require an affirmative "yes" for consent to take place between peers only**.
- ECLAG recalls that **consensual sexual activity can only take place between peers**, when there is no element of coercion, abuse of trust or dependency between them.
- **The best interest of the child requires that children are protected** in situations where they might not have explicitly objected, where they are unable to object or where they give a less apparent answer. Trauma response can include freeze or fawn with the inability for the child to raise an objection when facing abuse. There might also be cases of **imbalances of power** or **pre-existing trauma**, all of which affects the child's ability to consent and say no. It is, therefore, extremely important for consent to be provided explicitly and freely.
- An **affirmative consent approach** recognizes these vulnerabilities and **offers stronger protections against abuse**, reducing the likelihood of **secondary victimisation** and ensuring that victims are not burdened by unreasonable expectations of physical resistance. As highlighted by GREVIO experts<sup>9</sup>, this approach "provide(s) **clearer rules** to parties at risk of perpetrating or being victims of sexual violence, as well as providing clarity to those charged with **investigating and prosecuting** such cases".
- ECLAG asks however to ensure alignment between the definition of 'non-consensual sexual act' (*Article 3 (9)*) and 'consensual activities' (*Article 10 (5)*) with regards to the circumstances preventing child's free will.

---

<sup>8</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>9</sup> Council of Europe, [4th General Report on Group of Experts on Action against Violence against Women and Domestic Violence's \(GREVIO\) activities covering the period from January to December 2022](#).

→ See our amendments to Articles 3 and 10.