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Flexible Implementation and the EU Sexual Abuse Directive

Ton van den Brink, Michael Hübner, Alexander Hoppe, Anna Citterbergová, Elaine Mak, Anna Taimr

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InDivEU comprises a consortium of 14 partner institutions coordinated by the Robert Schuman Centre at the European University Institute, where the project is hosted by the European Governance and Politics Programme (EGPP). The scientific coordinators of InDivEU are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

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Abstract

This report concerns the Directive on combating the sexual abuse and sexual exploitation of children and child pornography (SAD). It assesses the room for flexible implementation it provides and the way in which EU Member States have made use of this. The sample of Member States includes Czech Republic, Germany, Ireland and the Netherlands. The Directive includes various ways to allow for flexible implementation. The directive establishes thresholds for the maximum terms of imprisonment that the Member States should include in their laws (minimum harmonization). The directive equally contains provisions with elaboration discretion for the Member States, allowing them to further flesh out the content of these provisions in national law. This is especially the case with regard to the provisions on prevention and protection of victims. The directive further contains open-worded and non-defined terms which also allow for differentiated implementation. Our analysis demonstrates that implementation legislation varies quite substantially across the Member States. Frequently, the national implementation strategy has been informed by the wish not to unnecessarily change existing laws. From an input legitimacy perspective this may be criticised, but also be understood from the particular nature of criminal law and legislation. This report has not identified major implementation problems, but especially the open worded provisions may create legal uncertainties.

Keywords

Differentiated integration, flexible implementation, European Union, Sexual Abuse Directive

Contents

1. Introduction[1]

1.1 Background

This case study report was written as part of Work Package 7 of the Horizon 2020 project InDivEU ('Integrating Diversity in the European Union'). WP7, titled 'differentiation through flexible implementation', studies whether flexible implementation may be a way to cope with heterogeneity among Member States, as a complement or alternative to forms of differentiated integration. Whereas under differentiated integration, some Member States are excluded from a part of EU law or policies altogether, under flexible implementation (all) Member States are given room to make further choices during the implementation process.

Flexible implementation may be a way for Member States to tailor EU-wide standards to domestic conditions.[2] At the same time, the resulting variation between Member States may also lead to more fragmented and less effective policies.[3] The aim of WP7 it to find out if and under what conditions these potential positive and negative effects of flexible implementation arise.

The work package is divided into two parts. The first part consisted of the development and creation of a dataset that mapped the scope for flexible implementation in EU directives in the period 2006-2015, the Flexible Implementation in the European Union (FIEU) dataset.[4] This dataset was used to analyse overall patterns in the discretion offered to Member States during implementation.[5]

The second part of the work package consists of three case studies, in the fields of environmental law, justice and home affairs, and the internal market, respectively. The aim of these case studies is to analyse the actual implementation of a specific directive in four Member States (Czech Republic, Germany, Ireland and the Netherlands), in order to find out to what extent and in what ways Member States make use of the flexibility offered to them in directives and what effects the resulting differences in implementation (if they occur) have on the effectiveness and legitimacy of the directive.

This report examines the implementation of the 2011 Directive on combating the sexual abuse and sexual exploitation of children and child pornography (SAD), a directive in the field of EU criminal justice.[6] In the remainder of this introductory section, we will explain why this Directive was selected and what methods were used to study its implementation in the four Member States. Subsequently, we outline the further structure of this case report.

1.2 Selection of the directive

The selection of the Sexual Abuse Directive builds on the FIEU dataset. The dataset measures the degree of discretion given to Member States in 164 directives adopted between 2006 and 2015. This timeframe was chosen because patterns of (differentiated) implementation take time to materialize after adoption of a directive. This initial coding exercise revealed a number of key characteristics that make the SAD a good case for studying differentiated implementation.

The SAD scores relatively high in terms of the overall degree of discretion to the Member States. In the Directive, 38 out of 86 substantive provisions (or: 44%) include a form of discretion for Member States. This is well above the mean of 26% and median of 22% in the dataset.

1 This subsection uses parts of the text of the *Flexible Implementation and the Energy Efficiency Directive* report.
2 Hartmann, 2016; Thomann, 2019; Zhelyazkova and Thomann, 2021.
3 Cf. Versluis 2007.
4 Princen et al., 2019.
5 Zbiral et al., 2020.
6 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, OJ L 335, 17 December 2011.

The purpose of the case studies is to find out what use Member States make of the opportunity for flexible implementation and what the consequences of such variation are. Thus, the choice for the Directive was first and foremost guided by the need to select a 'most likely' case of flexible implementation, and hence a relatively large degree of discretion. The SAD fulfils this criterion.

Second, the SAD contains *different types* of the discretion. The Directive mostly contains minimum harmonization provisions. Furthermore, The SAD equally contains some quite openly worded provisions (especially regarding preventive measures). These leave the Member States much policy discretion to adopt measures they see fit. Finally the SAD contains discretion in terms of its scope of application, e.g. when persons qualify as minors for the purposes of this Directive.

1.3 Analytical framework

The central question we seek to answer is: what use have the Czech Republic, Germany, Ireland and the Netherlands made of the flexibility in implementation offered to them by the Directive and what effects has that had on the effectiveness and legitimacy of the Directive? We answer this question in four steps, which form the analytical framework behind the case study:

1. What room for differentiated implementation does the Directive offer?

   The scores of the SAD in the FIEU dataset show that it allows for a large degree of discretion, however, an analysis of implementation practices requires a further, more qualitative analysis of the precise scope for flexibility in the Directive. This analysis also includes EU-level measures taken beyond the SAD itself, as well as ECJ case law that specifies the room for manoeuvre that Member States have during implementation.

2. How do Member States make use of the room offered by EU law?

   Discretion is a necessary but not a sufficient condition for differentiation in implementation to occur. Only if Member States make use of the room offered to them, will flexibility lead to actual differences between Member States. This requires an in-depth analysis of implementation practices, which has been undertaken for four Member States.

3. What are the motives behind the choices made in the domestic implementation process?

   If and to the extent that differences in implementation occur, the next step is to analyse their implications. Do they lead to better or worse outcomes in terms of effectiveness and legitimacy? As a first step towards answering this question, we look at the motives behind the choices made in the four Member States. This may shed an initial light on the question whether differences in implementation are a result of attempts to tailor EU-wide standards to domestic conditions or of other considerations.

4. What effects does the variation in implementation practices have?

   Under this final question, we explore what effects variation in implementation practices between the Member States has had. This is the final step towards answering the overarching central question.

1.4 Methods used

The case study analysis relies on four types of methods and sources. First, legal sources from the EU-level were used to examine the scope for flexible implementation offered by the SAD. The analysis has been based on the SAD itself and guidance documents from the Commission (remarkably, no CJEU decisions have been issued on the interpretation of the Directive).

Second, legal documents from the Member State levels were analysed to trace the transposition of the SAD in domestic law. To that end, the original transposing measures within the Member States were examined. In this way, an overview was generated on the choices made in transposing the provisions in the SAD.

Third, reports and (academic) studies on the SAD were used to obtain more insight into the background of the SAD and the way it is implemented in the Member States. These documents also contributed towards assessing the effects of variation in implementation.

Fourth and finally, a number of interviews were done with academic and policy experts in the Member States. These experts worked partly inside and partly outside of government. In total, five interviews were done with six interviewees in the Czech Republic, Germany, Ireland and the Netherlands. These interviews were used to gain more insight into the SAD itself, the choices made in implementing it, the motives behind these choices and their effects. As a general aim, the interviews were meant to go beyond the 'paper reality' of the documents, in order to include the processes that took place in the backstage. For this latter purpose, information from the Czech Republic could only limitedly be assessed.

1.5 Structure of the report

The remainder of this report is structured as follows. Section 2 presents the background to and content of the SAD. It also provides an assessment of the flexibility offered to Member States by the SAD. Section 3 describes how the four Member States have used the flexibility offered to them in implementing the Directive. It provides insights in the implementation strategies of the Member States and a detailed overview of how they have made use of the flexibility offered to them in implementing the SAD. Section 4 zooms in on the drivers and motives behind the choices made in the Member States, while section 5 assesses the effects of the resulting differentiation. Section 6 formulates a number of conclusions and implications on the basis of the analysis.

2. Content and background of the Directive

Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography was adopted on 13 December 2011.[7] It replaced the earlier Framework Decision 2004/68/JHA.[8] It is based on the Articles 82 (2) and 83 (1) TFEU, the legislative competences of the EU in the field of criminal law and criminal procedure introduced by the Treaty of Lisbon.

2.1 Rationale

Several legal and non-legal reasons have laid at the basis of the replacement of the Framework decision. In terms of the legal factors, the desire to align EU law with the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation (the Lanzarote Convention; COE Convention) and the entry into force of the Treaty of Lisbon (ToL) have been important drivers. The ToL has not only facilitated the adoption of legislation in the field of criminal law and criminal procedure,[9] but also established the Charter on fundamental rights as a legally binding documents. Article 24 of the Charter establishes the rights of the child. But there have been – indeed perhaps more important – non-legal factors as well. 'Grooming' and other new forms of sexual abuse and exploitation using information technology, had become an increasingly serious problem.[10]

7 Originally, the Directive was numbered 2011/92/EU, this has been revised 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.

8 EU, 2003.

9 Although important conditions – still – apply, such as the requirement that legislation must be limited to minimum harmonization, that only directives may be adopted and that legislative measures should be limited to regulating particularly serious crime with a cross-border dimension.

10 Klimek, 2012.

More generally, research had indicated that certain forms of sexual violence (such as abuse of teenagers) were on the rise and were getting more serious (e.g. child victims portrayed in pornography were getting younger and the images were becoming more and more violent).[11] These developments had highlighted problems in the functioning of the Framework decision, such as the limited criminalization of serious forms of sexual abuse. Sex tourism was, for instance, not covered. The Framework decision had, furthermore, only limitedly addressed problems of criminal investigation and prosecution (e.g. in the situation when child victims did not report crimes).

The main objective of the Directive has not been contested.[12] To the contrary, the awareness of the problem of child abuse and child exploitation has increased over the years in the Member States, and with it has come a strong conviction that it needs to be combated more forcefully.[13] Member States, moreover, have largely subscribed to the increased cross-border dimension of the issue, mainly induced by the digitalization of the crimes involved. Moreover, Council of Europe action, in particular the 2007 Lanzarote Convention Protection of Children Against Sexual Exploitation and Sexual Abuse, paved the way for the Directive.[14] The Dutch government has in particular given strong support to the Directive, as the country is relatively much involved in the modus operandi of child abuse. This is a consequence of the relatively highly developed internet society and the digital service infrastructure.[15]

The issues which have been raised by the Member States (in the Council) remained limited to points on which their national criminal laws diverged greatly (e.g. how to deal with non-adult perpetrators) and the clarity of the obligations (e.g. the exact scope of the obligation to protect victims).[16] This shared belief that the Directive should be adopted has facilitated the decision-making at a time when the Treaty of Lisbon was still quite new and the common ground and the accrued *acquis* still limited.[17] A source of controversy in the legislative process was whether to include an obligation for Member States to block websites that contain or spread child pornography.[18] This element has not been included in the final version in which the legislature chose to include an obligation to remove harmful content rather than blocking websites that contain such content altogether.

EU dimension

The Commission also put forward that national responses had thus far been insufficient, both at the level of legislation and at the level of enforcement. In terms of legislation, the Commission argued that existing national legislation was insufficiently strong and consistent to provide a vigorous social response.[19] Insufficient responses by law enforcement authorities to sexual abuse of children increased the problems and differences and divergences across EU Member States in investigations and prosecutions added further to that.[20] Individual Member States' responses would in any case be inadequate according to the Commission as the cross-border dimension of the problem had increased, partly because of the digital environment that increasingly impacted the problem.

11 European Commission, 2010a; European Commission, 2010b.
12 As the German respondent indicated, in Germany the transformation of criminal law took place irrespective of the directive that had been adopted.
13 Krings, 2014.
14 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
15 Interview with Erik Planken, Senior Policy Advisor at the Dutch Department of Law Enforcement and Crime Prevention, MS Teams, May 31, 2021.
16 Nowell-Smith, 2012.
17 Interview with Erik Planken, Senior Policy Advisor at the Dutch Department of Law Enforcement and Crime Prevention, MS Teams, May 31, 2021.
18 Gercke, 2012, p. 524.
19 European Commission, 2010a, p. 2.
20 In the case of Ireland, the Irish respondent put forward that before the adoption of the Directive even the legislation in Ireland was inadequate. Thus, the Directive provided an incentive and also a structure for adopting new legislation: Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.

2.2 Scope and content

The Directive establishes minimum rules concerning the definition of criminal offences and sanctions. Furthermore, it contains provisions to strengthen prevention of these crimes and the protection of victims. These provisions cover investigation and prosecution of offences (Articles 2 to 9 and 11 to 17), assistance to and protection of victims (Articles 18 to 20), and prevention (Articles 10 and 21 to 25). "As such, the directive introduces certain innovations, compared to other multilateral instruments, as it extends the scope of the offences."[21]

Extended scope of application

Compared to the old Framework decision, the Directive introduces the following elements:

- New criminal offences, such as grooming and (the organization of) child sex tourism;
- The definition of child pornography is linked to the COE Convention;
- Increase and diversification of maximum penalties;
- Simplification of the investigation of offences;
- Facilitation of the cross-border prosecution of offences;
- Victim protection provisions specifically in criminal investigations and proceedings and access to legal remedies;
- General obligations on the Member States to adopt preventive measures, e.g. to prevent recidivism and to prevent access to child pornography on the internet.

The Directive is also wider in scope in relation to the COE Convention. Unlike the Convention, the Directive contains prohibitions from activities with children imposed on offenders, blocking access to child pornography on the internet, criminalising coercing a child into sexual relations with a third party, child sexual abuse through pornographic performances online, and a non-punishment clause for child victims. It also goes beyond the obligations imposed by the COE Convention regarding the level of penalties, free legal counselling for child victims and repression of activities encouraging abuse and child sex tourism.[22]

2.3 Detailed overview

The Directive contains first of all a number of *offences* that Member States should include in their criminal codes, all of which are minimum harmonisation provisions. These offences can be divided into four categories: sexual abuse, sexual exploitation, child pornography and the solicitation of children online for sexual purposes. These offenses include new phenomena such as online grooming (Article 6), webcam sexual abuse and accessing child pornography online (Article 5(3)). The latter offence has been included to reflect the emerging practice that offenders no longer necessarily 'possess' or 'download' harmful images. In order to avoid criminal liability in case of accidental clicking, the EU legislature has prescribed that liability only arises when a person has 'knowingly' accessed child pornography. According to consideration 18 this means that the person should 'both intend to enter a site where child pornography is available and know that such images can be found there'. This subjective element of the definition of the offence may be objectified (recurrent visiting of sites containing child pornography and/or paying for accessing such sites may constitute evidence of intent) but is not without practical problems. Moreover, in legal doctrine there has been disagreement whether criminal liability would at all be desirable.[23]

21 European Parliamentary Research Service, 2017, p. 23.
22 European Commission, 2020.
23 Ziemann and Ziethen, 2012, p. 169.

The Directive contains thresholds for the maximum terms of imprisonment that the Member States should include in their laws (e.g. the offense of engaging in sexual activities with a child who has not reached the age of sexual consent shall be punishable by a maximum term of imprisonment of at least 5 years – so this leaves open the possibility for Member States to include higher maximums). This part of the Directive also includes provisions on incitement aiding and abetting and attempt (Article 7), criminal liability of legal persons (Article 12) and aggravating circumstances (Article 9). The Directive equally contains provisions on jurisdiction which are of particular interest in the context of sex tourism: e.g. the possibility for MS to try their citizens for offences committed abroad, the trial of offenders that reside in their territory and when the victim is one of their nationals (Article 17).

With regard to *investigation and prosecution*, the Directive contains provisions with elaboration discretion for the Member States, allowing them to further flesh out the content of these provisions in national law. These provisions deal with seizure and confiscation (Article 11); it provides that prosecution should not solely depend on a report or accusation being made by the victim, and that criminal proceedings must be able to continue even if the victim has withdrawn his or her statement (Article 15). The Directive further ensures that for the most serious offences, prosecution must be possible for a sufficient period of time after the victim has reached the age of majority (Article 15(2)). Other provisions equally seek to facilitate investigation and prosecution, including the obligation to provide law enforcement and prosecution authorities with effective tools to investigate child sexual abuse, child sexual exploitation and child pornography offences (Article 15(3)) and the removal of obstacles for those that work with children to report (Article 16).

The next element of the Directive regards provisions on *prevention and protection of victims*, similar to the investigation and prosecution these concern elaboration discretion. Some of these provisions are of a quite concrete and specific nature. Such specific provisions regard excluding convicted offenders from professional activities involving direct and regular contact with children (Article 10(1)) and the right that MS must ensure for employers to request information about convictions and disqualifications for professional or organized voluntary activities involving direct and regular contact with children (Article 10(2)). The Directive contains, furthermore, provisions which aim at mitigating the effect of the offenses, such as obligation to ensure that child pornography sites hosted within their territory are promptly removed and to block access to such sites when these are hosted abroad (Article 25).

Other provisions in the field of prevention and protection of children are worded in more general terms. Member States should set up prevention activities such as education, awareness raising and training of officials (Article 23) and provide ‘assistance and support’ to victims as soon as there are reasonable grounds to suspect an offence (Article 18(2)). Children reporting abuse within the family should receive ‘special protection’ (Article 19(1)). Furthermore, ‘specific standards’ for interviews with child victims should be adopted. At the same time, the Directive contains a number of specific requirements in this regard, e.g. on the right to legal representation.

2.4 Recent developments

After the transposition deadline, of 18 December 2013, had passed the Commission initiated in the beginning of 2014 several infringement procedures against 15 Member States (including the Netherlands[24] and Ireland) for not communicating all the national measures taken to ensure full implementation of the Sexual Abuse Directive. Ireland and the Netherlands could resolve the issues – without the Commission sending a reasoned opinion – respectively in June 2015 and February 2016.

24 The Netherlands transposed the Directive on 1 March 2014.

The Commission initiated a second series of infringements procedures in 2019. This time it not only concerned non-communication, but the failure to implement the SAD correctly into national law.[25] Proceedings were launched against all Member States, except Denmark, Cyprus, Ireland and the Netherlands[26] (with which dialogue on conformity is ongoing).[27] In Germany there are problems with the correct implementation of Articles 9 (a) and (b), on the aggravating circumstances, and Article 15(2), on the statute of limitations.[28] Apparently, the German legislature went beyond the discretion provided to them in the latter provision. Similarly, the Commission identified issues in the Czech implementation of the SAD, in particular Article 4(7) and Articles 9 (a), (c) and (f) were incorrect.[29] In response, the Czech government acted swiftly and has proposed a Bill implementing these provisions in the Czech Criminal Code, which also included a limitation to the statute of limitations of one offence.[30] In contrast, the exact nature of the problems in the Netherlands is unknown, though, our interviewee indicated that it concerned implementation of some provisions with quasi-legislation.

This second wave of infringement procedures is part of a bigger review of the current legal framework. In particular, a dramatic increase in reports of online child abuse noted by the Commission in 2020, despite the Directive's inclusion of online forms of abuse, led to calls from both the Council and the European Parliament.[31] Following these calls, the Commission proposed an 8-pronged strategy:

- Better implementation of the Directive. The Commission has initiated 23 infringement procedures, mostly to address insufficient measures in the field of prevention; assistance, support and protection; and with regard to the definition of offences and level of penalties
- Reassess the existing legislation, including – but not only – the Directive (e.g. also the e-evidence proposal)
- Study by the commission to identify legislative gaps and to learn from MS practices and laws
- Better enforcement, e.g. by setting up victim identification teams
- Invest in prevention
- Setting up a European centre on prevention and countering of child sexual abuse that will support the Member States
- Facilitate companies to detect and report child sexual abuse (e.g. Facebook)
- International cooperation and networking.[32]

These developments may well lead to a revision of the Directive in due time, focusing on a further elaboration of i.a. the provisions on prevention and provisions addressing the further evolving digitalization of the area.

3. Transposition in selected Member States

This section assesses the way the Directive has been transposed in the selected Member States. The analysis focuses on the ways in which these Member States have used the discretion allowed by the Directive and the differences in implementation legislation this has resulted in. As a general remark, it should be noted that criminal law harmonization in general may easily lead to transposition issues at the national level. Indeed, criminal law systems are closely intertwined with nation states and their historic development (and are thus sensitive to the principle of national sovereignty).

25 European Commission, 2019.
26 Tweede Kamer der Staten-Generaal, 2020, p. 16.
27 European Commission, 2020.
28 Bundesministerium für Wirtschaft und Energie, 2020.
29 Ministryně spravedlnosti, 2020, see the explanatory memorandum.
30 Ministryně spravedlnosti, 2020,
31 European Commission, 2020, p. 1.
32 Ibid.

National criminal law systems have thus developed autonomously over centuries, expressing national values, thereby creating fine-grained regulatory frameworks that may differ substantively across Europe. The historic development of the laws on sexual offenses in the selected countries indeed date back to the 1800s.[33] At the same time, these laws have changed over time as a result of changing moral views on sexuality. On the one hand, views on e.g. same-sex relations have changed (resulting in alignment of age of consent requirements), while on the other hand the protective ethic towards children has been put more to the forefront. Such changes have manifested in all Member States, but not in the same way, not to the same degree and not at the same point in time.[34] Laws on sexual offenses thus remain deeply entrenched in national (legal) history and in national societal views on sexual morality. The implementation of the Directive (and the prior Framework decision) thus created alignment problems with the national criminal law systems as well as difficulties in the application of certain terms and concepts. E.g. in Germany it has been observed that the implementation of the Directive has generally added complexity to the system.[35]

3.1 Implementation strategies in the Member States

3.1.1 Czech Republic

In the Czech Republic the SAD was implemented by an act amending some provisions in the Criminal code, Criminal Procedure Code and the Act on Criminal Liability of Legal Persons and Proceedings Against Them.[36] The legislature, in the first place, considered that most of the requirements of the SAD were already in place in the Czech legal system. Yet, several changes were necessary to comply with the SAD, as the Czech legal system did not provide sufficient protection for citizens against human trafficking and protection for children against sexual assault at the level required by the European Union.[37] Though, the changes required were considered to be 'relatively minimal compared with other European Countries.[38] To achieve compliance with the SAD the Czech implementation introduced some new offences such as participation in a pornographic performance (Article 4(4) SAD) and making unlawful contact with a child (Article 6(1) SAD).[39] Furthermore, our interviewee indicated that the SAD has not provided a fundamental change for the Czech criminal law, this is also illustrated by the fact that only two new criminal offences had to be adopted.[40]

Overall, the transposition into Czech law was generally uncontroversial, uncomplicated and generated minimal debate. The assumption is that the need for adequate legislation to ensure effective protection against these crimes is widely perceived and accepted in society. Only one aspect was put up to discussion, which entailed the increase of the sanction for the offence of making unlawful contact with a child from one to two years of imprisonment.[41] This proposal has been accepted.

33 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
34 E.g. in Ireland these changes have taken place relative late: Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
35 Hauenstein, 2014.
36 Zákon č. 141/2014 Sb. *Zákon, kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, a zákon č. 418/2011 Sb., o trestní odpovědnosti právnických osob a řízení proti nim, ve znění zákona č. 105/2013 Sb.*
37 Zákon č. 141/2014 Sb. Důvodová Zpráva
38 Poslanecká sněmovna Parlamentu České republiky, 2014a, see comments made by Válková.
39 Ibid.
40 Interview with Czech academic expert, Prague, June 18, 2021.
41 Poslanecká sněmovna Parlamentu České republiky, 2014b, see A.8-A.11.

3.1.2 Germany

The German legislature implemented the SAD by adopting an act, which entailed minor adjustments of the existing law.[42] Thereby, the legislature considered that the German law already covered all essential requirements of the SAD.[43] In this respect, other EU legislation – the victim rights Directive – already contained similar implementation requirements, with in this case criminal procedural law which is also incorporated in the SAD.[44] The German implementation covered changes/adoption of provisions in relation to child pornography (including the increase of maximum term of imprisonment from 2 to 3 years), attending child pornographic performances as well as rules on jurisdiction.

Our interviews indicate that most of the changes in the German law would have occurred also without the Directive.[45] As to the implementation, the strategy seems - similar to the other Member States – to be that the legislature checks whether the aspects from the Directive have already been legislated, and if there are legal gaps it adopts new provisions.[46]

3.1.3 Ireland

The implementation of the SAD in Ireland was, initially, given effect by regulations in 2015.[47] This meant that it was not possible to include more measures than was required by the Directive; domestic reform of the criminal law had to be done by primary legislation.[48] In 2017 the latter was done by the Criminal Law (Sexual Offences) Act 2017, which transposed the SAD as well as the Lanzarote Convention, but also included other aspects – on sexual offences – not required by the Directive.[49] The Act of 2017 covers quite some aspects of the SAD, however, it must be read in conjunction with a variety of earlier statutes.[50]

Overall, the Irish act entails a modernization of the law, which was already longer necessary in Ireland. Adopting this act was incentivized by the SAD, which to a certain extent also inspired the content of the Act.[51] Yet, criminal law legislation from other common law jurisdictions also inspired the content.[52] In essence, the definitions adopted in the Act were not adopted on the basis of the Directive, rather did the legislature ensure that the definition adopted would comply with the one in the Directive.[53] Additionally, similar to the Netherlands not all provisions of the SAD have been implemented into legal provisions in Ireland. For example, the aggravating or mitigating factors that apply in Irish sentencing law are generally judicially developed.[54] Moreover, Article 25 has been implemented by a notice and takedown framework, rather strict legal measures.

42 Deutscher Bundestag (2015), Neunundvierzigstes Gesetz zur Änderung des Strafgesetzbuches – Umsetzung europäischer Vorgaben zum Sexualstrafrecht vom 21. Januar 2015: BGBl I 2015 Nr. 2, S. 10.
43 Deutscher Bundestag, 2014, p. 1.
44 Ministerium für Justiz und Gleichstellung des Landes Sachsen-Anhalt, 2015, p. 15
45 Interview with German academic expert, MS Teams, May 21, 2021.
46 Interview with German academic expert, MS Teams, May 21, 2021.
47 Statutory Instrument No. 309/2015 - European Union (*Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography)* Regulations 2015.
48 Section 3 European Community Act, 1972, nr. 27.
49 Oireachtas, 2015.
50 O'Malley, 2017, p. 1.
51 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
52 In particular the UK influenced the measures adopted on Article 25. Interview with Richard Troy, Criminal Justice Policy Section of the Department of Justice Ireland, MS Teams, May 21, 2021.
53 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
54 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.

3.1.4 Netherlands

The general implementation strategy in the Netherlands is to adopt only new rules where this is strictly necessary for a correct implementation.[55] On the basis of this general notion, the Dutch legislature, identified three categories of provisions in the Directive: 1. Provisions which have already been implemented in Dutch law; 2. Provisions which require implementation in practice, e.g. via policy measures; 3. provisions which require implementation via adoption of new provisions.

The first category forms the majority in the Dutch implementation of the SAD. Certain aspects have already been implemented on the basis of the Lanzarote Convention, such as the maximum term of imprisonment for child pornography and the offences of witnessing sexual activities/abuse and grooming.[56] Moreover, some provisions did not require further implementation because the general context provided the application of the Directive.[57] In this respect, the prosecutorial guidelines for the public prosecution service (*Openbaar Ministerie*) play an important, yet comparatively distinctive, role in the Dutch criminal system.[58] These guidelines, i.e. implement provisions on support measures for child victims as well as victim rights. Additionally, there is also a set of guidelines setting the bandwidth of the height of the term of imprisonment.[59] In this way the Dutch make use of various forms of quasi-legislation, which in practice often necessitates them to explain to the Commission how to implemented the Directive, as they are not used to these forms.[60] On the basis of this existing framework, the Netherlands only adopted new provisions to transpose Article 3(6) and 9 SAD.[61] Our interviews indicate that the implementation in the Netherlands is essentially a 'compliance test', which entails checking whether the national provisions comply with the Directive and any change should be minimal.[62]

It is interesting to note, however, that the implementation of the Directive is currently undergoing a full review and revision. After the initial minimalist implementation, the Dutch legislation on sexual offenses is now being examined more broadly. The correct implementation of the Directive has a key role in that process of revision, possibly also because of the realization that the initial implementation has not been correct or proper.[63]

3.2 Criminal offences and sanctions – General remarks

The core of the Directive consists of the provisions which establish minimum maximum terms of imprisonment for various criminal offences related to the sexual abuse and exploitation of children.[64] Member States' legislation determines whether, in addition to imprisonment, the offences are punishable with other sanctions. The implementation of the Directive is impacted at this point by pre-existing and more general aspects of national criminal law, namely the ability for courts to impose fines instead of, or in addition to, imprisonment.[65] Whereas in the Netherlands such a fine may always be imposed, the Czech Republic, Germany and Ireland only allow fines where explicitly mentioned.[66] National laws equally vary in terms of the definition of the terms of imprisonment.

55 Aanwijzing 337 van de aanwijzingen voor de regelgeving; Tweede Kamer der Staten-Generaal, 2013, p. 1.
56 Tweede Kamer der Staten-Generaal, 2013, p. 6.
57 Ibid., p. 11.
58 Ibid., p. 11-12.
59 Richtlijn voor strafvordering seksueel misbruik van minderjarigen (2015R047), 01.03.2015.
60 Interview with Erik Planken, Senior Policy Advisor at the Dutch Department of Law Enforcement and Crime Prevention, MS Teams, May 31, 2021.
61 Tweede Kamer der Staten-Generaal, 2013, p. 14-16.
62 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
63 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
64 Article 1 SAD.
65 In the Netherlands these sanctions may also be combined (Article 9(3) Wetboek van Strafrecht.).
66 See for example the difference between Section 176 and 182 Strafgesetzbuch (StGB).

The Czech Republic and Germany both contain minimum terms of imprisonment for certain offences, an element unknown in Dutch and Irish criminal law.[67] The Irish system is unique in another way: for some offences the type of sanction which can be imposed depends on whether it is based on a summary conviction or a conviction on indictment.[68] Some provisions only allow for a conviction on indictment, this means a proceeding brought by the Director of Public Prosecutions in front of a judge and jury.[69] Whereas, other offences in addition allow for a summary conviction, which is a proceeding in front of only a judge.[70] Generally, a summary conviction is sanctioned with a term of imprisonment not exceeding 12 months, while a conviction on indictment may result in much higher terms of imprisonment.

Data on the actual sanctions imposed by courts has been difficult to generate. With regard to Germany, our respondent indicated that the general level of the severity of the sanctions has been relatively low, albeit a bit rising in recent times following an equally rising consciousness of the seriousness of these crimes. Moreover, our Dutch and Irish respondents indicated that overall the maximum offences in their national law are much higher than they will actually be imposed.

Considerable differences equally exist with regard to alternative and supplementary sanctions. In the Netherlands, the deprivation of certain rights can be pronounced in addition to imprisonment.[71] Similarly, in the Czech Republic an activity ban may be imposed as an alternative or in addition to imprisonment.[72] The Czech and German laws also allow for the confiscation of objects/property, in the Czech Republic this may be imposed as an alternative sanction while in Germany it is an additional sanction.[73]

3.3 Scope of protection

Article 2 of the SAD contains a list of definitions yet some of the main concepts have been left undefined. The concept of 'sexual activities' and the 'age of sexual consent', (which is the age below which it is prohibited to engage in sexual activities with a child) are left for the Member States to define. The latter element varies considerably among the selected Member States.[74] In Germany it is set at 14 years, 15 years in the Czech Republic, 16 years in the Netherlands and 17 years in Ireland.[75]

Nonetheless, the age of sexual consent does not fully determine the level of protection provided by national law, as the protection may vary from provision to provision. For example, Irish law defines a 'child' in some cases as a person under the age of 15 years, in other cases as under the age of 17 years, and in yet other cases under the age of 18 years.[76] In the German law, a distinction is made between a child (below the age of 14) and youth (between 14-18 years), with consequential effect on the maximum sanction which may be imposed.[77]

67 Section 177 Strafgesetzbuch (StGB); Section 187 Zákon č. 40/2009 Sb.
68 See for example, Section 13(5) of the Criminal Law (Sexual Offences) Act 2017, nr. 2.
69 See for example, Section 17 of the Criminal Law (Sexual Offences) Act 2017, nr. 2.
70 In such a case it is the Director of Public Prosecutions which form of trial takes place, Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
71 Article 251 Wetboek van Strafrecht.
72 Section 192 in conjunction with 53 Zákon č. 40/2009 Sb.
73 Section 192 Zákon č. 40/2009 Sb.; Section 184b(6) Strafgesetzbuch (StGB).
74 O'Sullivan has demonstrated what the reasons are for the different definitions of "age of sexual consent" among the Member but has pleaded for harmonizing at least an age range: O'Sullivan, 2009.
75 European Commission, 2016a, p. 7.
76 See Section 3-5 of the Criminal Law (Sexual Offences) Act 2017, nr. 2.
77 Section 176 and 182 Strafgesetzbuch (StGB).

3.4 Criminal offences and sanctions – Detailed overview

This part explores the discretion and the national implementation of the five core provisions of the SAD, which establish minimum maximum terms of imprisonment for offences concerning sexual abuse, sexual exploitation, child pornography and the solicitation of children for sexual purposes (Articles 3-6 and 8 SAD).

These provisions provide the definitions of various criminal offences and set the respective minimum maximum term of imprisonment for this offence. The Member States have the discretion to provide a higher maximum term of imprisonment. Moreover, it seems that other sanctions may in addition or as an alternative to imprisonment still be in place in the Member States.[78] Additionally, these provisions provide the room to provide scope discretion, in relation to the scope of protection, as well as elaboration discretion. The latter provides the discretion to further elaborate the content in the national law.

Offences concerning sexual abuse

Article 3 contains offences concerning sexual abuse. In relation to the minimum maximum terms of imprisonment some provisions in this Article differentiate between offences against a child which has not reached the age of sexual consent and where the child is over that age, the latter being any person below the age of 18 years.[79] Only the Czech Republic and Germany applied this distinction when implementing the Directive.

Table 1 illustrates clearly that the Member States have made use of the discretion and have gone beyond the minimum maximum term of imprisonment. In comparison Ireland seems to sanction offences the highest, whereas the Netherland and Germany seem to stay the closest to the minimum requirement of the SAD.

Table 1. Maximum term of imprisonment at MS level on the basis of Article 3 SAD (where two years are mentioned, it concerns the term for offence with child below age of sexual consent and with child above this age)

	Czech Republic	Germany	Ireland	Netherlands
Article 3(2) – 1 year	2 years	5 years	10 years	2 years
Article 3(3) – 2 years	2 years	5 years	10 years	2 years
Article 3(4) – 5 years	8 years	10 years	Life imprisonment[80]/ 7 years[81]	12[82]/8 years[83]
Article 3(5)(i) – 8/3 years	10/5 years	*5 years*[84]	15 years	8 years
Article 3(5)(ii) – 8/3 years	12/10 years	*5 years*	14 years	8 years
Article 3(5)(iii) – 10/5 years	12/10(5) years	*5 years*	Life imprisonment	12 years
Article 3(6) – 10/5 years	12/10 years	10/5 years	10 years	10 years

78 See in particular the wording in Article 3(1) SAD: 'Member States shall ensure that the intentional conduct […] is punishable'; as well as recital 15, which provides that the Directive obliges Member States to provide for criminal penalties in their national legislation.
79 Note this applies also to Article 4 SAD.
80 Below the age of 15 years.
81 Below the age of 17 years.
82 Below the age of 12 years.
83 Between the age of 12 and 16 years.
84 The implementation of Article 3(5)(i)-(iii) SAD in Germany seems not in compliance with the Directive's requirements.

Specifically, in relation to engaging in sexual activities with a child this results in the following differences (see Table 1 on Article 3(4)). In the Netherlands sexual activity with a child below the age of 12 years is sanctioned with 12 years of imprisonment, while between 12-16 years this may result in 8 years of imprisonment.[85] In Ireland the difference is that a sexual activity with a child below 15 years of age can be sanctioned with life imprisonment, while between 15-17 years of age this may be sanctioned with 7 years of imprisonment.[86] Whereas, this distinction does not exist in the Czech Republic and Germany, which provide protection for children under the age of 15 years, respectively, 14 years.[87]

Additionally some national provisions illustrate the discretion the Member States have as to the way of implementation. This is in particular visible with the implementation of Article 3(2) and 3(3) SAD, which in all Member States has been implemented in one and the same provision, thereby making no distinction between witnessing a sexual activity or sexual abuse.[88] In the Netherlands the legislature explained that sexual abuse is considered to be part of 'sexual activities'.[89] Similarly, the German and Irish law make no difference between causing a child to witness sexual activity or sexual abuse.[90] The Czech provision is rather open-worded compared to the other national provisions, which sanctions the endangered upbringing of a child, incl. negligence, by enabling or encouraging immoral life and by violating duties of parent's responsibility.[91]

For the implementation of Article 3(4) the Dutch legislature opted for a broader implementation, than required by the Directive. The Dutch law makes a distinction between sexual activities concerning sexual penetration/intercourse and so-called 'lewd acts'.[92] The former can be sanctioned by 12 or 8 years of imprisonment, depending on the age, whilst for the latter 6 years of imprisonment may be imposed.[93]

Offences concerning sexual exploitation

Article 4 contains offences concerning sexual exploitation. Table 2 illustrates the differences in implementation between the Member States. The Netherlands has the highest terms of imprisonment here, whereas Germany stayed the closest to the minimum of the Directive.

Table 2. Maximum term of imprisonment at MS level on the basis of Article 4 SAD

	Czech Republic	Germany	Ireland	Netherlands
Article 4(2) – 5/2 years	10 or 5 years (*child > no mention of below 15 years*)	5 years	14 or 10 years[94]	15 years
Article 4(3) – 8/5 years	10 years (*child > no mention of below 15 years*)	10 years	14 or 10 years[95]	15 years
Article 4(4) – 2/1 years	2 years (*child > no mention of below 15 years*)	3/2 years	1 year or 10 years*[96]	4 years
Article 4(5) – 8/5 years	12 years	10 years (below 18 years)	14 years	15 years
Article 4(6) – 10/5 years	12 years	10 years (below 18 years)	14 years	15 years
Article 4(7) – 5/2 years	5/2 years	5 years	1 year or 5 years*	6/4 years

85 Article 244-245 Wetboek van Strafrecht.
86 Section 16-17 of the Criminal Law (Sexual Offences) Act 2017, nr. 2.
87 Section 187 Zákon č. 40/2009 Sb.; Section 176(1) Strafgesetzbuch (StGB).
88 The Netherlands, similarly, implemented Article 4(2)-(3) and (5)-(6) under the same provision on human trafficking (see Article 237f Wetboek van Strafrecht).
89 See also Hof Den Haag, 23.02.2015: ECLI:NL:GHDHA:2015:329.
90 In Ireland this is assumed, as there is no specific provision for witnessing sexual abuse.
91 Section 201 Zákon č. 40/2009 Sb.
92 'Handelingen van seksuele aard die in strijd zijn met de sociaal-ethische norm.'
93 Article 244-247 Wetboek van Strafrecht.
94 Two possible provisions: Section 3 and 11 of the Criminal Law (Sexual Offences) Act 2017, nr. 2.
95 Ibid.
96 * = summary conviction / conviction on indictment. See also section 3.2 of this Report.

Offences concerning child pornography

Article 5 contains offences concerning child pornography. The Member States have implemented these five offences either with one (the Netherlands) or two provisions in their national law. In theory, the highest term of imprisonment can be imposed in Ireland, while the Czech Republic stayed the closest to the minimum of the Directive.

Table 3. Maximum term of imprisonment and discretion used at MS level on the basis of Article 5 SAD

	Czech Republic	Germany	Ireland	Netherlands
Article 5(2) – 1 year	2 years	3 years	1 year or 5 years*[97]	4 years
Article 5(3) – 1 year	2 years	3 years	1 year or 5 years*	4 years
Article 5(4) – 2 years	3 years	5 years	1 year or 14 years*	4 years
Article 5(5) – 2 years	3 years	5 years	1 year or 14 years*	4 years
Article 5(6) – 3 years	3 years	5 years	1 year or 14 years*	4 years
Article 5(7) - option	n/a (*Not applied*)	Applied	n/a	n/a
Article 5(8) - option	n/a	Applied	n/a	n/a

Limitations and restrictions

The Directive provides the Member States with some room to include some limitations on the application of certain offences or restrict the application of some offences in certain specific circumstances.

Article 5(1): The SAD provides some discretion to the Member States for them to provide a defense in relation to pornographic material.[98] Germany and Ireland both have a defense for the possession or obtaining access of child pornography. In Germany it concerns the performance of state functions, tasks resulting from agreements with a competent government agency or official or professional duties.[99] In Ireland it concerns the exercise of functions under the censorship of films act/publications acts/video recording acts or for the purpose of the prevention, investigation or prosecution of offences under this act.[100] Moreover, it is a defense where the accused proves that he possessed or obtained access to child pornography, for the purpose of bona fide research.[101] In the past, the Netherlands also had a defense in place for therapeutic, educational or scientific purposes, however, this has been deleted because it allowed too many opportunities for abuse.[102] Similar to the Netherlands, the Czech law does also not provide a defense for pornographic materials.

Article 5(7)/(8): The SAD provides the Member States with an option to apply or disapply the provision on child pornography in specific circumstances (see Table 3).[103] Only Germany has made explicit use of these options. In the first place, the German legislature decided not to penalize the possession, obtaining access or production (without the purpose of distribution) of child pornography,

97 * = summary conviction / conviction on indictment. See also section 3.2 of this Report.
98 Article 5(1) SAD,'without right'; recital 17 SAD.
99 Section 184b(5) Strafgesetzbuch (StGB).
100 Section 14(3) Criminal Law (Sexual Offences) Act 2017, nr. 2.
101 Section 14(4) Criminal Law (Sexual Offences) Act 2017, nr. 2.
102 Tweede Kamer der Staten-Generaal, 2002.
103 Article 5(7)-(8) SAD.

which entails a person which is 18 years of age or older at the time of depiction.[104] The German legislature considered the protection of adults with a youthful appearance as inappropriate, as young adults who do not have this appearance are equally not protected against being used to produce pornography.[105] As our German respondent indicated, the reason for using this form of discretion flows from the understanding of what should be the ground for criminal liability here. Rather than the intent of the perpetrator, the German legislature considers that victim protection should be the rationale of the provision. As the interests of adults are not protected, the no criminal liability should be imposed. For the same reason the German legislature opted not to penalize the production of child pornography which is not intended for distribution and does not entail the actual occurrence (tatsächliches Geschehen) of children, thus only reproduces a realistic (fictitious) occurrence.[106]

The other Member States have not adopted such legislation, it seems that the aforementioned situations are sanctioned in these Member States.[107] At least, in all of them the definition of child pornography includes 'persons who appear to be a child'.[108]

Solicitation of children for sexual purposes

Article 6 contains offences concerning solicitation of children for sexual purposes**.** Only 6(1) contains a minimum maximum term of imprisonment. As to 6(2) the Directive only requires that the conduct is punishable in the Member States. Ireland has set the highest maximum term of imprisonment, whereas the Netherlands and the Czech Republic stayed on the lower side.

Table 4. Maximum term of imprisonment at MS level on the basis of Article 6 SAD

	Czech Republic	Germany	Ireland	Netherlands
Article 6(1) – 1 year	2 years	5 years	14 years (below 17 years)	2 years
Article 6(2) – (no min. set)	2 years	5 years	14 years	2,5 years

Article 6(2) SAD has been implemented differently across the Member States. The implementation of this provision in the Czech Republic and the Netherlands entails the concept of attempt, which in contrary is, not required in Germany and Ireland. In the latter Member States, the communication with a child for the purpose of sexual exploitation is already a criminal offence in its own right.[109] In the Czech republic, the fact that it concerns an attempt does not affect the sanction that may be imposed as it is punishable according to the sanction set for the completed criminal offense.[110] This is different in the Netherlands, where the maximum penalty (4 years of imprisonment) is reduced by one third in case of an attempt.[111]

104 Section 184c(1)(3) Strafgesetzbuch (StGB).
105 Deutscher Bundestag, 2014, p. 32.
106 Section 184b(1)(3) Strafgesetzbuch (StGB); Deutscher Bundestag, 2014, p. 30.
107 European Commission, 2016a, p. 9.
108 Article 240b Wetboek van Strafrecht; Section 9 Criminal Law (Sexual Offences) Act 2017; Section 192 Zákon č. 40/2009 Sb.
109 Section 176(4) Strafgesetzbuch (StGB); Section 8(1) in conjunction with section 2 Criminal Law (Sexual Offences) Act 2017.
110 Section 21(2) Zákon č. 40/2009 Sb.
111 Article 45 Wetboek van Strafrecht.

Consensual sexual activities

In Article 8 SAD the Directive provides the Member States with the policy option to decide whether certain sexual activities are also penalized where it involves peers who are close in age or where it involves a child who has reached the age of sexual consent.

Table 5. Option not to penalize certain offences at MS level on the basis of Article 8 SAD

	Czech Republic	Germany	Ireland	Netherlands
Article 8(1) - option	n/a	n/a	Applied (*implicit*)	Applied (*implicit*)
Article 8(2) - option	n/a	n/a	n/a	Applied (*implicit*)
Article 8(3) - option	n/a	Applied	n/a	Applied (implicit)

Only Germany explicitly applied one of the options provided in Article 8, opting not to penalize the offence of possessing and/or producing pornography for private use involving children who have reached the age of sexual consent, who have consented to this use and have not been abused.[112] The German legislature had to make use of this option as the German criminal law system contains a rule of compulsory prosecution, in principle requiring the prosecutor to institute proceedings in every case.[113]

In contrast, on the basis of the opposite reason the Dutch legislature did not have to use this option, as the criminal system allows the public prosecution or courts to make use of the options in Article 8. The possession and production of child pornography under any circumstances is in principle prohibited and sanctioned in the Netherlands, nonetheless, the principle of opportunity allows the public prosecutor not to prosecute under certain circumstances.[114] Similar, is the concept of 'ontuchtige handelingen' (lewd acts), which entail sexual activities contrary to prevalent socio-ethical norms. This concept does, however, not entail normal consensual sexual activities between peers who are close in age. Whether this is the case will be determined by the public prosecutor or the court.[115] In Ireland, essentially the same applies to consensual sexual activities between peers, where the law explicitly provided a defence where the defendant is younger or less than 2 years older than the child.[116] Therefore, unlike Germany the Dutch and Irish legislature did not have to avail of transposing the provision in the national law.

3.5 Additional sanctions

This part explores the discretion and the national implementation of the provisions requiring the Member States to provide the necessary additional sanctions on the offences in Articles 3-7 SAD. These additional sanctions entail disqualification of convicted persons from professional activities and liability and sanctions of legal persons in relation to the aforementioned offences. The room for the Member States is to elaborate on the content of these sanctions in the national system. Thereby, the Directive sometimes provides possible (non-mandatory) options which the Member States may implement.

112 Section 184c(4) Strafgesetzbuch (StGB); European Commission, 2016a, p. 10.
113 Elsner and Peters, 2006.
114 Tweede Kamer der Staten-Generaal, 2013, p. 18.
115 Tweede Kamer der Staten-Generaal, 2013, p. 18.
116 Section 17(8) Criminal Law (Sexual Offences) Act 2017. More requirements, not a person in authority nor in an intimidatory or exploitative relationship, apply.

Additional sanctions: disqualification arising from convictions

The Member States are required to adopt measures which enable the temporary or permanent disqualification of convicted persons from exercising at least professional activities involving direct and regular contact with children.[117]

In all Member States it is possible to judicially disqualify a convicted offender with regard to future activities involving direct and regular contacts with children. In Ireland, a person can be disqualified from exercising any activity where necessary for the purpose of protecting the public from serious harm from the person.[118] A court order to this end may cover both professional and voluntary activities.[119] In the Czech Republic, Germany and the Netherlands courts are in general only able to impose a disqualification of profession if the offence was committed in relation to the profession.[120] Moreover, in Germany the requirements to impose a disqualification are interpreted restrictively, as the disqualification conflicts with the principle of social rehabilitation and the right to a free choice of profession.[121] The disqualifications should in all Member States be applied on a temporary basis. However, in Germany, Ireland and the Netherlands they may, exceptionally and under strict circumstances, become permanent.[122]

In addition to these general disqualifications the Czech and German courts may impose specific disqualifications. The Czech law contains disqualifications for pedagogy and social workers, disqualifying a person from working in these areas where the offence was committed in a pedagogy activity for pedagogy workers and a social activity for social workers.[123] In Germany, the law contains a reverse disqualification, prohibiting "*Träger der öffentlichen Jugendhilfe*" to employ persons convicted of sexual crimes for work related to the child and youth welfare.[124] Moreover, a convicted person is prohibited to employ young people or otherwise supervise, instruct, or train them.[125] These more specific disqualifications in Germany allow to take into account offences conducted out-of-work context.

The Member States must also provide employers - for professional and voluntary activities involving children – with the possibility to request information of the existence of criminal convictions or disqualifications.[126] Essentially, all the Member States have a particular procedure in place for employers to ensure that possible employees are of good conduct. In the Netherlands and Ireland there is even an obligation for private employers to acquire a certificate of good conduct in relation to certain work or activities, as specified in the respective laws.[127] Such an obligation exists in Germany only for public authorities working with children, and in the Czech Republic only for pedagogic work, social work, work in the social and legal protection of children or organisations with a special authorization (in relation to voluntary work).[128] Additionally, the Czech Republic and Germany have a limitation in place, which only allows employers, under certain conditions to request information on the conduct of the employee. Whereas, in the Czech Republic no information on the criminal conduct may be provided if not in line with the circumstances, while in Germany it is not possible to request an extended criminal record.[129]

117 Article 10(1) SAD.
118 Additionally, regulations 4-6 of Statutory Instrument No. 309/2015 - European Union (Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography) Regulations 2015, contain an obligation for courts to consider prohibiting a the offender from working with children for a specified time after his or her release from prison.
119 Section 16(4) Sex Offenders Act 2001.
120 Section 73 Zákon č. 40/2009 Sb.; Section 70 Strafgesetzbuch (StGB); Article 251(2) in conjunction with 28 Wetboek van Strafrecht..
121 Missing Children Europe et al., 2015, p. 117.
122 Section 70 Strafgesetzbuch (StGB); Section 16(6) Sex Offenders Act 2001; Article 251(2) in conjunction with 28 Wetboek van Strafrecht.
123 Act No 108/2006 Coll; Act No. 359/1999 Coll; Act No. 563/2004 Coll.
124 Section 72a Sozialgesetzbuch VIII.
125 Section 25 Jugendarbeitsschutzgesetz.
126 Article 10(2) SAD; recital 41 and 43 SAD leave considerable room for discretion to the Member States.
127 Regeling verklaring omtrent het gedrag; Section 12 National Vetting Bureau (Children and Vulnerable Persons) Act 2012, nr. 47.
128 Section 31 Bundeszentralregistergesetz; Section 29a of Act no. 563/2004 Coll.; Missing Children Europe et al., 2015, p. 104.
129 Section 316(4) Zákon č. 262/2006 Sb; Section 30a Bundeszentralregistergesetz.

The main difference between the Irish and other systems is that in the other Member States the employee has to request a certificate himself and provide it to the employer, while in Ireland a liaison person of an organization has to request the certificate.

An important aspect in Ireland and the Netherlands is that they apply procedures to ensure the continued screening of persons with a certificate. In Ireland, persons employed must be checked after a specified period, while in the Netherlands the agency providing the certificate systematically screens organisations and persons working with children.[130]

Liability of legal persons

Article 12 stipulates that Member States need to make sure that any legal person must be held liable for any of the offences listed in Articles 3-7 "committed for their benefit" by a person that has (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person. More explicitly, Article 12(2) adds that also "a lack of supervision or control" by such a person leading to the commission of any of the offences is punishable.

The Czech Republic, Germany and the Netherlands implemented this with general criminal law provisions. In Ireland the Criminal Law (Sexual Offences) Act 2017 allows to hold a director, manager, secretary or other officer of a body corporate as well as the body itself liable if one of the aforementioned persons would be guilty of an offence in that act.[131]

Sanctions on legal persons

Article 13 lays down the fines to be applied to persons held liable pursuant to Article 12. These sanctions, both concerning Articles 12(1) (13(1) and 12(2) (13(2), sanctions should be "effective, proportionate and dissuasive". Article 13(1) further stipulates that the sanctions concerning Article 12(1) should include criminal and non-criminal fines and offers a list of additional fines Member States may include:

a. exclusion from entitlement to public benefits or aid;

b. temporary or permanent disqualification from the practice of commercial activities;

c. placing under judicial supervision;

d. judicial winding-up; or

e. temporary or permanent closure of establishments which have been used for committing the offence.

According to the Commission report, "all Member States have introduced administrative or criminal penalties that are applicable to legal persons".[132] Additionally, the Czech Republic and the Netherlands have "also chosen to introduce the additional sanction of publishing or displaying the decision/judgement in which the legal person was found guilty of the crime".[133] Concerning the list of optional fines set out in 13(1), two of our four countries have chosen not to transpose any of the options, Germany and Ireland (and thereby belong to the minority of Member States overall). The Netherlands and the Czech Republic accordingly allow for some of the optional penalties, as summarized in table 6.

130 Section 20 National Vetting Bureau (Children and Vulnerable Persons) Act 2012; Missing Children Europe et al., 2015, p. 147.
131 Section 57 Criminal Law (Sexual Offences) Act 2017.
132 European Commission, 2016a, p. 12.
133 European Commission, 2016a, p. 12.; Dolman, 2021.

Table 6. Choice of optional fines Article 13(1) SAD

Sanctions	Czech Republic	Germany	Ireland	Netherlands
(a) exclusion from entitlement to public benefits or aid	yes	no	no	yes
(b) temporary or permanent disqualification from the practice of commercial activities	yes	no	no	unclear
(c) placing under judicial supervision	no	no	no	unclear
(d) judicial winding-up	yes	no	no	unclear
(e) temporary or permanent closure of establishments which have been used for committing the offence	no	no	no	unclear

As to Article 13 (2), none of the Member States has additional measures transposed with regard to Article 12(2). Rather, the same rules apply to those sanctioned under Art 12(2) as to those legal persons sanctioned under Article 12(1).[134]

Member States are offered the discretion to choose the appropriate measures and sanctions and are offered optional sanctions in Article 13(1).

3.6 Enforcement provisions

This part explores the discretion and the national implementation of the provisions on enforcement of the offences in the SAD. These provisions cover a variety of aspects, including the non-prosecution of penalties to the victim, the application of the statute of limitations, effective means of investigation, reporting obligations and the removal of illegal online content. The room for the Member States in these provisions consists of elaboration discretion, in particular requiring the Member States to achieve a certain objective, but leaving the details of it up to Member States.

Non-prosecution or non-application of penalties to the victim

Article 14 lays down that MS should, "in accordance with the basic principles of their legal systems", enable national authorities to not prosecute child victims, having been subjected to any of the acts defined in Articles 4(2), (3), (5) and (6) as well as 5(6), even if they have been involved in criminal activities.

From the information gathered so far it seems that all four MS already had legislation in place that transposes this provision.[135] In the Netherlands, both the public prosecution[136] as well as courts[137] may determine that offences should not be prosecuted due to personal circumstances of the offender or the general circumstances of the activity. In the Czech Republic, a child which requires or accepts for the sexual intercourse, masturbation, exposing himself or other similar behaviour payment or other

134 European Commission, 2016a, p.12.
135 European Commission, 2016a, p.12.
136 Article 167 Wetboek van Strafvordering.
137 Article 9a Wetboek van Strafrecht.

consideration is not liable for such an act. This applies also to situations when a child is inducing or helping.[138] For Germany and Ireland, the information we gathered so far is not conclusive, yet the Commission report confirms that these Member States also transposed the provision.

Investigation and prosecution

Article 15 regulates "Investigation and prosecution". Article 15(2) requires the MS to make sure offences mentioned in the first parts of the Directive are prosecuted "for a sufficient period of time after the victim has reached the age of majority".[139] Moreover, Article 15(3) stipulates that proportionate and effective means of investigation should be used in relation to offences referred to in Articles 3 and 7, "such as those which are used in organized crime or other serious crime cases".[140]

The requirement regarding prosecution in Article 15(2) have been implemented differently in the four Member States and concerning different offences. Both Ireland and the Netherlands have fully transposed this provision for all the offences listed in the respective articles.[141] The Dutch Law, for example, does not apply a statute of limitations in case of offences with a maximum term of at least 12 years.[142] In Germany and the Czech Republic, "the statute of limitations for some offences runs from the date the offence was committed".[143]

Regarding Article 15(3) on effective means of investigation, "most of the other Member States transpose it through a multiplicity of provisions from criminal procedural codes", which also includes our four Member States. So far, we only have a list of possible means of investigation for one Member State, namely the Czech Republic: wiretapping and recording telecommunication (with special conditions for human trafficking, among others), feigned transactions, surveillance, seizure or substitution of a consignment, property search, obligation to present a thing, removal of a thing.

Reporting suspicion of sexual abuse or sexual exploitation

Article 16 concerns the reporting of suspicions of sexual abuse or sexual exploitation. It lays down that MS should ensure "that the confidentiality rules imposed by national law on certain professionals whose main duty is to work with children do not constitute an obstacle" to reporting suspicion with regard to offences referred to in Articles 3 to 7.[144] Further, Article 16(2) stipulates that MS should also take measures to encourage persons to report the suspicions referred to in Article 16(1).

Dutch law allows persons who are normally bound to secrecy, to report situations of (supposed) child abuse to the respective authorities without the need of consent of the respective victim.[145] In Germany, specific groups of professionals, such as medical staff, psychologists, teachers, etc., are allowed to report potential cases of abuse but only after having tried to talk to the respective victim in case this is possible.[146] The Irish Law contains a duty to report potential child sexual abuse cases for a broad group of professionals who work - also indirectly – with children in the education, health, justice, youth and childcare sectors.[147] This group includes clergy, employees in child care facilities and adult counselling.[148] By contrast, Czech law has subjected the issue to the general provisions on preventing/not reporting a crime. In Czech Republic, Germany and Ireland certain professional

138 Section 203 Zákon č. 40/2009 Sb.
139 European Parliamentary Research Service, 2017, p. 10.
140 European Commission, 2016a, p.12.
141 Ibid.; This is in contrast to the Commission's finding in European Commission, 2016a.
142 Article 70 in conjunction with 71 Wetboek van Strafrecht.
143 Ibid.
144 Article 16(1) SAD.
145 Article 53, derde lid, Wet op de Jeugdzorg; Now in Article 7.1.4.1 Jeugdwet.
146 Section 4 Gesetz zur Kooperation und Information im Kinderschutz.
147 Children First Act 2015; Department of Children and Youth Affairs, 2017.
148 Department of Children and Youth Affairs, 2017, p. 19; Kool et al. 2021, p. 40.

groups are not only allowed but indeed also obliged to report potential abuses.[149] The more general obligation for the Member States to encourage reporting of Article 16(2) has only in Ireland and the Netherlands resulted in specific implementation measures, with in Ireland a non-statutory duty to report potential abuse for every citizen.[150]

Measures against websites containing or disseminating child pornography

Lastly, Article 25 presents "measures against websites containing or disseminating child pornography". It's main objective is "to disrupt the availability of child pornography".[151] The provision consists of two parts.

In the first place, Member States need to take the necessary measures for the quick removal of the harmful content, within their own territory and, additionally, try to remove them also outside of their territory.[152] This part is a specific obligation for the Member States, which builds upon similar (existing) obligations in EU legislation. The first piece of legislation is Directive 2000/31/EC, which set the basis for procedures on removing and disabling access to 'illegal information'.[153] The provision in the SAD specifies this for content of child sexual abuse. Nowadays, even more legislation entail obligations, with the focus, on the one hand, on the content (public provocations online to commit a terrorist offence), and on the other hand, on the medium (video sharing platforms).[154] According to our interviews, these obligations required regulatory alignment in the Member States.[155]

In the Netherlands the transposition of Article 25(1) is based on the implementation of Directive 2000/31/EC, which resulted in a system of notice and take down. This system existed already since 2001-2003, which primarily required intermediaries to take down unlawful content.[156] Furthermore, the Dutch law provides that when "an automated work is searched and data regarding the criminal offence is found, the Public Prosecutor or the Examining Judge can decide to make this data inaccessible as far as it is necessary to end the criminal offence or to prevent new offences".[157] Hence, if automated searches generate child pornography on the Internet, it can be removed by the respective authorities. In Germany, there are "voluntary cooperation agreements in place between service providers, the Internet hotlines (INHOPE) and the police."[158] In the Czech Republic, removal is regulated through criminal law, by "general provisions that allow the seizure of material relevant to criminal proceedings, e.g. material used in the commission of an offence"[159], and the removal should take place "without undue delay.[160] In Ireland, no specific legal provisions on removal of these websites are in place, but "a self-regulatory framework for internet service providers (ISP)" applies.[161] This framework consists of a national reporting centre, Hotline.ie, where illegal content online can be reported by anyone. [162]

149 European Commission, 2016a, p.13.
150 Kool et al. 2021, p. 40.
151 European Commission, 2016b, p. 3.
152 Article 25(2) SAD.
153 European Commission, 2018.
154 De Steel et al. 2018, p. 21. EU (2017), Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA; EU (2018), Directive 2018/1808/EU of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.
155 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
156 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
157 Article 125o Wetboek van Strafvordering.
158 Missing Children Europe et al., 2015, p. 118. In 2020 the German legislature adopted a provision which allows the police to distribute virtual child pornography in order to infiltrate and achieve success in investigations on illegal content (Section 184b(5)(2) StGB).
159 European Commission, 2016b, p.9.
160 Ibid.
161 Ibid.
162 Irish Internet Hotline, <https://www.hotline.ie/about/> Accessed on: 16 June 2021.

Thereby, the Irish rely on the pre-existing structure which already exists since 1999.[163] If the analysts of Hotline.ie identify the content to be child sexual abuse material, Hotline.ie will either issue a notice to the online service provider (if it concerns a member subscribing to Hotline.ie) or An Garda Síochána (Irish police) requesting the immediate removal of the content.[164] The police, in addition to the reports from Hotline.ie, receive the most reports via automatic means (around 70-80%).[165] In this respect, the Irish police also coordinates with others, such as EUROPOL, INTERPOL and the UK police on sharing information.

In the second place, the Member States have the additional possibility to block access to these websites containing or disseminating child pornography within their territory.[166] Yet, such blocking "must comply with transparent procedures and provide adequate safeguards, in particular to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction."[167] This provision was the most controversial during the negotiations of the Directive, as in the original proposal the Directive contained a compulsory blocking requirement.[168] However, there were concerns on the effectiveness of this measure in practice, in particular because child pornography disseminators exchange their pornography less on the internet and more on P2P networks.[169] Only Ireland has decided to adopt blocking measures, while the Netherlands, Germany and the Czech Republic have not transposed this provision (which was not mandatory).[170] The Irish measures entails a voluntary scheme between Irish internet service providers and the policy where they collaborate to block access to illegal content. The aim of this measure is to protect consumers from viewing child sexual abuse material and also to prevent the further exploitation of children.[171] A similar approach already existed in the United Kingdom, which influenced the approach taken in Ireland.[172] Though, being aware of the questions on effectiveness, they consider the public awareness dimension of blocking websites is also important, sending a signal to the accidental or curious viewer.[173] In contrast, the Dutch pushed for the optional nature of the provision. In the past they have conducted research on the effectiveness of blocking measures for websites, which concluded that the list of websites would be rather small.[174] Moreover, the blocking would be rather expensive, in particular in relation to the benefits that it would provide.[175] Therefore, the Dutch have tried to focus more on alternative measures trying to remove the content.

3.7 SAD before national courts

On the national level, there is a variety of case law on the application of the national law implementing the Sexual Abuse Directive. However, when specifically searching on case law that either explicitly refers to the Directive or the specific national act transposing the Directive, the amount becomes limited. The majority of cases referring to one of these legal acts comes from Germany, whereas relevant references in Ireland are not on sexual abuse of Children.

163 Interview with Richard Troy, Criminal Justice Policy Section of the Department of Justice Ireland, MS Teams, May 21, 2021.
164 Irish Internet Hotline, Code of Practice, <https://www.hotline.ie/publications>, Accessed on: 16 June 2021.
165 Interview with Richard Troy, Criminal Justice Policy Section of the Department of Justice Ireland, MS Teams, May 21, 2021.
166 Article 25(2) SAD.
167 Ibid.
168 Jeney, 2015, p. 42.
169 Parti and Marin, 2013, p. 152.
170 European Commission, 2016b, p. 10. In the Czech Republic this is self-regulated by internet service providers.
171 Garda blocking initiative, see: https://www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/press-releases/2020/february/internet-sites-containing-child-abuse-material-to-be-blocked-10th-february-2020.html.
172 Interview with Richard Troy, Criminal Justice Policy Section of the Department of Justice Ireland, MS Teams, May 21, 2021.
173 Interview with Richard Troy, Criminal Justice Policy Section of the Department of Justice Ireland, MS Teams, May 21, 2021.
174 Interview with Erik Planken, Senior Policy Advisor at the Dutch Department of Law Enforcement and Crime Prevention, MS Teams, May 31, 2021.
175 Interview with Erik Planken, Senior Policy Advisor at the Dutch Department of Law Enforcement and Crime Prevention, MS Teams, May 31, 2021.

The assumption is that the national laws implementing the Directive are seen as 'domestic' law, as there have been no European Court of Justice cases so far on the SAD. This impression is also confirmed by our interviewees.[176] Nevertheless, if we look at the national law we see some awareness amongst the national courts of the SAD's role in relation to national child sexual abuse provisions.

In some cases, this awareness just entails the acknowledgment of the national legislatures intention when implementing the SAD. For example, a Court of Appeal in the Netherlands confirmed that the legislature has not made use of the discretion offered by Article 5(8) SAD to adopt an exception for the production and possession of child pornography for private use.[177]

However, the national courts sometimes also apply the SAD in light of giving the national provision the correct interpretation. This can be in light of the Directive's objectives, but also on the basis of the intended scope of protection of a provision in the SAD.[178] Moreover, a Czech and Dutch court interpreted a national provisions consistently with the SAD, the latter in particular because the legislature intended to include the definition given by the Directive.[179]

Also the German Bundesgerichtshof stayed close to the SAD's text, because of the legislature will to base a provision on the SAD. In this case, it even concerned the interpretation of a discretionary provision, Article 8(3) SAD, which allows the Member State not apply a provision on child pornography, in so far as the sexual acts in the pornography did not involve any abuse. Though, the concept of 'abuse' was not explicitly provided in the Directive, the BGH held that abuse should be interpreted as it was used in Council Framework Decision 2004/68/JHA.[180]

These cases suggest that - when being aware of the application of the SAD - the courts do not expand the room of the SAD. Though, incidentally a national court gives its own interpretation to concepts of the SAD, at least where this concept provides this room. This was the case in relation to Article 2(c)(ii) SAD which refers to the purpose (*any depiction of the sexual organs of a child for primarily sexual purposes*), but not whether the respective use is also decisive. The German Bundesgerichtshof held here that the purpose is not depended on the independent motivation of the individual user, but only the illustration or representation is decisive for determining the purpose.[181]

Lastly, a Czech and German court have ruled on the extension of scope of the SAD. In the Czech case the Court held that the national provision implementing Article 6 SAD goes beyond the scope of this provision, by prohibiting the illegal establishment of contact with a child in general instead only through information and communication technologies.[182] Whereas, the German Court clarified that the extension of the scope of 'child pornography' to also include writings ('Schriften') – sexual child abuse depicted with word – was within the discretionary room of the Member States.[183]

The lack of ECJ cases suggested a limited awareness of the SAD on the national level. Nevertheless, the Czech, Dutch and German courts occasionally refer to the SAD and apply and/or interpret its provisions. This seems to suggest that, despite the broad discretion of the SAD, the domestic courts try to stay close to the SAD's intentions. However, it should be kept in mind that the cases referring to the SAD are only a very small portion of cases in which national provisions implementing the Directive are applied.

176 Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.
177 Gerechtshof Amsterdam, 04.03.2021, ECLI:NL:GHAMS:2021:647.; See also: Bundesgerichtshof, 23.01.2018, 1 StR 625/17.
178 Bundesgerichtshof, 19.02.2013, 1 StR 465/12.; Hoge Raad, 12.03.2013, ECLI:NL:HR:2013:BY9719.
179 Nejvyšší soud, 28.06.2018, ref. no. 3 Tdo 536/2018; Gerechtshof Arnhem-Leeuwarden, 13.05.2019, ECLI:NL:GHARL:2019:4494.
180 Bundesgerichtshof, 12.01.2021, 3 StR 362/20.
181 Bundesgerichtshof, 01.09.2020, 3 StR 275/20.
182 Nejvyšší soud, 25.11.2020, ref. no. 8 Tdo 1041/2020.
183 Bundesgerichtshof, 19.03.2013, 1 StR 8/13.

4. Drivers of variation

What are the motives for the different ways in which the Member States have implemented the Directive? Our analysis shows the choices made in the four Member States may be attributed to a number of considerations. These considerations work differently for the selected Member States, resulting in variation in implementation choices. Apart from the *conservation* consideration (leaving the national legislative framework as much as possible intact) we distinguish the *systematic* consideration, the *principles-based* consideration and the *political* consideration.

The dominant strategy in the Member States has been to leave pre-existing legislative frameworks as much as possible intact (the *conservation* consideration). Most notably, differences between the Member States in the maximum imprisonment sentences can be explained from that strategy. The same is true for the additional provisions on sentences such as the those on minimum ages of consent. Variation was equally demonstrated for those aspects of the Directive that rely on general elements of national criminal law, such as those on alternative and supplementary sanctions. Although the study has not included an analysis of all policy measures to implement the obligations on preventive measures, the first consideration in this context has equally been to examine whether existing measures already suffice.

This 'minimalist' implementation strategy seems firmly embedded in the Member States' legislative practice. In the Netherlands this strategy is even explicitly part of formal legislative policies. Changing the laws is only the third step after considering (1) whether existing laws are sufficient and (2) whether non-legislative measures may be adopted to achieve the Directive's objectives. All selected Member States had already legislation in force to address child abuse and child exploitation. Thus, the strategy to first consider whether existing laws suffice for the implementation of the Directive may be seen as understandable rather than as a sign of legislative inaction. Indeed, this strategy may be informed by the desire not to burden practice (in this case criminal courts) with a fundamental overhaul of the legislative framework if there is no absolute need to do so.

The *systematic* consideration is related in that it equally departs from the idea that the SAD did not fill a legislative void. On the basis of the systematic consideration the Member States seek, however, to align the implementation of the Directive with the broader framework of criminal law. The provisions on alternative and supplementary sanctions are a good example.[184] Rather than designing a specific regime for the offenses covered by the Directive, the selected Member States have simply applied their general provisions on alternative and supplementary sanctions. This strategy ensures coherence of the overall system of such sanctions, a situation which could not have been achieved if the Member States would have adopted specific provisions for the sexual offenses covered by the Directive. In other words, the systematic consideration seeks to avoid a situation in which the implementation becomes a 'regulatory island' in the broader framework of criminal law. The systematic consideration not only works internally. The Irish strategy to align the enforcement of the Directive with UK practices is an example of 'external systematic alignment', in this case also to allow for a more smooth cooperation between authorities of the countries. In any case, the systematic consideration has equally led to variation in the implementation choices of the Member States, as these broader frameworks differ across Member States.

Our study has revealed a third consideration as one of the drivers of differentiation. Rather than the texts of national legislation or the system of which these form part, this consideration is based on the principles and ideas which underly national criminal law and criminal law policy. The view that victim protection should be the guiding principle for the implementation of Article 5(7)/(8) SAD has made the German legislator to decide not to criminalize content displaying adults (but seemingly minors). Other Member States that have been guided rather by perpetrator's behaviour have made a different choice in this regard.

184 Another example are the provisions on attempt. In the Dutch situation, attempt is a cause for reduction of the maximum penalties, but not in other Member States.

Political considerations have been relevant as well, even though – as observed before – the overall objectives of the Directive have been largely uncontested. This makes the SAD perhaps a rather particular EU legislative act. To allow the Member States to make a more refined balance of possibly conflicting interests is usually one of the reasons to include national discretion in EU legislation. Generally, this seems to play no significant role for the Directive, but it is different for individual provisions of the Directive, however. The provisions on reporting suspicions of sexual abuse or sexual exploitation are a case in point. The objectives of the Directive clash with the interests involved in confidentiality requirements for various professionals. The discretion allowed for by the Directive translated into quite diverging legislative choices in the Member States. This was not only resulted in different legislative choices for particular groups of professional. Also the general obligation for every citizen to report potential abuse stands in contrast with other Member States which have refrained from adopting such an obligation. Political considerations may equally relate to effectiveness. The Dutch government's conviction that blocking websites which have hosted harmful content is relatively costly and contributes relatively little to the achievement of the objectives of the directive has resulted in the non-implementation of the facultative article 25 of the directive. Other Member States may have decided otherwise for more principled reasons.

Lastly, the observation warrants attention that in two of the four selected Member States a second implementation 'wave' is taking place. Based on what can be assessed at the time of writing of this report, it seems that the Directive will be implemented anew in a more profound manner in the Netherlands and Ireland. What drives this 'second implementation' is an increasing awareness of the seriousness of the offenses and the growing frequency thereof.

5. Effects of variation

Implementation legislation varies quite substantially across the Member States. In 2016, the Commission noted quite some implementation problems.[185] Apart from the implementation of the substantive criminal law provisions, the Commission identified room for improvement in the field of preventive measures, intervention programs and victim support. Remarkably, these latter provisions allow the Member States considerable policy discretion but apparently this still makes them vulnerable for breaches of the implementation obligations. On the other hand, the approach of the Commission seems a rather legalistic one. It identifies implementation problems when the information submitted by the Member States is 'inconclusive', which seems to refer to the actual content of the transposition measures. This is problematic when provisions are implemented rather through concrete policy measures or when the transposition measures leave in their turn discretion to administrative or other public authorities. This may not necessarily mean that the Directive has not been correctly implemented or that the objectives of the Directive have not been properly achieved.

This brings us to the actual implementation of the Directive in practice. Just as the Commission's implementation overview, this report has equally focused mainly on transposition issues. The Directive has proved to be a rich source of flexibility and differentiated implementation. But what are the effects thereof in practice? The Directive is applied in a decentralized manner. Any criminal court in the Member States has jurisdiction to apply the offenses listed in the Directive. No quantitative data was available on the actual imposition of sentences and the possible differences in this regard between the Member States. The interviewees equally had a limited overview thereof. The overall impression, however, is that the sentences imposed are generally much lower than the maximum sentences provided for by national law. Also, more generally, the impact of the Directive on the Member States seems to have been quite modest.[186]

185 European Commission, 2016a.

186 The German respondent indicated that 90 % of the cases were already adequately addressed by German pre-existing laws. He indicated though that the adoption of the Directive in general increased the awareness of the problem of child abuse in Germany.

The Commission has identified some areas for further action.[187] These may be indicative of the effects of the current Directive. Apart from practical measures, such as increasing technical capacity to address online criminal behaviour, the Commission considers legislation to better enable and support relevant stakeholders in preventing, detecting, reporting child abuse. Especially the responsibilities of online services providers would need to be strengthened according to the Commission. These are indeed aspects the SAD has left largely open. As such, this may signal the discretion offered to the Member States ultimately impacts the overall effectiveness of the Directive, especially in light of the increased salience of the issue.

Differences in national legislation may cause cross-border issues and reduce the level playing field between Member States. This has been a concern in the context of the SAD as well. *'Children in all Member States should be protected from offenders from all Member States, who can travel easily'* according to the EU legislature. The SAD offers a basic level of protection but does not ensure full equal protection. We cannot draw the conclusion on the basis of our analysis, however, that this creates problems in practice, e.g. that child abusers consider which Member States apply lower maximum imprisonment sentences. Digital forms of abuse and exploitation – for which the cross border dimension is high – seem to depend rather on the availability of digital infrastructures. The size and the importance of the digital infrastructure is the reason why in the Netherlands digital forms for abuse and exploitation are viewed as a particular serious problem. Another aspect of the cross-border dimension relates to cooperation between public authorities. The respondents have indicated that this could be improved. This has also been one of the inputs into the decision-making process on the revision of the Directive. The freedom under the current Directive thus seems to be detrimental to the adequate achievement of the Directive's objectives.

The last observation that we can draw from this case is that variation may create "implementation uncertainty". This is in particular the case for open provisions in EU legislation. These may cause uncertainty for national legislatures on what which policy choices could still fit and which would be incompatible with the text and the objectives of EU legislation.

6. Reflections on the legitimacy and effectivity of variation

Thus far, we have included few normative perspectives in our analysis. Without applying a rigorous normative framework we will now reflect at least on the type of normative questions which have become apparent. The first set of reflections relates to the constitutional background of the Directive. The EU legislature has simply been prohibited from adopting full harmonization measures in the field of EU criminal justice. This explains the definition of only minimum periods for the maximum sentences. Future revisions of the Directive will not include limitations in this regard unless the Treaty legal basis would be altered to allow for maximum harmonization measures. This is an unlikely prospect. Furthermore, this aspect of the Directive seems largely unproblematic, even though the Member States have indeed adopted quite diverging laws. Indeed, no evidence has been found to suggest that the flexibility offered to the Member States has been detrimental to the achievement of the overall objectives of the Directive or that it causes particular cross-border problems. The same is true for the more adjacent provisions. The balance between accommodating diversity and the achievement of the Directive's objectives therefore seems carefully struck, which would fit in an output legitimacy perspective.

What does the Directive and its implementation teach us from the perspective of input legitimacy? The point earlier made that the Directive has sparked little fundamental controversy is an important observation in this context. The uncontested nature of the Directive suggests that it reflects, ultimately, citizens' preferences well (and that no serious differences between such preferences have been found at national level). The other side of the coin is that the decision-making process, as a consequence, can hardly be qualified as a sort of multi-level 'multi-balancing' process.

187 European Commission, 2020.

Both at the EU level and at the national levels such a fundamental debate on how to balance possibly conflicting interests has not taken place. The dominant strategy to leave pre-existing laws as much as possible intact seems to sit uneasily with input legitimacy demands. On the other hand, these pre-existing laws may in their turn already be the expression of, ultimately, citizens' preferences.

Flexibility offered in terms of open-worded and non-defined terms raises other legitimacy issues. Especially the exact scope for national flexibility may be difficult to identify. This may relate to the content of the provisions but also to the nature of the implementation measures. In the case of the Netherlands, the question has emerged whether implementation of specific aspects of the Directive through non-legislative measures (such as prosecutorial guidelines, ministerial guidelines) would be sufficient.[188] Even though the instrument of the Directive includes freedom of choice regarding form and methods, the Commission has been emphasizing the need for legislative measures.[189] Such a more 'legalistic' approach may not sit well with national views and practices on the role of legislative measures in achieving policy objectives (in the Dutch context '*de-regulation*' ambitions have been difficult to align with EU requirements in this regard).

This brings us to an observation on the effectiveness of the Directive. All in all, the Directive seems to be successful in meeting its objectives. Even though it has perhaps not fundamentally transformed national legislation, it has had its effects on raising awareness (and, in the case of Ireland, on the structuring of sexual offences law). On specific points the Directive has indeed led to substantive changes in the laws of the Member States. The impact of the Directive in the second implementation waves promises to be even more profound. The flexibility offered by the directive seems to have limited impact on the overall effectiveness. This conclusion may be derived from the discussion on the revision of the directive. The provisions offering flexibility are not the reason for the revision. Rather, issues that the current Directive has left unregulated are on the agenda now, and also responses to the (technological and other) developments that have emerged since the Directive was adopted.

This case study has, furthermore, demonstrated that legislating in the EU is a dynamic process. Not only the Directive itself, but also its implementation in the Member States has been subject to review. This adaptive power is important in light of the changing technological developments, the increasing scope of the problems of child abuse and exploitation and the changing societal views thereon. In substantive terms, this allows a careful (re-) balancing of national diversity and the policy objectives at hand.

188 Interview with Erik Planken, Senior Policy Advisor at the Dutch Department of Law Enforcement and Crime Prevention, MS Teams, May 31, 2021.

189 Earlier decisions of the CJEU support the Commission's position. The CJEU considers legally binding, generally applicable and legislative measures may be necessary in order to achieve the result to be achieved.

References

Legislation

EU

EU (2003) *Council framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography*.

EU (2011) *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*.

EU (2017) *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*.

EU (2018) *Directive 2018/1808/EU of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities*.

Czech Republic

Act No. 359/1999 Coll. *On the Social and Legal Protection of Children.*

Act No. 563/2004 Coll. *On Pedagogical Staff and on the Amendment to some Other Acts.*

Act No 108/2006 Coll. *On Social Services.*

Zákon č. 40/2009 Sb. *Trestní zákoník.*

Zákon č. 141/2014 Sb. *Trestní řád.*

The Netherlands

Wetboek van Strafvordering.

Wetboek van Strafrecht.

Wet op de Jeugdzorg, BWBR0016637.

Richtlijn voor strafvordering seksueel misbruik van minderjarigen (2015R047), 01.03.2015.

Regeling verklaring omtrent het gedrag, 28.05.2013, nr. 365293.

Germany

Deutscher Bundestag (2015) *Neunundvierzigstes Gesetz zur Änderung des Strafgesetzbuches – Umsetzung europäischer Vorgaben zum Sexualstrafrecht*, 27.01.2015, XVIII/98.

Bundeszentralregistergesetz.

Sozialgesetzbuch VIII.

Strafgesetzbuch (StGB).

Jugendarbeitsschutzgesetz, Gesetz zum Schutze der arbeitenden Jugend.

Bundeskinderschutzgesetz, Gesetz zur Stärkung eines aktiven Schutzes von Kindern und Jugendlichen.

Gesetz zur Kooperation und Information im Kinderschutz.

Ireland

European Community Act, 1972, nr. 27.

Sex Offenders Act 2001, nr. 18.

National Vetting Bureau (Children and Vulnerable Persons) Act, 2012, nr. 47.

Children First Act 2015, nr. 36.

Statutory Instrument No. 309/2015 - European Union (Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography) Regulations 2015.

Criminal Law (Sexual Offences) Act 2017, nr. 2.

Case Law

Czech Republic

Nejvyšší soud, 28.06.2018, ref. no. 3 Tdo 536/2018.

Nejvyšší soud, 25.11.2020, ref. no. 8 Tdo 1041/2020.

Germany

Bundesgerichtshof, 19.02.2013, 1 StR 465/12.

Bundesgerichtshof, 19.03.2013, 1 StR 8/13.

Bundesgerichtshof, 23.01.2018, 1 StR 625/17.

Bundesgerichtshof, 01.09.2020, 3 StR 275/20.

Bundesgerichtshof, 12.01.2021, 3 StR 362/20.

Netherlands

Gerechtshof Den Haag, 23.02.2015, ECLI:NL:GHDHA:2015:329.

Gerechtshof Arnhem-Leeuwarden, 13.05.2019, ECLI:NL:GHARL:2019:4494.

Gerechtshof Amsterdam, 04.03.2021, ECLI:NL:GHAMS:2021:647.

Hoge Raad, 12.03.2013, ECLI:NL:HR:2013:BY9719.

Interviews

Interview with Erik Planken, Senior Policy Advisor at the Dutch Department of Law Enforcement and Crime Prevention, MS Teams, May 31, 2021.

Interview with Richard Troy, Criminal Justice Policy Section of the Department of Justice Ireland, MS Teams, May 21, 2021.

Expert Workshop on the Transposition of the 2011 Sexual Abuse Directive with Thomas O'Malley and Jeroen ten Voorde, MS Teams, May 7, 2021.

Interview with German academic expert, MS Teams, May 21, 2021.

Interview with Czech academic expert, Prague, June 18, 2021.

Secondary Sources

Bundesministerium für Wirtschaft und Energie (2020) *Kleine Anfrage der Abgeordneten Dr. Franziska Brantner, Markus Tressel, Agnieszka Brugger, weiterer Abgeordneter und der Fraktion BÜNDNIS 90/DIE GRÜNEN - Betr.: „Stand der EU-Vertragsverletzungsverfahren" BT-Drucksache: 19/17642*, 2 April 2020.

Council of Europe (2007a) *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, 25 October 2007.

Council of Europe (2007b) *Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, Lanzarote, 25 October 2007.

De Steel A., Buiten M., Peitz M. (2018) *Liability of online hosting platforms: should exceptionalism end?, Centre on Regulation in Europe,* (Cerre).

Department of Children and Youth Affairs (2017) *Children First - National Guidance for the Protection and Welfare of Children*, Government Publications, Dublin.

Deutscher Bundestag (2014) *Entwurf eines Gesetzes zur Änderung des Strafgesetzbuches – Umsetzung europäischer Vorgaben zum Sexualstrafrecht*, Drucksache 18/2601, April 2014.

Dolman (2021) *T&C Strafrecht, commentaar op art. 51 Sr*, online, accessed on: 20 June 2021.

Elsner B. and Peters J. (2006) *The Prosecution Service Function within the German Criminal Justice System*. In: Coping with Overloaded Criminal Justice Systems. Springer, Berlin, Heidelberg, pp 207-236.

European Commission (2010a) *Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA,* 29 March 2010.

European Commission (2010b) *Proposal for a Directive on combating sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA*, MEMO/10/107, Brussels, 29 March 2010, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_10_107.

European Commission (2016a) *Report from the Commission to the European Parliament and the Council assessing the extent to which the Member States have taken the necessary measures in order to comply with Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography*, COM (2016) 871.

European Commission (2016b) *Report from the Commission to the European Parliament and the Council assessing the implementation of the measures referred to in Article 25 of Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography*, COM (2016) 872.

European Commission (2018) *Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online*, C/2018/1177.

European Commission (2019) *October infringements package: key decisions*, INF/19/5950

European Commission (2020) *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, EU strategy for a more effective fight against child sexual abuse*, COM(2020) 607.

European Parliamentary Research Service (2017) *European Implementation Assessment of Directive 2011/93/EU combating sexual abuse of children*, April 2017

Gercke, M. (2012) Die EU Richtlinie zur Bekämpfung von Kinderpornographie. *Computer Und Recht*, *28*(8), pp. 520-525.

Hartmann, J.M. (2016) *A Blessing in Disguise? Discretion in the Context of EU Decision-Making, National Transposition and Legitimacy Regarding EU Directives*, PhD Dissertation, Leiden University. Available at: https://openaccess.leidenuniv.nl/handle/1887/43331

Hauenstein, B. (2014) *Europarechtliche Bezüge des Kinder- und Jugendpornographiestrafrechts. Zum unionsrechtlichen Hintergrund aktueller Auslegungsfragen der §§ 184b, 184c StGB*. Zeitschrift für Internationale Strafrechtsdogmatik 2014, 7-8, pp. 348-352.

Jeney, P. (2015) *Combatting child sexual abuse online*, European Parliament. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536481/IPOL_STU(2015)536481_EN.pdf.

Kool, R.S.B, Kerssies, S. and van der Rijst, T. (2021) ‘‘Mind the (Knowledge) Gap’: Towards a Criminal Duty to Report Child Sexual Abuse?’ 17(1) *Utrecht Law Review* pp. 33–45.

Klimek L. (2012) ‘Solicitation of children for sexual purposes: the new offence in the EU (under the Directive 2011/92/EU)’, *International and Comparative Law Review*, Vol. 12., No. 1, p. 141–151.

Krings G. (2014) Neuer maßstab im kampf gegen kinder- und jugendpornografie, *Zeitschrift Für Rechtspolitik*, *47*(3), pp. 69–72.

Ministerium für Justiz und Gleichstellung des Landes Sachsen-Anhalt (2015) *Interministerieller Opferschutzbericht Der Landesregierung,* 30.10.2015, available at: https://mj.sachsen-anhalt.de/fileadmin/Bibliothek/Politik_und_Verwaltung/MJ/MJ/recht/opferschutzbericht-1.pdf.

Ministryně spravedlnosti (2020) *Vládní návrh Zákon ze dne 2020, kterým se mění zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, zákon č. 45/2013 Sb., o obětech trestných činů a o změně některých zákonů (zákon o obětech trestných činů), ve znění pozdějších předpisů, a některé další zákony*, Sněmovní tisk 980/0, 17.8.2020.

Missing Children Europe, ECPAT and eNACSO (2015) *A survey on the transposition of Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography*, available at: http://www.enacso.eu/news/survey-on-the-transposition-of-directive-201193eu-on-combating-sexual-abuse-and-sexual-exploitation-of-children-and-child-pornography/.

Nowell-Smith, H. (2012) Behind the scenes in the negotiation of eu criminal justice legislation. *New Journal of European Criminal Law*, *3*(3-4), pp. 381–393.

Oireachtas (2015) *Criminal Law (Sexual Offences) Bill 2015*, Explanatory And Financial Memorandum.

O'Sullivan C. (2009) 'Protecting young people from themselves: reform of the age of consent law in Ireland', *Dublin University Law Journal 2009*, 31, 386-411

O'Malley T. (2017) *Criminal Law (Sexual Offences) Act 2017 – The Offence Provisions,* Presentation by Tom O'Malley BL Annual National Prosecutors' Conference 25 November 2017, Dublin Castle Conference Centre, available at: https://www.dppireland.ie/app/uploads/2017/11/PAPER_-_Tom_OMalley_BL.1.pdf, p. 1.

Parti, K., & Marin, L. (2013) Ensuring freedoms and protecting rights in the governance of the internet : a comparative analysis of blocking measures and internet providers' removal of illegal internet content. *Journal of Contemporary European Research*, *9*(1), pp. 138–159.

Poslanecká sněmovna Parlamentu České republiky (2014a) *Stenografický zápis 6. schůze, 5. února 2014, 7. Vládní návrh zákona, kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, a zákon č. 418/2011 Sb., o trestní odpovědnosti právnických osob a řízení proti nim, ve znění zákona č. 105/2013 Sb. /sněmovní tisk 45/ - prvé čtení*, 5.2.2014.

Poslanecká sněmovna Parlamentu České republiky (2014b) *Pozměňovací a jiné návrhy k vládnímu návrhu zákona, kterým se mění zákon č. 141/1961 Sb., o trestním řízení soudním (trestní řád), ve znění pozdějších předpisů, zákon č. 40/2009 Sb., trestní zákoník, ve znění pozdějších předpisů, a zákon č. 418/2011 Sb., o trestní odpovědnosti právnických osob a řízení proti nim, ve znění zákona č. 105/2013 Sb*, sněmovní tisk 45/4.

Princen, S., H. Smekal and R. Zbiral (2019) *Codebook Flexible Implementation in EU Law*, InDivEU, Deliverable D7.1, 26 June 2019.

Thomann, E. (2019) *Customized Implementation of European Union Food Safety Policy. United in Diversity?* (Basingstoke: Palgrave Macmillan).

Tweede Kamer der Staten-Generaal (2002) *Kamerstukken II 2001/02, 27 745, nr. 12, Wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en de Gemeentewet (partiële wijziging zedelijkheidswetgeving), Amendement van het lid Barth c.s. ter vervanging van dat gedrukt onder nr. 8*, Kamerstukken II 2001/02, 27 745 nr. 12.

Tweede Kamer der Staten-Generaal (2013) *Implementatie van de richtlijn 2011/93/EU van het Europees Parlement en de Raad ter bestrijding van seksueel misbruik en seksuele uitbuiting van kinderen en kinderpornografie, en ter vervanging van Kaderbesluit 2004/68/JBZ van de Raad (PbEU L 335)*, Memorie van Toelichting, Kamerstukken II 2012/13, 33 580 nr. 3.

Tweede Kamer der Staten-Generaal (2020) *Verslag van een schriftelijk overleg over de geannoteerde agenda voor de JBZ-raad van 8-9 oktober 2020*, Kamerstukken II 2020/21, 32317 nr. 637.

Versluis, E. (2007) 'Even Rules, Uneven Practices: Opening the Black Box of EU Law in Action', *West European Politics*, Vol. 30, No. 1, pp. 50-67.

Zbiral, R., S. Princen and H. Smekal (2020) *Mapping the Legal Scope for Flexible Implementation in EU Directive*, InDivEU, Deliverable D7.3 28 December 2020.

Zhelyazkova, A. and E. Thomann (2021) 'I Did It My Way: Customisation and Practical Compliance with EU Policies,' *Journal of European Public Policy*, DOI:10.1080/13501763.2020.1859599.

Ziemann S., Ziethen J. (2012) Die neue EU-Richtlinie zur Bekämpfung von Kindesmissbrauch und Kinderpornografie, *Zeitschrift für Rechtspolitik,* 2012 (45) 6, pp. 168-171.

Websites

Irish Internet Hotline, https://www.hotline.ie/about/.

Garda Blocking Initiative, https://www.garda.ie/en/about-us/our-departments/office-of-corporate-communications/press-releases/2020/february/internet-sites-containing-child-abuse-material-to-be-blocked-10th-february-2020.html, 10 February 2020.

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