

**Compilation of extracts: A Study on national
measures for combating child pornography –
How countries implement international
standards**

Reports extracted from the full 'ELSA for Children' report:

**"How does legislation protect child victims from sexual violence
in the national legal framework in Europe?"**

Summary:

This study is a thematic compilation of information extracted from the final report of the 'ELSA for Children' Legal Research project. The full report is the result of international research carried out throughout 2012 by 250 law students and young lawyers from 23 European countries in support of the Council of Europe ONE in FIVE Campaign to stop sexual violence against children.

Each national research team responded to questions set out in a questionnaire (see Academic Framework). A first part of the study investigates the definition of child pornography adopted by each state and the attribution of criminal liability; a second part focuses on the aspect of participation of a child in pornographic performances.

The purpose of this study is to facilitate high quality legal comparisons and to raise awareness of a major social and legal issue in Europe. The 'ELSA for Children' Legal Research project will certainly also be a valuable source of information for the monitoring work of the Committee of the Parties of the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the "Lanzarote Committee").

INTRODUCTION

Child Pornography, committed by the use of a computer system or through other tools, has become an increasing issue, especially because of a proliferation of technology and its availability on the consumer level. Costs declined dramatically, because of the little effort that new technologies require nowadays to record some material and put it online, creating live chats, streaming videos and more. This entailed also the possibility to reach more effectively a wider audience, and this makes it even more attractive to child sexual abusers. As a consequence, child pornography ranks high among the different kinds of abuse.

Children exposed to pornography are victims of events that recur each time the product is downloaded, viewed or distributed. Most of the times are also unaware victims. Despite the fact that they fully understand the results of these actions, the event has often important consequences on the social life of the child and on the psychological side.

The increasing relevance of this issue in the modern society is the reason why we decided to focus our publication on the topic of Child Pornography. We extracted the relevant parts from the Report ELSA for Children, a wider research on the national implementation of European and International Standards on the protection of children against violence and sexual abuse, and we compiled them together. This thematic compilation of national measures on combating child pornography concerns solutions adopted in 23 European countries and aims at facilitating high quality legal comparison in this matter.

At the same time, having 250 law students working together with academics from their Universities and national NGOs, we believe to have contributed to raising awareness on this important social and legal issue and to have encouraged law students and young lawyers to actively engage themselves in the protection of children not only now, but also in the future, in the development of their professional careers.

Before letting you to the reading of the reports, we would like to thank the International Coordinators Committee, the National Researchers, National Coordinators and National

Academic Advisors, who put a lot of efforts in the outcome and in its promotion, making this result unique.

Our warmest gratitude goes especially to the Council of Europe, in particular to the Children's Department, the Lanzarote Committee and the Directorate for Communication. First of all because of the decision to fund the publication of this research, but, more important, for their constant support and appreciation, that was essential in all phases of this project.

Vasco Silva and Federica Toscano

International Coordination Committee

ELSA for Children Legal Research Group

Academic Framework

Child Pornography in General:

- x. Is the State party to the Council of Europe Convention on Cybercrime? If yes, what is the date of ratification and signature? If not, is the State planning to ratify?
- xi. How does the national legislation define “child pornography”? Is it compatible with the definition in Article 20(2) of the Lanzarote Convention? Please comment.
- xii. To whom does the State attribute the criminal liability to? Is it compatible with the Article 20(1.a) to (1.f)?
- xiii. What is the control mechanism for pornographic materials? If the state is a party to the Lanzarote Convention, did the state use the reservation right that has been given to them in the Lanzarote Convention Article 20(3) and 20(4)?

Participation of a Child in Pornographic Performances:

- xiv. Does the State criminalize intentional conduct of making a child participate in pornographic performances? Does the State highlight and differentiate between recruitment and coercion? What is the State’s approach to the attendance of pornographic performances involving the participation of children? If the State is a party to the Lanzarote Convention, did the state use the reservation right stated in Article 21(2)?

ELSA BOSNIA AND HERZEGOVINA

Child Pornography in General:

x. Bosnia and Herzegovina signed Council of Europe Convention on Cybercrime on February 9th 2005 and it had been ratified on May 19th 2006.

xi. As in the case of child prostitution, Bosnia and Herzegovina, in its legislation does not have exactly defined crime as "child pornography." Nearest contents of one offense in the legislation of Bosnia and Herzegovina, the content of Article 20 ("Child pornography") Lanzarote Convention, is provided in the **Criminal Code of the Federation of Bosnia and Herzegovina**, Article 211, which relates to the criminal offense of "abuse of a child or a minor for pornography," and Article 212 relating to the criminal offense of "Introduction a child to pornography."

"Article 211

The exploitation of a child or a **minor for pornography**

(1) Whoever uses child or a minor for taking photographs, audiovisual materials, or other pornographic content, or possesses, or imports or sells or distributes or shows such material, or such persons make to participate in pornographic performance, shall be punished by imprisonment of one up to five years.

(2) Items that are intended or used for the perpetration of criminal offense referred to in paragraph 1 shall be forfeited and the items that resulted from the perpetration of criminal offense referred to in paragraph 1 this Article shall be confiscated and destroyed.

Article 212

Introducing a child to pornography

(1) Whoever sells, shows or public display or otherwise makes available documents, photographs, audio-visual and other items of pornographic content or pornographic show, shall be punished by a fine or imprisonment up to one year.

(2) Items referred to in paragraph 1 this Article shall be forfeited. ^{“1}

¹ Article 211 and 212, Criminal Code of of the Federation Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03)

Same offenses are codified in the **Criminal Code of Brcko District of Bosnia and Herzegovina** in the articles 208 and 209.²

The **Criminal Code of the Republika Srpska** contains two charges relating to the abuse of children and minors in the area of pornography. The first is "The exploitation of children and minors for pornography"³ and the other "Production and display of child pornography"⁴. The first provision is punishable by 6 months to 5 years for those who abuse a child or a minor to produce images, audio-visual materials and other or other objects of pornographic content, or a child or a minor use for pornographic show. A second provision is a novelty in the criminal legislation of the Republic of Srpska. The basic form of this act is done by a person who provides, distributes, publicly exhibits or displays, or otherwise makes available documents, photographs, audio-visual or other objects containing child pornography or whoever produces such materials, acquires or holds or presents child pornographic show. This offense is punishable by fines or imprisonment up to 1 year.

Since Bosnia and Herzegovina ratified the Optional Protocol to the Convention on the Rights of the Child, on the Trafficking of Children, Child Prostitution and Child Pornography, the goal of Bosnia and Herzegovina is the protection of children from trafficking, child prostitution and child pornography, in order to prevent the trafficking of children and in line with the fulfillment of this goal Bosnia and Herzegovina has developed an Action plan for Children 2011-2014 and the implementation of it will take a step forward in protecting of children and their rights in Bosnia and Herzegovina.⁵

xii. Article 211 of the Criminal Code of the Federation of Bosnia and Herzegovina and Article 208 of the Criminal Code of Brcko District of Bosnia and Herzegovina, which are related to the criminal offense of "exploitation of children or minors for pornography" punishment is determined by imprisonment of one to five years for one who uses a child or a minor for making pictures, audiovisual materials, or other pornographic content or possesses, or imports or sells or distributes or shows such material or makes such persons to participate in pornographic performance, and Article 212 of the Criminal Code of the Federation of Bosnia and Herzegovina and Article 209 of the Criminal Code of Brcko District of Bosnia and Herzegovina, which is related to the crime of "Introducing a child to pornography" punishment is determined by fine or imprisonment up to one year for those who sells, shows or public display or otherwise makes

² Article 208 and 209, Criminal Code the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BDBiH", No. 10/03, 45/04, 6/05)

³ Article 199, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

⁴ Article 200, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

⁵ The Action Plan for Children 2011-2014, the Ministry for Human Rights and Refugees, July 2011, Sarajevo

available documents, photographs, audio-visual and other items of pornographic content or pornographic show. The Criminal Code of the Republika Srpska in provision "Exploitation of children and minors for pornography" (Article 199)⁶ provides a penalty of imprisonment of six months to five years for anyone who abuses a child or a minor to produce images, audio-visual materials and other items of pornographic or other content, or uses a child or a minor for pornographic show. A second provision "Production and display of child pornography" (Article 200)⁷ provides *a fine or imprisonment up to one year* for the one who offers, distributes, publicly exhibits or displays, or otherwise makes available documents, photographs, audio-visual and other objects containing child pornography or who such materials produces, acquires or holds or presents child pornographic show.

xiii. Article 211, paragraph 2 of the Criminal Code of the Federation of Bosnia and Herzegovina⁸ and Article 208, paragraph 2 of the Criminal Code of Brcko District of Bosnia and Herzegovina⁹, provision "exploitation of children or minors for pornography," it was determined that the objects intended or used for the perpetration of criminal offense referred to in paragraph 1 of this Article shall be forfeited and the items that were created by the perpetration of the crime paragraph 1 this Article shall be confiscated and destroyed. As far as criminal offenses under Article 212 of the Criminal Code of the Federation of Bosnia and Herzegovina and Article 209 of the Criminal Code of Brcko District of Bosnia and Herzegovina "Introducing a child to pornography", in paragraph 2 of this Article holds that the objects from the first paragraph will be confiscated.

Article 199, paragraph 2 of the Criminal Code of the Republika Srpska¹⁰, the provision of "Exploitation of children and minors for pornography," determined that items and funds under paragraph 1 this provision shall be seized. Article 200, paragraph 5, the provisions of the "Production and display of child pornography," determined that items and funds under paragraph 1 and 2 this provision shall be seized.

Bosnia and Herzegovina has signed and ratified the Lanzarote Convention not long time ago. In recent times, there is more evidence of the dangers of the spread of child pornography over the Internet and the measures to be taken. Connection to this, large number of international laws

⁶ Article 199, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

⁷ Article 200, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

⁸ Article 211 and 212, Criminal Code of the Federation Bosnia and Herzegovina, ("Official Gazette of FBiH", No. 36/03)

⁹ Article 208 and 209, Criminal Code of of the Brcko District of Bosnia and Herzegovina, ("Official Gazette of BD BiH ", No. 10/03, 45/04, 6/05)

¹⁰ Article 199 and 200, Criminal Code of Republika Srpska, ("Official Gazette of RS", No. 49/03, 108/04, 37/06, 70/06)

were adopted and a special significance for our criminal law has a Council of Europe Convention on Cyber Crime and the Optional Protocol to the Convention on the Rights of the Child, on the trafficking of Children, Child Prostitution and Child Pornography. They define specific measures aimed at fighting and preventing child pornography.

Participation of a Child in Pornographic Performances:

xiv. In the above-mentioned provisions of criminal legislation of Bosnia and Herzegovina, which are related to "child pornography," we realize that there is punishment for any form of involvement, abuse, exploitation, or guidance of children and minors in pornography, therewith in the criminal laws of Bosnia and Herzegovina is provided the same penalty regardless of whether the control or involvement of children and minors in pornography. The penalty is not included for those who attend in pornographic performance, which includes the participation of children in the same.

ELSA CROATIA

Child pornography in general:

x. The Republic of Croatia is a member of the Convention on Cybercrime of the Council of Europe which was signed on 23 November 2001 when was adopted at the conference of the Council of Europe in Budapest. After the adoption of the Law on Ratification of the Convention, Croatia has ratified the Convention on Cybercrime as the second state on 17 October 2002. The provisions of the Convention are implemented in the Croatian Criminal Code by the Act on modifications and amendments to Criminal Code, which entered into force on 1 October 2004 when a sufficient number of states ratified the Convention. It was added to the Criminal Code as "Child pornography on a computer system or network" and Article 197a¹¹ which criminalized a number of socially unacceptable behaviours related to computers and computer networks. The Convention on Cybercrime has enabled the police and judicial authorities more effective prosecution of perpetrators of criminal offenses against the confidentiality, integrity and availability of computer data and systems and the fight against criminal offenders of child pornography.

xi. In the Croatian Criminal Code, which entered into force on 1st January 1998, there is no definition of the term "child pornography" or pornography in general. Legislators believed the term is too extensive and it is not easy to define. Despite the lack of definition, from the Article 196 (1)¹² can be concluded that pornographic material are photographs, audiovisual materials,

¹¹Criminal Code (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11) -Child pornography on a computer system or network
Article 197 a

Whoever produces, offers, distributes or procures through a computer system or network for himself or for another person, or who possesses in a computer system or on a computer-data storage medium pornographic contents which show children or minors engaged in sexually explicit conduct or which are focused on their sexual organs, shall be punished by imprisonment for one to ten years.

Whoever makes accessible to a child, through a computer system, network or a computer-data storage medium, the pictures, audio visual material or other objects of pornographic content, shall be punished by a fine or by imprisonment not exceeding three years.

Special devices, objects, computer programs or data used or adapted for the perpetration of criminal offense referred to in paragraphs 1 and 2 of this Article shall be forfeited.

¹²Criminal Code (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11) - Abuse of children or juveniles in pornography
Article 196

Whoever uses a child or a juvenile for the purpose of making pictures, audio visual material or other objects

and other items of pornographic content .Because of the large gap between reality and the current Criminal Code, as a result of globalization and progress in all fields, new Criminal Code is prepared and will enter into force on 1st January 2013.It is compatible with the Convention on Cybercrime, Lanzarote Convention and other documents that the Republic of Croatia has signed in the meantime.

Article 163 (6)of the new Criminal Code defines child pornography as "material that visually or otherwise shows a real child or realistically depicted non-existent child or a person who looks like a child engaged in real or simulated sexually explicit conduct or showing sexual organs of children in sexual purposes. Materials that have an artistic, medical, scientific, information or similar importance should not be considered pornography in terms of this Article".¹³The definition is made based on the Article 20 (2) Lanzarote Convention¹⁴ and has been further extended with parts from paragraph (3) in which the state is given the option to retain the right not to apply.

xii. Pursuant to paragraph (1) of the same article was made Article 163 (2)¹⁵ of the new Croatian Criminal Code that criminal liability for offenses related to child pornography attributed to everyone who has any connection with child pornography, from direct producers to the end

of a pornographic nature, or possesses, imports, sells, distributes or presents such material, or induces such persons to take part in pornographic shows shall be punished by imprisonment for one to five years.

¹³Criminal Code (NN 125/11), Article 163 (6)

¹⁴Lanzarote Convention – Offences concerning child pornography
Article 20

Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalized:

- a)producing child pornography;
- b)offering or making available child pornography;
- c)distributing or transmitting child pornography;
- d)procuring child pornography for oneself or for another person;
- e)possessing child pornography;
- f)knowingly obtaining access, through information and communication technologies, to child pornography.

For the purpose of the present article, the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.

Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a and e to the production and possession of pornographic material:

–consisting exclusively of simulated representations or realistic images of a non-existent child;

–involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

(4)Each Party may reserve the right not to apply, in whole or in part, paragraph 1.f.

¹⁵Criminal code (NN 125/11) - Exploitation of children for pornography
Article 163

The punishment referred to paragraph (1) of this Article shall be inflicted an unauthorized recording, products, offers, makes available, distributes, expand, imports, exports, obtains for himself or for another, sells, gives, display or possess child pornography or knowingly access through information and communication technologies.

users who knowingly gain access to child pornography through information and communication technologies. The right of reservations from the Lanzarote Convention, Article 20 (4), has not been used. Opinions are divided. Liberal claims that the new Criminal Code is too hard on those who are in no way in contact with an actual child. They state that it would lead to the criminalization of a large number of people because the criteria are lower, more people will satisfy them and instead of a reduction it will come to an increase in criminal activity. After the new law, which criminalizes and only surfing through the sites that do not have to show a child but just a person who looks like a child, entry into force, the number of pedophiles that have never touched a child will suddenly increase. There is a possibility that the law will not have desired legal effect on increasing the security but it will draw attention to capturing easily available end users through their IP addresses, instead of discovering the real sex offenders and rapists who, when put photographs and videos on the Internet, skilfully hiding behind various proxy and are rarely discovered. They are also refer to one of the basic principles of law which says that "if the perpetrating the criminal offense has no victim, there is no crime," thus raising a question whether viewing pictures is the worst thing than sexual harassment, rape and physical abuse. Supporters of the new Criminal Code considered that the tightening of sanctions and the introduction of new offenses is necessary to decrease the crime rate. They believe that capturing the end users (those who only watch) will get to the drop in demand for the content of child pornography, and thus to a narrowing of the pornography market. The main argument is the prevention and correction of "moderate pedophiles" who buy and watch, and the ability to get through them to dealers and producers of pornographic material, and thereby break the whole chain. Thing about which everyone agrees is that the penalties for sexual abuse of children are too small in the legal and judicial practice, and is also mentioned the disproportion amount of penalties in compared to the actual gravity of the offense and harm to the victim. Also in Croatia, there is the problem of frequent determining the minimum penalty prescribed in many easier or more difficult cases.

xiii. Ministry of Internal Affairs is responsible for the control, detection and suppression of child pornography, along with the police. Unfortunately, despite many attempts, we did not get any further information from the Ministry. For protection of children from violence in general, responsible are police, courts and social welfare centres (child protection centres). Child protection in general is the responsibility of the police, courts and social welfare centres (child

protection centres). They act according to the Law on Protection from Domestic Violence¹⁶, Family Law¹⁷, Criminal Law¹⁸, Criminal Procedure Code¹⁹ and the Law on Juvenile Courts²⁰. The results of an international research project BECAN²¹ for Croatia pointed out the poor organization and functioning of the system where the common problem is losing or lack of official documents, contradictory data and the lack of relevant data. But Croatia is already working to improve the system, the National Strategy for Protection against Domestic Violence for the period 2011 by 2016 in which is described the current situation and given the goals to be achieved by 2016.

Participation of a Child in Pornographic Performances:

xiv. In the Croatian Criminal Code, which is in force until 31st December 2012, there is no article that refers to the participation of children in pornographic performances. The new Criminal Code, which will 1st January 2013 take effect, severely criminalizes procuring a child in any manner and for any purpose as well as each participation of a child in pornographic shows. According to the Article 21 of Lanzarote Convention²² which refers to offenses related to the participation of children in pornographic performances, composed Article 164 of Croatian Criminal Code²³ entitled "Exploitation of children in pornographic performances". In the Article

¹⁶ Law on Protection from Domestic Violence (NN 137/09, 14/10, 60/10)

¹⁷ Family Law (NN 116/03, 17/04, 136/04, 107/07, 57/11, 61/11)

¹⁸ Criminal Law (NN 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11), respectively from January 1, 2013 Criminal Law (NN 125/11)

¹⁹ Criminal Procedure Code (NN 152/08, 76/09, 80/11, 121/11)

²⁰ Law on Juvenile Courts (NN 84/11)

²¹ BECAN – Balkan Epidemiological Study on Child Abuse and Neglect

²² Lanzarote Convention – Offences concerning the participation of a child in pornographic performances
Article 21

Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalized:

a) recruiting a child into participating in pornographic performances or causing a child to participate in such performances;

b) coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes;

c) knowingly attending pornographic performances involving the participation of children.

Each Party may reserve the right to limit the application of paragraph 1.c to cases where children have been recruited or coerced in conformity with paragraph 1.a or b.

²³ Criminal Code (NN 125/11) - Exploitation of children in pornographic performances
Article 164

Whoever child entices, recruits, or encouraged to participate in pornographic performances shall be punished by imprisonment from one to eight years.

Who earns from pornographic performances in which it participates child, or otherwise exploits the child in pornographic performances shall be punished by imprisonment from one to ten years.

Whoever, by force, threat, deception, fraud, abuse of power or position, or difficult position or relation of dependency, coerces or induces child to participate in pornographic performance, shall be punished by

have been introduced all the provisions of Article 21 of the Convention and the content is additionally expanded with the provisions in paragraph (5) relating to the confiscation of all devices, tools and computer programs, and the destruction of pornographic material formed through perpetration of criminal offense. Croatia did not use the right of reservations from the Article 21 (2) of Lanzarote Convention, but already severely criminalizes visits to all pornographic performances in which children are involved. In the new Criminal Code, under Article 87 (7)²⁴ a child is considered a person who has not attained the age of eighteen. In the law, any contact of children with pornography has been described as a crime, so the state makes no difference between recruitment and coercion when it comes to participation of a child in pornography. General recruitment is regulated by the Labor Act that its provisions leaves very little room for the minors work. According to Article 17 (1) of the Labour Act²⁵, persons under the age of fifteen years shall not be employed in general as well as persons over fifteen and under eighteen years old who attend compulsory primary education. Considering that the basic obligatory education is available to all Croatian citizens, and ends about the age of eighteen, the legislature has limited work of minors. There are always exceptions, so those juveniles who, for unknown reasons, do not attend school but working, protects the Article 19 (1) of the Labour Act²⁶ which prohibits the employment of minors in performing certain activities that may endanger their safety, health, morality or development.

imprisonment from three to twelve years.

Imprisonment from paragraph 1 of this Article shall be inflicted who is watching pornographic show live or via communication gadget if he knew or should have known that in it participates a child.

Special devices, equipment, computer programs or data designed, adapted or used to commit or facilitate the perpetrating the criminal offense referred to in paragraphs 1, 2 and 3 of this Article shall be confiscated, and pornographic material that has emerged of the offense from paragraph 1 and 2 this article will be destroyed.

²⁴Criminal Code (NN 125/11), Article 87 (7)

²⁵Labour Act (NN 149/09, 61/11, 82/12), Article 17 (1)

²⁶Labour Act (NN 149/09, 61/11, 82/12), Article 19 (1)

ELSA ESTONIA

Child Pornography in General:

x. Estonia is a party to the Council of Europe Convention on Cybercrime. The date of signature is November, 23, 2001. The date of ratification is May, 12, 2003.

xi. Estonian national legislation does not directly define the term “child pornography“.

xii. According to clause 178 of the Penal Code, criminal liability is attributed to a person, who manufactures, stores, hands over, displays or makes available in any other manner of pictures, writings or other works or reproductions of works depicting a person of less than 18 years of age in a pornographic situation, or person of less than 14 years of age in a pornographic or erotic situation.

It is almost compatible with the Article 20 (1.a) to (1.f) of Lanzarote Convention, with the exception of the act of knowingly obtaining access, through information and communication technologies, to child pornography, which is criminalized by section 1.f. of Article 20 of the Lanzarote Convention.

xiii. The availability of child pornography on someone’s computer is controlled by the Estonian Police and Border Guard Board. If someone accidentally comes across a pornographic material, depicting a child, in the internet he or she can report this directly to the Police and Border Guard Board or it is also possible to contact the Internet policeman.

Participation of a Child in Pornographic Performances:

xiv. Clause 175 of the Estonian Penal Code criminalizes human trafficking with the purpose of child exploitation, which is among other things “inducing minors to participate as models or actors in pornographic or erotic performances“. The national legislation does not highlight and differentiate between recruitment and coercion.

ELSA FINLAND

Child Pornography in General:

- x. The Finnish Government signed the Council of Europe Convention on Cybercrime (CETS No. 185) on 23rd of November 2001. The ratification process was done on 24th of May 2007 at the same time with the implementation of the Council of the European Union Framework Decision on attacks against information systems (2005/222/JHA). The Convention came into force on 1st of September 2007.²⁷
- xi. Child pornography crimes are criminalized mainly²⁸ in chapter 17 of the Criminal Code. At first, the Finnish legislator has not used the word “child pornography” in the CC. The CC uses the concept of “*sexually obscene pictures* or visual recordings depicting children”.²⁹ Basically, what is considered as sexually obscene pictures (or visual recordings, here in after with a word picture is meant also any type of visual recordings unless otherwise mentioned) depicting children depends on the case. At least all the pictures which combine sexuality and a child are regarded as sexually obscene.³⁰ The last-mentioned means basically any type of pictures that represents a child in a sexual context. In this assessment (what is regarded as sexually obscene) the age of a child is relevant, how he or she is depicted, how the sexuality occurs and what is the overall impression of the image.³¹ This definition covers at least all the acts mentioned in Explanatory Report, section 143³².

Child pornography is defined in Article 20(2) of the Convention. The definition includes “real” or “simulated” pictures. Also in the CC realistic (simulated) pictures are regarded as a forbidden material (as well as the real pictures of course). The criminalization is realised as follows:³³

²⁷ See HE 153/2006 vp.

²⁸ Solicitation of a child for producing child pornography is criminalized in the CC, c 20, s 8b(1).

²⁹ Criminal Code, c 17, s 18, *Distribution of sexually obscene pictures*, c 17, s 18a *Aggravated distribution of sexually obscene pictures depicting children* and c 17, s 19 *Possession of sexually obscene pictures depicting children*.

³⁰ HE 6/1997, p.147-148.

³¹ HE 6/1997, p.147-148.

³² In section 143 of the Explanatory Report of the Lanzarote Convention: “a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children, or between an adult and a child, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; or e) lascivious exhibition of the genitals or the pubic area of a child”

³³ LaVM 43/2010 vp; see also T. Ojala, p.170–171.

- i. If the picture was depicting a *real* situation, it does not matter either the picture has been taken by photographing or has been drawn or has been painted. So the material in this case is forbidden regardless of the technique how the picture is created.³⁴
- ii. *Realistic* pictures are forbidden only if they confusingly remind photos, videos or such visual recordings. If the realistic pictures are drawn, painted or such, the pictures are not regarded as forbidden material. (The realistic situation means cases where there has not been a real child in those pictures. Those pictures are only depicting an imagined sex scene.)

Government Bill states that a word “simulated” has not been defined in the Convention and that is why the word does leave room for national interpretation. Finnish legislator’s interpretation is that with a word “simulated” is meant *an imitation of reality*.³⁵ The latter means that simulated pictures have to confusingly remind photos, videos or such visual recordings depicting reality. Pictures which are drawn, painted or such, does not fit in this definition. The definition is compatible with the definition in Article 20(2).

Finally it must be mentioned that the definition of “sexually obscene pictures” is quite old fashioned and should probably be replaced with some other formulation. In fact, this definition is quite widely criticised in Finland and something should be done to it in near future. As far as sexual crimes against children are concerned, a better formulation could be *e.g.* “child pornography”. It would be more present-day and also more compatible with the international obligations. In addition, the term would highlight the blameworthiness of that type of crimes. Moreover, it could be better if these offences were placed in the chapter 20³⁶ of the Criminal Code instead of keeping them in the chapter 17. This would lead to better consistency inside the Criminal Code, because the main purpose of criminalizing the child pornography is to protect the health and development of children rather than to protect the public order which, in turn, is the main purpose of the chapter 17 of the Criminal Code.

- xii. The CC covers comprehensively all sorts of perpetrators.³⁷ In c 17, s 18 the criminal liability is attributed to producers³⁸, exporters and importers and additionally to all sorts of

³⁴ It’s good to mention that it is not criminalized if the depiction is deemed justifiable because of the informative nature or manifest artistic value of the film or recording (Criminal Code, c 17, s 18(3)).

³⁵ HE 282/2010 vp, p.53.

³⁶ Main purpose of the chapter 20 is to protect the sexual autonomy of human beings.

³⁷ Criminal Code, c 17, s 18, s 18a and s 19; also see HE 282/2010 vp, p.51 – 56.

³⁸ If the child is under 16 years of age, the producer is perpetrated also either in c 20, s 6, *Sexual abuse of a child* or c

distributors regardless of whether the distributing is commercial or non-commercial. The possession of child pornographic materials is criminalized in c 17, s 19. The latter provision includes a criminalization of a person who knowingly obtains an access through information and communication technology to child pornographic materials.³⁹

The Finnish legislation is compatible with Article 20(1)(a) to (1)(f). All conducts mentioned in those paragraphs are criminalized either in c 17, s 18 *Distribution of sexually obscene pictures* (or in its aggravated version c 17, s 18a) or in c 17, s 19 *Possession of sexually obscene pictures depicting children*. When it comes to paragraph 1.d (procuring), the conduct is not particularly mentioned in the CC, but the Finnish legislator deems the word “possession” to cover procuring for oneself. Procuring for another is deemed to be distributing.⁴⁰

xiii. Pornographic materials in general are not forbidden in Finnish legislation. Only child pornography, bestiality and pornography depicting violence are criminalized. The latter two are criminalized only if they are produced, exported, imported or distributed in some manner. Possession of these kinds of pictures is not prohibited.⁴¹

It is also prohibited to deliver or market pornography (in purpose of gaining) by causing public offence. The latter means that it is prohibited to put pornography on public display, deliver pornography unsolicited to another and openly offer pornography for sale or advertise it.⁴² It is relevant that the conduct is conducive to causing public offence.⁴³ In practice the marketing of pornographic materials has been done by placing magazines, videos etc. to some places in stores where they are not directly on sight, on top of the shelves for instance.

It is good to mention that according to Kuvaohjelmalaki, *the Act on Audiovisual Programmes* (710/2011) section 6 it is prohibited to provide pornography to a person under 18 years of age due to the classification demands. Illegal exhibition or distribution of pornographic programmes to a person under 18 years of age is also criminalized in the CC, c 17, s 18b *Illegal exhibition or distribution of audiovisual programmes to a minor*. Mediakasvatus- ja kuvaohjelmakeskus, *the Finnish Centre for Media Education & Audiovisual Media*, which job is to supervise the compliance of the

20, s 7, *Aggravated sexual abuse of a child* (T. Ojala, p.171).

³⁹ This is a new criminalization in Finland. The Finnish Government wanted to criminalize an act of obtaining an access to child pornographic materials despite of is it done through ICT or not. However, the Legal Affairs Committee (of the Finnish Parliament) considered that the provision would be too open to various interpretations if the criminalization was not limited to using ICT (LaVM 43/2010 vp; see also T. Ojala, p.27.).

⁴⁰ HE 282/2010 vp, p.52.

⁴¹ Criminal Code (39/1889), c 17, s 18; see also HE 6/1997 vp.

⁴² Criminal Code (39/1889), c 17, s 20 *Unlawful marketing of obscene material*.

⁴³ M. Majanen, 'RL 17: Rikokset yleistä järjestystä vastaan' in *Rikosoikeus*, T. Lappi-Seppälä et al. Juridiikkaonline, WSOYpro, 1 November 2008, viewed on 22 August 2012, chapter II.7.

Act on Audiovisual Programmes has authority to make inspections to audiovisual programme providers' business premises. The Centre has also authority to impose a penalty payment to enforce its advice.⁴⁴ The supervision made by the Centre is primarily ex post control by nature. The classification and labelling of audiovisual materials are nowadays done mainly by the program providers themselves. The classification is made by a person called "classifier".⁴⁵ Basically any person who is at least 18 years of age and is deemed suitable for the job can be trained to be a classifier.⁴⁶ Furthermore the Act regulates for example on what time is it appropriate to broadcast pornography in a TV (according to section 6 of the Act, at a time of day when under 18 years old children do not normally watch TV). Further, the Act regulates primarily about the classification and labelling of audiovisual programmes.

Finland did make one reservation provided by the Lanzarote Convention Article 20(3). Because of the reservation right the Finnish legislation does not prohibit pictures representing children who have reached 16 years of age but are under 18 years of age, if the pictures are produced and possessed with the consent of those children and solely for their own private use. This is not mentioned in the CC but the legislator considered it acceptable and left it to be regulated by the general principles of criminal law.⁴⁷

The general principles of criminal law mentioned above means basically three different options. Firstly it is possible that the conduct is not regarded as a child pornography crime, because of *the doctrine of consent* – for example, if a child between the age of 16 and 18 years have voluntarily created pictures with his or her partner, it can be considered that the "victim" has given a consent to an act and the act therefore is legitimate. Secondly, court has an option to waive punishment because of the CC, c 6, s 12(2) *Waiving of punishment* in which provision there is mentioned following: "A court may waive punishment if the perpetrator has committed the offence under the age of 18 years and the act is deemed to be the result of lack of understanding or of imprudence". And thirdly, the prosecutor have an option to decide not to prosecute due to c 1, s 7(2) of the Criminal Procedure Act (689/1997), if the offender is under 18 years of age and the act is deemed to be the result of the lack of understanding rather than heedlessness of the prohibitions of the law.⁴⁸

Above there are only mentioned situations where the "victim" has reached the age of 16 and he or she has given consent to creating pictures from the common sexual act. However, it is also

⁴⁴ Act on Audiovisual Programmes (710/2011), section 19, section 24 and section 25.

⁴⁵ Section 13 of the Act.

⁴⁶ HE 190/2010 vp.

⁴⁷ HE 282/2010 vp, p.56; see also LaVM 4/2004 vp.

⁴⁸ HE 282/2010 vp, p. 56.

good to notice that in Finland the doctrine of consent can be used although the child is under 16 years old. In these cases the age of the “victim” cannot be much less than 16 years⁴⁹ and the picture need to be produced in circumstances which do not include any abuse of a child. Further, there must not be great difference in the ages of the couple. In order the consent to be valid, the consent must be given in advance, voluntarily and it has to be accurate enough.⁵⁰ In the case No. KKO 2001:7 it was pronounced that a 12 years old child cannot give a valid consent to the conducts which are damaging his or her health. Although the case was concerning the situation where the offender had provided strong alcohol to a child and the conduct were damaging the health of a child, it can be stated in general that if a child is young enough he or she is incompetent to give a valid consent to activities which are impairing his or her development. Sexual acts are these types of activities which are conducive to impairing the development of a child and therefore a young child is incompetent to give a valid consent to those kinds of acts.⁵¹

Participation of a Child in Pornographic Performances:

xiv. At first, it is good to refer to the paragraph 2(b) of chapter II of this report (Child Prostitution), in which is mentioned provisions that criminalizes partly the conduct mentioned in Article 21(1)(a) to (1)(b). This is because making a child to participate in pornographic performances is regarded as prostitution.⁵² That is why the recruiting and coercion is criminalized in c 20, s 9 *Pandering*, and s 9a *Aggravated Pandering* and in c 25, s 3 *Trafficking in human beings* and s 3a *Aggravated trafficking in human beings*. Above mentioned provisions do not, however, criminalize conduct which does not include coercion or from which the perpetrator does not benefit. These types of solicitation crimes are criminalized in c 20, s 8b(2) *Solicitation of a child for sexual purposes*. The Finnish legislation meets the requirements mentioned in Article 21(1)(a) to (1)(b) of the Lanzarote Convention.

⁴⁹ D.Frände, *Yleinen rikosoikeus*, translated into Finnish by M. Wahlberg, Edita Publishing Oy, Porvoo, 2012, p. 138. If the child is considered to be too young, he or she cannot give a valid consent regarding the doctrine of consent.

⁵⁰ See T. Ojala, p. 177.

⁵¹ Frände, p.138; also see KKO 2001:7 which is concerning about the case where the perpetrator were held guilty of committing an assault (the CC, c 21, s 5(1)), because he or she had provided strong alcohol to the victim who was 12 years old. See also T. Ojala, p. 119-120, where is mentioned that the doctrine of consent cannot be used if the child is under 13 years of age.

⁵² HE 34/2004 vp, p.85.

As mentioned in paragraph 2(b) of chapter II of this report, the Finnish legislation does differentiate the recruitment and coercion. As mentioned earlier, the selection between these two offences (pandering and trafficking in human beings) depends on the level of control the offender has over the victim. The greater the control over a person is the greater the chance is that the crime is regarded as trafficking in human beings in place of pandering. Furthermore, the offence can also be regarded as Rape, Coercion into sexual intercourse or Sexual abuse, for example.⁵³

A person attending pornographic performances that involve participation of children under 18 years of age is criminalized in the CC, c 20, s 8c. This is a new provision if compared to the time before the ratification of the Lanzarote Convention. Finland did not use the reservation right stated in Article 21(2) of the Lanzarote Convention.⁵⁴

⁵³ HE 282/2010 vp, p57; also see p.50.

⁵⁴ HE 282/2010 vp, p. 57–58.

ELSA GERMANY

Child Pornography in General:

- x. The Council of Europe Convention on Cybercrime of 23 November 2001 was signed by Germany on the day on which it was opened for signature. It was then ratified on 9 March 2009 and entered into effect on 1 July 2009.⁵⁵ The penal provisions regarding child pornography are now more severe so a more effective action can be taken against the increasing spread of child pornography particularly on the Internet.
- xi. Article 20(2) of the Lanzarote Convention defines the term *child pornography* as "any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes."⁵⁶ Although German law does not contain a distinct definition of child pornography, the Criminal Code does cover virtual child pornography.⁵⁷ With the recent introduction of the offences of "distribution, acquisition and possession" of juvenile pornography, Germany has extended protection from exploitation in pornography to all children under 18 years of age.⁵⁸

With regard to pornographic materials § 11(3) of the Criminal Code reveals:

§ 11- Definitions

(3) Audiovisual media, data storage media, illustrations and other depictions shall be equivalent to written material in the provisions which refer to this subsection.⁵⁹

The German jurisdiction defined the term *pornography* in the so-called "Fanny Hill-Decision" of the *Federal Court of Justice* (BGH, *Bundesgerichtshof*),⁶⁰ which refers to "obscene

⁵⁵ Accessed Sept. 2012: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG>.

⁵⁶ Text of Convention: <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>.

⁵⁷ German Criminal Code, §§ 184b, 184c & 11(3); accessed in September 2012 from the Federal Ministry of Justice: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

⁵⁸ German Criminal Code, § 184b: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

⁵⁹ Accessed in Sept 2012: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0073.

⁶⁰ Decision of the German Federal Court of Justice, BGHSt 23, 40; see also: <http://www.whiteit.de/downloads/Studie020511.pdf>.

scriptures/material“.⁶¹ Pornographic are those scriptures and materials which “with disregard to other human references are sexual actions in a rough intrusive, attention-grabbing manner which push to the foreground and exclusively or predominantly are targeted on the excitement of sexual impulses“.⁶² To such a degree, nude images solely do neither constitute yet pornography, nor child pornography.⁶³ A significant⁶⁴ sexual connotation has to come along, whereas for sexual actions with children a lower level is to be determined than for sexual actions of adults.

- xii. Germany has extended protection from exploitation in pornography to all children under 18, with the recent introduction of the offences of “distribution, acquisition and possession” of juvenile pornography⁶⁵:

§ 184b - Distribution, acquisition and possession of child pornography

(1) Whosoever

1. disseminates;
2. publicly displays, presents, or otherwise makes accessible; or
3. produces, obtains, supplies, stocks, offers, announces, commends, or undertakes to import or export in order to use them or copies made from them within the meaning of No. 1 or 2 above or facilitates such use by another pornographic written materials (§ 11 (3)) related to sexual activities performed by, on or in the presence of children (§ 176 (1)) (child pornography)

shall be liable to imprisonment from three months to five years.

(2) Whosoever undertakes to obtain possession for another of child pornography reproducing an actual or realistic activity shall incur the same penalty.

(3) In cases under subsection (1) or subsection (2) above the penalty shall be imprisonment of six months to ten years if the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences and the child pornography reproduces an actual or realistic activity.

(4) Whosoever undertakes to obtain possession of child pornography reproducing an actual or realistic activity shall be liable to imprisonment not exceeding two years or a fine. Whosoever possesses the written materials set forth in the 1st sentence shall incur the same penalty.⁶⁶

⁶¹ Decision of the Higher Regional Court of Duesseldorf, OLG Düsseldorf NJW 1974, 1474 (1475).

⁶² Decision of the Federal Court of Justice, Criminal Department, BGHSt 37, 55 (59f): *see also* decision of the Federal Administrative Court, BVerwG (NJW 2002, 2966).

⁶³ Differentiating: Higher Regional Court of Koblenz, OLG Koblenz NJW1979, 1467.

⁶⁴ *See*: MüKo-Hörnle § 184 German Criminal Code marginal no. 15 with further details.; also decision of the Federal Court of Justice, Criminal Department, BGHSt 43, 366 (368): *Spreizen der Beine, um die unbedeckten Genitalien offen zur Schau zu stellen.*

⁶⁵ German Criminal Code, § 184b: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

§§ 184b and 184c of the German Criminal Code criminalise the distribution, acquisition and possession of pornography involving children (under 14 years of age) and juveniles (between 14 and 18), respectively.⁶⁷ Although these paragraphs technically rank among “written materials”, the definition of written materials also encompasses audio-visual media, data storage media, illustrations and other depictions.⁶⁸ In addition it is worth pointing out that §§ 184b and 184c punish not only materials produced as a result of actual sexual abuse, but also realistic representations of sexual activities, such as virtual child pornography (see below).^{69 70}

§ 184b is now to be interpreted to cover the provocative exhibition of children’s sexual organs, but it is unclear whether this interpretation is legally authoritative or discretionary.⁷¹

Under §§ 184b and 184c, it is punishable to, among other actions, disseminate, publicly display, produce, obtain, supply, offer, import or export, such material⁷²; this is on the lines of Article 20(1.a) to (1.e) of the Lanzarote Convention. The punishment for these activities under the German Criminal Code is imprisonment for three months to five years for child pornography and up to three years or a fine for juvenile pornography. Possession of child pornography is also punishable,⁷³ while possession of juvenile pornography is punishable unless the materials were produced by persons below 18 years of age and with consent (see below).⁷⁴

Article 20(1.f) related to § 184b (1) no. 1-3 and § 11 (3) of the German Criminal Code plus § 184d which refers also to § 184b. According to § 184b any person is punished that *distributes* child pornographic material *through the media, information and communication technologies*.

⁶⁶ http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620.

⁶⁷ German Criminal Code, §§ 184b and 184c: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

⁶⁸ *ibid.*

⁶⁹ German Criminal Code, §§ 184b and 184c: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

⁷⁰ Accessed Oct 2012: <http://www.mediendelikte.de/bt184b.htm>.

⁷¹ Polizeiliche Kriminalprävention der Länder und des Bundes, 2012, 28/10/2012, <http://www.polizei-beratung.de/themen-und-tipps/sexualdelikte/kinderpornografie/rechtliche-grundlagen.html>.

⁷² German Criminal Code, §§ 184b and 184c: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

⁷³ § 184b: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

⁷⁴ § 184c(4): http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

Furthermore, if the offender acts on a commercial basis or as a member of a gang, punishment is increased from six months to 10 years' imprisonment for child pornography and three months to five years for juvenile pornography.⁷⁵

- xiii. An advance control/check-up of pornographic Internet offerings can be conducted by the providers' youth protection officers to be appointed by law or by voluntary self-monitoring institutions.

In March 1999, the *Central Office for Spontaneous Research in Data Networks (Zentralstelle fuer anlassunabhaengige Recherchen in Datennetzen - ZaRD)*⁷⁶ has started its work. The ZaRD is part of the *Technical Service Centre for Information and Communication Technology* within the *Federal Office for Criminal Investigation (Bundeskriminalamt - BKA)*, which especially provides technical support in criminal investigations on the Internet. Officers at the ZaRD search all services on the Internet, even at night and at weekends. The ZaRD has already been successful.⁷⁷

Furthermore, the *Federal Office for Criminal Investigation* cooperates closely with the *Länder* within the context of the *Central Office for Child Pornography* there. Information is exchanged with the help of a computer-assisted evaluation system. The *Federal Office for Criminal Investigation* organises annual clerical conferences. Another measure is the *Federal Office of Criminal Investigation's* concept for combating the production of and trade in child pornography that entails a harmonised, strategic procedure by the Federal and the *Länder* police. In this connection, the *Federal Office for Criminal Investigation* organises an annual specialist seminar on child pornography.⁷⁸

Germany signed the Convention of the Council of Europe on the Protection of Children against Sexual Exploitation and Sexual Abuse on 25 October 2007 when it was opened for signature.⁷⁹ The Convention contains requirements for dealing with criminal offences, beyond the commercial sexual exploitation of children to sexual abuse without a commercial motive jurisdiction, the responsibility of legal entities, law on criminal proceedings, storage of data on sentenced sexual offenders, international cooperation and preventive measures.⁸⁰

⁷⁵ § 184b(3) and 184c(3): http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

⁷⁶ ZaRD, Bundeskriminalamt BKA= Federal Office for Criminal Investigation: http://www.bka.de/nn_206376/DE/DasBKA/Aufgaben/Zentralstellen/ZaRD/zard__node.html?__nnn=true.

⁷⁷ Federal Office for Criminal Investigation, 2012, 29/10/2012, http://www.bka.de/nn_204456/DE/DasBKA/Aufgaben/Zentralstellen/ZaRD/zard__node.html?__nnn=true#doc204436bodyText5.

⁷⁸ Federal Office for Criminal Investigation, 2012, 29/10/2012, http://www.bka.de/DE/ThemenABisZ/Deliktbereiche/Kinderpornographie/kinderpornographie__node.html?__nnn=true.

⁷⁹ Status as of Oct. 2012: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=8&DF=14/10/2012&CL=ENG>.

⁸⁰ *ibid.*

Depending on the extent to which use is made of the reservation options, this will call for legislative action in the area of criminal law. This has already been partly covered by the law transposing the framework decision of the Council of the European Union on combating the sexual exploitation of children and child pornography.

The ratification of the Council of Europe Convention is on its way.

Germany did not make use of the reservation right that was given in the Lanzarote Convention Article 20(3): §§ 184b and 184c of the German Criminal Code punish not only materials produced as a result of actual sexual abuse, but realistic representations of sexual activities, such as virtual child pornography, too.⁸¹ Possession of child pornography is also punishable,⁸² while possession of juvenile pornography is punishable unless the materials were produced by persons under 18 years and with consent.⁸³

Regarding Article 20(4) of the Lanzarote Convention, § 184d of the German Criminal Code criminalises actions on the lines of Article 20(1.f) of the Lanzarote Convention, which are “knowingly obtaining access, through information and communication technologies, to child pornography”.⁸⁴ There is also no use of reservation right to be found here.

Participation of a Child in Pornographic Performances

xiv.

Article 21 of the Lanzarote Convention – Offences concerning the participation of a child in pornographic performances

(1) Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

- (a) recruiting a child into participating in pornographic performances or causing a child to participate in such performances
- (b) coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes
- (c) knowingly attending pornographic performances involving the participation of children⁸⁵

§ 184b of the German Criminal Code - Distribution, acquisition and possession of child pornography

(1) Whosoever

⁸¹ §§ 184b and 184c: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620.

⁸² § 184b: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620.

⁸³ § 184c(4): http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620.

⁸⁴ Text of the Lanzarote Convention: <http://conventions.coe.int/Treaty/EN/treaties/html/201.htm>.

⁸⁵ *ibid.*

1. disseminates;
2. publicly displays, presents, or otherwise makes accessible; or
3. *produces*, obtains, supplies, stocks, offers, announces, commends, or undertakes to import or export in order to use them or copies made from them within the meaning of Nos 1 or 2 above or facilitates such use by another pornographic written materials (§ 11 (3)) related to sexual activities performed by, on or in the presence of children (§ 176 (1)) (child pornography)

shall be liable to imprisonment from three months to five years. ...⁸⁶

The legal situation regarding “making a child participate in pornographic performances“ and “recruiting“ or “coercing“ children in this area can be qualified as unclear and unsystematical: Partially, preliminary actions for the production of child pornography are covered by § 176(4) no. 3 of the German Criminal Code; actual actions of abuse for the purpose of the production of child pornographic material are not only covered by § 176a (3) but generally also by § 184b(1) no. 3 of the German Criminal Code.⁸⁷

As every other offence, § 184 of the German Criminal Code requires intention. The offender has to act knowingly and deliberately in causing the result.⁸⁸

Thus, German penal law makes it illegal for one or more persons to engage in sexual intercourse or other sexual acts with a child with the intent to produce pornographic material to be disseminated or publicly displayed.⁸⁹ Perpetrators of this crime face punishments of not less than two years’ imprisonment.⁹⁰

§§ 176, 176a, 177 and 180 of the Criminal Code must also be taken into consideration: As mentioned above § 176 covers the one part of the crime concerned with the abuse of a child; § 177 contains the offence of sexual assault by use of force or threats; in this way coercing a person to engage in sexual activity by force or threat.⁹¹

§ 180 furthermore criminalises causing minors to engage in sexual activity as well as inducing of children.⁹² According to the German Criminal Code it is illegal to groom a child by using publications to influence the child to engage in sexual activities with an

⁸⁶ § 184b: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620.

⁸⁷ Accessed in Oct 2012: <http://www.whiteit.de/downloads/Studie020511.pdf>.

⁸⁸ Accessed in Sept 2012: <http://www.gegen-missbrauch.de/gesetzeslage>.

⁸⁹ Accessed Sept. 2012: <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=185&CM=&DF=&CL=ENG&VL=1>.

⁹⁰ *ibid.*

⁹¹ § 177: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1517.

⁹² § 180: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1552.

adult.⁹³ *Grooming*, describes the recruitment of children and tempering them onto sexual abuse *for the purpose* of producing child pornography.⁹⁴

This provision also criminalises offering, demonstrating or promising a child to someone else for purposes of sexual abuse or conspiring with another person to sexually abuse a child.⁹⁵

German legislation has not made use of the reservation right stated in Article 21(2) of the Lanzarote Convention.⁹⁶

⁹³ § 176: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1493.

⁹⁴ Accessed Oct 2012: <http://www.whiteit.de/downloads/Studie020511.pdf>.

⁹⁵ http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1620.

⁹⁶ List of declarations, reservations and other communications with regard to treaty No. 201: <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=201&CM=8&DF=14/10/2012&CL=ENG&VL=1>.

ELSA GREECE

Child Pornography in General:

x. Greece has signed but has not yet ratified the Council of Europe Convention on Cyber Crime. (Date of Signature : 23/11/2001)

State is recently seriously oriented to a series of administrative reforms as well as it is highly concerned to meet up European standards of judicial operation. As a result, ratification of the Convention is on the top of the agenda.

xi. According to the provisions of Article 348A⁹⁷ of the Greek Penal Code, Pornographic material constitutes every depiction, real or figurative imprinting, on electronic carrier or any material of a minor's body, intended for sexual excitement, as well as the recording or imprinting, on electronic carrier on any material, of a real, simulated or fictitious indecent assault acted for the same purpose by or with a minor. As a consequence, the compatibility of the national article with Lanzarote Convention's provision is more than obvious, if 348A⁹⁸ of Greek Penal Code is not wider. More precisely, while article 20§2 of the Lanzarote Convention is referring only to the depicting of genitals as punishable , national legislation criminalizes depicting of any part of the minor's body efficient to lead to sexual stimulation.

xii. Whoever⁹⁹ prepares, possesses, puts by any means into circulation pornographic material, coming under the definition of the preceding paragraph, is sentenced to at least one year imprisonment plus a monetary penalty, while pornographic material distribution associated with the exploitation of need, of mental or intellectual weakness, of corporeal incompetence of minors due to an organic disease or with the performance of physical violence against a minor , constitutes an aggravated circumstance punishable as a felony. Moreover, this article was amended in 2007 to include the use of the Internet or electronic means as a means to disseminate child pornography. The 2007 amendments and the inclusion of the Internet as a means to disseminate material led to the introduction of use of the Internet to commit a crime being deemed an aggravating form of the offense. This section states that pornographic material

⁹⁷ Global Resource of Information Directory , Greece – Country Profile, <http://www.fosigrid.org/europe/greece>

⁹⁸ Global Resource of Information Directory , Greece – Country Profile, <http://www.fosigrid.org/europe/greece>

⁹⁹ International Criminal Police Organization – INTERPOL, National Laws , Legislation of Interpol member states on sexual offences against children , Greece - Grèce – Grecia , Athens, <https://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaGreece.pdf>

constitutes every depiction, real or simulated, in any format, of a minor's body, intended for sexual excitement, as well as the recording or imprinting, in any format, of a real, simulated or fictitious indecent assault acted for the same purpose by or with a minor. The article states that it is an offense to manufacture, offer, provide, possess, or sell such pornographic material for profit. As a result, article 348A¹⁰⁰ is fully compatible with provisions (20)1.a and 1.f as mentioned in text of the Convention. However, provision of article (20)1.f refers to the *possession of access* to pornographic material via technology, informatics or communication means. This is a citation differentiated from the *possession* of pornographic material itself through a computer system or use of the Internet, stated in article 348A¹⁰¹ §2 of the Greek Penal Code.

xiii. Policing of the Internet as well as Control mechanism for pornographic materials is a difficult discussion, as it hits over issues of the constitutionally protected freedom of speech and the confidential character of communication. Hellenic Police has established the Sector for the Prosecution of Cybercrime in 2004 acknowledging the problem of security on the Internet. During the recent years, several cases of promoting illegal activities on the Internet have been unravelled by this Police Sector. This specific Office is co-operating with Europol, Interpol, FBI and the US department of homeland Security. In Greece , there is also Safeline, that is joining forces with other agencies of provision of Internet services , EDET (=National Net of Research & Technology) & PSD (=Panhellenic School Net) , Institutions of Research & Culture, Unions of Consumers and Greek Police in order to limit flow of illegal content on the Internet. The program is being supported by the “Action Plan for Safer Use of the Internet”, launched by the E.U. and is being operated by SAFENET, collective organization of Internet Services Providers in Greece. Operation of SafeLine is based upon articles 10 and 12 of Greek Constitution, which provide the right of reference to citizens and legitimization for them to establish unions and non – profit corporations aiming to protect individual and social rights in return. SafeLine is receiving complaints concerning Internet sites or newsgroups, where users have detected pictures of children being maltreated anywhere in the world. State being party to the Lanzarote Convention, didn't use the reservation right as mentioned in article 20§3 of the Convention , since all the forms of pornography cited are criminalized by the national legislator and included in the letter of law (article 348A). On the other hand, the State seems not to have penalized intentional access to porn material via technology as provided in paragraph 1.f of article 20. Therefore, we can maintain that it made use of its reservation right, as long as the national legislator still

¹⁰⁰ Global Resource of Information Directory , Greece – Country Profile, <http://www.fosigrid.org/europe/greece>

¹⁰¹ Law Library of Congress , <http://www.loc.gov/law/help/child-rights/greece.php>

criminalizes only the “possession” (article¹⁰² 348 A par.2 of the Greek Penal Code) of pornographic material but not the “possession of access” (article 20 par. 1 of the Lanzarote Convention) to it. As a result, simple on-line watching or surfing on pornographic material without the process of downloading from related websites does not constitute a crime according to national legislation. In this case, there is no stable incorporation of data into electronic or other carrier and subsequently no such real dominating over the pornographic material as to justify “possession”.

Participation of a Child in Pornographic Performances:

xiv. Article 348B, Penal Code. Attracting Children for Sexual Purposes;

This article defines the crime of an adult using information and communications technology to entice a child under fifteen years of age to meet in person in order to commit offenses as specified in Articles 339 and 348A¹⁰³. Where the initial proposal was followed by further similar acts which resulted in one of the offenses specified above, the offender is liable to imprisonment for at least two years and a fine of between €50,000 and €200,000.

As regards to the discrimination between “recruitment” and “coercion”, the terminology used to describe the above – mentioned criminalized activity is that of “enticement”, which apparently seems conceptually closer to the notion of “recruitment”.

As it can be seen through the examination of Greek Penal Code, the national legislator does not criminalize the attendance of pornographic performances involving the participation of children at all and as a consequence , national legislation ends up incompatible with provision in article 21 § 1.c of the Lanzarote Convention.¹⁰⁴

¹⁰² Global Resource of Information Directory , Greece – Country Profile , <http://www.fosigrid.org/europe/greece>

¹⁰³ Global Resource of Information Directory , Greece – Country Profile , <http://www.fosigrid.org/europe/greece>

¹⁰⁴ However, it should be noted that attendance of pornographic performances is a criminal act, according to a special law “about indecent publications” (Law 5060/1931)

ELSA IRELAND

Child Pornography in General:

x. Ireland signed the Budapest Treaty on the 28th of February 2002, but has yet to ratify it.¹⁰⁵ As of the 24-9-12 Ireland has not ratified the convention, Irish computer law is being updated with the suggestion by Paul C Dwyer that the convention being close to ratification.¹⁰⁶

xi. Article 20(2) of the Lanzarote Convention defines “child pornography” as any material depicting children in real or simulated explicit sexual conduct, or any depiction of sexual organs for sexual purposes. The Child Trafficking and Pornography Act, 1998, Section 2 defines the child as any person under the age of 17. This is compatible with Article 18 (2) of the Convention. Child Pornography is defined in Section 2 (a)(1) of the Act as any visual representation of a child engaged in explicit sexual activity and (a)(2) any depiction of the genital or anal region of the child for sexual purposes. Section 2 (b) includes audio representation as child pornography, while section 2 (d) also accounts for any representation, description or information produced by computer-graphics or electronic or mechanical means which imply a child is available for the purpose of sexual exploitation.¹⁰⁷

Therefore, the national legislation is compatible with the Lanzarote Convention as it clearly prohibits all forms of Child Pornography as indicated in the Convention.

xii. The Lanzarote Convention Article 20(1.a) to (1.f) requires the state to criminalize, the production, offer, distribution and transmission, procuring of child pornography and the knowledgeable access to child pornography.

The Child Trafficking and Pornography Act, 1998 criminalises the organisation and facilitation of sexual exploitation of children, which Section 3 (a-b) includes the production of child pornography. Section 5 of the act criminalizes any person who knowingly engages in the production, distribution, publication, import or export, advertisement or possession of child pornography.

¹⁰⁵ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG> Accessed on 24-09-2012

¹⁰⁶ <http://www.icctf.org/blogs/2/6/computer-crime-legislation-in-ir?PHPSESSID=28ac8f6e095115194efa2e590f3c4c28>

¹⁰⁷ <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html#sec1>

Therefore, it is concluded that the national legislation is sufficiently thorough and is compatible with the level of criminalization required by the convention.

xiii. Ireland signed the convention on the 25th of October 2007, but to date has not ratified the convention.¹⁰⁸ Therefore as the state has not ratified the convention no known reservations are yet to be made. However, given the extent of the protection in The Child Trafficking and Pornography Act, 1998, it would seem unlikely for such reservations to be made to the production and possession of pornographic material, Article 20(3) or knowingly accessing child porn, Article 20(4).

The Act, however in Section 6(2)(a) allows for the possession of child pornography for the censorship of films, publications and video recordings. Section 6(2)(b) allows for the possession of child pornography for the prevention, investigation and prosecution of offenses under the Act. Section 6(3) allows for the possession of child pornography for bona fide research.¹⁰⁹ Therefore, it could be predicted that such reservations may be made upon ratification of the Convention.

The control mechanisms for pornographic material are largely a self-regulating framework where internet service providers operating within the state are obliged to remove pornographic materials. Any user may report such content to Garda Síochána via their hotline address¹¹⁰. If the material is outside the jurisdiction it is notified to the hotline in that jurisdiction or their relevant enforcement agencies, which aims to remove all illegal content.¹¹¹

Participation of a Child in Pornographic Performances:

xiv. The Child Trafficking and Pornography Act, 1998, Section 4 (1) criminalizes any person who has custody, care or charge of a child and allows the child be used for pornographic purposes. Therefore, the participation of children in pornography is criminalized.

Section 3 (3) defines sexual exploitation as inducing or coercing the child to engage in the prohibited activity, there is no differentiation between coercing and recruitment. “Recruitment” is not explicably mentioned in the Act.

¹⁰⁸ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=1&DF=&CL=ENG>

¹⁰⁹ <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html#sec1>

¹¹⁰ www.hotline.ie

¹¹¹ Speech by Alan Shatter, T.D., Minister for Justice, Equality and Defence at the Seanad Private Members Motion On Child Abuse Material on the Internet - Wednesday 29 February 2012
<http://www.justice.ie/en/JELR/Pages/SP12000038>

The attendance of pornographic performances involving children is prohibited, Section 2 (a)(2) defines child pornography as to include, “a person who is depicted as being a child and who is or is depicted as witnessing any such activity.”

The State is not a party to the convention, it would be predicted no reservation would be made to limit the application of Article 21 1.c.

ELSA ITALY

Child Pornography in General:

x. The Convention on Cybercrime was signed by Italy on the 23rd November 2001 (date of the opening of the signature), without any reservations; it was then ratified on 5th June 2008 and made effective on 1st October 2008¹¹².

xi. The concept of pornography is still nebulous. In fact, even *Legge* n. 38/2006, which introduced the corresponding crime, does not give a definition, because it is difficult to define it without taking into consideration the single and specific context in which it can be found. For this reason, it is preferable to maintain it as an elastic element, adaptable from case to case.¹¹³ Within the Italian legal order, it can be found a concept closed, but not coincident, to the one of pornography, namely that of obscene act: according to art. 529 c.p. this is an act or object which, in line with common sense, offends decencies, with the exclusion of what is considered an art or medical or science or similar work, unless it is offered on sale, sold, or procured for a minor, for purposes different from studies (that is, for primarily sexual purposes). A part of doctrine links pornography to the realization of sexual acts by/on a minor¹¹⁴. Another part, in accordance to jurisprudence, retains that pornography is every show/part of it consisting essentially in manifesting or soliciting the sexual instinct, through reproduction/representation/exhibition of genitals¹¹⁵. In any case, thank to the recent *Legge* n. 172/2012, art. 600 *ter* par. 6 c.p. provides now a legal definition of *child* pornography, which is any kind of representation, made through any kind of mean, that visually depicts a minor engaged in a real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes. Clearly, this definition corresponds to the one given by art. 20 (2) of the Lanzarote Convention.

¹¹² Italy has also authority (A) on it.

¹¹³ So it has a value of an extra-judicial concept, even if can raise difficulties in relation to the definition of the element of the crime itself.

¹¹⁴ FIANDACA G. – MUSCO E., *Diritto penale, Parte speciale*, Zanichelli editore, Bologna, 2010; MANTOVANI F., *Diritto penale*, Cedam, Padova, 2011.

¹¹⁵ ROMANO B., *Delitti contro la sfera sessuale della persona*, Giuffrè, Milano, 2007; Cass. Pen., section III, n. 25464/2004; Cass. Pen., section III, n. 5397/2001; Cass. Pen., section III, n. 10981/2010.

xii. The dispositions of the criminal code related to child pornography have been deeply changed by *Legge* n. 172/2012. For example, according to art. 600 *ter* c.p., it is punishable for child pornography who:

- realises pornographic exhibitions using minors (par. 1 n. 1), that is realizing private or public show, on air, for a plurality of audience (even if, by fact, there is only one person)¹¹⁶;
- produces pornographic materials using minors (par. 1), that is producing graphic/magnetic/electronic/visual supports which consent the indirect vision of pornographic exhibition, without requiring a lucrative purpose¹¹⁷ (par. 1 n. 1);
- recruits minors for child pornography minors (par. 1 n. 2)¹¹⁸;
- induces minors to participate in pornographic exhibitions (par. 1 n. 2), that is to create in the minors the will of participate, with the concrete exhibition and production;
- profits from child pornography of minors, that is receiving any kind of utility (par. 1, n. 2)¹¹⁹;
- commercializes these pornographic materials (par. 2); this is different from the provision contained in par.. 1 because, in this case, there is an entrepreneurial activity (organization + lucrative purpose + destination for a plurality of consumers);
- distributes or divulges or spreads or publicizes these pornographic materials (par. 3), called pornographic proselytism; this is different from par. 2 and 4, because it is required neither the lucrative purpose nor a significant number of addressees (just three persons);
- distributes or divulges information (these information have to be neither new nor real, but they have to be specific)¹²⁰ finalized to sexual soliciting or exploitation of minors, and this can be made by using any kind of means, i.e. through a chat line or a downloader software¹²¹ (par. 3);
- offers or gives, also for free and also for just one occasion, these pornographic materials to a private and single person, i.e. through e-mail¹²² (par. 4);
- attends to pornographic exhibitions in which minors are involved (par. 5).¹²³

¹¹⁶ Cass. Pen., united section, n. 13/2000.

¹¹⁷ With the concrete danger of diffusion: Cass. Pen., section III, n. 1814/2008.

¹¹⁸ This is a new hypothesis of child pornography introduced by *Legge* n. 172/2012.

¹¹⁹ This is a new hypothesis of child pornography introduced by *Legge* n. 172/2012.

¹²⁰ Cass. Pen., section III, n. 15927/2009.

¹²¹ Cass. Pen., section III, n. 2842/2000; Cass. Pen., section III, n. 11169/2009; Cass. Pen., section III, n. 28524/2009. The crime is concrete when the material is on-line, without requiring a consequent download: Cass. Pen., section III, n. 25232/2005.

¹²² Cass. Pen., section III, n. 2421/2000; Cass. Pen., section III, n. 5397/2002.

¹²³ This is an important introduction that was deeply debated in the Parliament and which was the most

Moreover, article 600 *quater* c.p. punishes also the detention of child pornography material, since this provision aims at sanctioning the person who procures child pornography for himself/herself or another person or who possesses it, without requiring the effective use¹²⁴. In this case is included also the conduct of downloading pornographic materials from a pay-website and saving it on a personal computer.¹²⁵

In the end, article 600 *quater.1*, concerning virtual pornography, states that: the sanctions foreseen in artt. 600 *ter* and *quater* c.p. are applied also when pornographic materials represent virtual images realized using images or parts of images of minors (in this case the sanction is reduced of 1/3). Virtual images are images that are not associated, totally or partially, to a real situation, but that seem real thank to a graphic elaboration.

In conclusion, nowadays the attribution of criminal liability is fully compatible with the one contained in the Lanzarote Convention: artt. 600 *ter* and *quater.1* c.p. reflect art. 20 (1) lett. *a*, *b* and *c* and this is made even in a more specific way; art. 600 *quater* and *quater.1* reflect art. 20 (1) lett. *d* and *e*. A little difference can be found regarding art. 20 (1) lett. *f*. In fact, art. 600 *ter* criminalizes directly the conduct of the offer, not of the receiver, but then it is with an extensive interpretation of the article that the receiver is punished too; finally, art. 600 *quater* c.p. criminalizes the conduct of procuring and possessing pornographic materials and not the conduct of just obtaining access to it, which is not sanctioned (differently from the Lanzarote Convention).

xiii. Regarding artt. 20 (3) and 20 (4) of the Lanzarote Convention, we can notice that:

- art. 600 *quater.1* c.p. does criminalize virtual pornography;
- art. 600 *ter* c.p. does not criminalize the conduct of realizing or producing or inducing pornography when this happens for affective or libidinous reasons, only for a private use, without any cession or commercialization or diffusion or exhibition to a third person¹²⁶.
- art. 600 *quater* c.p. sanctions whoever procures or is in possess of pornographic materials for a period of time, also if it is just for personal utilization, even if he/she does not actually use it; however, just consulting or watching the material online is not sanctioned.

xiv. As mentioned above, art. 600 *ter* par. 1 c.p. criminalizes also whoever (even a minor) induces minors to participate in pornographic exhibitions. It does not highlight any difference between

controversial point of the ratification act of law. Before this, the mere attendance to child pornography was not punished.

¹²⁴ Cass. Pen., section V, n. 36094/2006.

¹²⁵ Cass. Pen., section III, n. 41570/2007; Cass. Pen., section III, n. 42100/2007.

¹²⁶ Cass. Pen., united section, n. 13/2000.

recruitment and coercion, but art. 602 *ter* c.p. indicates as aggravating circumstance the fact of inducing the minor to prostitution/pornography with violence or threat (coercion) or abusing of his/her state of necessity. The mere attendance is now criminalized (art. 600 *ter* par. 5), without using the reservation right stated in art. 21(2) of the Lanzarote Convention.

ELSA LATVIA

Child Pornography in General:

x. Latvia is party to the Council of Europe Convention on Cybercrime. Latvia signed the Convention on the 5th of May 2004; it was ratified by the Parliament on 27th of October 2006, and entered into force on the 1st of June 2007. In accordance with Article 29, paragraph 4, of the Convention, Latvia has reserved the right to refuse the request for preservation under this article in cases where it has reasons to believe that at the time of disclosure the condition of dual criminality cannot be fulfilled.

xi. In Latvian national legislation child pornography is defined in the Law on Pornography Restrictions, Article 1, paragraphs 1 and 2:

“1) **material of a pornographic nature** – composition, printed matter, image, computer programme, film, video or sound recording, television programme, or radio programme, other material in any form or type, that does not have publicly educational or informative, scientific or artistic value and in which directly, specifically and openly naturalistically:

a) genitals are completely or partially depicted, sexual acts of gratification by masturbation are depicted or described, as well as sexual acts or sexual acts of gratification in an unnatural way are described, including imitation of the specified activities,

b) sexual acts or sexual acts of gratification in an unnatural way are depicted, as well as imitation of the specified activities; or,

c) sexual acts of gratification in a violent manner, brutality in sexual activities (sadistic and masochistic activities), sexual acts of gratification with animals or necrophilia are depicted or described;

2) **child pornography** – material of a pornographic nature, in which a child is depicted or described, or any other material in which:

a) a child who is involved in sexual activities, a child completely or partially without clothing in a sexual pose or in clothing of an obscene nature is depicted or described, children's genitals or pubic region are depicted in a stimulating way,

b) a person having the appearance of a child who is involved in the activities specified in Sub-clause "a" of this Clause is depicted or described or presented in a manner specified in Sub-clause "a",

c) there are realistic images with an actually non-existent child who is involved in the activities specified in Sub-clause "a" of this Clause or presented in a manner specified in Sub-clause "a";”

“Sexual act” in this particular context signifies vaginal intercourse, while “sexual acts of gratification in an unnatural way” include other types of intercourse, including homosexual.

While paragraph 142 of the Explanatory Report to the Lanzarote Convention excludes material having artistic, medical, scientific or similar merit from the definition of child pornography, national legislation grants such exclusion only regarding pornographic material. Child pornography is explicitly separated from pornographic material in general and no “informative, scientific or artistic value” exceptions are applicable to the definition.¹²⁷ While Article 9 of the Law on Pornography Restrictions grants such exceptions to restrictions of circulation of child pornography for, *inter alia*, the process of education, for scientific, research or medical purposes, such exemptions are applied after the material is already recognized as child pornography. Artistic material or material used for artistic purposes is not exempt. Together with the definition of child pornography referring to "any other material in which (...) a child who is involved in sexual activities (...) is depicted or described", it creates a potential for misapplication and a considerable need for interpretation.

The formula “for primarily sexual purposes” used in Lanzarote Convention and the formula “in a stimulating way” (*uzbudinoši* in Latvian) used in national legislation, are liable to different interpretations. Sexual purposes refer to an intent towards sexual stimulation (subjective state), while “a stimulating way” requires an objective element. It is currently unclear what test courts will apply in practice – opinion of the court, opinion of an average person, expert opinion, or subjective intent to sexually stimulate.

The term “sexual organs” (Lanzarote Convention) is considerably wider than “genitals or pubic region” (national law). Under national definition genitals (*dzimumorgāni* in Latvian) and pubic region (*kaunums* in Latvian) are separated, thereby implying a strict and narrow understanding of the term “genitals”. While previously described problems in the definition are mainly potential, understanding of the term “sexual organs” has already caused difficulties in practice. In 2008 several rulings of Riga Centre Region Court (*Rīgas pilsētas Centra rajona tiesa* in Latvian), after considerable research, in the context of erotic performances defined sexual organs as excluding

¹²⁷ Andra Reinfelds, *Bērnu pornogrāfija - kā noteikt tās robežas* (2008) Jurista Vārds No.7 (511), 19 February 2008.

legs, breasts and buttocks. The rulings created some controversy in the legal press.¹²⁸ There is no information on whether the proffered definition continues to be used; even if it is considered obsolete, it shows the practical consequences of a strict understanding of the national definition.

Article 20(3) of the Lanzarote Convention provides for Parties the right to not criminalize producing or possessing child pornography “consisting exclusively of simulated representations or realistic images of a non-existent child.” Therefore simulated representations of a non-existent child are *a priori* included in the definition of child pornography in Lanzarote Convention. While no definition of simulated representations can be found in either the Lanzarote Convention or its explanatory report, *travaux préparatoires* of 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 understand simulated representations as “some comics, pictures, books or films (e.g. Lolita) if they refer to sexual activities with children, and which are produced without real images of existing children and are produced for private use and are not susceptible to further dissemination“.¹²⁹ As a result Directive 2011/93/EU as adopted must be interpreted so that “only realistic images of a child, for the production of which an existing child was originally misused, although its identity was later graphically modified, are (...) to be included in this provision”.¹³⁰ Similarly, Council of Europe Convention on Cybercrime Article 9, paragraph 2, clause c includes in child pornography “realistic images representing a minor engaged in sexually explicit conduct” thereby not including simulated representations. In conclusion, national definition of child pornography currently might not include simulated representations of a non-existent child, depending on the understanding of “material of a pornographic nature, in which a child is depicted or described” part of the national definition of child pornography.

It must be noted that “a person having the appearance of a child” in national definition can be interpreted as either a non-existing person as has been the case in the Netherlands,¹³¹ or an existing person. The limits of interpretation have not been tested in courts.

¹²⁸ Jānis Neimanis, *Koncentrēšanās uz detaļām aizēno lietas būtību* (2009) Jurista Vārds No.16 (569), 21 April 2009.

¹²⁹ Roberta Angelilli, Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, 2009 p.2-3.
<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/wd_child_sexual_abuse_angelilli/wd_child_sexual_abuse_angelilli_en.pdf> accessed 5 November 2012

¹³⁰ Council of the European Union Working Party on Substantive Criminal Law, Interinstitutional File: 2009/0049 (CNS) (20/21 April 2009) Article 1, para. (b).
<<http://register.consilium.europa.eu/pdf/en/09/st09/st09049.en09.pdf>> accessed 5 November 2012

¹³¹ Bert-Jaap Koops, *Cybercrime Legislation in the Netherlands* (December 2010) Electronic Journal of Comparative Law vol. 14.3 p. 12. <<http://www.ejcl.org/143/art143-10.pdf>> accessed 5 November 2012

In Latvia there has been a highly publicized case, called “*Princesses’ lieta*” in Latvian, where the pornographic material was a comic titled “Johnny the Mathematician” that was published in a pornographic magazine. It was drawn in *manga* (Japanese comics) style and depicted two persons of indeterminate age engaged in algebra homework, who subsequently engage in sexual activities. The comic was published in 2001, before the adoption of current national definition of child pornography. After confiscating the edition of the pornographic magazine¹³² and beginning a criminal investigation,¹³³ no further action was taken by law enforcement authorities and the case never reached court.

It must be noted that, the relationship between Latvian law and international treaties being mostly monistic, and Latvia being a party to United Nations Convention on the Rights of the Child Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography as well as Convention on Cybercrime, definitions of child pornography given in aforementioned conventions are directly applicable.¹³⁴ If and when Latvia ratifies the Lanzarote Convention, the definition given in Article 20(2) will be directly applicable as well.

xii. Under Article 166, paragraph 2 of the Criminal Law liability applies to persons for:

„downloading, acquisition, importation, production, public demonstration, advertising or other distribution of such pornographic or erotic materials as relate or portray the sexual abuse of children, (...) or the keeping of such materials”

No special provisions exist regarding minors producing or distributing pornographic images. The prevalence among minors in Europe of so-called “sexting” – sending by mobile communication devices of erotic or pornographic images of oneself or others – exposes a potential problem. Under current legal circumstances a seventeen year old taking a pornographic picture of his or her consenting married partner can be sentenced to deprivation of liberty of up to two years (Article 65, paragraph 2 of the Criminal Law) and court would not be able to consider being a minor a mitigating circumstance.¹³⁵

¹³² „Policija konfiscē bērnu pornogrāfiju saturošo komiksu” (Delfi.lv, 18 October 2001).

<<http://www.delfi.lv/news/national/criminal/policija-konfisce-bernu-pornografiju-saturoso-komiksu.d?id=1990314>> accessed 5 November 2012

¹³³ „Lūdz sākt kriminālvajāšanu ‘Princesses’ lietā” (Delfi.lv, 21 May 2002).

<<http://www.delfi.lv/news/national/criminal/ludz-sakt-kriminalvajasanu-princesses-lieta.d?id=3218443>> accessed 5 November 2012

¹³⁴ Diāna Hamkova, *Vai bērnu pornogrāfija Latvijā nav sodama* (2007) Jurista Vārds No.13 (466), 27 March 2007.

¹³⁵ Decision of Meeting of Judges of Criminal Department of Senate of Supreme Court of Republic of Latvia and Chamber of Criminal Cases of Supreme Court of Republic of Latvia on Recommendations Regarding Uniform Application of Sentencing Regulations (1 July 2008) para. 9.

<[http://www.at.gov.lv/files/docs/conferences/paraugi/kl-01\[1\].07.08.doc](http://www.at.gov.lv/files/docs/conferences/paraugi/kl-01[1].07.08.doc)> accessed 5 November 2012

Acquisition is understood as acquiring into ownership, possession or use, not requiring will to acquire ownership, and is compatible with procuring such materials for oneself or another person.¹³⁶ Transmission also necessitates at least temporary keeping of such materials and therefore is included in the definition.

A potential problem can be seen in the difference between distribution (national definition) and making available (Lanzarote Convention Article 20 (1.b)). Distribution requires acquisition of the material by another person while making available is completed upon the material being potentially available to another person. Keeping such materials is not a necessary precondition to making them available, thus creating potential for complications in cases where materials are made available using communication technologies (peer-to-peer networks, torrent websites).¹³⁷ Whether such theoretical differences are grave enough to lay outside the bounds of interpretation of the norm in practice is unclear. Attribution of criminal liability for actions relating to child pornography is potentially compatible with the Lanzarote Convention, but such compatibility remains untested.

The “without right” exemption used in Article 20(1) of the Lanzarote Convention applies to the process of education, scientific, research or medical purposes, law enforcement institutions and courts (for the performance of duties thereof) and for a State or local government institution, in so far as is necessary for the performance of duties prescribed by law (Article 9 of the Law on Pornography Restrictions).

xiii. While the Law on Pornography Restrictions offers an explicit definition of pornographic materials, no such definition of erotic materials exists. Such a lack has been found to create difficulties in distinguishing between these categories.¹³⁸ The Law on Pornography Restrictions initially provided for an expert commission that, upon request by an investigative body, could evaluate potentially pornographic materials. Forming such a commission proved to be politically complicated and financially expensive, and provision for it was eliminated from the Law on Pornography Restrictions. Recently there have been calls to restore such a commission and expand its powers.¹³⁹ Therefore currently no centralized system of control of pornographic material or expert body for evaluation of such material exists. In either administrative or criminal

¹³⁶ Hamkova, *Vai bērnu pornogrāfija Latvijā nav sodāma*, referring to Decision of Plenum of Supreme Court of Republic of Latvia „On Practice in Criminal Cases Regarding Wrongful Acts with Arms, Munitions, Explosives and Special Resources” (2 June 1997) Latvijas Republikas Augstākās tiesas Plēnuma lēmumu krājums (Rīga, TNA 2002).

¹³⁷ see also *Explanatory Report to Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* para. 136.

¹³⁸ inter alia, Reinfelde, *Bērnu pornogrāfija - kā noteikt tās robežas*.

¹³⁹ *Informative Report „On Foreign Experience in Combating Prostitution and Recommendations on Allaying Prostitution in Latvia”* p. 22

proceedings, both the investigative body and court can request an expert opinion on whether the materials under question are pornographic. No legal requirements for such experts exist.

Article 50 of Protection of Rights of Child Law states that it is prohibited to show, sell, give as a gift, rent or promote to a child toys and video recordings, computer games, newspapers, magazines and other types of publications, in which erotica and pornography are promoted and which pose a threat to the psychological development of a child. Such materials may not be accessible to the child, irrespective of the form of expression, devices for showing and location thereof. Sale, distribution or demonstration of pornographic materials requires a permit of the local municipal authority, such places being inaccessible to children and subject to municipal regulations. Advertising of material of a pornographic nature is prohibited. Restrictions do not apply to the process of education, scientific, research or medical purposes, specialized libraries, law enforcement institutions and courts (for the performance of duties thereof) and for State or local government institutions, in so far as is necessary for the performance of duties prescribed by law.

Depending on the form and usage of potentially pornographic materials, besides the Law on Pornography Restrictions, further and partly parallel restrictions exist in, *inter alia*, Law On the Press and Other Mass Media (Article 7), Electronic Media Law (Article 26), Advertising Law (Article 3, paragraph 2), Law On Information Society Services, Regulation of the Cabinet of Ministers on Restrictions of Entertainment of an Intimate Character, Regulation of the Cabinet of Ministers on Circulation of Computer Games, as well as further municipal regulations. Therefore, depending on the form and usage of such materials, there are several state institutions responsible for enforcement of the laws mentioned.

If pornographic materials are distributed to children with the aim of sexual gratification, such actions constitute either corruption of children (Article 162 of the Criminal Law) or encouraging to involve in sexual acts (Article 162.¹ of the Criminal Law), depending on the facts of the case. If there exists no aim of sexual gratification (e.g., selling a journal containing pornographic imagery to a person under eighteen years of age), violation of the requirements regarding the importation, manufacture, distribution, public demonstration or advertising of such materials carry an administrative sanction under Article 173.² of Latvian Administrative Violations Code. If the materials are erotic (undefined term), the sanction is a warning or a fine of 100 LVL (142.45 €) to a natural person or a fine of up to 1000 LVL (1424.50 €) to a legal person, with or without confiscation of property. For pornographic materials the fine is 100-250 LVL (142.45-356.12 €)

for natural persons and 1000-2500 LVL (1424.50-3561.25 €) for legal persons, with or without confiscation of property.

The State Police is empowered to draw up the initial administrative violation report. Administrative violation matters in cases of distribution of pornographic materials are examined by district (city) court judges. If the administrative violation has been committed in the area of electronic mass media, it falls under the jurisdiction of National Electronic Mass Media Council, except for cases, when the administrative violation report has been drawn up by another institution's officials, who are authorized to examine the relevant administrative violation matters. If the administrative violation has been committed in the area of public advertising, further measures can be applied by the Consumer Rights Protection Centre. Furthermore, if the mass medium has repeated violations of provisions regarding the circulation of pornographic materials within a one year period or published child pornography, the Prosecutor General of the Republic of Latvia, the Chief State Notary of the Enterprise Register and the Minister of Finance have the right to initiate legal proceedings in regard to termination of operation of a mass medium (Article 7 and Article 12 of Law on the Press and Other Mass Media).

If violation of provisions regarding the circulation of pornographic materials is repeated within a one year period, it carries a criminal sanction of deprivation of liberty for a term not exceeding one year, or custodial arrest, or community service, or a fine not exceeding 150 times the minimum monthly wage (Article 166, paragraph 1 of the Criminal Law).

Participation of a Child in Pornographic Performances:

xiv. Making a child participate in pornographic performances is not a separate offence. If such a performance is recorded, the offence is production of child pornography (Article 166, paragraph 3 of the Criminal Law). If the performance includes displaying the child naked or inappropriate physical contact and the offender is an adult or the child does not consent, the offence is corruption of children (Article 162 of the Criminal Law). Underage victims are incapable of consent. If the performance includes a higher degree of physical contact and is aimed at achieving sexual gratification and the child is under sixteen years of age or in financial or other dependence of the offender or offender is an adult, the offence is sexual connection with a person under sixteen years of age (Article 161 of the Criminal Law). If the child receives a fee for the performance, depending upon the degree and nature of contact, involving a child in such a performance could be involving a person in child prostitution or living on the avails of

prostitution regardless of age and consent of the child (Articles 164 and 165 of the Criminal Law).

It can be seen that the current legal situation, although inconsistent and vague, does consider making a child participate in pornographic performances an offence. Some theoretical exceptions can be imagined, e. g., a pornographic performance organized by a person between sixteen and eighteen years of age where the participant consents and is also between sixteen and eighteen years of age. Such exceptions remain purely theoretical. However, it is still strongly advisable to make causing or recruiting a child to participate in pornographic performances, as well as attending such performances, a separate offence, with differing sentences depending on nature of coercion and age of the child.

The difference between recruitment and coercion currently varies depending on the nature of coercion. If coercion is applied through physical violence or threats of such to the victim or person intimate to the victim, depending on the nature of the performance, the offence is rape or violent sexual assault. Nonviolent coercion is corruption of children (Article 162 of the Criminal Law). Recruitment without elements of coercion if the child is under sixteen years of age falls under solicitation of children for sexual purposes (Article 162.¹ of the Criminal Law). Recruitment of a child over sixteen years of age could be construed as attempted corruption of children if the recruiter is an adult and depending on the details of the particular case.

In an internal assessment carried out by the Cabinet of Ministers in 2008 it was found that knowingly attending pornographic performances involving the participation of children was not considered a crime under laws in effect at the time.¹⁴⁰ Although knowing attendance of such a performance could theoretically be understood as abetting (joint participation) – knowingly promoting the commission of a criminal offence, providing means, or removing impediments for the commission of such (Article 20, paragraph 4 of the Criminal Law) – and attendee could be held liable in accordance with the same article of the Criminal Law which provides for the liability of the perpetrator, such a possibility remains untested.

In the aforementioned internal assessment it was suggested that Latvia could use the reservation right stated in Article 21 paragraph 2 of Lanzarote convention not to apply Article 21 paragraph 1.c (knowingly attending pornographic performances involving the participation of children).¹⁴¹

¹⁴⁰ *Explanatory report on Project of Cabinet of Ministers Ordinance "On Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse"* p. 4.

¹⁴¹ *Explanatory Report on Project of Cabinet of Ministers Ordinance "On Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse"* pp. 4-5.

ELSA MALTA

Child Pornography in General:

x. Malta is a party to the Council of Europe Convention on Cybercrime (Budapest, 23rd November 2001). The Convention was signed on the 17th January 2002 and ratified on the 12th April 2012. The Convention entered into force on the 1st August 2012.

xi. Maltese law fails to define the term ‘child pornography’, yet it punishes any act which is capable of portraying an indecent image of a child. The law defines the term ‘indecent material’ which includes photographs, images, audio or video recordings, digitally created or electronic images, drawings, cartoons, text and simulated representations or realistic images of a minor, even if the minor is non-existent, or of the sexual parts of a child for primarily sexual purposes.¹⁴² This concise definition of the term ‘indecent material’ coincides with the definition ‘child prostitution’ in Article 20(2) of the Lanzarote Convention.

xii. The Criminal Code punishes any person who makes or produces or permits to be made or produced any indecent material or produces, distributes, disseminates, imports, exports, offers, sells, transmits, makes available, procures for oneself or for another, or shows such indecent material.¹⁴³ Moreover, the law punishes any person who acquires, knowingly obtains access through information and communication technologies to, or is in possession of, any indecent material which shows, depicts or represents a person under age.¹⁴⁴

The conduct punished by the Maltese legislator is very similar to that punished by the Lanzarote Convention, and since the provision was recently added to our Code, one may conclude that it was designed purposefully to comply with the Convention.

xiii. The competent authority which controls pornographic materials is the Malta Police Force.

Malta has adopted the Lanzarote Convention without any reservation thereto, and thus it did not use the reservation right that has been given by the Lanzarote Convention in Articles 20(3) and 20(4).

¹⁴² Criminal Code, Chapter 9 of the Laws of Malta; Article 208A (7).

¹⁴³ Criminal Code, Chapter 9 of the Laws of Malta; Article 208A (1).

¹⁴⁴ Criminal Code, Chapter 9 of the Laws of Malta; Article 208A (1B).

Participation of a Child in Pornographic Performances:

xiv. The law criminalises any person who with violence compels a person under age into participating in a pornographic performance or knowingly makes any gain or derives any benefit there from;¹⁴⁵ or who engages a person under age to participate in pornographic performances;¹⁴⁶ or who knowingly causes, for sexual purposes, a person under age to participate in real or simulated sexually explicit conduct or exhibition of sexual organs, including through information and communication technologies;¹⁴⁷ or who knowingly attends a pornographic performance involving the participation of a person under age.¹⁴⁸ The term ‘knowingly’ portrays the intentional nature of the offence, which requires that the agent is willing to either compel a person to participate in pornographic performances or to attend a pornographic performance involving children.

At face value, it does not seem that the legislator highlight and differentiate between recruitment and coercion. Nonetheless, the punishment attributable to the offence when the agent ‘compels’, ‘knowingly causes’ or ‘knowingly attends’ is somewhat more heinous than when the agent ‘engages’ a child to participate in pornographic performances. This shows that the legislator is more severe when the child is knowingly and intentionally coerced to participate in such performances.

Since the Lanzarote Convention was adopted without any reservation thereto, Maltese law also punishes any person who knowingly attends a pornographic performance involving the participation of a person under age.¹⁴⁹

¹⁴⁵ Criminal Code, Chapter 9 of the Laws of Malta; Article 204A (1).

¹⁴⁶ Criminal Code, Chapter 9 of the Laws of Malta; Article 204B (1).

¹⁴⁷ Criminal Code, Chapter 9 of the Laws of Malta; Article 204D (c).

¹⁴⁸ Criminal Code, Chapter 9 of the Laws of Malta; Article 204D (e).

¹⁴⁹ Criminal Code, Chapter 9 of the Laws of Malta; Article 204D (e).

ELSA NORWAY

Child Pornography in General:

x. Norway is party to the Council of Europe Convention on Cybercrime. It was signed by Norway 23 November 2001, and ratified 30 June 2006.¹⁵⁰

xi. The 1902 Penal Code describes “child pornography” as “any presentation of sexual abuse of children or any presentation of a sexual nature that involves children”. The description is used in the section that criminalizes child pornography (Section 204a), and should serve the definitional purpose in this context¹⁵¹.

Art. 20 (2) of the Lanzarote Convention defines “child pornography” as: “any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes”.

The main questions here are whether or not the Norwegian provision is compatible with the definition when it comes to 1) “any material”, that is visually depicting a child engaged in 2) “real or simulated sexually explicit conduct”, or depictions of a child’s sexual organs 3) “for primarily sexual purposes”. Secondly, another significant question will be whether the definition of a “child” in the convention is compatible with the definition in the Norwegian legislation.

Art. 20 (2): “any presentation”

According to preparatory work of the Norwegian Penal Code, the term “any presentation” in the Penal Code Section 204a refers to any medium, including text based presentations.¹⁵² This seems to be compatible with the term, “any material”, used in the convention’s definition.

Art. 20 (2): “real or simulated sexually explicit conduct”

According to the Explanatory Report of the Convention, the term “sexually explicit conduct” must be defined by the parties to the Convention. It covers, however, at least sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse in a sexual context and lascivious exhibition of the genitals or the pubic area of a child. As clarified above, the Norwegian Penal

¹⁵⁰ Council of Europe, viewed on 24 October 2012, <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG>>.

¹⁵¹ Ot.prp. nr. 22 (2008-2009). (Preparatory works for the Penal Code of 2005)

¹⁵² Ot. prp. nr. 37 (2004-2005).

Code refers to “any presentation of a sexual nature that involves children” (Section 204a). According to the preparatory works of the Penal Code, this refers to presentations of actions that are sexual in the sense that they are linked to genitals or sexual activity.¹⁵³

It is not a requirement that the acts are sexually motivated.¹⁵⁴ Any presentation that is presenting a child as a sexual object, will, according to the preparatory works, be affected by this provision – for instance where children are forced to pose in sexually provocative positions.

This should at least cover the required criteria clarified in the Explanatory Report. The Norwegian term probably comprises more than the requirements by including presentations that are not sexually motivated, but that appear to be of sexual nature in specific contexts. For example, pictures of young children without clothes on, that were taken for an innocent purpose by their parents, could be regarded as “of sexual nature” if they are spread to unauthorized persons for sexual purposes.

The definition of the convention refers to material that depicts children in sexually explicit conduct that is “real or simulated”. The Explanatory Report does not explain this term, but it seems correct to interpret this so that “child pornography” also includes material which simulates existing or non-existing children engaging in sexual conduct. This interpretation can be supported by the fact that Art. 20 of the Convention, according to the Explanatory Report, was inspired by the Council of Europe Convention on Cybercrime Art. 9, which includes “realistic images representing a minor engaged in sexually explicit conduct” in its definition of child pornography. This comprises images that are morphed of natural persons, and also images generated entirely by a computer.¹⁵⁵ The Norwegian Penal Code Section 204a, on the other hand, does not define whether or not simulated images could be classified as child pornography. The more general term “any presentation” is used here. However, animated or manipulated presentations are considered to be child pornography if they depict sexual abuse or sexualisation of children¹⁵⁶. This should cover the same material as the term “simulated” in the Lanzarote Convention Art. 20 (2).

The term “primarily sexual purposes”

The Lanzarote Convention’s definition of child pornography includes “any depiction of a child’s sexual organs for primarily sexual purposes”. This sentence modifies the definition, meaning that material having a pure artistic, medical, scientific or similar merit will not be within the ambit of

¹⁵³ Ot. prp. nr. 22 (2008-2009).

¹⁵⁴ Ibid.

¹⁵⁵ The Explanatory Report of the Convention of Cybercrime.

¹⁵⁶ Ot. prp. nr. 22 (2008-2009).

the provision. As a result, presentations could be considered acceptable in some contexts whereas they could be considered to be of “sexual nature” in others.

The Norwegian Penal Code Section 204a (5) and 204 (4) state that “sexual depictions that must be regarded as justifiable for artistic, scientific, informational or similar purposes shall not be regarded as pornographic”. Therefore, Norwegian legislation seems to be compatible with the Convention on this point.

Moreover, “child” is to be, according to the Lanzarote Convention Art. 3, any person under the age of 18 years. “Child” is defined in the Norwegian Penal Code Section 204a. as “any person who is or who appears to be under 18 years of age”. This means that the Norwegian legislation complies with the requirements of the Convention, but also goes a bit further by including persons that “appears to be under 18 years of age”.

Finally, the Convention’s definition of “child pornography” is, according to the Explanatory Report, based on the Optional Protocol to the United Nations Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. This convention is ratified by the Norwegian government and was implemented in the Norwegian legislation in 2000. During the preparation of the national ratification act, the current Norwegian national legislation was assumed to be compatible with the requirements of the protocol, and new national legislation was not needed for the implementation.¹⁵⁷ This suggests that Norwegian legislation is compatible with the Convention’s Art. 20 (2).

xii. To prepare for ratification of the Lanzarote Convention, amendments to the national legislation relating to child pornography have occurred (in the 2005 Penal Code), but they have not yet entered into force. It is not confirmed when this will happen. The following discussion will be based on the current legislation (the 1902 Penal Code), but the amendments will also be discussed to determine whether or not they satisfy the requirements of the Convention.

Criminal liability related to child pornography in the current Norwegian legislation is essentially regulated in the Penal Code Section 204a (1). Any person who engages in any of the following acts, is to be criminally liable:

“a. produces, procures, imports, possesses, delivers to another person or for payment or systematically acquaints himself with any presentation of sexual abuse of children or any presentation of a sexual nature that involves children,

b. concerns himself with presentations of sexual abuse of children or presentations of a sexual nature that involve children in any other way as referred to in Section 204, first paragraph, or

¹⁵⁷ St. prp. nr. 58 (2000-2001).

c. induces any person under 18 years of age to allow pictures of himself or herself to be taken as part of any commercial presentation of moving or non-moving pictures of a sexual nature, or produces such presentations depicting any person under 18 years of age.”

Section 204a litra b is referring to Section 204 (1) litra d, which attributes liability to any person, who: “gives a public lecture or arranges a public performance or exhibition of a pornographic nature”. In addition to this, Section 204a attributes liability to any person who “willfully or negligently fails to prevent the commission in any activity of any act referred to in the first paragraph”. Also, Section 205 states that the liability stated in the provisions in this chapter, “shall also apply to any person who aids and abets the act”.

The Lanzarote Convention Article 20 (1) litra a to litra f attributes criminal liability to those who are producing, offering, making available, distributing, transmitting, procuring or possessing child pornography, and those who are knowingly obtaining access to child pornography. Further, Article 24 (1) and (2), also attributes liability to any person who is intentionally “aiding or abetting the commission” of the offences or “attempts to commit” the offences established in accordance with the Convention.

According to the preparatory works of the amendments to the 2005 Penal Code,¹⁵⁸ it was assumed that the national penal legislation essentially met the requirements of the Lanzarote Convention. When it comes to the criminal liability regulation, it was assumed that only small amendments were needed to meet the requirements.

Art. 20 (1) litra a: “Producing”

The Lanzarote Convention Article 20 (1) litra a attributes criminal liability to a person who is “producing child pornography”. Likewise, the Penal Code Section 204a (1) litra a attributes criminal liability to “Any person who...produces...any presentation of sexual abuse of children or any presentation of a sexual nature that involves children”. This provision is upheld in the amended 2005 Penal Code Section 311 (1) litra a.

Art. 20 (1) litra b: “offering or making available”

Article 20 (1) litra b of the Convention also attributes criminal liability to a person who is “offering or making available child pornography”. According to the Explanatory Report (paragraph 136), this covers a wide range of cases, for example providing material to others, including creation of websites or web communities of child pornography or publishing material there, which is available for others. On this point, the current Norwegian legislation has been

¹⁵⁸ Ot. ptp. Nr. 22 (2008-2009).

regarded to not fully meet the requirements of the Convention.¹⁵⁹ The Penal Code uses the terms “delivers to another person” (Section 204a (1) litra a), “publishes” and “in any other way attempts to disseminate” (Section 204a (1) litra b) cf. 204 (1) litra a)). It seems clear that the terms “delivers to another person” or “publishes” do not cover the convention’s “offering or making available”. This would probably, in most cases, be covered by the term “in any other way attempts to disseminate” in the current Norwegian provision. However, the interpretation of “attempts to disseminate” is debatable. To make sure the convention is fulfilled on this point, the amended legislation will use the terms “offers” and “makes available”, see the 2005 Penal Code Section 311 (1) litra b.

Art. 20 (1) litra c: “distributing or transmitting”

The Convention’s Article 20 (1) litra c attributes criminal liability to a person who is “*distributing or transmitting child pornography*”. According to the Explanatory Report, “distribution” is active dissemination of material. The Norwegian Penal Code Section 205 (1) litra a uses the term “*attempts to disseminate*”, which should fulfil the requirements. This provision is continued in the amendments.¹⁶⁰ “Transmitting” does, according to the report, cover actions like sending material through a computer system to other persons, and also providing material such as photographs or magazines. This should in the Norwegian legislation be covered by the terms “delivers to another person” (Section 204a (1) litra a), “publishes”, “sells”, and “in any other way attempts to disseminate” (Section 204 (1) litra). The 2005 Penal Code includes the same elements¹⁶¹.

Art. 20 (1) litra d: “procuring”

Article 20 (1) litra d criminalizes procuring of child pornography for one self or for another person. The Norwegian legislation is in the same way criminalizing “procuring” of child pornography in the Penal Code Section 204a (1) litra a, and this is continued in the Code of 2005. Also at this point, the legislation seems to be compatible with the requirements of the Convention.

Art. 20 (1) litra e: “possessing”

In Article 20 (1) litra e of the Convention, criminal liability is attributed to persons who are “possessing child pornography”. The Explanatory Report states that this covers possession by whatever means, such as video cassettes, DVDs, magazines, mobile phones, stored material in a computer system, storage devices, diskettes etc. Likewise, the Norwegian Penal Code attributes

¹⁵⁹ Ibid.

¹⁶⁰ The Penal Code of 2005 Section 311 b).

¹⁶¹ The Penal Code of 2005 Section 311 (1) c).

liability to “any person who [...] possesses [...] any presentation of sexual abuse of children or presentations of a sexual nature that involves children”, cf. Section 204a (1) litra a. The same elements are continued in the 2005 Penal Code. On this point, both the Convention and the Norwegian legislation go slightly further than the UN Optional Protocol about sale of children, child prostitution and child pornography. Article 2 of the protocol does not require that the States attribute liability to those who are only possessing child pornography for personal use.

Art. 20 (1) litra f: “knowingly obtaining access... to child pornography”

The Lanzarote Convention Article 20 (1) litra f attributes criminal liability to a person who is “knowingly obtaining access, through information and communication technologies, to child pornography”. The Explanatory Report states that the rationale behind this provision is to also attribute liability to those who are accessing child pornography websites without downloading, and therefore cannot be caught under the offence of procuring or possession. There has to be an intention behind this action, and the person in question has to know that child pornographic material can be found there. According to the preparatory works for the amendments of the 2005 Penal Code regarding child pornography,¹⁶² it was suggested to amend the national legislation on this point to make sure that the requirements of the Convention were met. The current legislation concerning this is to be found in the 1902 Penal Code Section 204 a (1) litra a.

In contrast to the Convention, the Section 311 (1) litra c of the 2005 Penal Code is not limited to access obtained through information and communication technology, therefore including for example printed images, video-cassettes, magazines etc. It has nevertheless been discussed whether or not the term “systematically acquaints himself” covers all cases where somebody after the Convention Art. 20 (1) litra f is “knowingly obtaining access”. The provision has therefore been amended, and the term “intentionally gains access” will be used when the Code enters into force.

It was assumed in the preparatory works that the Convention does not give any qualifying conditions for how access has to be achieved. The Convention’s use of the word “knowingly” could probably embrace a wider area than the wording “intentionally” in the Norwegian amendment. The Explanatory Report does however state that the provision only covers those cases where the access is achieved intentionally. Therefore, the Norwegian legislation has to be assumed to meet the requirements of the convention when the 2005 Penal Code enter into force.

Art. 24 (1): “aiding or abetting the commission”

¹⁶² Ot. prp. ne. 22 (2008-2009).

As mentioned above, Art. 24 (1) of the Convention also attributes liability to any person who intentionally is “aiding or abetting the commission” of the offences established in accordance with the Convention. In the same way, the Norwegian Penal Code Section 205 indicates that the liability stated in the provisions about child pornography shall apply to any person who “aids and abets the act”. This provision has been maintained in the Penal Code of 2005. This being said, it seems clear that the Norwegian legislation is compatible with the requirements of the Convention on this point as well.

xiii. The National Criminal Investigation Service (Kripos),¹⁶³ in cooperation with the Norwegian internet provider Telenor, developed in 2004 an internet filter¹⁶⁴ that blocks access to web sites containing child pornographic material. Kripos say they have a good overview of web pages of such material, much because of tips from the public.¹⁶⁵

When child pornographic material is detected, a “stop” site will show up on the screen. The number of views of this warning in recent years has been at about 15 000-16 000 per day in Norway, but many of the hits are results of virus or redirection without user involvement. The filter does not store information about the IP address or any identifying information about the user, and generates no criminal charges. The filter is used by most internet providers in Norway, and a several other countries have started using similar filters after the same model. As child pornography is an international issue, international cooperation is essential. Therefore, the information that Kripos receives from the investigation of the detected material, is shared with the authorities of other countries.¹⁶⁶

Participation of a Child in Pornographic Performances:

xiv. The current Norwegian legislation is in the Penal Code Section 224 (1) and (3) attributing criminal liability to any person who “exploits” a person who is under 18 years of age for the purpose of prostitution or “other sexual purposes”, “independently of any use of force or threats”. This includes the act of inducing another person to “allow himself or herself to be used for such purposes”. Section 224 (2) is also attributing criminal liability to any person who “aids and abets such exploitation or inducement”. Under the preparations of the 2005 Penal Code, the Norwegian government assumed that the requirements of the Convention’s Art. 21 (1) *litra a*

¹⁶³ See also subsection II. 3. i. ii. for more information about Kripos.

¹⁶⁴ The Child Sexual Abuse Anti Distribution Filter (CSAADF).

¹⁶⁵ Kripos, ‘Internettfilteret CSAADF’, the Police, viewed on 24 October 2012, <<https://tips.kripos.no/cmssite.asp?c=1&h=41&menu=2>>.

¹⁶⁶ *Ibid.*

and b about recruiting a child into participating in pornographic performances, or coercing or causing a child to participate in such performances, were met by this provision.¹⁶⁷ The wording is continued in the 2005 Penal Code¹⁶⁸.

To sum up, the Norwegian State does criminalize intentional conduct of making a child participate in pornographic performances, the difference between recruitment and coercion is not highlighted.

The Norwegian legislation has no provisions that clearly attribute criminal liability to persons who attend pornographic performances involving the participation of children. At this point, the Norwegian Government has assumed that amendments are needed to meet the requirements of the Convention's Art. 21 (1) litra c, which is prohibiting the act of "knowingly attending pornographic performances involving participation of children".¹⁶⁹ Therefore, a new provision in the 2005 Penal Code (Section 311) will attribute criminal liability to those who "attend a performance of sexual abuse against children or a performance that sexualizes children".¹⁷⁰

¹⁶⁷ Ot.prp. nr. 22 (2008-2009).

¹⁶⁸ The Penal Code of 2005 Section 257.

¹⁶⁹ Ot.prp. nr. 22 (2008-2009).

¹⁷⁰ Translation by the author.

ELSA POLAND

Child Pornography in General:

x. Poland has signed the convention on the cybercrime on the 23 of November 2001, however, has not ratified it yet.

xi. There is lack of pornography definition in material law, introducing of this has been left to the doctrine. Between many considered definitions, the most respected is one by Professor M. Filar, defining pornography as:

„Performance of sexual activities, in a way which concentrates only on its technical aspects, in isolation from intellectual or personal aspects. Showing genitals, while they are operating, resolving to dehumanized sex technology.”¹⁷¹

This definition is not free from defects¹⁷², or in different words, it does not include all types of content, usually considered as pornography. Essential in this case is judge’s role, who may interpret the term broadly, adapting it to different cases.

The Convention requires considering the image of naked person as pornography, not necessarily taking part in sexual activity. Using alternatively systemic interpretation and comparing laws article 202 in relation to article 191 § 1 of Penal Code, it has to be concluded that just an image of naked person may also be considered as pornography within the meaning of Penal Code. Earlier definitions by professor Filar, which state that pornography presents behaviors which are against those commonly accepted or tolerated and do not comply with minimal aesthetic standards, are helping to interpret when does an image of naked person become pornography¹⁷³. Again, role of the judges is visible, because they decide which content shall be considered as presenting pornographic, artistic or educational values. Aforementioned analysis leads to the conclusion what in particular cases might or must not be considered as pornography, even though it does not allow deriving a general definition. Child pornography is nothing more than content mentioned above, treating about children.

Definition from article 20 (2) of The Convention states that pornography is showing a child during the sexual activity, which refers to first definition, or that pornography is performance of

¹⁷¹ M. Filar, *Przestępstwa seksualne w nowym KK. Krótkie komentarze*, Toruń 1997s. 39-40

¹⁷² A. Marek, *Prawo Karne*, CH Beck, Warszawa 2011, s. 500-503

¹⁷³ M. Filar, *Pornografia. Studium z dziedziny polityki kryminalnej*, Toruń 1997

genitals in sexual approaches, which complies with definitions mentioned further. Finally, Polish law allows applying (for court proceedings) actual definition introduced in The Convention and after ratification it will become part of national legal order. This means that The Conventions requirements are fulfilled.

xii. Penal responsibility for acts mentioned in Penal Code may be incurred by individuals, over 17 years. On special conditions, also juveniles over 15 years might be taken under responsibility, however it is limited to heaviest torts, does not contain prohibited acts, connected with child pornography (also in chapter referring to punishments).

Legal entities and other collective entities have to take responsibility, according to the rules in law on liability of legal entities¹⁷⁴. It's article 3 states that legal entities have to take responsibility for acts undertaken on their behalf or benefit, either when a person authorized to act on others behalf crosses those limits or does not fulfill duties or when a third party acts while the other person knowing what she is doing. Collective entities have to take responsibility for wide variety of delicts, also according to article 16 item 1 pt 7 of the law, for crimes from article 202 § 3-4b of Penal Code, which means that responsibility for crimes connected with child pornography has to be taken by everyone, apart from minors below 17 years, which fulfills The Conventions requirements.

xiii. At present there is Lack of specified mechanism of pornographic content control. In Polish penal law shall be that adults may use pornography, which makes punishing possession for personal use pedophile pornography excessive, although it is not right because in the process of its formation at least touching child is necessary, which is harmful and is a penal act. Only when someone is forced to watch any type of pornography (article 202 § 1 Penal Code¹⁷⁵), or when it is being presented to the minor (article 202 § 2¹⁷⁶), penal law is applicable. In such case, commitment of punishable act has to be notified to the Police. As though act is being prosecuted *ex officio*, notification may be provided by anyone, not only a victim. Apart from notifications, cells of Bureau of Criminal Investigation Police Headquarters¹⁷⁷ are searching for pedophile content on the internet, mostly with external organizations' help¹⁷⁸. Failure of preventive censorship comes from The Constitution, certainly from Press independence, coming from

¹⁷⁴ Dz.U. 2002 Nr 197 poz. 1661

¹⁷⁵ w roku 2011 52 skazania, z czego 47 na karę pozbawienia wolności, w tym 39 w zawieszeniu

¹⁷⁶ w roku 2011 14 skazań, z czego 8 na karę pozbawienia w wolności w zawieszeniu

¹⁷⁷ m.in. Zespół dw. z Handlem Ludźmi i Pornografią dziecięcą; więcej na stronie <http://www.policja.pl/portal.php?serwis=pol&dzial=1&t=32&x=59&y=7>

¹⁷⁸ m.in. ściśle współpracujący z Policją i organizacjami międzynarodowymi zespół Dyzurnet.pl, działający przy Naukowej i Akademickiej Sieci Kontaktowej i w ramach Stowarzyszenia INHOPE; więcej pod adresem: <http://www.dyzurnet.pl/>

article 54 of Penal Code, basic for democratic state, and before 1989 commonly broken in Poland¹⁷⁹. Exception of this rule was introduced to Penal Code within the article 200b, according to which public preaching of pedophilia is being punished. It is an interesting regulation, because Penal Code has punished only preaching of genocide or commencing aggressive war or similar crimes before. It is hard to imagine a situation in which one will commit crime from article 200b of Penal Code.¹⁸⁰, because pedophiles usually conceal their preferences, aware that they are against the law and regular people will never agree to commit sexual acts against children, because of pedophilia promotion. This is why regulation seems useful as shaping legal awareness however, as punishment basis it is not reasonable

Individuals enjoying the artistic freedom (manufacturing pieces involving children) or educational freedom (generating documentation containing for example images of nude minors) have to consider that penalizing proceedings might be commenced against them, although it may occur only when their behavior may intentionally seem as a delict from article 202, and article 191a¹⁸¹ of Penal Code. However it would be impossible to control any piece of pornography entering the circulation. And what is more important it also limits its number.

Penal Code punishes in article 202 § 4b an act, based on production, distribution, presentation, storage, possession, generation of pornography in which an object is generated or converted image of a minor, taking part in sexual act, which means that there is no exclusion mentioned in article 20 (3) of The Convention.

Penal Code does not punish the act mentioned in article 20 (3) sentence 3 of The Convention, which means when individuals presented will become mature enough to incur penal responsibility, they shall not possess any more pornographic content, showing minors, even if there were exceptions aforementioned law. Although such act is punished, its social harm, in the meaning of Penal Code may be little or even there might be no social harm in it, it means that according article 1 § 2 of Penal Code such act is not a crime at all. However this must be considered by the Court, which allows boosting flexible attitude towards so delicate content, without exclusion of punishment in particular cases. If an individual is in possession of pornographic content, showing him or her own, then an offender and a victim are one person, so there is Lack of punishment because there is no social harm. It is also important that penal law cannot interfere into people's life in an exaggerated way- which would happen in aforementioned case.

¹⁷⁹ wynika z tego uczulenie społeczeństwa na wszelkie formy ograniczania wolności mediów

¹⁸⁰ choć istnieją m.in. strony internetowe propagujące „pozytywną pedofilię” – np. www.nambla.org i inne

¹⁸¹ article 191a jest przepisem ogólnym, obejmującym dorosłych i dzieci, ale o szerszym zakresie, gdyż penalizuje wykonywanie każdego wizerunku nagiej osoby, bez jej zgody;

Lack of stipulation from article 20 (3) makes Polish legal system more flexible, fulfilling The Conventions requirements at the same moment.

Participation of a Child in Pornographic Performances:

xiv. There is Lack of regulations, directly penalizing children involvement in pornographic performances, according article 21 of the Convention. Enough although not direct protection is provided by other laws. Every single pornographic performance will be mentioned at least in article 198, 199, 200 or 200 § 2 of Penal Code and people not involved in the process directly, though helping in performance organization, may be sentenced for help to commit a crime or attempting to commit it. So punishment includes all individuals connected with pornographic performance but it does not general one, general law, while it lets to vary the responsibility, according to part which one has taken in committing an act and what was ones action based on.

Attempt to commit any crime is being punished on Penal Code basis as strictly as its actual commitment. (article 13 § 1 relating to article 14 § 1 Penal Code).

In case of leading children to taking part in pornographic performances, punishment is sometimes, according to article 200a of Penal Code moped to preparation process. If perpetrator wants to some crimes from article 200 and 197 § 3 pt. 2 of Penal Code or capturing pornographic content (which corresponds with described above parts of pornographic performance) and according to this he or she commences contact via telecommunication or teleinformation system with the minor commits the same crime which is an act sui generis. As later processed punishment against offenders acting in situations in which child is unable to discover or identify them is set to protect children, when it is harder to get adults help and in which it is much easier to manipulate kids, so mainly when perpetrator uses the Internet. In other situations, for example personal contact in the street, perpetrator will be punished for eventual attempt to undertake action, (for example article 200 of Penal Code), but only when it will directly lead to committing a crime. If perpetrator according article 200a § 1 just to commit an act, misleads minor or uses minors mistake or inability to interpret situation in a relevant way or uses illegal threats, is punished far more strictly than when there is Lack of such evidence according to § 2 minor relevantly interprets situation and is not forced to anything.

Existing laws fulfill requirements from article 21 of The Convention in sufficient, although not direct way, both in the meaning of action, recruitment and attempt.

ELSA PORTUGAL

Child Pornography in General:

x. The Council of Europe Convention on Cybercrime was signed by Portugal on the 23rd of November 2001. It was approved by Resolution nr. 88/2009 of the Portuguese Parliament and ratified by Presidential Decree nr. 91/2009 on the 29th of August 2009, as published in Portugal's Official Journal nr. 179/2009 on the 15th of September 2009. On the 24th of March 2010 the ratification of the Convention was deposited with the Secretary General of the Council of Europe, date in which it is considered to be officially ratified by the Portuguese Government. Pursuant to article 36(4) of the Convention, it entered into force in Portugal on the 1st of July 2010.

Upon ratification, Portugal issued the following reservation:

“In accordance with Article 24, paragraph 5, of the Convention, the Portuguese Republic declares that it shall not grant extradition of persons who: a) are to be trialled by an exceptional court or who are to serve a sentence passed by such a court; b) it has been proved will be subject to a trial which affords no legal guarantees of criminal proceedings complying with the conditions internationally recognised as essential to the protection of human rights, or will serve their sentences in inhuman conditions; c) are being demanded in connection with an offence punishable with a lifetime sentence or a lifetime detention order. The Portuguese Republic shall grant extradition only for crimes punishable with penalty of deprivation of liberty superior to one year. The Portuguese Republic shall not grant extradition of Portuguese nationals. Portugal shall not grant extradition for offences punishable with the death penalty under the law of the requesting State. Portugal shall authorise transit through its national territory only in respect of persons whose circumstances are such that their extradition may be granted.¹⁸²”

In order to harmonize national legislation with the Convention on Cybercrime, Law nr. 109/2009, September 15th, was passed.

¹⁸² As can be noted at:

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=185&CM=8&DF=16/09/2012&CL=EN&VL=1>

xi. The most relevant piece of national legislation regarding child pornography (*rectius*, underage¹⁸³ pornography) is article 176 of the Portuguese Penal Code, where no clear-cut definition of “child pornography” analogous to that of Article 20(2) of the Lanzarote Convention can be found in order to assess the compatibility of both.

In Portugal, in order to ascertain a definition of “child pornography”, one must therefore turn to international agreements or European acts to which the State is bound, such as article 2(c) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; article 1(b) of the Council Framework Decision nr. 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography; or Directive nr. 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, which will replace the Council Framework Decision 2004/68/JHA.

xii. According to Article 176 of the Portuguese Penal Code, the State attributes criminal liability to any male or female of at least 16 years of age¹⁸⁴ who attempts or succeeds in one of the following four actions¹⁸⁵:

1. Using or inciting an underage person to participate in a show, photo, film or digital recording of a pornographic nature;
2. Producing, distributing, importing, exporting, broadcasting, exhibiting or transferring pornographic material, for any reason and by any means;
3. Acquiring or possessing pornographic material with the intent to distribute, import, export, broadcast, exhibit or transfer it;
4. Acquiring or possessing pornographic material even without such intent.

It should be noted that we presently make reference only to the so-called *real* child pornography (i.e. featuring real children). Below we will address other forms of child pornography, such as *virtual or realistic* child pornography and *seeming* child pornography.

Still, the legislation is fundamentally compatible with article 20(1) of the Convention to the extent it criminalises most of the conducts listed down in the latter, perhaps with exception made to paragraph 1.f. This paragraph is intended to proscribe the conduct of those who knowingly and intentionally enter websites where child pornography is available and proceed to watch it by

¹⁸³ In Portugal, people under the age of 18, according to article 122 of the Portuguese Civil Code.

¹⁸⁴ The threshold for criminal liability in Portuguese law. See Article 19 of the Portuguese Criminal Code.

¹⁸⁵ Following the arrangement of ALBUQUERQUE, Paulo Pinto de, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, Universidade Católica Editora, 2010, p. 551;

means other than downloading¹⁸⁶ (e.g., streaming videos or observing images online), therefore never *de facto* “acquiring” or “possessing” any of the pornographic material. In fact, the Portuguese provision does not cover such conduct, which could therefore take place without incurring criminal liability. However, seeing as article 20(4) of the Convention expressly provides each State with the right not to apply paragraph 1.f., the Portuguese legislation could still be deemed compatible with article 20(1) of the Lanzarote Convention.

xiii. In regards to the reservation rights provided to all states party to the Convention, article 20(4) could be in play insofar as the Portuguese legislation does not apply article 20(1.f). Further reference to this issue can be found above (question *iii*).

Concerning the first part of article 20(3), Portugal does not criminalize the production and possession of pornographic material consisting exclusively of simulated representations of realistic images of a non-existing child.

As we have seen in the previous section (*iii*), Portugal criminalises four typical conducts relating to *real* child pornography. The conduct covered in article 20(3) of the Convention would be tantamount to *wholly virtual or realistic* child pornography (the virtual representation of a non-existing child), which the State does not criminalise in any way, shape or form; in contrast to *partially virtual or realistic* child pornography (the virtual representation of an existing child, with the assistance of graphic technology) which is criminalized if associated to production, distribution, import, export, broadcast, exhibition or transferral activities (parallel to action nr. 2, on question *iii* above) or to acquisition and possession with the intent to carry on any of the previous activities (parallel to action nr. 3). Finally, it is disputed whether the so-called *seeming* child pornography (featuring real people of age that resemble children) is criminalized, seeing as some scholars also include this final category in the concept of *virtual or realistic* child pornography, reasoning that the determining factor is the pornography viewer’s impression that he is indeed watching a child¹⁸⁷, while others hold that configuring pornography made by people of age as child pornography runs afoul of the principle of legality¹⁸⁸.

Concerning the final part of article 20(3), there is no such exclusion from criminal liability under the current Portuguese legal provision.

¹⁸⁶ See recital 140 of the Explanatory Report to the Lanzarote Convention, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/201.htm>;

¹⁸⁷ See ALBUQUERQUE, Paulo Pinto de, *Comentário do Código Penal à luz da Constituição da República e da Convenção Europeia dos Direitos do Homem*, Universidade Católica Editora, 2010, p. 552;

¹⁸⁸ See ANTUNES, Maria João, Cláudia Soares, «Artigo 176.º», *Comentário Conimbricense ao Código Penal*, dir. Jorge de Figueiredo Dias, Tomo I, 2012, p. 883 to 885;

In regards to control mechanisms, the Portuguese legislation does not require Internet Service Providers (ISPs) to report suspected child pornography to law enforcement or any other mandated agency. There is however a combined project entitled *Internet Segura*¹⁸⁹ (“Safe Internet”), co-founded by the European Commission with the participation and support of the Ministry of Education, the Foundation for National Scientific Computing, Microsoft Portugal, the National Agency for Knowledge Society and the Foundation for the Dissemination of Information Technology.

The mission of *Internet Segura* is to block illegal content on the Internet including (but not restricted to) child abuse and child pornography, and prosecute their disseminators in an effective way in conjunction with Portuguese law enforcement agencies and both national and international Internet Service Providers. It also strives to provide minors with information, guidelines, alerts regarding safe Internet usage, and even a help line and an e-mail address which children are encouraged to reach out to if they feel troubled or confused by anything they come across with on the internet.

Participation of a Child in Pornographic Performances:

xiv. The State does indeed criminalize the intentional conduct of making a child participate in pornographic performances.

It should however be noted that such participation may encompass several behaviours, ranging from the mere physical presence of the child as a passive bystander amidst the other interveners in the performance, perhaps with some contact of sexual nature or exhibitionism, to the practice of relevant sexual acts. Where actual relevant sexual acts take place, involving children under the age of 14, the case will be for “sexual abuse of children” rather than mere “participation of children in pornographic performances”.

As such, please refer to the section immediately below for a more detailed analysis of the legal nuances regarding the participation of children in pornographic performances.

¹⁸⁹ <http://www.internetsegura.pt/>

ELSA REPUBLIC OF MACEDONIA

Child Pornography in General:

x. The Republic of Macedonia signed the Convention on Cybercrime on 23/11/2001 and ratified it on 15/09/2004. The Convention was enforced on 1/1/2005.

xi. Definition of child pornography is provided by the CC of RM. There is a special part of the Code, Section XIII, article 122 respectively, which gives an explanation of many different concepts used in the Code. Apparently, one of them is the child pornography. The term ‘child pornography’ is defined as follows:

“Child pornography shall mean pornographic material which visually shows an explicit sexual activities with minor, or an explicit sexual activities with a person looking like a minor, or real pictures which show an explicit sexual activities with a minor.”¹⁹⁰

Definition provided in the Lanzarote Convention:

“For the purpose of the present article, the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.”¹⁹¹

COMPATIBILITY:

These two definitions are generally compatible in the first part that refers to the explanation of the material. It is a material that *visually* depicts a child engaged in sexually explicit conduct/shows explicit sexual activities with a minor.

Firstly, we see that the CC of the RM does not use the term ‘child’ but the term ‘minor’. We consider these terms to be synonyms yet there is a terminological difference.

A child in terms of the Lanzarote Convention is any person under the age of 18 years. Similarly, a child like victim of a crime in terms of the CC, shall mean a minor up to 18 years. It is the same with every other national law which provides a definition of a child.

Unfortunately, The CC of RM as well as the other laws is not concrete and explicit. There is not terminological compatibility. Namely, looking through national legislation, we notice the use of a

¹⁹⁰ Criminal Code of the Republic of Macedonia, Section XIII, article 122, item 24

¹⁹¹ Law on ratification of the Lanzarote Convention, chapter VI, article 20(2), Gazette of the RM 135, 08.10. 2010

few terms a: child, minor, juvenile, person who is not full of age, person up to 18 years, younger juvenile, an older juvenile respectively - younger major.¹⁹²

Secondly, the CC does not specify whether the sexual activities in which a child is a part of, should be real or simulated, although it mentions afterwards 'real pictures which shows sexual activities with a minor.' Similarly, I am wondering what does the term 'real pictures' mean.

Furthermore, it also includes the term 'a person who looks like a minor', without explicitly explaining the meaning of that term.

At the end, nothing is said about depiction of a child's sexual organs for sexual purposes.

xii. Yes, it is compatible. As it is required in the Article 20(1a) to (1f) of the Lanzarote Convention, the Republic of Macedonia did take the necessary legislative measures to ensure that every intentional conduct in regard to child pornography is criminalized in the Criminal Code of the Republic of Macedonia.

As follows, the article 193-a 'production and distribution of child pornography' of the CC of the RM:

(1) A person who produces child pornography in order to distribute it, or he/she transports it or offers it or it makes the child pornography available otherwise, shall be punished with an imprisonment of at least five years.

(2) A person who obtains child pornography for him/herself or for another, or possesses child pornography, shall be punished with an imprisonment from five to eight years.

(3) If the crime from items (1) and (2) of this Article is committed using computer system or by any other means of mass communication, shall be punished with an imprisonment of at least eight years.

(4) If the crime from this Article is committed by juridical person, it shall be punished with a fine.

With regard to their compatibility, this Article criminalizes every conduct that is mentioned in the Lanzarote Convention.

xiii. The State has implemented a lot of measures for children protection. The First World Children Embassy Megjashi; UNICEF; the Commission of Children rights protection and the Children Parliament of the Republic of Macedonia, provide continuous children protection through their work. Moreover, the Ministry of labour and social justice has established a special

¹⁹² Ministry of Justice, Comparative review of the legislation of the Republic of Macedonia with the Convention on the rights of children, p. 14, Skopje, may 2010

register for people foredoomed for minor's sexual abuse and paedophilia by an effective juridical decision.

In regards to pornographic materials, the first control measures are noticeable in the last few years. Namely, this year a special consulting body on children protection from illegal contents, threatening and activities on internet, established within the Government of the Republic of Macedonia held a meeting for the first time. The project will seek to reduce the dangers and harmful effects on children and youth. In the upcoming period an opening of helpline is planned, which will help to increase the knowledge of parents and children for self-protection, as well as to guide every person who is willing to report child pornography on the Internet. Parents should use free software tools to protect children online, which can be purchased in any IT shop or downloaded from the Internet. They will be able to set parameters when using Internet by their children, time can be used as measure, as well as pages and the content which can be seen.

There are some key areas of concern covered by the project, including any illegal content, child pornography, online courting, hate speech and the protection of children. One of the tasks included in the project is formation of a Centre for Raising Awareness among the local population. They will be responsible for creating national strategies to raise awareness among children, youth, parents and teachers. Its work will be coordinated by the National Internet Hotline Provider.

Furthermore, the national Commission for children rights of the RM did a special national program on children rights protection in RM (2005-2015). The sixth strategic aim of the Ministry of Justice and Ministry of Internal Affairs includes disabling media presentation of violence, pornography and inconvenient behaviour, respectively a development of appropriate guidelines for a child protection from information and material which are disadvantageous and destructive.

The State is a party to the Lanzarote Convention, but it did not use the reservation right that has been given to the parties in the Lanzarote Convention.¹⁹³

Participation of a Child in Pornographic Performances:

xiv. Yes, it does. In Section XIX, article 193 (3) to (6) of the Criminal Code of the Republic of Macedonia, the State does criminalize both the intentional abuse of a minor and compelling of a minor to participate in pornographic performances.

¹⁹³ Law on ratification of the Lanzarote Convention, Gazette of the RM 135, 08.10. 2010

At first, a person who will abuse a minor for making of audiovisual pictures or other items with pornographic content or for participating in a pornographic performance, as well as the one who participates in the performance, they both shall be punished with an imprisonment from three to five years.

Secondly, a person who will compel a minor for making and recording pictures or other items with pornographic content or for participating in a pornographic performance, shall be punished with an imprisonment of at least eight years.

Thirdly, if this crime is committed upon a minor below the age of fourteen, the perpetrator shall be punished with an imprisonment of at least four years.

Moreover, if the crime is committed by a juridical person, it shall be punished with a fine. All the objects used for committing the crime shall be taken away as well.

The Criminal Code does not specify the difference between recruitment and coercion, although it criminalizes the abuse of a minor for making of audiovisual pictures or other items with pornographic content or for participating in a pornographic performance and the compel of a minor for making and recording pictures and other items with pornographic content, as well as for participating in pornographic performance. The abuse and compel are part of the crime named as: 'showing pornographic materials to a minor'.¹⁹⁴

The term 'abuse' is not explained or defined. Additionally, the term 'compel', which refers to the term 'coercion', may be explained only in regards to compel like specific crime. Namely, the crime of compel belongs to the section of crimes against human rights and freedoms, not to the section of crimes against sexual freedom and sexual morality.

As a result of this, we can only use the definition provided in that Article and apply it afterwards for better understanding of what a coercion of a child for participating in pornographic performances would mean. Namely, a compel means compelling of a person by using force or serious threat, to do or not to do something, or to put up with something.¹⁹⁵

In this sense, compel of a child for participating in pornographic performance would be any compelling of a child for participating in pornographic performance by using force¹⁹⁶ or serious threat.

¹⁹⁴ Criminal Code of the Republic of Macedonia, SECTION XIX, article 192 (3) and (4)

¹⁹⁵ Criminal Code of the Republic of Macedonia, Section XV, article 139 (1)

¹⁹⁶ "A force shall also mean the use of hypnosis and stunning instruments in order to bring a person in a state of unconsciousness against his/her will or to incapacitate him/her and prevent resistance.", Criminal Code of the Republic of Macedonia, Section XIII, article 122 (18)

The State's approach to the attendance of pornographic performances involving the participation of children includes taking different measures for prevention and intervention in cases of child pornography, through implementation of national strategies, plans, projects and trainings.

This year the Government will launch a project for protection of children and youth from illegal and harmful internet content which poses a threat to their proper development. The project will encompass measures and establishment of bodies involving representatives from the whole society, coordinated by the Ministry of Information Society and Administration.

The project will develop in four directions: establishment of a national centre for safer internet; development of a national programme and an action plan for prevention and protection of children and youth from internet abuse; enhancement of control and sanctioning; and state's accession to three international associations for protection of children from this type of threat (Safer Internet Programme of the European Commission, Insafe - network of Awareness Centres in 27 countries in the European Union, Norway, Iceland and Russia, and INHOPE - global network of internet hotlines).

Training on "Online child pornography" realized in the Ministry of Internal Affairs of the Republic of Macedonia (follows as MIA of RM), like a part of the bilateral cooperation between the MIA of RM and the Embassy of the Republic of France in RM, guided by French experts from the Department of repression of child pornography on the Internet, Mr. Sylvain Beck and Mr. Rezhis Vilet.

Action plan for prevention and handling of sexual abuse of children and paedophilia 2009-2012, with priorities like taking measures to prevent and sensitize the general public for this negative phenomenon as well as to assist and protect victims of sexual abuse and paedophilia, introduction of measures and treatment program for persons convicted of these offenses while serving the sentence and after completion of the sentence in order to prevent recidivism, establishment of a mechanism for the coordination of stakeholders from all areas of the prevention and handling of sexual abuse of children and paedophilia, establishment of continuous education of professionals to recognize and take protection measures, establishment of a single record, conduct monitoring and evaluation, promotion of international cooperation and implementation of all the international Conventions regarding the children rights and their protection, especially in the field of sexual abuse.¹⁹⁷

¹⁹⁷ Ministry of Labour and Social Justice, Action plan for prevention and handling of sexual abuse of children and pedophilia, 2009-2012 year, Skopje, 2009

Cooperation of the MIA of RM, NVOs, National Committee to combat human trafficking and illegal migration.

A strategy to combat Human Trafficking and Illegal Migration in the RM; National action plan to combat trafficking in human beings and Illegal Migration in the RM and an action plan to combat trafficking in children in the RM, defining the strategic goals, like prevention, support and protection of the victims and witnesses, international cooperation etc. ¹⁹⁸

The State is a party to the Lanzarote Convention, but it has not used the reservation right that has been given in the Lanzarote Convention.¹⁹⁹

¹⁹⁸ The Government of the Republic of Macedonia, National committee to combat human trafficking and illegal migration in the republic of Macedonia, Skopje, March 2006

¹⁹⁹ Law on ratification of the Lanzarote Convention, Gazette of the RM 135, 08.10. 2010

ELSA ROMANIA

Child Pornography in General:

x. Is the State party to the Council of Europe Convention on Cybercrime? If yes, what is the date of ratification and signature? If not, is the State planning to ratify?

Romania is party to the Council of Europe Convention on Cybercrime since 23rd November 2001. The treaty was ratified on 12th May 2004 and entered into force on 9th September 2004.

xi. How does the national legislation define “child pornography”? Is it compatible with the definition in Article 20(2) of the Lanzarote Convention? Please comment.

The Romanian legislation defines “child pornography” as any object, film, photograph, slide, logo or other visual material that display sexual conduct or posture with a pornographic character that show or involve persons under the age of 18, while the Lanzarote Convention defines child pornography as “any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes.”

“ They are compatible in a large extent, but a difference between these two definition is that Lanzarote Convention expands on types of sexually explicit conducts while Romanian criminal law doesn’t specify this. Another difference between these articles is about stating the phrase “child sexual organs“. The Lanzarote Convention is more accurate than Romanian legislation.

xii. To whom does the State attribute the criminal liability to? Is it compatible with the Article 20(1.a) to (1.f)?

The criminal liability is attributed to the perpetrator, which can be a person who produces child pornography for distributing, who offers or makes available child pornography, who distributes or transmits child pornography, who procures child pornography for oneself or for another person, who possess child pornography, who hold pornographic materials with minors in a media system or information data storage system, without right . Romanian legislation assumed most of the rules set by Lanzarote Convention.

xiii. What is the control mechanism for pornographic materials? If the state is a party to the Lanzarote Convention, did the state use the reservation right that has been given to them in the Lanzarote Convention Article 20(3) and 20(4)?

In Romania, the control mechanism for pornographic materials is National Authority for Communication. As mentioned in the beginning of this paper, Romania has made no reservations regarding the implementation of the Lanzarote Convention.

Participation of a Child in Pornographic Performances:

Participation of a Child in Pornographic Performances:

xiv. Does the State criminalize intentional conduct of making a child participate in pornographic performances? What is the State's approach to the attendance of pornographic performances involving the participation of children? If the State is a party to the Lanzarote Convention, did the state use the reservation right stated in Article 21(2)?

In Romanian legislation, the difference between recruitment and coercion is highlighted but not differentiated. Both are punished with prison from 2 to 7 years and the prohibition of some rights. It is certain that a criminal offence committed by coercion will be punished more severe by a judge when individualizing the punishment. Yet again, Romania made no reservations upon implementation the Lanzarote Convention.

ELSA RUSSIA

Child Pornography in General:

x. The Russian federation is not a party to the Council of Europe Convention on Cybercrime. Currently there is no official information if the State is planning to ratify Convention.

xi. The legal definition of pornography is presented in the Commentary to the Criminal Code of the Russian Federation under the editorship of the Chief Justice and the Attorney General of the Russian Federation (Article 242- 1 and Article 242-2):

1. Pornographic materials or items - items that prints obscene, extremely cynical display of sex and exciting sexual instincts.

2. Manufacturing pornography is printing in any way, drawing, modeling from life sex.

Unfortunately, this definition is not clear and does not give a detailed description of signs of pornography, leaving scope for subjective interpretation.

“Child pornography” (pornographic material involving minors) expert in the study of criminal cases is defined as the demonstration of sexual activity with a person under a certain age. Given the above criteria pornography involving a minor is defined as a detailed representation of the sexual parts of a child and sexual reproduction of an end in itself, as well as other acts of a sexual nature with his participation. Child is the person that obviously not of full age, that is, 18 years (Article 87 of the Criminal Code).

xii. In the current legislation provides for criminal liability for illegal manufacture or distribution of pornographic materials or objects (Articles 242, 242-1, 242-2 of the Criminal Code).

Article 242 “The illegal distribution of pornographic materials or objects” says following: “Illegal manufacture to distribution or advertising, distribution and advertising of pornographic materials or objects, as well as illegal trade in printed publications, films or videos, pictures, or other items of a pornographic nature - shall be punished punishable by a fine of one hundred thousand to three hundred thousand rubles or the salary or other income for a period of one to two years, or hard labor for a term not exceeding two years, or imprisonment for the same term.”

Article 242-1 “Production and distribution of materials or objects with pornographic images of minors”:

1. Production, storage or movement across the State border of the Russian Federation for distribution, public display or advertising or distribution, public display or advertising materials or objects with pornographic images of known minors, as well as attracting known minors as performers to participate in entertainment pornographic events by the person of eighteen years old or older (adult), - shall be punishable by imprisonment for up to six years.

2. The same acts committed:

a) by a parent or other person to whom the law had responsibilities for the upbringing of a minor, a teacher or other employee of an educational, medical or other institution obligated to supervise the minor;

b) to the person known to be under the age of fourteen;

c) by a group of persons by prior conspiracy or by an organized group - shall be punished by imprisonment for a term of three to eight years.

Article 242-2. The use of a minor to the production of pornographic materials or objects (federal law from 29.02.2012 N 14-FZ)

1. Photo, film or video of a minor in order to manufacture and (or) distribution of pornographic materials or items or to attract a minor as an artist to participate in the entertainment of a pornographic nature, committed by a person eighteen years of age - punishable by imprisonment for a term of three to ten years with deprivation of the right to occupy certain positions or engage in certain activities for a term of fifteen years, or without it.

2. The same acts committed:

a) in respect of two or more persons;

b) a group of persons by prior conspiracy or by an organized group;

c) in respect of a person under the age of fourteen;

d) use of information and telecommunication networks (including the network "Internet"), - shall be punished by imprisonment for a term of eight to fifteen years with deprivation of the right to occupy certain positions or engage in certain activities for up to twenty years or without and with restriction of freedom for up to two years, or without it.

xiii. The Russian Federation do not use the reservation right that has been given in the Lanzarote Convention Article 20(3) and 20(4).

Participation of a Child in Pornographic Performances:

xiv. Criminal Law of the Russian Federation does not highlight and differentiate between recruitment and coercion. The Russian Federation do not use the reservation right stated in Article 21(2) of Lanzarote Convention.

ELSA SLOVAK REPUBLIC

Child Pornography in General:

x. Slovak Republic acceded to this Convention and signed it on 4/2/2005. It has been ratified on 8/1/2008.²⁰⁰

xi. According to the Sec. 132, subsection 3 of the Criminal Code the definition of child pornography reads as: For the purposes of this Act, child pornography shall mean pornographic material that visually depicts coitus, different act of sexual intercourse, or other conduct similar to sexual intercourse with a child, or naked parts of the child's body, and that it is designed to gratify sexual desire of another. The definition given in the Criminal Code does not exactly copy the definition of child pornography mentioned in Lanzarote Convention, but it is compatible to such extent that objective side of this crime is specified enough and thus taxatively defines actions, whose basic characteristic is abuse of a child. In Slovak legal system only pornography, which depicts a real child is penalized. Computer-generated child or for example modified pictures of children from animated fairy-tales are not penalized.

The Criminal Code differentiates between gaining of child to participate in pornographic performances and coercing a child into participation in pornographic performances. In basic merits mentioned in Sec. 368, subsection 1, the Criminal Code enables to impose sentence to the offender, who exploits, elicits, offers or otherwise abuses a child for manufacturing child pornography, or enables such abuse of a child, or otherwise participates in such manufacturing a term of imprisonment of 4 to 10 years. But in qualified merits mentioned in Sec. 368, subsection 2, the Criminal Code enables to impose sanction to the offender if he commits the offence referred to in Sec. 368, subsection 1 by more serious manner a term of imprisonment of 7 to 12 years. Acting in more serious manner is specified in Sec. 138 as follows:

Acting in a more serious manner shall mean that a criminal offence was committed

a) with the use of a weapon, except for the criminal offences of the first degree murder pursuant to Sec. 144, the second degree murder pursuant to Sec. 145, killing pursuant to Sec. 147 and Sec. 148, homicide pursuant to Sec. 149, bodily harm pursuant to Sec. 155, Sec. 156 and Sec. 157,

²⁰⁰ Quoted on: 15/8/2012.

Available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CL=ENG>

- b) for a longer period of time,
- c) in a brutal and agonising manner,
- d) with the use of violence, the threat of imminent violence or the threat of other grievous harm,
- e) by housebreaking,
- f) by deception,
- g) taking advantage of another person's helplessness, inexperience, dependency or subordination,
- h) by breaching an important duty prescribed by law and connected with his employment, position or function,
- i) by an organised group, or
- j) against several persons.

xii. According to the Article 20 of the Lanzarote Convention concerning child pornography:

Each Party shall take necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:

- a. producing child pornography;
- b. offering or making child pornography available;
- c. distributing or transmitting child pornography;
- d. procuring child pornography for oneself or for another person;
- e. possessing of child pornography;
- f. knowingly obtaining access, through information and communication technologies, to child pornography.²⁰¹

The Criminal Code prosecutes:

Sec. 368 - Manufacturing of Child Pornography:

(1) Any person who exploits, elicits, offers or otherwise abuses a child for manufacturing child pornography, or enables such abuse of a child, or otherwise participates in such manufacturing, shall be liable to a term of imprisonment of 4 to 10 years.

(2) The offender shall be liable to a term of imprisonment of 7 to 12 years if he commits the offence referred to in subsection 1

²⁰¹ Available at: http://www.coe.int/t/dghl/standardsetting/children/Source/LanzaroteConvention_svk.pdf

- a) against a child under 12 years of age,
- b) acting in a more serious manner, or
- c) in public.

Sec. 369 - Dissemination of Child Pornography

(1) Any person who disseminates, transports, procures, makes accessible or otherwise puts into distribution child pornography shall be liable to a term of imprisonment of 1 to 5 years.

Sec. 370 - Possession of Child Pornography

Any person who has child pornography in his possession shall be liable to a term of imprisonment of up to 2 years.

Slovak legislation is fully in accordance with the Article 20 (1,a-e) of the Lanzarote Convention. The only insufficiency that can be found is in the paragraph f, that aims to avoid for children to become victims of child pornography distributed through information or communication technologies, for example on the Internet. One way to prevent distribution of child pornography on the Internet is to block websites with unlawful content, in our case with child pornography. However, we find that neither in Slovakia, nor in the EU, there is no direct legislation that would specifically define duties of operators in this regard.

xiii. Many experts believe that Slovakia is missing an effective control mechanism, by which it would be more effective to fight against child pornography, that is to increase the protection of children against sexual and other abuse. It is therefore said, that ratification of the Lanzarote Convention at our territory, could help to improve this situation, because it offers in its provisions a platform for better and more effective control.

Regarding the exception according to the Article 20(4), in our legislation there is no particular provision that would penalize access to the child pornography through the means of communication technologies, such as the Internet. Operators regulate the situation mainly through their self-regulatory initiatives. In 2009, the three biggest Slovak operators agreed upon blocking of unlawful websites containing child pornography in pursuance of a black list provided by the Internet Watch Foundation – renowned international organization monitoring the spreading of internet paedophilia. The company O2 Telefónica also established a nonstop helpline with phone number 0800 500 500, or consultations by sending an e-mail to potrebujem@pomoc.sk. Orange also gives its clients an opportunity to warn about a website with content inappropriate for children and youth through an online form on the website

www.orange.sk or costumer line 905.²⁰² Other protective measures include for example Stopline: „National centre for reporting unlawful content or activity on the Internet that could endanger children and youth. Suggestions in the centre are analysed by specialists, who send suspicious websites from Slovakia for verification to the Police Force.”²⁰³

The conditions of distribution of audiovisual works are governed by the Act no. 343/2007 Coll. on the Conditions of Registration, Public Distribution and Preservation of Audiovisual Works, Multimedia Works and Phonograms of Artistic Performances including Amendments and Supplements to certain other acts (Audiovisual Act) as amended. It also regulates protection of minors against distribution of works with pornographic character that is ensured by uniform labelling system of works by age suitability, in respect of its inaccessibility or inadequacy for minors. According to Sec. 20 of the Act no. 308/2000 Coll. on Broadcasting and Retransmission and on Amendments of the Act no. 195/2000 Coll. on Telecommunications, the provider of audiovisual media services is on request obliged to ensure, that this service and all of its elements, which can impair the physical, mental or moral development of minors, especially those that contain pornography or coarse unjustified violence, were available only in such way, that minors can not under normal circumstances hear or see this service on request and all of its elements. The broadcaster of a television programme service and the provider of audiovisual media service are on request obliged to establish and exercise an uniform labelling system stated by a special act – that is the Act no. 343/2007 Coll. The Criminal Code in Sec. 372 persecutes a person who exhibits or otherwise makes pornography accessible to persons under 18 years of age in a place accessible to such persons. It must be expressly stated on the website, that its content is not intended for persons younger than 18 years.

²⁰² Quoted on: 28/8/2012.

Available at: <http://www.euractiv.sk/bezpecny-internet/clanok/problem-detskej-pornografie-na-internete-sa-potlaca-ale-neriesi-017924>

²⁰³ Ibid.

ELSA SWEDEN

Child Pornography in General:

x. Sweden signed the Convention on Cybercrime 2001-11-23.²⁰⁴

The question of whether Sweden should ratify the Convention and the additional protocol was discussed in the ministerial memorandum Ds 2005:6. It was said to be important that the Swedish penal legislation could offer good protection against the misuse of modern technology and that procedural law could give efficient opportunities to investigate crimes of IT-nature. It was also expressed to be important that Sweden work as an active part in the international cooperation on such issues concerning IT crime, as the main characteristic is that those types of crimes are generally not restricted by national borders. In the memorandum, the ministry proposed that Sweden should ratify the Cybercrime Convention and the additional protocol and that its provisions should be redrafted to Swedish legal text.²⁰⁵

The Ministry of Justice also suggested, in a directive in 2011, that a new examination should be done on the legislative changes that would be necessary for Sweden to meet the requirements of the Convention and the additional protocol. The new examination was said to be needed because of ongoing ratifications of other directives²⁰⁶ and because the basis of the assessment in the previous directive, of whether Swedish law complies with the requirements drawn up in the Convention and the additional protocol, had substantially changed since 2005.²⁰⁷ The new examination should include a review of the provisions in the Convention and protocol in order to analyze the need for Swedish constitutional amendments, proposals for change in legislation as well as suggestions on which reservations to certain provisions that Sweden might wish to make.²⁰⁸ The report following the investigation on Sweden's possible ratification is scheduled to be presented no later than 2013-05-02.²⁰⁹

²⁰⁴ <http://Conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=&DF=&CL=ENG> (Retrieved 2012-08-23).

²⁰⁵ Ds 2005:6 "Brott och brottsutredning i IT-miljö; Europarådets konvention om IT-relaterad brottslighet med tilläggsprotokoll", [*Crime and criminal investigation in the IT environment, the Council of Europe Convention on Cybercrime and its Additional Protocols*], p. 202.

²⁰⁶ Mentions directive 2006/24/EG and the amendment of directive 2002/58/EG.

²⁰⁷ Dir 2011:98 "Tillträde till Europarådets konvention om IT-relaterad brottslighet med tilläggsprotokoll", [*Access to the Council of Europe Convention on Cybercrime and its Additional Protocols*], p. 3-4.

²⁰⁸ Dir 2011:98 "Tillträde till Europarådets konvention om IT-relaterad brottslighet med tilläggsprotokoll" p. 5-6.

²⁰⁹ Dir 2011:98 "Tillträde till Europarådets konvention om IT-relaterad brottslighet med tilläggsprotokoll" p. 14.

xi. Offences concerning child pornography are legislated in the Penal Code chapter 16, § 10 a. The definition of “picture” includes all types of art forms, i.e. also images produced with computer technology and cartoon images, and it is not required that the image depicts a specific child or that a child has modeled.²¹⁰

The definition of pornographic image is the same for child pornography offences as for other crimes relating to pornography. A picture is generally considered to be pornographic under Swedish law when it depicts a sexual scene in an uncovered and challenging way, without containing any artistic or scientific values.²¹¹

In the context of child pornography, a “child” is defined as anyone under the age of 18 or a person whose pubertal development is not complete.²¹² It is the external physical changes that occur during puberty that are intended when speaking of “pubertal development”. Due to this definition, the provision means that anyone who goes through puberty late can be assessed under the concept of “child” even if he or she is 18 or older.²¹³ If the person is under the age of 18 but fully developed through puberty it may, in some cases, be required by the law that it is understandable from the pornographic image and the surrounding circumstances that the depicted person is under the age of 18, for criminal liability to be imposed on the accused.²¹⁴ When assessing whether the depicted person is perceived to be under the age of 18, the court can examine how the image has been marketed or what information is given through, for example, advertising text. If there is only a suspicion that the depicted person may be under the age of 18, the age requirement might not be considered to be met.²¹⁵

Since the provision on child pornography contains a definition of the term "child", it seems the legislature did not intend to criminalize so-called “evocation pornography”, referring to cases where adult models are portrayed as children or are provided with different characteristics to bring thoughts to children in a sexual context.²¹⁶ It is not, however, required that a child is included in material which have obvious sexual meaning, but it may be sufficient that the child is in a situation where one or more adults perform some type of sexual act. Images portraying children in a manner that alludes to sexual behavior, without having the child participating in any act, may also be subject to criminalization. As a general rule to determine the nature of materials,

²¹⁰ Karnov comment on Penal Code chapter 16 § 10 a, nr 741, author Göran Nilsson (2012-06).

²¹¹ SOU 2007:54 ”*Barnet i fokus – En skärpt lagstiftning mot barnpornografi*” [*Child in Focus - A stricter legislation against child pornography*], p.77 (which refers to Proposition. 1970:125, ”*Med förslag till ändring i tryckfrihetsförordningen m.m.*”, [*with the proposal to amend the Freedom of the Press Act etc.*] p.79 f).

²¹² SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a.

²¹³ Karnov comment on Penal Code chapter 16 § 10 a, nr 750, author Göran Nilsson (2012-06).

²¹⁴ SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a.

²¹⁵ Karnov comment on Penal Code chapter 16 § 10 a, nr 752, author Göran Nilsson (2012-06).

²¹⁶ Karnov comment on Penal Code chapter 16 § 10 a, nr 749, author Göran Nilsson (2012-06).

it is required that the image is perceived, under common values and language, to be presenting a child in a pornographic environment.²¹⁷

The provision on child pornography includes involvement of any child pornographic images in all types of media. In other words, the provision is intended to cover images in printed magazines as well as those accessible on the internet and images in videos or films.²¹⁸

It is worth mentioning that when Sweden ratified²¹⁹ the *Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, a reservation was declared to one of the articles;

Article 2

“For the purposes of the present Protocol:

(a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration;

(b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;

*(c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”*²²⁰

Sweden declared that “any representation” in paragraph (c) was interpreted as “visual representation”.²²¹

xii. The child pornography offences punishable under Swedish law are:

1. To depict a child in a pornographic image
2. To distribute, assign, let, display or otherwise make such an image of a child available to someone else
3. To acquire or offer to sell such an image of a child
4. To pass on contacts between buyers and sellers of such images or to take other actions aimed at promoting trade in such images, or

²¹⁷ Proposition. 2009/19:70 ”Barnpornografibrottet”, [Child pornography offences], p. 16.

²¹⁸ Proposition. 2009/19:70 ”Barnpornografibrottet” p. 16.

²¹⁹ Signed 2000-09-08, ratified 2007-01-19.

²²⁰ Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (New York, 25 May 2000) Article 2.

²²¹ http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11c&chapter=4&lang=en#EndDec (Retrieved 2012-10-06).

5. To possess such an image of a child or view such a picture that he or she has made available for him- or herself.²²²

If the pubertal development of the child who is illustrated has been completed, responsibility for offences mentioned above in 2-5 may only be imposed if it can be determined by the presentation of the image and circumstances surrounding the image that the person is under the age of 18.²²³

The intention of establishing the list above in the provision for child pornography offences was to try to criminalize all forms of acts where an image with child pornographic content is made available to anyone else and the legislator has meant the list to be interpreted only as exemplifications of criminal acts.²²⁴

The definition of "depicting" a child in a pornographic image is that such an image is produced through for example photographing, filming, artificial manufacture or through the child being used as a model for drawings. It is not necessary that the child imagined is a real person; the provision also includes fictional representations. Also manipulation of film sequences, for example, to create child pornography material through cutting and pasting such sequences, may be subject to criminal penalties.²²⁵

The expression "distribution" means that an image is transmitted or made available for more than a few people. In the case of availability or brokering to a limited group of people or to a single person, the same paragraph of the list may be subject to application but then rather by the terms "assigning", "leasing" or "displaying", depending on the circumstances.²²⁶ To "assign" a picture means that the picture is sold, donated or traded away. To "let" a child pornographic picture to someone else means that the image is rented out or lent without compensation. "Displaying" of an image means that someone plays a movie for someone else.²²⁷ The terms mentioned in paragraph 3 of the list refers specifically to criminalization of purchasing a child pornographic image and making such an image available for sale. The purpose of this paragraph is to cover the intermediaries who can be involved at the stage of distribution and assigning of child pornographic images.²²⁸

²²² SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a

²²³ SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a

²²⁴ Karnov comment on Penal Code chapter 16 § 10 a, nr 742, author Göran Nilsson (2012-06).

²²⁵ Proposition. 2009/10:70 "Barnpornografibrottel", [*Child pornography offences*], p.17

²²⁶ Proposition. 2009/10:70 "Barnpornografibrottel" p.17.

²²⁷ Karnov comment on Penal Code chapter 16 § 10 a, nr 742, author Göran Nilsson (2012-06).

²²⁸ Karnov comment on Penal Code chapter 16 § 10 a, nr 743, author Göran Nilsson (2012-06).

Anyone who arranges contacts between buyers and sellers of child pornographic images or takes any other similar measures aimed at promoting trade with such images may carry criminal responsibility according to paragraph 4. Such actions can thus be criminal without the organizer directly being in contact with child pornography, if he or she intends to increase the circulation of such material. These types of acts are punishable at the level of action to facilitate transfer or acquisition. An example could be that a person provides address information between sellers and buyers of the material without there being any personal contact but it is required that the deed has sought to promote trade in child pornography and that there has been more than a single occasion of communication or transaction.²²⁹

To possess a child pornographic image (paragraph 5) means that the person has it in his or her possession without necessarily being the owner. This provision represents the lower limit of the punishable responsibility. Because it requires possession of the image, it is not illegal to simply look at the picture as someone else shows it and it is not illegal to physically hold the image as it is displayed.²³⁰

If an image has been retrieved through the use of Internet, possession of the image arises when the image is saved by transferring it to any type of storage device.²³¹

To make a child pornographic image available for oneself means that someone has actively, paid for access to the material or otherwise, through effort, has gained access to it.²³²

The penalty scale of child pornography criminal offences is imprisonment of up to two years but if the offence may be regarded as less severe, the scale allows a maximum of six months in prison or imposes fines.²³³ An example of a case where the offence may be considered as less severe is when one person at a single occasion has produced and saved a child pornographic image on his or her computer, or if, for example, a tourist is caught with such material in his or her luggage.²³⁴

Child pornography offences can also be considered to be of a more severe nature. For such offences, the penalty scale imposes imprisonment for at least six months and at the most six years. When evaluating the severity, it should especially be taken into account if the crime has been committed for financial or commercial gain, as part of business, if a particularly large number of images have been involved or if the images are of especially young children. It should

²²⁹ Karnov comment on Penal Code chapter 16 § 10 a, nr 744, author Göran Nilsson (2012-06).

²³⁰ Proposition. 2009/10:70 ”Barnpornografibrotten”, [*Child pornography offences*], p.17.

²³¹ Karnov comment on Penal Code chapter 16 § 10 a, nr 745, author Göran Nilsson (2012-06).

²³² Karnov comment on Penal Code chapter 16 § 10 a, nr 746, author Göran Nilsson (2012-06).

²³³ SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a.

²³⁴ Karnov comment on Penal Code chapter 16 § 10 a, nr 748, author Göran Nilsson (2012-06).

also be taken into account if the offence has been a part of criminal activities on a systematic or larger scale, or if the child is exposed to violence, coercion or any form of exploitation in a particularly ruthless manner.²³⁵

An exemption from criminal liability for depiction and possession is when someone paints, draws or otherwise produces an image of a child pornographic nature through handicraft, if the image is not intended to be displayed, distributed, transferred, leased, or otherwise be made available to others. With this exception, the intention has been to refer to cases where a person uses such a method to manufacture an image of child pornographic nature and it can be assumed that the image essentially is intended for personal use. If, however, the image might be shared or otherwise put into circulation, criminal responsibility is still effective.²³⁶

A second exemption from the provision on child pornography is if the materials can be regarded as justified with reference to the surrounding circumstances. This is intended to exclude such possession which may be necessary for research, news dissemination and advocacy from criminal responsibility. When determining if this exemption can be applicable, it has to be assessed if the purpose of the possession may be considered justifiable, i.e., not whether the holder of the material can be regarded as excusable due to his or her profession.²³⁷

Furthermore, the legislator considers that there is no explicit exemption from the prohibition provided in cases where young people, for example two persons who are both 16 years old, depict their own legally performed sexual acts.²³⁸

As regards statutory limitation, penalties for child pornography crimes of a normal nature may not be imposed if the suspect has not been indicted or been arrested within five years from the date on which the offence was completed. For minor offences, there is a two-year limitation and ten years for crimes with aggravating nature.²³⁹

Even if the child pornography offence has been committed abroad, there is in some cases a possibility for the Swedish court to rule. According to general rules there should be some link to Sweden for Swedish jurisdiction to be applicable. Ties may exist if the offender habitually resides in Sweden or if he or she is a Swedish citizen. However, there are often restrictions in jurisdiction according to the requirement of double criminality, meaning that the offence shall be punishable in the country where the offence was committed, as well as in Sweden. In addition,

²³⁵ SFS 2010 :1357, *Penal Code*, Chapter 16 § 10 a.

²³⁶ Proposition. 2009/10:70 ”*Barnpornografibrottet*” [*Child pornography offences*], p.18.

²³⁷ Proposition. 2009/10:70 ”*Barnpornografibrottet*” p.18.

²³⁸ Proposition. 2009/10:70 ”*Barnpornografibrottet*” p.18.

²³⁹ Proposition. 2009/10:70 ”*Barnpornografibrottet*” p.19.

there may be restrictions ruling that the penalty cannot be more severe than the most severe punishment prescribed for the same offence in the country where the crime was committed.²⁴⁰

There are also provisions in Swedish law (1998: 1443) stating that import of child pornographic images to and export of such images from, Sweden is illegal.²⁴¹

xiii. Child pornography offences can be detected by the police in various ways. The police frequently receive tips from the public which are first assessed for credibility and then an investigation may be opened regarding the materials and the circumstances surrounding the case. Every image of child pornography that the police are given knowledge of are marked with a unique code and stored in an image database. When the police review an image, attempts are made to identify the vulnerable depicted children. Occasionally, information on the origin of the image can be retrieved by analyzing the backgrounds or dialects and languages used. Criminal investigation begins when the offender or the child has been identified. Interpol is also informed. The police also work to seek out people who share child pornography material on the Internet, which often leads to international cooperation since the networks can be transnational. If the police find a webpage containing child pornography they collaborate with the internet service provider (ISP), if such an agreement exists. The ISP can then redirect the link to a blocked page. Information on the webpage found is also sent to the Finance Coalition aiming to ensure that no one can make financial purchases with the current page.²⁴²

The Swedish Financial Coalition works to complicate and prevent trade of child pornography, with the goal to stop child abuse. The coalition was established through a partnership between several Governmental institutions and partners in both the non-profit and private sectors. Ultimately, it is the police who are responsible for combating child pornography, but because economic transactions occur in this type of trade, different parties of the financial industry also become key players in the preventive work. Members of the coalition focus primarily on finding sellers of child pornographic material and then act to close the possibility for the seller to receive any payments.²⁴³

xiv. One of the main reasons for criminalization of child pornography is that the legislator considers there to be a substantial risk that such images might be used to encourage children to participate in sexual acts.²⁴⁴ The criminalization is intended not only to protect the children

²⁴⁰ Proposition. 2009/10:70 ”Barnpornografibrottet”, p.19.

²⁴¹ Act (1998:1443) on the prohibition of import and export of child pornography.

²⁴² <http://www.polisen.se/Om-polisen/Sa-arbetar-Polisen/Olika-typer-av-brott/Brott-mot-barn/Sexuella-overgrepp-mot-barn-och-barnpornografi/> (Retrieved 2012-08-25).

²⁴³ www.finanskoalitionen.se (Retrieved 2012-09-25).

²⁴⁴ Proposition. 2009/10:70 ”Barnpornografibrottet”, [Child pornography offences], p.15.

depicted or otherwise involved in the creation of the material, but also to protect children in general. Those children who are involved in the creation, however, are exposed to a particular risk of harm to privacy and integrity and both the creation and possible circulation of the image imply a violation even if the child is normally not able to assess the impact and meaning of his or her own participation. The violation of integrity may be considered to be continuous in the sense that every occurrence of the image implies a penalty worth violation.²⁴⁵ However, it can be possible to produce child pornography without committing sexual assaults against children.²⁴⁶ The criminalization of child pornography is therefore included as a provision in the Penal Code chapter concerning crimes against public order. This is done to differentiate between child pornography offences and what is regarded as “other” sexual assaults against children. For this reason, it is considered that the link to a sexual child abuse is irrelevant for the question of whether child pornography is punishable or not.²⁴⁷

²⁴⁵ Swedish Prosecution Authority, office of the Prosecutor-General, official letter; ”SL./ Riksåklagaren ang barnpornografibrott”, [The Prosecutor General regarding child pornography offences] (Retrieved 2011-09-14) page 3.

²⁴⁶ Proposition. 2009/10:70 ”Barnpornografibrottet” p.57.

²⁴⁷ Swedish Prosecution Authority, office of the Prosecutor-General, official letter; ”SL./ Riksåklagaren ang barnpornografibrott” (Retrieved 2011-09-14) page 3.

ELSA THE NETHERLANDS

Child Pornography in General:

x. Is the State party to the Council of Europe Convention on Cybercrime? If yes, what is the date of ratification and signature? If not, is the State planning to ratify?

The Netherlands is a party to the Council of Europe Convention on Cybercrime. It has been signed on 23rd of November 2001, ratified on 16th of November 2006 and entered into force in The Netherlands on 1st of March 2007.

xi. How does the national legislation define “child pornography”? Is it compatible with the definition in Article 20(2) of the Lanzarote Convention? Please comment.

The definition the Dutch government adopted is the same as in the Lanzarote Convention. Child pornography is “een afbeelding, van een seksuele gedraging, waarbij iemand die kennelijk de leeftijd van achttien jaar nog niet heeft bereikt, is betrokken of schijnbaar betrokken”.²⁴⁸

xii. To whom does the State attribute the criminal liability to? Is it compatible with the Article 20(1.a) to (1.f)?

The state attributes criminal liability to the person whom is involved, looks to be involved, distributes, publicly shows, makes, imports, exports or has in his possession and materials .

Under point 1.f. The Dutch government has been the government who proposed to add this point but 1.f. it was put in the Convention only as an optional clause.²⁴⁹ As proposers of the clause they off course have taken it up in their own legislation and can be found back in the Dutch criminal code.

xiii. What is the control mechanism for pornographic materials? If the state is a party to the Lanzarote Convention, did the state use the reservation right that has been given to them in the Lanzarote Convention Article 20(3) and 20(4)?

The Netherlands has not used the reservation rights under Article 20(3) and Article 20(4). Under Article 20(3) first subsection it has the ability to exclude paragraph 1a to e to the production and

²⁴⁸ Tekst en commentaar pagina 1085, goedkeuring pagina 11-12.

²⁴⁹ Goedkeuring p 11.

possession of pornographic materials “consisting exclusively of simulated representations or realistic images of a non-existent child“.

The Dutch government has as his aim with art 240b Criminal Code a broad protection of children against sexual exploitation and sexual abuse²⁵⁰ which can be found back in the bestandsdeel „schijnbaar is betrokken“ (apparently is involved). The background of this is that the Dutch government has wanted not only to protect the child but also that the child must be protected from „behaviour that can be used to make encourage or seduce children to participate in sexual behaviour or behaviour that can become part of a subculture that sexual abuse encourages“.²⁵¹ Therefore also virtual child pornography can be a violation of Dutch law in specific circumstances.²⁵²

The second subsection of Article 20(3) would allow for an reservation for cases where „a child that would have reached the legal age for sexual majority but not yet the age of 18 and the images possessed would solely be for their own private use“. In this case the Dutch government recons that the chances of such a case coming to light are quite slim but if this would happen the “opportunitiebeginsel” gives the public prosecutor the possibility not to prosecute so making a reservation is not needed.²⁵³

In regard to the possible reservation right under art 20(4) Lanzarote Convention the Dutch government has not used its right to make a reservation and as it is already criminally prosecutable under article 240b.

Participation of a Child in Pornographic Performances:

xiv. Does the State criminalize intentional conduct of making a child participate in pornographic performances? Does the State highlight and differentiate between recruitment and coercion? What is the State’s approach to the attendance of pornographic performances involving the participation of children? If the State is a party to the Lanzarote Convention, did the state use the reservation right stated in Article 21(2)?

The intentional conduct of making a child participate in pornographic performances is criminalized under several Articles of the Dutch criminal code depending on the circumstances.

²⁵⁰ Goedkeuring P 12.

²⁵¹ Court of Almelo, 22 april 2011, LJN BQ2272.

²⁵² Example Hof ‘s Hertogenbosch 4 februari 2008 LJN BC3225, Gerechtshof Arnhem, 25 januari 2012 LJN BV2126. A case in which virtual pictures were not evident enough to be considered virtual child pornography: Rechtbank ‘s-Hertogenbosch 30 maart 2010 LJN BL8876.

²⁵³ Goedkeuring 12.

When a child is recruited for the use in a pornographic performance it is criminalized under Dutch law under article 273f.²⁵⁴ The article makes human trafficking illegal and by Article 273f(2) this includes forcing or recruiting someone for sexual abuse or prostitution.

Also the seduction of a child into participation in sexual abusive actions is criminalized by Article 248a of the Dutch criminal code.

Under Dutch law intentionally attending a pornographic performance with people involved, of whom someone knows or should know that they have not reached the legal age of 18 years, is criminalized under Article 248c of the Dutch Criminal code. For this article it does not matter how the children are recruited as the action of being present is a criminal action. Therefore the Dutch government has not used its reservation right under article 21(2) of the Lanzarote Convention.²⁵⁵

²⁵⁴ Idem.

²⁵⁵ Idem.

ELSA UKRAINE

Child Pornography in General:

x. Ukraine is a party to the Council of Europe Convention on Cybercrime. It was signed on the 23 of November 2001 and ratified on the 7th of September 2005.

xi. According to the Lanzarote Convention the term “child pornography” shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes. In Ukrainian legislation the meaning of the above mentioned term was widen. According to the law of Ukraine on ‘Protection of Public Moral’ “child pornography” is any material that visually depicts a child or a person appearing to be a minor engaged in real or simulated explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes. The definition given by the Law corresponds to the Conventional definition.

xii. Criminal Code of Ukraine had criminalized crimes concerning child pornography. These are: importation into Ukraine for sale or distribution purposes, or production, transportation or other movement for the same purposes, or sale or distribution of pornographic images or other items, containing child pornography, and compelling minors to participate in making pornographic works, images or motion and video films, computer programs. The person conducting these crimes shall be punished by imprisonment of five to ten years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years and forfeiture of pornographic items, motion pictures, video films, computer programs, and means of their making, dissemination and showing (p.4 Article 301 of the Criminal Code of Ukraine).

xiii. Ukraine while ratifying the Convention on Cybercrime reserved the right not to apply subparagraphs 1.d. (procuring child pornography through a computer system for oneself or for another person) and 1.e. (possessing child pornography in a computer system or on a computer-data storage medium). The Ministry of Interior Relations of Ukraine is responsible for disclosing offences concerning child pornography. There is a department on combating with cybercrime and trafficking in people.

There is the National Expert Commission of Ukraine on the protection of public morals. The main objective of the Commission is examination of products, events and sexual or erotic material and products containing elements or promoting the cult of violence, cruelty, pornography. Commission in accordance with its tasks: analyzes TV, radio and video production, repertoire of theatres, films and videos, production of printed media, as well as events and their accordance with legislation on the protection of public morals; takes measures to prevent the proliferation and prohibition screenings and programs, information materials, entertainment activities that might harm public morality; provides advice to public authorities and local governments, individuals and entities with government regulation and control over the circulation of goods and spectacles sexual or erotic nature; creates a database (catalogue) of all products with a sexual character and products containing elements of erotic, violence and cruelty; archive of erotic, pornographic products and products containing propaganda of a cult of violence and cruelty; publishes the conclusion of compliance with legislation on the protection of public morality about:

- printed production of sexual or erotic nature, intended for sale and distribution in designated places;
- events with sexual or erotic nature, held by individuals and legal entities in specially designated areas;
- production of electronic media with a sexual nature, production of audio and video cassettes recordings with sexual or erotic nature intended for sale or the provision of public rental;
- audio and video production with a sexual or erotic nature, designed to display in cinemas.

Having such responsibilities the abovementioned Commission takes expertise and gives the conclusion whether the given material is pornographic. If necessary the Commission has the right to address rights protection bodies and court.

Participation of a Child in Pornographic Performances:

xiv. National legislation of Ukraine does not foresee criminalization by separate articles of Criminal Code of Ukraine intentional behaviour concerning: children recruitment for participating in pornographic performances or children inducement for participation in such performances, forcing children to participate in pornographic performances or getting profit

from that or another exploitation of children with this purpose, conscious attendance of such performances in which children are involved.

Article 304 of the Criminal Code of Ukraine imposes criminal responsibility for involving juveniles in criminal activity. Involvement into criminal activity is expressed by actions of an adult person connected with direct psychological or physical influence on the juvenile and committed with the aim to provoke the desire to participate in one or several crimes by conviction, intimidation, corruption or fraud, etc. Direct object to this crime is a normal moral development of juveniles, persons under 18 years old.

ELSA UNITED KINGDOM

Child Pornography in General:

x. The UK is a party to the Council of Europe Convention on Cybercrime. It signed the Convention on November 23 2001, ratified it on 24 May 2011, and it entered into force on 1 September 2011.

xi. The main provisions regarding indecent photographs of children are Section 1 of the Protection of Children Act 1978 and Section 160 of the Criminal Justice Act 1988. The Sexual Offences Act provides a definition of ‘pornography’ in Section 51 as ‘a person is involved in pornography if an indecent image of that person is recorded; and similar expressions, and ‘pornography’, are to be interpreted accordingly’. ‘Indecent’ is not defined by the Protection of Children Act, but case law has stated that it is for the jury to decide by reference to recognised standards.

xii. Under the Sexual Offences Act, criminal liability regarding child pornography is attributed to the person who causes or incites the child to become involved in pornography or who intentionally arranges or facilitates the involvement in it. Criminal liability for distributing an indecent photograph of a child is incurred under the Protection of Children Act, and criminal liability for possession of an indecent photograph of a child is incurred under the Criminal Justice Act. This is compatible with Article 20(1)(a) – (f) of the Lanzarote Convention.

xiii. The UK did not make a reservation under Article 20(3) and (4) of the Lanzarote Convention.

Participation of a Child in Pornographic Performances:

xiv. Intentional conduct of making a child participate in pornographic performance is criminalised under Section 48 of the Sexual Offences Act. This provision targets both recruitment and coercion.

ELSA SLOVENIA

Child Pornography in General:

x. The Republic of Slovenia is party to the agreement of the Convention of the Council of Europe on Cybercrime. The convention was signed on July 24th 2002 and ratified on September 8th 2004. In Slovenia, the convention entered into force on January 1st 2005.

xi. The Slovenian Criminal Code does not directly define the term “child pornography” as the term is defined in Art. 20, par.2 of the Lanzarote Convention. Legal theory and case-law complement this concept.

xii. The Criminal Code criminalizes any public exhibition, production, possession or distribution of pornographic material and penalizes whoever sells, presents or publicly exhibits documents, pictures or audio-visual or other items of a pornographic nature to a person under fifteen years of age, enables them to gain access to these in any other way or shows them a pornographic or other sexual performance (Art.176 par.1). A detention sentence of between six months and five years shall be given to whoever abuses a minor in order to produce pictures or audio visual or other items of a pornographic or other sexual nature, or uses them in a pornographic or other sexual performance or is knowingly present at such performance (Art. 176 par.2). The third paragraph of the same Article sets the same punishment for anyone who for themselves or others produces, distributes, sells, imports, exports or otherwise supplies pornographic or other sexual material depicting minors or their realistic images, or possesses such material, or uses access to such material using information and communication technologies, or discloses the identity of a minor in such material. In Slovenia the most common term used for such material is material which includes sexual abuse and sexual exploitation of children.

xiii. The Republic of Slovenia is party to the Lanzarote Convention, but has not ratified it yet.

In Slovenia, we have a website called Spletno oko (Web Eye) which collects anonymous tips of child pornography (and hate speech) online and forwards them to the prosecuting authorities. Reporting persons can report allegedly illegal content by first filling in a short reporting form where they can state the address of the website where the content was found. After that qualified reviewers of the hotline Spletno oko go through the report, and if they judge that the site indeed

has allegedly illegal content, they forward it to the prosecuting authorities. If the site in question is hosted on a Slovenian server, the problem is addressed by the police. At the same time the hotline informs the host provider of the existence of illegal content on the server, as instructed by the police. If the site in question is hosted on a foreign server, the report is sent to the Interpol via the Slovenian police, as well as the Inhop (an umbrella organization for online hotlines dealing with illegal content on the internet.) hotline in the country where the host server featuring the illegal content is located.²⁵⁶

Children and other minors are additionally protected from pornographic exploitation with the Mass Media Act²⁵⁷. In Article 84 it is stated that it is illegal for television stations to broadcast pornography if such broadcast could seriously damage mental, moral or physical development of children or other minors. However, television stations can broadcast informative and educational programmes as well as artistic audio-visual works which include sexual scenes, if such scenes do not violate the basic aesthetic and moral criteria approved by the publisher. Televised scenes including sexuality can also be broadcast as part of other shows under the condition that the content does not violate the aesthetic or moral criteria. Programmes or works that include sexual scenes must be clearly designated by a visual symbol; prior to the presentation an audio and visual warning must be given that such programming is not suitable for persons under the age of fifteen.

In Art.84 par.8, which concerns pornographic content in printed publication, the Mass Media Act states that such publications may only be offered in a way that the children and minors cannot see and buy them. Access to pornographic contents in electronic publications must be limited, by means of appropriate technical protection, in such a way that children and minors cannot access them.

Participation of a Child in Pornographic Performances:

xiv. Any action of recruiting or encouraging minors to participate in pornographic or other sexual presentations is determined as a criminal offence, as is stated in the second paragraph of Article 176 the Criminal Code of the Republic of Slovenia. Art. 176 par.2 states that whoever uses force, threat, fraud, transgression or abuse of power, recruitment, solicitation or for the purposes of exploitation recruits or encourages a minor to participate in the production of pictures, audio-visual or other pornographic material or other material with sexual content, or for

²⁵⁶ <https://www.spletno-oko.si/>, (last visited 10.9.2012).

²⁵⁷ Mass Media Act, State Administration Act, Official Gazette RS, No. 110/2006.

participation in such pornographic or other presentation, or knowingly attending such a presentation shall be condemned to detention for a period between six months and eight years.