

Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

DIRECTIVE^{X1} 2011/93/EU OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL

of 13 December 2011

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) and Article 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure⁽²⁾,

Whereas:

- (1) Sexual abuse and sexual exploitation of children, including child pornography, constitute serious violations of fundamental rights, in particular of the rights of children to the protection and care necessary for their well-being, as provided for by the 1989 United Nations Convention on the Rights of the Child and by the Charter of Fundamental Rights of the European Union⁽³⁾.
- (2) In accordance with Article 6(1) of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, in which Article 24(2) provides that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Moreover, the Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens⁽⁴⁾ gives a clear priority to combating the sexual abuse and sexual exploitation of children and child pornography.
- (3) Child pornography, which consists of images of child sexual abuse, 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.
- (4) Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography⁽⁵⁾ approximates Member States' legislation to criminalise the most serious forms of child sexual abuse and sexual exploitation, to extend domestic jurisdiction, and to provide for a minimum level of

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assistance for victims. Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings⁽⁶⁾ establishes a set of victims' rights in criminal proceedings, including the right to protection and compensation. Moreover, the coordination of prosecution of cases of sexual abuse, sexual exploitation of children and child pornography will be facilitated by the implementation of Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings⁽⁷⁾.

- (5) In accordance with Article 34 of the United Nations Convention on the Rights of the Child, States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. The 2000 United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and, in particular, the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse are crucial steps in the process of enhancing international cooperation in this field.
- (6) Serious criminal offences such as the sexual exploitation of children and child pornography require a comprehensive approach covering the prosecution of offenders, the protection of child victims, and prevention of the phenomenon. The child's best interests must be a primary consideration when carrying out any measures to combat these offences in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child. Framework Decision 2004/68/JHA should be replaced by a new instrument providing such comprehensive legal framework to achieve that purpose.
- (7) This Directive should be fully complementary with Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA⁽⁸⁾, as some victims of human trafficking have also been child victims of sexual abuse or sexual exploitation.
- (8) In the context of criminalising acts related to pornographic performance, this Directive refers to such acts which consist of an organised live exhibition, aimed at an audience, thereby excluding personal face-to-face communication between consenting peers, as well as children over the age of sexual consent and their partners from the definition.
- (9) Child pornography frequently includes images recording the sexual abuse of children by adults. It may also include images of children involved in sexually explicit conduct, or of their sexual organs, where such images are produced or used for primarily sexual purposes and exploited with or without the child's knowledge. Furthermore, the concept of child pornography also covers realistic images of a child, where a child is engaged or depicted as being engaged in sexually explicit conduct for primarily sexual purposes.
- (10) Disability, by itself, does not automatically constitute an impossibility to consent to sexual relations. However, the abuse of the existence of such a disability in order to engage in sexual activities with a child should be criminalised.
- (11) In adopting legislation on substantive criminal law, the Union should ensure consistency of such legislation in particular with regard to the level of penalties. The Council

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conclusions of 24 and 25 April 2002 on the approach to apply regarding approximation of penalties, which indicate four levels of penalties, should be kept in mind in the light of the Lisbon Treaty. This Directive, because it contains an exceptionally high number of different offences, requires, in order to reflect the various degrees of seriousness, a differentiation in the level of penalties which goes further than what should usually be provided in Union legal instruments.

- (12) Serious forms of sexual abuse and sexual exploitation of children should be subject to effective, proportionate and dissuasive penalties. This includes, in particular, various forms of sexual abuse and sexual exploitation of children which are facilitated by the use of information and communication technology, such as the online solicitation of children for sexual purposes via social networking websites and chat rooms. The definition of child pornography should also be clarified and brought closer to that contained in international instruments.
- (13) The maximum term of imprisonment provided for in this Directive for the offences referred to therein should apply at least to the most serious forms of such offences.
- (14) In order to reach the maximum term of imprisonment provided for in this Directive for offences concerning sexual abuse and sexual exploitation of children and child pornography, Member States may combine, taking into account their national law, the imprisonment terms provided for in national legislation in respect of those offences.
- (15) This Directive obliges Member States to provide for criminal penalties in their national legislation in respect of the provisions of Union law on combating sexual abuse, sexual exploitation of children and child pornography. This Directive creates no obligations regarding the application of such penalties, or any other available system of law enforcement, in individual cases.
- (16) Especially for those cases where the offences referred to in this Directive are committed with the purpose of financial gain, Member States are invited to consider providing for the possibility to impose financial penalties in addition to imprisonment.
- (17) In the context of child pornography, the term ‘without right’ allows Member States to provide a defence in respect of conduct relating to pornographic material having for example, a medical, scientific or similar purpose. It also allows activities carried out under domestic legal powers, such as the legitimate possession of child pornography by the authorities in order to conduct criminal proceedings or to prevent, detect or investigate crime. Furthermore, it does not exclude legal defences or similar relevant principles that relieve a person of responsibility under specific circumstances, for example where telephone or Internet hotlines carry out activities to report those cases.
- (18) Knowingly obtaining access, by means of information and communication technology, to child pornography should be criminalised. To be liable, the person should both intend to enter a site where child pornography is available and know that such images can be found there. Penalties should not be applied to persons inadvertently accessing sites containing child pornography. The intentional nature of the offence may notably be deduced from the fact that it is recurrent or that the offence was committed via a service in return for payment.

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- (19) Solicitation of children for sexual purposes is a threat with specific characteristics in the context of the Internet, as the latter provides unprecedented anonymity to users because they are able to conceal their real identity and personal characteristics, such as their age. At the same time, Member States acknowledge the importance of also combating the solicitation of a child outside the context of the Internet, in particular where such solicitation is not carried out by using information and communication technology. Member States are encouraged to criminalise the conduct where the solicitation of a child to meet the offender for sexual purposes takes place in the presence or proximity of the child, for instance in the form of a particular preparatory offence, attempt to commit the offences referred to in this Directive or as a particular form of sexual abuse. Whichever legal solution is chosen to criminalise ‘off-line grooming’, Member States should ensure that they prosecute the perpetrators of such offences one way or another.
- (20) This Directive does not govern Member States’ policies with regard to consensual sexual activities in which children may be involved and which can be regarded as the normal discovery of sexuality in the course of human development, taking account of the different cultural and legal traditions and of new forms of establishing and maintaining relations among children and adolescents, including through information and communication technologies. These issues fall outside of the scope of this Directive. Member States which avail themselves of the possibilities referred to in this Directive do so in the exercise of their competences.
- (21) Member States should provide for aggravating circumstances in their national law in accordance with the applicable rules established by their legal systems on aggravating circumstances. They should ensure that those aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply those aggravating circumstances. The aggravating circumstances should not be provided for in Member States’ law when irrelevant taking into account the nature of the specific offence. The relevance of the various aggravating circumstances provided for in this Directive should be evaluated at national level for each of the offences referred to in this Directive.
- (22) Physical or mental incapacity under this Directive should be understood as also including the state of physical or mental incapacity caused by the influence of drugs and alcohol.
- (23) In combating sexual exploitation of children, full use should be made of existing instruments on the seizure and confiscation of the proceeds of crime, such as the United Nations Convention against Transnational Organized Crime and the Protocols thereto, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime⁽⁹⁾, and Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime Related Proceeds, Instrumentalities and Property⁽¹⁰⁾. The use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims’ assistance and protection should be encouraged.

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- (24) Secondary victimisation should be avoided for victims of offences referred to in this Directive. In Member States where prostitution or the appearance in pornography is punishable under national criminal law, it should be possible not to prosecute or impose penalties under those laws where the child concerned has committed those acts as a result of being victim of sexual exploitation or where the child was compelled to participate in child pornography.
- (25) As an instrument of approximation of criminal law, this Directive provides for levels of penalties which should apply without prejudice to the specific criminal policies of the Member States concerning child offenders.
- (26) Investigating offences and bringing charges in criminal proceedings should be facilitated, to take into account the difficulty for child victims of denouncing sexual abuse and the anonymity of offenders in cyberspace. To ensure successful investigations and prosecutions of the offences referred to in this Directive, their initiation should not depend, in principle, on a report or accusation made by the victim or by his or her representative. The length of the sufficient period of time for prosecution should be determined in accordance with national law.
- (27) Effective investigatory tools should be made available to those responsible for the investigation and prosecutions of the offences referred to in this Directive. Those tools could include interception of communications, covert surveillance including electronic surveillance, monitoring of bank accounts or other financial investigations, taking into account, inter alia, the principle of proportionality and the nature and seriousness of the offences under investigation. Where appropriate, and in accordance with national law, such tools should also include the possibility for law enforcement authorities to use a concealed identity on the Internet.
- (28) Member States should encourage any person who has knowledge or suspicion of the sexual abuse or sexual exploitation of a child to report to the competent services. It is the responsibility of each Member State to determine the competent authorities to which such suspicions may be reported. Those competent authorities should not be limited to child protection services or relevant social services. The requirement of suspicion ‘in good faith’ should be aimed at preventing the provision being invoked to authorise the denunciation of purely imaginary or untrue facts carried out with malicious intent.
- (29) Rules on jurisdiction should be amended to ensure that sexual abusers or sexual exploiters of children from the Union face prosecution even if they commit their crimes outside the Union, in particular via so-called sex tourism. Child sex tourism should be understood as the sexual exploitation of children by a person or persons who travel from their usual environment to a destination abroad where they have sexual contact with children. Where child sex tourism takes place outside the Union, Member States are encouraged to seek to increase, through the available national and international instruments including bilateral or multilateral treaties on extradition, mutual assistance or a transfer of the proceedings, cooperation with third countries and international organisations with a view to combating sex tourism. Member States should foster open dialogue and communication with countries outside the Union in order to be able to

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prosecute perpetrators, under the relevant national legislation, who travel outside the Union borders for the purposes of child sex tourism.

- (30) Measures to protect child victims should be adopted in their best interest, taking into account an assessment of their needs. Child victims should have easy access to legal remedies and measures to address conflicts of interest where sexual abuse or sexual exploitation of a child occurs within the family. When a special representative should be appointed for a child during a criminal investigation or proceeding, this role may be also carried out by a legal person, an institution or an authority. Moreover, child victims should be protected from penalties, for example under national legislation on prostitution, if they bring their case to the attention of competent authorities. Furthermore, participation in criminal proceedings by child victims should not cause additional trauma to the extent possible, as a result of interviews or visual contact with offenders. A good understanding of children and how they behave when faced with traumatic experiences will help to ensure a high quality of evidence-taking and also reduce the stress placed on children when carrying out the necessary measures.
- (31) Member States should consider giving short and long term assistance to child victims. Any harm caused by the sexual abuse and sexual exploitation of a child is significant and should be addressed. Because of the nature of the harm caused by sexual abuse and sexual exploitation, such assistance should continue for as long as necessary for the child's physical and psychological recovery and may last into adulthood if necessary. Assistance and advice should be considered to be extended to parents or guardians of the child victims where they are not involved as suspects in relation to the offence concerned, in order to help them to assist child victims throughout the proceedings.
- (32) Framework Decision 2001/220/JHA establishes a set of victims' rights in criminal proceedings, including the right to protection and compensation. In addition child victims of sexual abuse, sexual exploitation and child pornography should be given access to legal counselling and, in accordance with the role of victims in the relevant justice systems, to legal representation, including for the purpose of claiming compensation. Such legal counselling and legal representation could also be provided by the competent authorities for the purpose of claiming compensation from the State. The purpose of legal counselling is to enable victims to be informed and receive advice about the various possibilities open to them. Legal counselling should be provided by a person having received appropriate legal training without necessarily being a lawyer. Legal counselling and, in accordance with the role of victims in the relevant justice systems, legal representation should be provided free of charge, at least when the victim does not have sufficient financial resources, in a manner consistent with the internal procedures of Member States.
- (33) Member States should undertake action to prevent or prohibit acts related to the promotion of sexual abuse of children and child sex tourism. Different preventative measures could be considered, such as the drawing up and reinforcement of a code of conduct and self-regulatory mechanisms in the tourism industry, the setting-up of a code of ethics or 'quality labels' for tourist organisations combating child sex tourism, or establishing an explicit policy to tackle child sex tourism.

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- (34) Member States should establish and/or strengthen policies to prevent sexual abuse and sexual exploitation of children, including measures to discourage and reduce the demand that fosters all forms of sexual exploitation of children, and measures to reduce the risk of children becoming victims, by means of, information and awareness-raising campaigns, and research and education programmes. In such initiatives, Member States should adopt a child-rights based approach. Particular care should be taken to ensure that awareness-raising campaigns aimed at children are appropriate and sufficiently easy to understand. The establishment of help-lines or hotlines should be considered.
- (35) Regarding the system of reporting sexual abuse and sexual exploitation of children and helping children in need, hotlines under the number 116 000 for missing children, 116 006 for victims of crime and 116 111 for children, as introduced by Commission Decision 2007/116/EC of 15 February 2007 on reserving the national numbering beginning with 116 for harmonised numbers for harmonised services of social value⁽¹¹⁾, should be promoted and experience regarding their functioning should be taken into account.
- (36) Professionals likely to come into contact with child victims of sexual abuse and sexual exploitation should be adequately trained to identify and deal with such victims. That training should be promoted for members of the following categories when they are likely to come into contact with child victims: police officers, public prosecutors, lawyers, members of the judiciary and court officials, child and health care personnel, but could also involve other groups of persons who are likely to encounter child victims of sexual abuse and sexual exploitation in their work.
- (37) In order to prevent the sexual abuse and sexual exploitation of children, intervention programmes or measures targeting sex offenders should be proposed to them. Those intervention programmes or measures should meet a broad, flexible approach focusing on the medical and psycho-social aspects and have a non-obligatory character. Those intervention programmes or measures are without prejudice to intervention programmes or measures imposed by the competent judicial authorities.
- (38) Intervention programmes or measures are not provided as an automatic right. It is for the Member State to decide which intervention programmes or measures are appropriate.
- (39) To prevent and minimise recidivism, offenders should be subject to an assessment of the danger posed by the offenders and the possible risks of repetition of sexual offences against children. Arrangements for such assessment, such as the type of authority competent to order and carry out the assessment or the moment in or after the criminal proceedings when that assessment should take place as well as arrangements for effective intervention programmes or measures offered following that assessment should be consistent with the internal procedures of Member States. For the same objective of preventing and minimising recidivism, offenders should also have access to effective intervention programmes or measures on a voluntary basis. Those intervention programmes or measures should not interfere with national schemes set up to deal with the treatment of persons suffering from mental disorders.

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- (40) Where the danger posed by the offenders and the possible risks of repetition of the offences make it appropriate, convicted offenders should be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children. Employers when recruiting for a post involving direct and regular contact with children are entitled to be informed of existing convictions for sexual offences against children entered in the criminal record, or of existing disqualifications. For the purposes of this Directive, the term ‘employers’ should also cover persons running an organisation that is active in volunteer work related to the supervision and/or care of children involving direct and regular contact with children. The manner in which such information is delivered, such as for example access via the person concerned, and the precise content of the information, the meaning of organised voluntary activities and direct and regular contact with children should be laid down in accordance with national law.
- (41) With due regard to the different legal traditions of the Member States, this Directive takes into account the fact that access to criminal records is allowed only either by the competent authorities or by the person concerned. This Directive does not establish an obligation to modify the national systems governing criminal records or the means of access to those records.
- (42) The aim of this Directive is not to harmonise rules concerning consent of the person concerned when exchanging information from the criminal registers, i.e. whether or not to require such consent. Whether the consent is required or not under national law, this Directive does not establish any new obligation to change the national law and national procedures in this respect.
- (43) Member States may consider adopting additional administrative measures in relation to perpetrators, such as the registration in sex offender registers of persons convicted of offences referred to in this Directive. Access to those registers should be subject to limitation in accordance with national constitutional principles and applicable data protection standards, for instance by limiting access to the judiciary and/or law enforcement authorities.
- (44) Member States are encouraged to create mechanisms for data collection or focal points, at the national or local levels and in collaboration with civil society, for the purpose of observing and evaluating the phenomenon of sexual abuse and sexual exploitation of children. In order to be able to properly evaluate the results of actions to combat sexual abuse and sexual exploitation of children and child pornography, the Union should continue to develop its work on methodologies and data collection methods to produce comparable statistics.
- (45) Member States should take appropriate action for setting up information services to provide information on how to recognise the signs of sexual abuse and sexual exploitation.
- (46) Child pornography, which constitutes child sexual abuse images, is a specific type of content which cannot be construed as the expression of an opinion. To combat it, it is necessary to reduce the circulation of child sexual abuse material by making it more

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difficult for offenders to upload such content onto the publicly accessible web. Action is therefore necessary to remove the content and apprehend those guilty of making, distributing or downloading child sexual abuse images. With a view to supporting the Union's efforts to combat child pornography, Member States should use their best endeavours to cooperate with third countries in seeking to secure the removal of such content from servers within their territory.

- (47) However, despite such efforts, the removal of child pornography content at its source is often not possible when the original materials are not located within the Union, either because the State where the servers are hosted is not willing to cooperate or because obtaining removal of the material from the State concerned proves to be particularly long. Mechanisms may also be put in place to block access from the Union's territory to Internet pages identified as containing or disseminating child pornography. The measures undertaken by Member States in accordance with this Directive in order to remove or, where appropriate, block websites containing child pornography could be based on various types of public action, such as legislative, non-legislative, judicial or other. In that context, this Directive is without prejudice to voluntary action taken by the Internet industry to prevent the misuse of its services or to any support for such action by Member States. Whichever basis for action or method is chosen, Member States should ensure that it provides an adequate level of legal certainty and predictability to users and service providers. Both with a view to the removal and the blocking of child abuse content, cooperation between public authorities should be established and strengthened, particularly in the interests of ensuring that national lists of websites containing child pornography material are as complete as possible and of avoiding duplication of work. Any such developments must take account of the rights of the end users and comply with existing legal and judicial procedures and the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. The Safer Internet Programme has set up a network of hotlines the goal of which is to collect information and to ensure coverage and exchange of reports on the major types of illegal content online.
- (48) This Directive aims to amend and expand the provisions of Framework Decision 2004/68/JHA. Since the amendments to be made are of substantial number and nature, the Framework Decision should, in the interests of clarity, be replaced in its entirety in relation to Member States participating in the adoption of this Directive.
- (49) Since the objective of this Directive, namely to combat sexual abuse, sexual exploitation of children and child pornography, cannot be sufficiently achieved by the Member States alone and can therefore, by reasons of the scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.
- (50) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and in particular the right to the protection of human dignity, the prohibition of torture and inhuman

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or degrading treatment or punishment, the rights of the child, the right to liberty and security, the right to freedom of expression and information, the right to the protection of personal data, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties. This Directive seeks to ensure full respect for those rights and principles and must be implemented accordingly.

(51) In accordance with Article 3 of the Protocol (No 21) on the position of United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Directive.

(52) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Editorial Information

- X1** Substituted by [Corrigendum to Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA \(Official Journal of the European Union L 335 of 17 December 2011\)](#).

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- (1) OJ C 48, 15.2.2011, p. 138.
- (2) Position of the European Parliament of 27 October 2011 (not yet published in the Official Journal) and decision of the Council of 15 November 2011.
- (3) OJ C 364, 18.12.2000, p. 1.
- (4) OJ C 115, 4.5.2010, p. 1.
- (5) OJ L 13, 20.1.2004, p. 44.
- (6) OJ L 82, 22.3.2001, p. 1.
- (7) OJ L 328, 15.12.2009, p. 42.
- (8) OJ L 101, 15.4.2011, p. 1.
- (9) OJ L 182, 5.7.2001, p. 1.
- (10) OJ L 68, 15.3.2005, p. 49.
- (11) OJ L 49, 17.2.2007, p. 30.