

Evaluation
of the
**Directive 2011/93/EU on combatting the sexual abuse
and sexual exploitation of children, and child
pornography, replacing Council Framework Decision
2004/68/JHA**
on the basis of the
Manifesto for a European Criminal Policy

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With Financial Support from the Criminal Justice Programme of the European Union and the Ragnar Söderbergs Stiftelse

INTRODUCTION

The fight against sexual abuse and sexual exploitation of Children as well as child pornography employs the interest of the European institutions for many years now. In 2011, a new Directive¹ (hereinafter: the Directive) was adopted for this purpose, replacing the relevant Framework Decision of 2004². This brief evaluation focuses on the question as to whether this new instrument complies with the fundamental principles of criminal policy set in the Lisbon Treaty.

1. On the requirement of a fundamental legal interest worthy of protection

a) The protected legal interest

It's declared that the general objective of the above mentioned EU-Directive is the protection of children from grave acts, like sexual abuse and sexual exploitation, which are directed against free development of their personality.

b) The importance of the protected legal interest within the scope of the European Union Law

According to Article 67 of the Treaty on the Functioning of the European Union, the Union shall endeavor to ensure a high level of security through measures to prevent and combat criminal conduct, like sexual abuse and sexual exploitation of children. According to Article 83 of the Treaty on the Functioning of the European Union, this objective should be mainly achieved through the establishment of minimum rules concerning the definition of criminal offences and sanctions in the area of sexual exploitation of children. Special objectives are considered to be the effective crime prosecution and the prevention of the sexual exploitation and abuse of children.

According to Article 6(1) of the Treaty on European Union, the Union recognizes 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 Program — 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.

c) Incorporation of the protected legal interest in the constitutional tradition of the Member States and the Charter of Fundamental Rights of the European Union

Free development of children's personality – in other words infancy – is protected by all European Constitutions as well as by many International Organizations, like the United Nations Organization

¹ Directive 2011/92/EU, OJ L 335, 17.12.2011, p. 1.

² Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13, 20.1.2004, p. 44.

(Article 34 of the United Nations Convention on the Rights of the Child and 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) or the Council of Europe (through the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse).

d) Extent of the social harm through the injury of the legal interest

The Directive doesn't include exact information about the extent of this problem. It only states that:

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 (Preamble, par. 3).

In the proposal of the Directive it was also stated that:

"Despite a lack of accurate and reliable statistics, studies suggest that a significant minority of children in Europe may be sexually assaulted during their childhood, and research also suggests that this phenomenon is not decreasing over time, rather that certain forms of sexual violence are on the rise".

e) The gaps of the current institutional framework

The Directive does not refer to the gaps of the current institutional framework.

Still, the proposal of the Directive referred precisely to the deficits of current legislation, mentioning that the task of the European legislator was to counter these deficits through a series of new measures:

"At EU level, Council Framework Decision 2004/68/JHA is considered to have a number of shortcomings. It approximates legislation only on a limited number of offences, does not address new forms of abuse and exploitation using information technology, does not remove obstacles to prosecuting offences outside national territory, does not meet all the specific needs of child victims, and does not contain adequate measures to prevent offences".

The proposal also drew attention to the fact that

"other Community initiatives, which are only partly and fragmentarily adopted, (like Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the internet, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, Decision No 854/2005/EC of the European Parliament and of the Council of 11 May 2005 establishing a multiannual Community Programme on promoting safer use of the internet and new online technologies, and Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions), cannot provide a solution to the problem".

f) Do the regulations of the Directive achieve the targets that are set by the Council of the European Union?

At this point a serious deficit is detected. Besides acts that obviously harm infancy, like sexual abuse or exploitation of children, the Directive also urges for the penalization of acts, which don't cause harm to specific children or even potentially put them in jeopardy.

This is for example the case, when the Directive urges for the penalization of acts of production or possession of pornographic material, that doesn't depict real children, or for the criminalization of acts of obtaining access to websites including material of child pornography. It should be emphasized that the Treaty of the Council of Europe provides the Member States with the option not to penalize this conduct.

2. Fulfillment of the ultima ratio principle

a) Alternative suggestions to deal with the problem

The Directive itself refers to various alternative suggestions, including exchanging information and experience in prosecution, protection or prevention, awareness raising, cooperation with private sector and encouragement of self regulation, or the setting up of mechanisms for data collection, as well as blocking access to websites with child pornographic material.

b) Foundation of the necessity for the implementation of criminal law

(1) The content of the Directive

The Directive does not refer to this subject. Still, the proposal to the Directive referred to four alternative options:

Policy option (1): No new EU action

The EU would take no new action (legislation, non-policy instruments, financial support) to combat child sexual abuse and exploitation, while Member States could continue the process of signature and ratification of the COE Convention.

Policy option (2): Complement existing legislation with non-legislative measures

Existing EU legislation, in particular Framework Decision 2004/68/JHA, would not be amended. Instead, non-legislative measures could be put in place to support coordinated implementation of national legislation. This would include exchanging information and experience in prosecution, protection or prevention, awareness raising, cooperation with private sector and encouragement of self regulation, or the setting up of mechanisms for data collection.

Policy option (3): New legislation on prosecuting offenders, protecting victims, and preventing offences

A new legislative act would be adopted, incorporating the existing Framework Decision, certain provisions of the COE Convention, and additional elements not contained in either of these. It would cover prosecution of offenders, protection of the victims, and prevention of the phenomenon.

Policy option (4): New comprehensive legislation to enhance prosecution of offenders, protection of victims and prevention of offences (as in option 3) plus non-legislative measures (as in option 2)

The existing provisions of Framework Decision 2004/68/JHA would be supplemented by EU action to amend substantive criminal law and procedure, protect victims, and prevent offences as under option 3, plus the non-legislative measures identified under option 2 to improve the implementation of national legislation.

Following the analysis of the economic impact, social impacts, and impacts on fundamental rights, options 3 and 4 represent the best approach to the problems and achieve the objectives of the Directive. The preferred option would be option 4, followed by option 3.

(2) Remarks

- The presentation of alternative solutions is identical in all three proposals of a Directive, as regards substantial criminal law. It doesn't seem to be founded on a significant evaluation, which would estimate the special requirements of the specific problem.
- The character of criminal law as last resort seems indeed to be justified in some cases of especially serious crimes, as sexual abuse. This is, however, not always the case. The criminalization of viewing pornographic material in the Internet, for example, does not seem to be necessary, if the state is really in the position to block access to all relevant websites.

3. Fulfillment of the culpability principle

a) The reference made in the Directive

The Directive refers explicitly to the culpability principle:

“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. 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”³.

³ Preamble, paras. 12, 13

Still, the exact content of this principle was determined in the proposal of the Directive:

“To determine the degree of seriousness and attach penalties proportionate to it, consideration is given to different factors which may intervene in very different sorts of offences, like the degree of harm to the victim, the level of culpability of the offender and the level of risk posed to society. Accordingly, a number of relations between offences can be established. In general terms, activities involving sexual contact are more serious than those which do not; the presence of exploitation makes the offence more serious than its absence; coercion, force or threats are more serious than abuse of a position of power of the offender or weakness of the victim, which in turn is more serious than free consent of the victim. Prostitution, which involves sexual activities and money, is more serious than pornographic performances, which may or may not include them; recruiting to prostitution or similar is more serious than mere causing, as it involves active seeking of children as commodities. On child pornography, production, usually involving recruiting and sexual contact with the child, is more serious than other offences like distribution or offering, which in turn are more serious than possession or access. As a result of combining these different criteria, distinction is thus made between five different groups of offences, depending on their degree of seriousness, leading to accordingly different levels of penalties for the basic crimes”.

On the basis of all the aforementioned factors, the Directive adopts the **principle of proportionality**. The Directive emphasizes explicitly on the following:

“In accordance with the principle of proportionality, as set out in that Article (Article 5 of the Treaty on European Union), this Directive does not go beyond what is necessary to achieve that objective”⁴.

b) Remarks

It should be positively evaluated that the Directive contains a ranking of penalties, according to the intensity of every offence – it states, for example, that a stricter sanction should be imposed in case of acts containing sexual intercourse than in case of conduct without sexual intercourse. Penalties for various acts, which contain sexual intercourse with children, are also ranked according to the special modalities of the offensive act: if, for example, violence or threat is implemented, or the sexual conduct takes place with the abuse of a position of dominance.

However it can't be said that the proportionality requirement is fulfilled. This happens for the following reasons:

- The Directive (as well as its proposal) declares that it is restricted to the minimum provisions, which are necessary for the fulfillment of its objectives, namely for the effective protection of children. However, in reality, it has exhausted every available measure, as it even penalizes conduct, which doesn't necessarily have to be punished according to the Treaty of the Council of Europe. As already mentioned, the Treaty allows the Member States not to penalize the acts of gaining access to pornographic websites (article 20 § 4 of the Treaty), as well as of producing and possessing child pornographic material, when it doesn't depict real children (article 20 § 3 of the

⁴ Preamble, para. 48.

Treaty). This choice seems reasonable, as it's quite difficult to assess the wrongdoing of this specific conduct.

- The fulfillment of the proportionality measure presupposes a clear definition of the harmed interests. However the Directive doesn't clarify which interests are harmed, for example, through watching child pornography material in the Internet, through possession of this material or even through production of child pornographic material for personal use, especially when one considers that this material doesn't presuppose the portrayal of a real child. Even the drawing of a child's genitals – if it's "realistic", according to Article 2 (c) iv of the Directive – "for primarily sexual purposes", is a criminal offence, which is punishable by a maximum term of imprisonment of at least three years. In these cases it can't be assessed, whether the measure of proportionality is actually fulfilled, as it's not clear which exact interest is harmed. For this reason it must be positively evaluated that according to the final form of the Directive:
 1. it shall be within the discretion of Member States to decide whether Article 5, penalizing Offences concerning child pornography, applies to cases involving child pornography where the person appearing to be a child is in fact 18 years of age or older at the time of depiction (Article 5 para. 7 of the Directive);
 2. it shall be within the discretion of Member States to decide whether acquisition, possession or production of child pornography must be penalized when: (a) child pornography consists only of realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes, (b) the pornographic material is produced or possessed by the producer solely for his or her private use and (c) the act involves no risk of dissemination of the material (Article 5 para. 8 of the Directive).
 3. Insofar as Member States are not obligated - according to Articles 2 (c) iv and 5 para. 8 of the Directive - to penalize acquisition, possession or production of child pornography consisting only of realistic images, if the pornographic material is produced or possessed by the producer solely for his or her private use and the act involves no risk of dissemination of the material, it seems that the principle of proportionality is offended when Member States are obligated to penalize obtaining access to such material by means of information and communication technology. Moreover this conduct could be prevented through the blocking of access to relevant websites. In other words the penalty doesn't seem to be an ultima ratio in this case.
- In any case, the penalization of this conduct should be followed by explicit reference to the objective elements, which are also mentioned in the Treaty of the Council of Europe, regarding the detection of the element of committing the crime "in full knowledge".

(In particular the Treaty's Memorandum specifies the following: "140. Paragraph 1 f is a new element introduced in this Convention. It is intended to catch those who view child images on line by accessing child pornography sites but without downloading and who cannot therefore be caught under the offence of procuring or possession in some jurisdictions. 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. Sanctions must not be applied to persons accessing sites containing child pornography inadvertently. 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”).

Indeed these elements are adopted in the final form of the Directive (contrary to its proposal), in paragraph 18 of the Preamble, where it is stated that the “ 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”. Still, these objective elements are not integrated in the body of the Directive (Article 5 para. 3, where this crime is described).

4. Fulfillment of the legality principle

a) Description of criminal conduct and its effect

The Directive doesn’t fulfill the requirements of the legality principle. In particular:

(1) Employment of the terms “sexual activities” and “sexual abuse” in Article 3 .

- The Directive doesn’t describe the content of sexual conduct, as it should. It’s well known that, especially when these acts are directed against children, apart from sexual intercourse and its substitutes, even acts of less intensity, like caressing of thighs or breasts, are considered to be sexual acts. The explicit content of **sexual conduct** should therefore be clarified.
- According to Article 3 § 3, causing a child to witness sexual abuse or sexual activities is punished. However the exact content of “sexual abuse” is not defined.
- It’s true, of course, that the term “sexual abuse” is also used in the title of this Article. If, however, every sexual activity with a child is considered to be an act of sexual abuse, the reference to both terms in the same Article seems to be superfluous.

(2) Vagueness of the definition of “child pornography” in Article 2 (c).

The definition of pornographic material with absolute clarity is very important, as this term is integrated in the actus reus of various criminal offences (Article 5 of the Directive) and in the same time it constitutes a prerequisite for defining the boundaries of blocking access to specific websites, according to Article 25, a practice that is directly related to freedom of expression.

This definition is, nevertheless, imprecise. In particular the phrases “sexually explicit conduct” and “any depiction of the sexual organs of any person appearing to be a child” are extremely vague. Especially if one considers that the Directive contains, as demonstrated above, the term “sexual conduct”, the vagueness of the term “sexually explicit conduct” becomes evident. The Memorandum of the Treaty of the Council of Europe specifies that the exact meaning of this conduct should be clarified by Member States: “143. “Sexually explicit conduct” must be defined by Parties. It covers at least the following real or simulated acts: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children, or between an adult and a child, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious

exhibition of the genitals or the pubic area of a child. It is not relevant whether the conduct depicted is real or simulated”.

(3) Vagueness of the definition of “pornographic performance” in Article 2 (e).

The terms “sexually explicit conduct” and “primarily sexual purposes” are used to outline the content of “pornographic performance” in Articles 2 (e) – and respectively the content of criminal conduct in Article 4 §§ 2 – 4. Thus, the vagueness regarding the content of these terms has a clear impact on the description of the criminal offence in these cases.

(4) Vagueness of the definition of “child prostitution” in Article 2 (d).

The definition of “child prostitution” should also be considered to be inadequate, due to the vagueness of the term of sexual conduct. The clarification of the content of this conduct, as proposed in 4.1.1, shall also help to define the content of “child prostitution” in Articles 2 (d) – and respectively to describe the criminal offence in Article 4 §§ 6 – 7.

(5) Vagueness of the definition of “recruiting” a child to participate in pornographic performances, according to article 4 § 5

The Directive doesn’t clarify the meaning of “recruiting” a child.

b) Enabling the Member States to adjust the sanctions according to the principle of proportionality of criminal offences and penalties in their legal order

The penalties are always defined with a minimum highest limit. This choice – also because of the crimes’ gravity – seems to satisfy the need of securing for every Member State enough space to adjust penalties according to the principle of proportionality in its legal order.

5. Fulfillment of the subsidiarity principle

The fulfillment of the subsidiarity principle is mentioned in the Preamble of the Directive, but it is also extensively founded in the proposal of the Directive.

The proposal emphasized the fact that the crimes of child sexual exploitation often present a cross-border character and that the differences between various legislations make dealing with respective criminal conduct difficult. The possibility to commit these crimes in Internet, as well as the widespread practice of sex tourism, with children as victims, confirms this cross-border dimension. According to the proposal, its objectives cannot be sufficiently achieved by the Member States, for the following reasons:

“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,⁵ 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 Directive for the following reasons. The Directive 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 Directive 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”.

According to the Directive (Preamble, para. 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”.

6. Fulfillment of the principle of intrasystematic consistency

a) The Directive

The Directive does not refer to the intrasystematic consistency of its rules. Still, according to its proposal,

“the objectives are fully consistent with the EU policy of promotion, protection and fulfilment of children’s rights in the internal and external policies of the EU. The EU explicitly recognised protection of children’s rights in the Charter of Fundamental Rights of the European Union, specifically in Article 24. Furthermore, in its communication *Towards an EU Strategy on the Rights of the Child*, the Commission set itself the objective of maximising the use of its existing policies and instruments partly with a view to protecting children from violence and sexual exploitation inside and outside the EU. The objectives are also consistent with the Safer Internet Programme set up to promote safer use of the internet and new online technologies, particularly for children, and to fight against illegal content. The Safer Internet Programme contributes to preventing child sexual abuse through an array of measures including the empowerment and protection of minors, awareness raising and education, self-regulation and safety tools. The objectives are also consistent with the new EU Youth Strategy (Council Resolution 27 November 2009), which targets children and young

⁵ Council Decision of 29 May 2000 to combat child pornography on the Internet (OJ L 138, 9.6.2000, p. 1).

people within the age range 13-20, and anchors European youth policy cooperation firmly in the international system of human rights. The EU Youth Strategy highlights that the life and future prospects of young people are significantly determined by the opportunities, support and protection received during childhood and calls upon stakeholders at local level to detect and help young people at risk and to signpost them to other services where needed and facilitate young people's access to health facilities”.

b) Remarks

According to Art 4 (5) of the Directive “causing or recruiting a child to participate in child prostitution, or profiting from or otherwise exploiting a child for such purposes shall be punishable by a maximum term of imprisonment of at least 8 years if the child has not reached the age of sexual consent, and of at least 5 years of imprisonment if the child is over that age”. On the other hand, according to the Directive on preventing and combating trafficking in human beings, the recruitment of children for (*inter alia*) the purpose of sexual exploitation [Art. 4 (2) (a), read in conjunction with Art. 2] shall be punishable by a maximum penalty of at least 10 years of imprisonment. If the participation in child prostitution, as a form of sexual abuse of children, is also a kind of exploitation of the prostitution of a vulnerable person, such as a child, falling under offences concerning trafficking in human beings, then, for the same conduct are proposed different sentences by the different EU-Directives (Directive on combating sexual abuse and sexual exploitation of children and Directive on preventing and combating trafficking in human beings).

This causes a serious problem for the intrasystematic consistency of EU-Law.

7. FINAL REMARKS-SUGGESTIONS

The Directive fulfills only partly the requirements of the Manifest of the European Criminal Policy Initiative.

In this Directive the criminalization is not justified in all cases of sexual abuse and sexual exploitation of children. For example the criminal law doesn't seem to be the last resort in the case of viewing pornographic material in the Internet, because this conduct could be prevented through other measures (blocking of access to the relevant websites). Concerning the protected interests, the production or possession of pornographic material, which doesn't depict real children seem to be unjustified, because it is not clarified which exact interest is here harmed.

Furthermore, the ranking of penalties according to the gravity of criminal offences (proportionality) is adopted by the Directive. There are, however, cases in which the principle of proportionality is not fulfilled by the Directive, like in above mentioned conducts of unclarified harmed interest.

The Directive doesn't fulfill the requirements of the legality principle, when it doesn't clearly define the exact meaning of terms like "sexual activities", "sexual explicit conduct" and "sexual abuse", that be used in various criminal offences. Another problem is the lack of consistency of the Directive with the other Directive on preventing and combating trafficking in human beings and protecting victims.

On the contrary, the principle of subsidiarity is sufficiently founded in the Directive. The same could be said for the introsystematic consistency of the Directive (consistency of the objectives of the proposal with the EU policy of protection of children's rights).

OVERALL EVALUATION

- ☐ The legislative act **fully complies with** the requirements of the Manifesto on European Criminal Policy.
- ☒ The legislative act **satisfies essentially** the requirements of the Manifesto on European Criminal Policy. Alterations or improvements are required only on certain points (see above, the suggestions).
- ☐ The legislative act meets **only partially** the requirements of the Manifesto on European Criminal Policy. Significant alterations or improvements are required (see recommendations).
- ☐ The legislative act **does not substantially meet** the requirements of the Manifesto on European Criminal Policy. Extensive and structural alterations are required (see recommendations).
- ☐ The legislative act **does not meet at all** the requirements of the Manifesto on European Criminal Policy.