
NGO POSITION PAPER

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

27 September 2010

Save the Children

Missing Children Europe

European NGO Alliance for Child Safety Online (eNACSO)

End Child Prostitution, Child Pornography and the Trafficking of Children (ECPAT)

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

**NGO POSITION ON THE PROPOSAL FOR A DIRECTIVE ON COMBATING THE SEXUAL ABUSE,
SEXUAL EXPLOITATION OF CHILDREN AND CHILD PORNOGRAPHY, September 2010**

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eNACSO is 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

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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.

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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

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)

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measures may also include legally binding instruments (regulations, directives and decisions) 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.

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

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- 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;
 - 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”.

purposes” would not fall within 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.

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.

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 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 of victim support organisations, including non-governmental organisations, other

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.

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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. It is therefore important that the provision of article 14 (2) is maintained, including with regard to the offences under Article 5(6) of the proposed directive

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”.

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.

Please also see Annex 1, which outlines our position on blocking; Annex 2, on removal, blocking, child protection and fundamental rights and; Annex 3, with proposals for amendments to Article 21, based on the elements presented above.

ANNEX 1. JOINT NGO POSITION ON BLOCKING

1. Child Abuse and the Internet

Without doubt the best way to prevent child abuse images being circulated on the internet is to stop child abuse in the first place. The draft Directive contains a broad range of measures which tackle the wider setting within which child abuse takes place. It would be quite wrong for the debate on the draft Directive to focus solely on the images of child abuse. The images are but one part, one dimension, of a much, much bigger set of typically very tragic issues. Of course finding ways to deal with the images is also extremely important, indeed we believe it is absolutely vital, but it would be regrettable if that aspect were to dominate the debate on the many other key challenges which are reflected in and addressed by the other articles within the draft Directive.

2. Child abuse images are a visual record of abuse and humiliation

It is bad enough that a child has been sexually abused but for a record of that abuse and the attendant humiliation to be captured and then published on the internet, potentially for the whole world to see, can add hugely to the psychological damage already done to the child by the originating abusive act.

3. The images undermine the child's self confidence and self esteem

The child in the image can never know, never be certain, who might have seen or downloaded the images. It severely undermines self confidence and gnaws away at a child's sense of self esteem. Every casual glance or remark from a stranger potentially is seen and interpreted through the prism of the possibility, the anxious embarrassing worry, that the other person knows about or has seen what has been done to them. As a distinguished clinician in the field has put it¹⁴

“The distribution of child sex abuse images means there can be one victim and many offenders. The fact that these images are spread and downloaded by others leads to heightened symptoms of post traumatic stress disorder, depression and or anxiety, plus a diagnosis so far not commonly seen in child sex abuse cases – paranoia.”

¹⁴ Dr Sharon Cooper, MD FAAP, University of North Carolina Chapel Hill School of Medicine, USA

4. The images are a gross violation of the child's right to privacy

In any and all proceedings concerning the abuse of a child, the courts and the professional staff working with the child go to extraordinary lengths to preserve the anonymity of the victims. That is rooted in sound therapeutic principles. If nothing else, we invite people to think about the production and publication of child abuse images as being a gross, an egregious violation of the child's right to privacy. Critics of Article 21 are often completely silent on this point.

5. Preventing further publication is a very important child protection measure

The fact that a child knows or believes images of their abuse continue to be spread on the internet leads to ever greater feelings of a loss of control and helplessness. Therapists and counsellors who work with child abuse victims whose images have appeared on the internet¹⁵ therefore agree it can help the child enormously to regain some sense of control over their lives, and immeasurably improves their chances of getting on to a path to some sort of recovery, if the child is seen to be believed about the abuse they have suffered and also recognizes that everything possible is being done, as fast as possible, to stop any more people looking at those pictures. And if the child cannot be sure that everyone will be stopped from seeing the pictures e.g. people who have already downloaded the images and are storing them offline, then they are at least comforted and helped by knowing that everything that can be is being done, again as quickly as possible, to stop the images spreading any further or being seen by any new or additional people. As another distinguished clinician put it:

*"If we as clinicians do not convey to the child that we are doing everything in our power to stop further distribution of the images, we send the wrong signals to the child and may strengthen destructive patterns."*¹⁶

Of course removing the pictures from public view is not the be all and end all of the matter. As the same clinician observed:

"On the other hand if we convey the sense that it is absolutely necessary to stop all further distribution for the child ever to feel OK about herself or himself again we end up in another corner and may disrupt the healing process. Working with accepting the consequences of a crime committed towards the child must always be connected with a clear message and a clear stand against the injustice committed against the child. And such a stand must also always be followed by actions. Thus I believe the disruption of distribution of the images to be a key factor in the recovery process but it is not the only or necessarily the main factor."

¹⁵ Tink Palmer, Marie Collins Foundation, UK, Julia von Weiler, Innocence in Danger e. V, Germany.

¹⁶ Bengt Söderström, psychologist, Stockholm Child & Adolescent Psychiatry

6. Further publication re-abuses the child

Echoing these views, for as long as the images remain on public view the child is in a very real sense being "re-abused". It is also why we say people who deliberately engage in viewing or downloading these images are child abusers by proxy, not so very different from those who made or put the images on the internet in the first place. A survivor of abuse that was recorded in photographs put it like this:

*"Those who view the images of my abuse are no different from those who made them in the first place. It feels like they are in the room, encouraging my abuse. I know, technically, there is a difference but, for me, it's not a lot of difference"*¹⁷

7. Further publication risks creating new child abusers

There is a growing body of evidence which suggests that people who deliberately download and start collecting child abuse images have a higher likelihood of going on to commit further offences against children, either online or in the real world, or both¹⁸. The images can fuel their fantasies and spur them on to commit further illegal acts. That is the second major reason for wanting such images to be removed from public view as quickly as possible: it helps reduce the numbers of potential new online and offline child abusers.

8. Removal of the illegal images by deletion or take down is the preferred option

We trust it is now clear why we are very concerned to ensure that, once discovered, any child abuse images are removed from public view as swiftly as possible. Ideally this removal will be achieved by the deletion of the material at source, linked to an immediate investigation by relevant agencies to determine who the children are and where they are to be found so that appropriate forms of intervention to help the victims can be planned and put in hand. Linked to this should be a law enforcement investigation to determine who was responsible for producing and distributing the material and holding them to account.

However, where deletion at source cannot be achieved swiftly, blocking can play an extremely valuable role. It can be used as an important short-term disruption tactic whilst the content is getting fully and permanently removed. It is in this sense that Article 21 makes a very important contribution to child protection.

¹⁷ Marie Collins, Dublin

¹⁸ See for example, *Self-Reported Contact Sexual Offenses by Participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet Sex Offenders*, Hernandez, November 2000, presented at the Association for the Treatment of Sexual Abusers (ATSA) in San Diego, California; also *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*. Kim, C (2004), based on data from the US Postal Inspection Service, Kim, C; and *Internet traders of child pornography and other censorship offenders in New Zealand: Updated Statistics (November 2004)*, Wilson and Andrews.

Whilst it is common ground that the ideal solution is for the images to be completely deleted and removed from the server where they are being housed, we all know this is simply not happening at the moment, and it never has. The Italian experience shows us it is possible to act against images at great speed¹⁹ yet academics from the University of Cambridge have shown²⁰ that, in reality, once a report has been made to the appropriate authorities, images can nonetheless still stay up on the web for substantial periods of time, months, or even years. The work of these academics is confirmed on an on-going basis by the daily experience of the individual hotlines that make reports relating to the same sites that they have previously reported on many occasions.

The great majority of the child abuse images on the web are housed on servers in countries outside of the EU. This does not mean that the children being depicted are necessarily from outside the EU. It is often hard to know where the children are from, but children the world over deserve our concern. The universal reach of the internet means we can no longer confine our safeguarding activities to children living within the geography of our own national boundaries and in any event the fact remains that the presence of these images on the internet has a very direct impact within the EU, in the ways we have described above. That is part of the justification for the Commission's proposal.

9. Do not let the best be the enemy of the good – blocking can play a valuable role

The web is by far the most popular and most widely used internet interface and that is why it is so important to deal with it as best we can. We acknowledge that at the moment it is possible to circumvent web blocking but if every country in the world were doing blocking there would be far fewer or no alternative addresses for people "to circumvent to".

Moreover, and perhaps more importantly, the evidence we have about the profiles of people arrested for downloading child abuse images suggests that the majority were not especially technically literate or competent²¹. They could very easily have been deterred from going on to find images that had been put behind a technical barrier such as web blocking. The fact that highly motivated and highly technically literate offenders can circumvent a particular measure is no reason to abandon that measure altogether. Look at the continuing battle against spam and viruses.

If we can prevent a significant number of people from becoming engaged with child abuse images it promises to free up law enforcement's time and resources to allow them to track

¹⁹ In Italy by law once notified by the police ISPs have six hours to remove or block access to identified illegal material or addresses.

²⁰ "The Impact of Incentives on Notice and Take-down", Moore and Clayton

²¹ Lucy Faithfull Foundation

down and deal with the smaller numbers of people who are clearly very determined to find the images and who also have the technical knowledge so to do.

10. Very large numbers of attempts are involved

In 2009 BT announced that they estimated their blocking solution is preventing up to 40,000 attempts per day to access known child abuse web sites over their broadband network. Extrapolated across the whole of the UK broadband network this suggests that blocking is preventing up to 58 million attempts per year²². Five months after blocking was launched in Denmark in 2006 the Danish police estimated that 238,000 users had attempted to reach known illegal child abuse images on the web²³. It was estimate that in Norway blocking was stopping between 10 and 12,000 attempts per day and in Sweden it was in the order of 20 – 30,000 per day²⁴. These are substantial numbers which give us an insight into the scale of offending which blocking addresses. The Danish police referred to the number of users, but the UK, Norwegian and Swedish numbers refer to attempts, many of which will be machine based but even so each and every attempt whether by a human or an automated system represents a criminal act of some sort.

11. Other technologies present different challenges demanding different solutions

We know and again acknowledge that web site blocking does not touch other technologies that are also used to distribute child abuse images. Most obviously we need to address the issue of Peer2Peer software and the re-emergence of Usenet Newsgroups as repositories for child abuse images. They require separate and additional measures. It is not a choice between tackling these or tackling the web. We need to do both.

We are glad that the European Financial Coalition is busy dealing with the supply side of commercial sites. Locking out the producers and distributors from online payments systems is hugely important. ICANN25 and their associated TLDs²⁶ should formulate policies and procedures to forbid the use of the domain names system to promote sites which obviously provide access to child abuse images, or which regularly contain such images or disseminate information about where to obtain them.

²² http://www.theregister.co.uk/2009/04/07/bt_cp_figures/

²³ http://www.politi.dk/da/aktuelt/nyheder/2006/boernepornofilter_24052006.htm

²⁴ http://www.politi.dk/da/aktuelt/nyheder/2005/filter_181005.htm

²⁵ The Internet Corporation for Assigned Names and Numbers

²⁶ Top Level Domains

12. Investigating the producers and distributors is essential in all cases

We completely reject the idea that if blocking is put in place it will somehow lead to a lessening of the pressure to apprehend the criminals behind the production and distribution of the abusive images. Blocking is a legitimate, we say necessary, tactic to disrupt the trade in or display of images whilst they are properly investigated and taken down by deletion at source.

13. We must improve our record of locating, identifying and helping victims

We have already commented on the importance of every case being investigated by law enforcement. However we readily acknowledge that finding the children depicted in the images is often a huge challenge for law enforcement. Technical improvements in the ability of different police held databases to work together may lead to more efficient, speedier efforts to determine the whereabouts of victims depicted in images but it is obvious that, usually, before a serious investigation can even begin it is necessary, or at any rate highly preferable, at least to have an idea about the country or jurisdiction where the offence shown took place. Unless the producer of the image has, normally unwittingly, left a clue about the geography it can be very hard to make any real progress. Improved technical analytical tools are likely to have an important role to play in this area.

14. Vital to reduce the possibility of the images reaching their intended markets

The people behind many of the commercial child abuse web sites typically are not paedophiles in the ordinary sense. They systematically arrange for children to be raped solely in order that they can photograph and film the rape so they can then, in turn, sell the pictures for profit. If these gangsters cannot reach a large part of their market, through the web, or if they are unable to collect payments for the images because the banks and credit card companies have locked them out, they will stop doing it or at any rate the volumes will be reduced as their trade is disrupted or closed down. Fewer new children will be abused, fewer children who have already been abused will be re-abused by their images remaining on display and fewer new people will find the sites so we reduce the risk of creating new child abusers. Where is the downside?

15. Worries about “mission creep” must be addressed

A number of concerns have been expressed about the way web blocking could be misused for other purposes. This is sometimes called “mission creep”. This is not an argument we can accept. Either you agree it is right to block access to child abuse images, or you do not. You have to take and judge each argument on its merits. It is not right to refuse to engage with the arguments about blocking child abuse images simply because you are worried about the way other people might later try to twist or misuse the same or similar arguments in relation to other issues. If you think it is wrong to use blocking against gambling web sites or against any other kind of site for that matter, then say so and vote against them. Do not make sexually abused children pay the price for someone else’s problems with gamblers.

16. Democratic accountability and scrutiny are essential

Underlying aspects of people's anxieties about "mission creep" is often a related concern that the use of blocking technology is open to abuse. They are concerned that access to web sites could be blocked surreptitiously, for political or commercial reasons.

We completely agree that the way in which blocking is carried out must be the subject of clear and transparent policies and procedures. It should not be possible for any reasonable person to harbour any reasonable doubt about the way the list of sites to be blocked is constructed, maintained or used. In the UK the operation of their hotline system and the blocking list which they produce is subject to full scrutiny by respected, independent external experts. If an address is blocked the reasons why it has been blocked should be stated and there should be an appeal mechanism. The draft of Article 21 makes provision for that. It says:

"The blocking of access shall be subject to adequate safeguards, in particular to ensure that the blocking is limited to what is necessary, that users are informed of the reason for the blocking and that content providers, as far as possible, are informed of the possibility of challenging it."

17. Working within the framework of the rule of law is fundamental

We need new approaches to address the gigantic growth in child abuse images which the internet has facilitated. Analogue solutions will not work in the new digital world which we have all helped to create. Article 21 brings the use of blocking clearly within the framework of law. It is a measure that deserves widespread support.

ANNEX 2. ARTICLE 21 – REMOVAL AND BLOCKING OF INTERNET SITES, CHILD PROTECTION AND FUNDAMENTAL RIGHTS

Article 21 of the Draft Directive as amended provides for the blocking and removal of websites which contain child abuse images. This proposal has come under severe criticism from certain actors which are concerned that the proposal may give rise to “mission creep” in that it could lead to other websites, such as those providing access to content protected by copyright, being blocked. The measure is also being attacked on grounds relating to fundamental rights, in particular the right to freedom of expression. The right to a fair trial is also at issue. We consider each of these elements in this section.

5.1 Mission Creep

We recognize that there is concern that the infrastructures developed to facilitate the blocking of child sexual abuse content will be ab/used to block a wider range or criminal or even legal content in the future. We fully support safeguards that ensure that this concern is minimized.²⁷

From a legal perspective it is made clear in the section dealing with the legal basis of the directive proposal, that the legislation cannot be used for any purpose other than the one stipulated in the text of the directive. This means that the legislation is confined to dealing with the blocking of websites which contain child abuse material and cannot be used to clamp down on internet sites that e.g. facilitate file-sharing.

5.2 Fundamental rights: Removal and Blocking does not infringe freedom of expression

Due to the potential for network level content blocking to be perceived as censorship, it is important to develop comprehensive ways to ensure the public’s trust and confidence in the list. In line with this, we believe that to avoid that that people will classify material as child abuse when in fact it isn’t, it is essential that the blocking is carried out by a credible organisation not only subjected to independent and expert scrutiny but also composed of specifically trained staff.

5.2.1 Child abuse material is a specific type of content which cannot be construed as the expression of an opinion and is not protected by Article 10(1) ECHR

The proposals relating to the blocking and removal of websites is being criticized on the basis that it could infringe the fundamental right of freedom of expression. This view is based, however, on a misconception of the rights flowing from this freedom that all forms of expression are protected regardless of their content. Freedom of expression is a right in itself as well as a component of other rights protected under the Convention and the Charter of

²⁷ Also see:

http://www.iwf.org.uk/documents/20100726_iwfcombating_online_child_sexual_abuse_content_at_national_and_international_levelsfinal.pdf

Fundamental Rights of the European Union.²⁸ Article 10 of the Convention is structured in two paragraphs. The first paragraph defines the freedom protected:

“Everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

Freedom of expression thus consists of three distinct rights: the freedom to hold opinions, the freedom to receive and to impart information and ideas. The freedom to hold opinions enjoys an almost absolute protection in the sense that the restrictions in paragraph two are inapplicable. The rights to receive and impart information and ideas, however, can under certain circumstances be subject to restrictions. The level of protection to which expression is entitled varies with the nature of the expression. The more distant the expression from the core values underlying the right, the more likely action restricting it can be justified.

Some forms of receiving and imparting information and ideas fall outside of the scope of freedom of expression such as speech promoting Nazi ideology and inciting to hatred and racial discrimination all fall outside the protection of Article 10. Further, the European Court of Human Rights has referred to the duty of avoiding “...expressions that are gratuitously offensive to others... such do not contribute to any form of public debate capable of furthering the progress in human affairs.”²⁹ It is inconceivable that child abuse material could make any meaningful contribution to public debate and indeed brings about serious harm – in the first place to the children involved, but arguably also to society as a whole. Therefore, one could argue that child abuse material is unworthy of the protection enjoyed by the right to freedom of expression. This is supported by case law from outside Europe.³⁰

5.2.2 Even if child abuse material were caught under “freedom of expression”, the restriction of blocking websites can be justified under Article 10(2) ECHR

The second paragraph of Article 10 stipulates the circumstances in which a state may legitimately interfere with the exercise of freedom of expression.

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are

²⁸ Freedom of expression is also protected by Article 11 of the Charter of Fundamental Rights of the European Union. We have focused in this paper on freedom of expression as protected by the Convention, because of the vast body of case law of the European Court for Human Rights (the “**Convention Court**”) on the subject. The Charter reaffirms the rights as they result from, *inter alia*, the Convention and recognizes the Court’s jurisprudence.

²⁹ *Otto-Preminger Institut v Austria*, 1994.

³⁰ For example, under Canadian constitutional law, the *Charter of Rights and Freedoms* applies. See *R. v Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.). The US Supreme Court ruled that child pornography is not a form of expression protected under the constitution on *New York v Ferber* (1982).

necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.”

The range of possible interference with the exercise of the right to freedom of expression is very wide, and there are no pre-established limits. Three cumulative conditions need to be fulfilled, however, in order for a domestic authority in a Contracting State to be able to interfere with freedom of expression: (i) the interference must be prescribed by law; (ii) aimed at protecting one or more limited interests or values; and (iii) necessary in a democratic society.

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”

“... although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others”.³¹

(i) The interference is prescribed by law

Any interference with the exercise of the freedom of expression must have a basis in the national law. As a rule, this would mean a written and public law adopted by the parliament. Provided the laws are public, accessible, predictable and foreseeable,³² as is likely to be the case with the implementation of the Draft Directive, this requirement will be met.

(ii) The interference is aimed at protecting one or more of the interests or values listed

The list of possible grounds on which the authorities may restrict freedom of expression is exhaustive. Authorities may not legitimately rely on any other grounds than those mentioned in Article 10 paragraph 2. When called into question, national courts must identify the value or interest protected by the respective provision, check whether it is enumerated in paragraph 2 and verify that the interest to be protected is “real” and not merely an uncertain possibility. The following justifications for restricting freedom of expression are highly relevant in the context of blocking websites which contain child abuse material.

³¹ European Court of Human Rights of 2nd of December 2008 (case of K.U. v. Finland, Application no 2872/02)

³² Sunday Times v the United Kingdom, 1979.

(a) Prevention of disorder and crime

The prevention of disorder or crime has been recognized as a legitimate justification for the restriction of freedom of expression by the Court in several cases.³³ The blocking of websites containing child abuse images is one of the measures designed to prevent criminal acts taking place, including acquisition and possession, knowingly obtaining access of such images, distributing, disseminating, transmitting, offering and supplying child abuse images. Arguably it also helps prevent the producing of child abuse material, as it limits the possibilities for producers to distribute the materials and to make any commercial profits from such activities.

(b) Protection of health or morals

The protection of morals has been relied upon extensively when dealing with pornographic literature and videos. In principle, the Court leaves national authorities a wide margin of appreciation, justified by the specificity of the “morals” in each Contracting State. In dealing with obscenity, however, the Court has delineated some criteria to help establish whether a certain restriction of freedom of expression is necessary which include the degree of accessibility to the general public, whether or not the materials are accessible free of charge and whether there are any age restrictions for access.³⁴ In *Müller*, the Court applied these criteria to an exhibition of paintings showing acts of sodomy, bestiality and homosexuality. The unlimited access of children played an essential role in the *Müller* judgment as it played in the *Handyside* case, where the applicant had published and distributed to pupils a book seen as obscene by the British authorities.

Although the Court has referred to the lack of a uniform concept of morals within the territory of the Contracting Parties, it goes without saying that the activities of making and producing child abuse material are regarded as “immoral” acts by any standard applied by the Contracting Parties or throughout the European Union. The internet, as a medium of distributing child abuse material, is by its very nature highly accessible to a broad public without any restrictions in terms of age. While it is possible for parents to install software and “filters” on their home computers to help monitor and block certain websites, it is impossible for parents to control all contents accessible to their children. The more widely available child abuse material becomes, the higher the risks of exposure for children – or other internet users with no intention of viewing illegal content for that matter.

(c) Protection of the reputation or rights of others

The protection of the reputation or rights of others is by far the most frequently used ground for justification by national authorities for limiting freedom of expression. “Rights of others” invoked often include religious freedom and protection against racism. The Court has held that

³³ For example: *Saszmann v Austria*, 1997.

³⁴ See *Müller and Others v. Switzerland*, 1988.

“[t]he Convention is to be read as a whole and therefore the interpretation and application of Article 10 [...] must be in harmony with the logic of the Convention.” In that same context, the Court has referred to the duty of avoiding expressions that are gratuitously offensive to others.³⁵ Child abuse material is inherently offensive and harmful to children and society as a whole. What is at stake in this context is not only the reputation and the right of privacy rights³⁶ of the children depicted in child abuse material, but - arguably more fundamentally - their right not be treated in a degrading manner contrary to their physical and moral integrity.

(iii) The interference is necessary in a democratic society

Any measures restricting the rights guaranteed by the Convention have to be proportional to the goal to be reached. The Convention Court has clarified that there must be a “pressing social need” for the interference to be “necessary”.³⁷ What social need could be more pressing in a democratic society than the protection of the fundamental rights and integrity of children?³⁸ Moreover, this need is recognized by the international community both in the CoE Child Convention and the Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography.

The single most important “disadvantage” consistently repeated by the measure’s opponents, is that the blocking/removal of websites containing child abuse images may be “overbroad” and that contents may be blocked which the measure does not intend to target. It should be possible, however, to circumvent this side-effect of the measure by putting in judicial control over the decision to block or remove the images. In addition, it could be possible to inform consumers the reasons for the blocking/removal and to provide them with the means to query the restriction. It is clear, however, that such a disadvantage, which can be addressed by a number of practical solutions, does not by any means outweigh the salutary effects the blocking will bring about in terms of protecting children’s rights.

5.2.3 The spirit and text of the Convention prohibit the abuse of rights

Freedom of expression can conflict with other rights protected by the Convention. When such a conflict occurs, the Court will strike a balance in order to establish the pre-eminence of one right over the other. In protecting certain rights included in the Convention, any harmful effects on other rights need to be taken into account: Article 17 of the Convention explicitly prohibits any acts aimed at the destruction of any of the rights and freedoms protected by the Convention. This is an important limitation on the application of any right flowing from the Convention and indeed prevents the abuse of rights.

³⁵ Otto-Preminger Institut v Austria, 1994.

³⁶ Privacy has been relied upon in justifying several interferences. See e.g. Tammer, 2003.

³⁷ Observer and Guardian v the United Kingdom, 1995.

³⁸ See for example the *Oakes* test in Canada, which asks for a “pressing and substantial purpose”.

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Freedom of expression is therefore not an absolute right. In the issue at hand, freedom of expression needs to be weighed against children's rights. Children are one of the most vulnerable groups in society, and they are deserving of a heightened form of protection. This protection is a universally accepted goal, as suggested by international norms such as the Convention on the Rights of the Child. Article 24 of the Charter also lays down a positive obligation to act with the aim of ensuring the necessary protection for children. Child abuse material is in many ways antithetical to the values of freedom of expression, and its restriction promotes other democratic values and the rights of children. Freedom of expression cannot, therefore, be abused as a sort of "wildcard" to hamper the protection of children's fundamental rights.

ANNEX 3 – PROPOSED AMENDMENT FOR ARTICLE 21

1. Member States shall ensure that measures are put in place to facilitate the speedy deletion of any child abuse image or webpage found to contain child abuse images which are housed or published on the internet from within their jurisdiction.
2. With regard to the websites offering or containing child abuse images or pages containing child abuse images which are hosted outside the European Union, the Commission will take the necessary initiatives, pursuant to Article 17 of the TEU , on behalf of the European Union, to seek to obtain, through all available means of action, the effective removal of the child abuse images by the third country concerned.
3. Member States shall ensure that, wherever possible, the person or legal entity within their jurisdiction owning or controlling the image or web page which is to be deleted is notified and given an opportunity to appeal against the decision.
4. Member States shall ensure that measures are put in place to collect and maintain an up to date list of addresses of child abuse images or web pages containing child abuse images which are housed on or published from parts of the internet which are not within their own jurisdiction. With proper regard for its security, this list shall be distributed by the relevant authorities to each internet service provider operating within the Member State's jurisdiction linked to a requirement that access to those addresses shall be blocked within six hours of receipt.
5. Member States shall ensure that Internet users attempting to reach an address on a blocking list shall be informed of the reason why the address is being blocked.
6. The content removal and access blocking measures mentioned above are without prejudice to all other instruments which the law enforcement authorities of the Member States, acting within the applicable national legal framework, as adapted to the present Directive, where needed, assisted by Eurojust and Europol, might envisage to use, in co-operation with the relevant economic stakeholders and representative NGOs, to identify the victims shown on the child abuse images and find effective ways to disrupt the commercial transactions underlying the offer of and access to such image.
7. The application of any and all of the foregoing provisions shall not be executed in such a way as to prejudice the outcome of any criminal investigation.