



Strasbourg, 25 August 2020

CRD/VC1813

***Analysis of the provisions of the Draft Law of Ukraine “On Amending some Legislative Acts of Ukraine Concerning the Implementation of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)”***

**Combating Violence against Children in Ukraine**

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The contents of this report are the sole responsibility of the author and do not necessarily reflect the views of the Council of Europe.

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## Abbreviations

CC	Criminal Code
CPC	Criminal Procedure Code
CSAM	Child Sexual Abuse Material
CSEA	Child Sexual Exploitation and Sexual Abuse
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Lanzarote Committee	Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
LC	Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

## Introduction

Ukraine ratified the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention hereinafter LC)<sup>1</sup> on 27 August 2012, which entered into force on 1 December 2012. Ukraine has participated in all monitoring rounds of the Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Committee).

A number of recommendations were addressed to Ukraine in the First<sup>2</sup> and Second<sup>3</sup> implementation reports adopted by the Lanzarote Committee which focused on the framework and strategies to combat sexual abuse of children in the circle of trust.

This report has been prepared in the context of the project *Combating violence against children in Ukraine*. This project aims to support Ukraine to strengthen responses to child sexual exploitation and sexual abuse (CSEA), including in the digital environment, promoting child-friendly practices with a focus on ensuring the rights of child victims and witnesses in proceedings and promoting the rights of the child in the digital environment. This project builds on progress made during the project focussing on combatting violence against women and children (2017) and the work undertaken in the context of the project to end online child sexual exploitation and abuse @ Europe (2018-2021).

The LC refers to the terminology of “child pornography”, the Lanzarote Committee participated in the development of the Luxembourg Guidelines on terminology, in line with this terminology the term “Child Sexual Abuse Material” (CSAM) will be used wherever possible in this report. The term “child pornography” will continue to be used where direct reference is made to the provisions of the LC<sup>4</sup>.

The purpose of this report is to analyse the provisions of the Draft Law of Ukraine “*On Amending some Legislative Acts of Ukraine Concerning the Implementation of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)*” Registration No. 3055. This analysis has been prepared by comparing the provisions to the draft law with the provisions of the LC taken as a whole, the explanatory report to the LC<sup>5</sup>, as well as the opinions and reports adopted by the Lanzarote Committee.

The caselaw of the European Court of Human Rights (ECtHR) is clear that states are under positive obligations to provide children with effective and practical protection from sexual abuse and that this can only be achieved by criminal-law provisions<sup>6</sup>.

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<sup>1</sup> <https://rm.coe.int/protection-of-children-against-sexual-exploitation-and-sexual-abuse/1680794e97>

<sup>2</sup> <https://rm.coe.int/1st-implementation-report-protection-of-children-against-sexual-abuse-/16808ae53f>

<sup>3</sup> <https://rm.coe.int/t-es-2017-12-en-final-lanzarotecomiteereportcircleoftruststrategies/16807b8959>

<sup>4</sup> <http://luxembourgguidelines.org/english-version/>

<sup>5</sup>

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3832>

<sup>6</sup> X and Y v. the Netherlands [1985] ECHR no.8979/80

Failure to protect children from sexual abuse has been found to violate Articles 3 and 13 of the European Convention on Human Rights (ECHR)<sup>7</sup>, and Articles 3 and 8 ECHR<sup>8</sup>.

Article 27 LC requires Parties to ensure that the offences established in accordance with the Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness. It is beyond the scope of this analysis to comment on the adequacy of the duration of the sentences imposed by the draft provisions analysed.

Article 28 LC requires that certain circumstances be taken into consideration as aggravating circumstances. Article 67 of the Criminal Code (CC) identifies certain circumstances as aggravating. In addition, certain provisions of the draft amendments introduce specific aggravating circumstances for certain offences, where these are present they have been analysed as going beyond the specific minimum standards set down in the relevant LC provisions. It is beyond the scope of this report to analyse whether Article 67 CC adequately transposes all of the requirements of Article 28 LC.

## 1) Limitation period (Draft Article 49(6) CC)

### a) *Relevant LC provisions*

Article 33 LC provides that the limitation period continues to run for a sufficient period of time to allow prosecutions to be effectively initiated after the child has reached the age of majority. This article is restricted to the offences provided in Articles 18 (sexual abuse), 19, paragraph 1.a and b (recruiting or causing or coercing or profiting from the exploitation of a child for prostitution), and 21, paragraph 1.a and b (offences recruiting or causing a child to participate in pornographic performances and coercing or profiting from the exploitation of a child in such performances).

Article 33 LC makes reference to the age of majority as the starting point to be taken into account when calculating the limitation period for a crime. The Explanatory Report recalls at paragraph 231 that it is for each state Party to define a “*sufficient period of time*” but recalls that the intention of this provision is twofold: to allow the child sufficient time to file a complaint after they have reached the age of majority and to allow the prosecution authorities to bring prosecutions for the offences concerned.

Under Ukrainian law the limitation period varies between 2 and 15 years according to the level of severity of the crime as set down in legislation. It is beyond the scope of this analysis to comment on the adequacy of the duration of the limitation periods set down for each crime under Ukrainian law.

### b) *Compliance of draft law with LC provisions*

**Scope:** The new paragraph 6 inserted into Article 49 CC provides that the limitation period will run from the date the victim reaches the “legal age” in case of illegal abortion (Article 134), illegal placement of a person in a mental institution (Article 151), rape

<sup>7</sup> O’Keeffe v. Ireland [2014] ECHR – GC no.35810/09

<sup>8</sup> M.G.C. v. Romania [2016] ECHR no. 61495/11

(Article 152), sexual violence (Article 153), forcing sexual intercourse (Article 154), sexual intercourse with a person under 16 years old (Article 155), debauchery of minors (Article 156), offences relating to “pornographic items” (Article 301 see comments on the amended provisions below), offences relating to prostitution (Articles 302 and 303).

The provisions of Article 49 new paragraph 6 CC therefore appear to include a wider range of criminal offences than the minimum standards as set down in the LC.

**“legal age” versus “majority”:** The draft provisions of Article 49 new paragraph 6 CC make reference to the date the person reaches the “legal age”. It appears that under Ukrainian Criminal Law the “legal age” corresponds to children who are 16 years of age whereas the age of majority in Ukraine appears to be defined as 18 years of age<sup>9</sup>.

While Article 18.2 of the LC requires state Parties to define the “legal age”, Article 33 clearly refers to the age of majority, Article 6 of the Family Code of Ukraine stipulates that children under the age of 14 are considered to be minors and children between the ages of 14 and 18 are considered to be under the age of majority<sup>10</sup>.

### **c) Recommendations**

**The authorities should consider amending the wording of Article 49, new paragraph 6 CC to provide for the limitation period to run from the date when a child victim reaches the age of majority, not the “legal age”.**

## **2) Corporate Liability (Draft Articles 96<sup>3</sup> and 96<sup>6</sup> CC)**

### **a) Relevant LC provisions**

Liability under Article 26 LC may be criminal, civil or administrative. Article 26 LC identifies two situations: the first covers situations where offences are committed by a person who has a leading position within the legal person and the second covers situations whereby the commission of offences is made possible due to a lack of supervision or control of natural persons acting under the authority of the legal person. Paragraph 178 explanatory report sets down the various conditions that need to be met for liability to arise in each of these situations:

*“Under paragraph 1, four conditions need to be met for liability to attach.*

*First, one of the offences described in the Convention must have been committed.*

*Second, the offence must have been committed for the entity’s benefit.*

*Third, a person in a leading position must have committed the offence (including aiding and abetting). The term “person who has a leading*

<sup>9</sup> Responses of Ukraine to the General Overview Questionnaire, accessed 16/08/20 at : <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168047094d>

<sup>10</sup> Responses of Ukraine to the General Overview Questionnaire, accessed 16/08/20 at : <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168047094d>

*position” refers to someone who is organisationally senior, such as a director.*

*Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity.*

...

*paragraph 2 requires Parties to be able to impose liability on a legal entity (“legal person”) where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity’s authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are:*

- 1) the offence was committed by an employee or agent of the legal entity;*
- 2) the offence was committed for the entity’s benefit; and*
- 3) commission of the offence was made possible by the leading person’s failure to supervise the employee or agent.”<sup>11</sup>*

Article 28 paragraph 2 LC sets down the sanctions applicable to legal persons held liable for any of the offences established under the LC.

The Lanzarote Committee found in its 1<sup>st</sup> implementation report that Ukraine was the only party not to have implemented legislation as provided by Article 26 and urged Ukraine to implement legislation on the basis of which legal persons can be held liable for acts of CSEA<sup>12</sup>.

#### ***b) Compliance of draft law with LC provisions***

Draft Article 96<sup>3</sup> new paragraph 5 CC appears to go some way to implementing the provisions of Article 26 paragraph 1 LC. The draft provision identifies:

- relevant offences;
- stipulates that the offences must be committed on behalf of the legal entity;
- identifies that the offences must be committed by its authorised representatives which is identified as meaning officials who are entitled to act on behalf of the legal entity;

The draft provisions are silent as to the fact that the authorised representative must be acting within their powers as a leading person for the legal entity for corporate liability to arise.

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<sup>11</sup> Paragraphs 178 and 179 Explanatory report.

<sup>12</sup> Recommendation 62, first implementation report.

The draft provisions are also silent as to corporate liability arising whereby an agent of the legal person is able to commit a relevant offence due to a failure by the legal entity to adequately supervise their agents or employees.

Draft Article 96<sup>6</sup> CC provides for the liquidation of legal persons held liable for relevant offences and appears to be in line with the provisions of Article 27.2 LC.

### **c) Recommendations**

**The Ukrainian authorities should consider amending the draft provisions of Article 96<sup>3</sup>, new paragraph 5 CC to address the fourth condition set down for corporate liability to arise for offences committed by persons in leading positions and all three conditions identified for corporate liability to arise where an offence is committed due to a lack of supervision. Making provision to criminalise legal persons where offences are committed due to lack of supervision is all the more important in light of the global health pandemic which has led to increased use of home working and distance working which may decrease the level of supervision over employees, thereby increasing risks of exploitation for children accessing services online.**

## **3) Sexual abuse of children aged under 16 (Draft Article 155 CC)**

### **a) Relevant LC provisions**

Article 18 LC sets down the definition of sexual abuse. Paragraph 1.a criminalises the fact of a person engaging in “sexual activities” with a child who has not yet reached the “legal age for sexual activities” whereas paragraph 1.b refers to offences committed against a child of any age where use is made of coercion, force or threats or where the offence is committed by specific persons in a position of trust or in certain relationships to the child.

The definition and scope of “sexual activities” is left to the parties to define.

Article 18 paragraph 2 requires Parties to define the legal age below which it is prohibited to engage in sexual activities with a child. It is recalled that Article 3 LC defines a child as a person under the age of 18.

In response to the general overview questionnaire, Ukraine stated that the norm setting out the age for legal sexual activities was lacking.

The Lanzarote Committee has urged Ukraine to review its legislation “*to specify that the child’s age for engaging in sexual activities is not relevant in the case of sexual abuse in the circle of trust.*”<sup>13</sup>

Failure to take into consideration a child’s particular vulnerability and the special psychological factors involved in the rape of minors committed in a family setting, has been found to be a violation of Articles 3 and 8 ECHR<sup>14</sup>.

<sup>13</sup> Recommendation 5 first implementation report.

<sup>14</sup> G.U. v. Turkey [2019] ECHR no. 16143/10



### ***b) Compliance of draft law with LC provisions***

The draft amendments to Article 155 paragraph 1 CC go some way to transpose these different requirements of Article 18.

The definition provided in the draft law identifies several sexual activities that are prohibited to engage in with children under the age of 16: “sexual acts related to vaginal, anal or oral penetration”. This is wider than the former definition which referred only to “sexual intercourse”.

The age referred to is “sixteen years of age”, this provides legal certainty in relation to these prohibited activities.

The draft law provides that this offence may be committed by an adult, this appears to be in line with the spirit of the LC which is not intended to criminalise sexual activities of young adolescents who are engaging in consensual sexual activities between themselves.

This offence may be committed using “genitalia, other body organ or part or any object” this is a very wide definition and provides wide scope for protection of children from sexual abuse.

The draft amendment to Article 155 paragraph 2 CC appears to introduce a new condition for the liability of family members or other persons in a position of trust. The draft amendment appears to condition this liability on the commission of acts in exchange for monetary or other remuneration or promise of other remuneration to the victim. Making criminal liability by a person in a position of trust conditional on the exchange of money or other remuneration lessens the protection proffered to children. In effect the draft amendment would result in sexual abuse of a child by a person in a position of trust without any exchange of money or remuneration etc. being excluded from the scope of the heavier sentence provided for by Article 155 paragraph b.

Such a situation would fall short of the minimum standard set down in Article 18 paragraph 1.b LC.

### ***c) Recommendations***

**The authorities should consider whether there are any provisions to protect children from sexual abuse by another child? I.e. non-consensual sexual activities among young adolescents? Any such liability should be in line with the provisions of the LC relative to intervention programmes or measures (Articles 15-17).**

**The draft amendment appears to require clarification to ensure that the following actions are clearly criminalised:**

- Sexual abuse of a child under 18 where use is made of coercion, force or threats;**
- Sexual abuse of a child under 18 where abuse is made of a recognised position of trust, irrespective of whether these acts are committed in**

**exchange for money or other remuneration or promise of remuneration to the victim or a third party;**

- **Sexual abuse of a particularly vulnerable child under 18, here vulnerability refers to mental or physical disability or situation of dependence.**

#### 4) Child harassment with a sexual aim (Draft Article 156<sup>1</sup> CC)

##### a) *Relevant LC provisions*

Article 23 LC introduces the offence of solicitation of a child for sexual purposes. This Article should be read in conjunction with the Lanzarote Committee Opinion on Solicitation of children for sexual purposes (the LC Opinion on Grooming) which was adopted in 2015, in light of the increasing use of information and communication technologies (ICTs) by children and offenders<sup>15</sup>. The Lanzarote Committee recalled that while online solicitation of a child for sexual purposes may lead to an adult proposing a meeting to a child, it is also possible for sexual offences to be committed exclusively online i.e. without a physical meeting ever taking place. Paragraph 20 of the LC Opinion on Grooming states: “...Parties should consider extending its criminalisation also to cases when the sexual abuse is not the result of a meeting in person, but is committed online.”

The Opinion on Grooming also reminds Parties of the range of unlawful behaviours that may take place online including the offences set down by Articles 20 to 22 of the LC as well as attempts to commit any offence established by the Convention (Article 24 paragraph 2).

The Interpretative Opinion on the applicability of the LC to sexual offences against children facilitated through the use of information and communication technologies (LC Opinion on ICTs)<sup>16</sup> further underlines that the offences established by the LC remain criminalised whatever the means used to commit them, even where the text of the Convention does not specifically mention ICTs.

Article 22 LC establishes the offence of corruption of a child by causing a child below the legal age for sexual activities to watch sexual acts or performing such acts in the presence of children. It is recalled that showing children sexually explicit content is a common factor in the grooming process.

##### b) *Compliance of draft law with LC provisions*

The draft provisions of Article 156<sup>1</sup> CC effectively introduce the offences established by Article 23 LC and indeed go beyond these minimum standards by introducing a harsher sentence for acts committed by a group of persons. This would strengthen the criminal law particularly in regard to the solicitation of children by criminal gangs and

<sup>15</sup>

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064de98>

<sup>16</sup> <https://rm.coe.int/t-es-2017-03-en-final-interpretative-opinion/168071cb4f>

organised crime, in line with the requirements of Article 28.e LC relating to aggravating circumstances.

The draft Article 156<sup>1</sup> CC refers to “an offer to meet, including using information and communication systems or technologies”. It is not clear whether this pertains simply to the offer being communicated through ICTs or whether this also covers situations whereby an adult solicits a child to participate in an online meeting during which the adult intentionally perpetrates sexual offences.

The draft Article 156 currently limits liability under this provision to the commission of sexual acts or abuse (draft article 156<sup>1</sup> paragraph 1 CC) or production of child pornography (Article 156<sup>1</sup> paragraph 2 CC). The other offences identified by the LC Opinion on Grooming have not been included in the scope of this offence.

### **c) Recommendations**

**In the interests of legal certainty, the wording of draft Article 156<sup>1</sup> CC should be clarified and strengthened to fully transpose the provisions of Article 23 read in conjunction with the LC Opinion on Grooming.**

**The authorities are encouraged to consider expanding the scope of draft Article 156<sup>1</sup> paragraph 2 to include all the offences established by Articles 20, 21 and 22 LC, in accordance with the LC Opinion on Grooming.**

**The authorities are also encouraged to consider whether the draft provisions can be amended to ensure that the corruption of children is criminalised as a constituent element of “child harassment” and as a separate crime. This would be prudent in light of the common modus operandi used by sexual offenders to expose children to harmful sexual content online as a stage of the grooming process.**

## **5) Offences related to child sexual abuse material (Draft Article 301<sup>1</sup> CC)**

### **a) Relevant LC provisions**

Article 20 LC establishes relevant offences concerning child pornography/CSAM. Article 20 LC refers to intentional conduct, committed without right and criminalises: the production, offering or making available, distributing or transmitting, procuring or possessing child pornography.

The term “child pornography” is defined very widely to include “*any material that 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 explanatory report further clarifies that this refers to “*any visual depiction*” including “*data...which are capable of conversion into a visual image*”.

As regards “*purchase*” of CSAM: paragraph 138 of the explanatory report to the LC clarifies that the offence of procuring CSAM includes instances of downloading or buying CSAM.

As regards “*possession*” of CSAM: paragraph 139 of the explanatory report to the LC clarifies that “*an effective way to curtail the production of child pornography is to attach criminal consequences to the conduct of each participant in the chain from production to possession.*” There is a clear intention to criminalise simple, albeit intentional, possession of CSAM.

As regards “*access to*” CSAM: paragraph 140 of the explanatory report to the LC underlines that “[t]o be liable the person must both intend to enter a site where child pornography is available and know that such images can be found there”.

The Lanzarote Committee Declarations on web addresses advertising or promoting CSAM<sup>17</sup>, and sexual offences against children facilitated through ICTs<sup>18</sup> are also of relevance here.

The Lanzarote Committee Opinion on sexually suggestive or explicit images and/or videos generated, shared and received by children (LC Opinion on sexting)<sup>19</sup> also clarifies that children who engage in consensual sexual activities, including activities involving sexually explicit images or videos of children, should not be criminalised.

#### ***b) Compliance of draft law with LC provisions***

The provisions of draft Article 301<sup>1</sup> paragraph 1 CC criminalises the conscious access to, purchase or possession of “child pornography” ... “*if such acts are committed for the purpose of using them with a sexual aim*”. This unnecessarily limits the scope of criminal liability by imposing an additional mental element to the commission of the crime. This falls short of the standard set down by Article 20 paragraph 1. *d, e, and f* LC which simply requires there to be intentional conduct. This excludes other situations whereby an adult who has no sexual aim in mind may access, purchase or possess CSAM for other purposes, for example with the intention of coercing the victim depicted into producing further images for profit. This would also fail to cover situations of possession of CSAM for the purposes of web-storage.

Draft Article 301<sup>1</sup> paragraph 2 CC criminalises the importation into Ukraine “*to sell, or distribute it, store, transfer or otherwise move it with the same purpose.*” The wording of this draft article qualifies the intentionality of this offence by setting down a limitative list of purposes. This draft article appears to fall short of the minimum standard set down by Article 20 paragraph 1.c LC which requires Parties to criminalise the intentional distribution or transmission of CSAM.

Draft Article 301<sup>1</sup> paragraph 3 CC criminalises the “*production, distribution or sale of CSAM or coercing a minor to participate in child pornography creation*”. This

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<sup>17</sup>

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cffa>

<sup>18</sup> <https://rm.coe.int/t-es-2017-03-en-final-interpretative-opinion/168071cb4f>

<sup>19</sup> <https://rm.coe.int/opinion-of-the-lanzarote-committee-on-child-sexually-suggestive-or-exp/168094e72c>

paragraph appears to fully implement the offences set down by Article 20 paragraph 1.a, b and c LC.

Draft Article 301<sup>1</sup> paragraph 4 CC introduces harsher sentencing where certain offences relating to CSAM are committed by a “*group of persons by their prior conspiracy, or coercing a minor to participate in child pornographic creation*”. The introduction of these aggravating circumstances is in line with Article 28.e LC.

The note inserted at the end of this draft provision provides a definition of the term “child pornography” which appears to limit this to “*any image*”, this is more restrictive than the wording of Article 20 paragraph 2 LC.

### ***c) Recommendations***

**It is recommended that draft Article 3011 paragraph 1 CC be revised to remove the requirement that this offence be committed with the purpose of using them for a sexual aim.**

**Draft Article 3011 paragraph 2 CC should be simplified to cover any form of distribution or transmission of CSAM, beyond the limitative list currently set down.**

**It is recommended that the definition provided in the draft article be amended to widen the scope to include any visual depiction of a child (video or otherwise) to ensure that criminalisation is not limited to still images of a child.**

**The draft provisions do not make any reference to age of the offender. These provisions would benefit from clarification to bring the draft law in line with the LC Opinion on Sexting to ensure that children are not criminalised in the circumstances identified in that opinion.**

## **6) Offences relating to the holding of a spectacular event involving a minor (draft Article 301<sup>2</sup> CC)**

### ***a) Relevant LC provisions***

Article 21 LC establishes offences relating to the participation of children in pornographic performances. The mental element for these offences is intention and the behaviours criminalised include conduct related to the organisation of such performances: recruiting or causing, coercing or profiting or otherwise exploiting a child. This Article also criminalises conduct related to a spectator who knowingly attends such performances.

The definition of “pornographic performances” is left to each Party to establish.

### ***b) Compliance of draft law with LC provisions***

Draft Article 301<sup>1</sup> paragraph 1 CC goes beyond the minimum standards set down by the LC by criminalising the holding of such performances, including with the use of ICTs, thereby giving effect to the LC Opinion on ICTs. This is a really key element to protect children from all forms of CSEA in the online environment.

Draft Article 301<sup>1</sup> paragraph 2 CC effectively implements the provisions of Article 21 paragraph 1.c LC relating to knowingly attending such performances.

Draft Article 301<sup>1</sup> paragraph 3 CC criminalises the actions of “*involving*” and “*coercing*”. This provision appears to fall short of the minimum standard set down by Article 21 paragraphs 1.a and b. It is unclear that the act of “*involving*” would criminalise the behaviours of “*recruiting*” or “*causing a child to participate*”. The draft provisions are also failing to criminalise the act of “*profiting from or otherwise exploiting a child for such purposes*”.

Draft Article 301<sup>1</sup> paragraph 4 CC establishes harsher punishment for the involvement or coercion of younger children (under the age of 14) in such performances. This is in line with Article 28 paragraph 1.c LC relating to aggravating circumstances where offences are committed against particularly vulnerable children, including very young children.

### **c) Recommendations**

**Draft Article 301<sup>1</sup> CC should be strengthened to ensure that all the types of conduct identified by Article 21 paragraphs 1.a and b, relating to the organisation of pornographic performances involving children, are criminalised.**

## **7) Timeliness of proceedings (Draft Articles 28 and 214 CPC)**

### **a) Relevant LC provisions**

Article 30 LC sets down the principles necessary to protect children involved in the investigation of offences of CSEA. It is recalled that investigations and proceedings must uphold the best interests of the child and Parties must adopt a protective approach towards victims. Article 30 paragraph 3 LC requires Parties to ensure that investigations and proceedings are treated as a priority and carried out without unjustified delay.

Such measures are understood to be an important way of protecting child victims from re-traumatisation and to ensure that child victims are protected from alleged perpetrators without delay. The term “*child*” is used here which should be understood to refer to persons under the age of 18 in accordance with Article 3.a LC.

### **b) Compliance of draft law with LC provisions**

The amendments proposed to Article 28 CPC introduces a specific requirement that criminal proceedings concerning sexual offences against an “underage person or a minor” must be initiated immediately and treated with priority. The draft provision appears to be sufficiently broad in scope to encompass any sexual offence. The draft provision also appears to cover all children under the age of 18 as in Ukrainian law the term “underage” refers to children under the age of 18 and the term “minor” refers to children under the age of 14.

The draft provision is silent as to the initiation of investigations without unjustified delay, prioritising the investigation of CSEA is a necessary precursor to commence criminal proceedings without unjustified delay.

The amendments proposed to Article 214 CC insert references to sexual offences against children into the provision requiring immediate entry of legal entities onto the Unified Register of Pre-Trial Investigations, thereby ensuring prompt investigation of legal persons.

### *c) Recommendations*

**This provision should be completed by a provision requiring the investigation of sexual offences against a child under the age of 18 to be initiated without unjustified delay and as a matter of priority.**

## 8) Questioning (Draft Article 224 CPC)

### *a) Relevant LC provision*

Article 35 LC establishes the specific safeguards necessary to safeguard the interests of the child being interviewed in the context of investigations or criminal proceedings of sexual offences. Paragraph 3 specifically requires Parties to implement these safeguards where there is any doubt about the age of the victim.

### *b) Compliance of draft law with LC provisions*

The amendments to Article 224 CPC introduces a requirement that where a person's age is uncertain they shall be questioned in accordance with the rules relating to the questioning of an "underage person or a minor" until their age is ascertained.

It is understood that the term "underage" refers to children under the age of 18 and "minor" refers to children under the age of 14. This amendment appears to fully implement the requirements of the LC as regards the presumption of minority.

### *c) Recommendations*

None.

## 9) Basic Principles of childhood protection (New paragraph 3 Article 3 Law on the Protection of Childhood)

### *a) Relevant LC provisions*

Article 2 LC establishes the principle of non-discrimination, Article 31 paragraph 3 LC provides for access to free legal aid for victims of CSEA.

Article 11 (2) LC establishes the principle that where a victim's age is uncertain and there are reasons to believe they are a child, Parties should ensure that the special protective measures afforded to child victims of sexual offences are afforded to those victims until their age is verified. Article 34 paragraph 2 LC requires Parties to ensure that any uncertainty as to the actual age of the victim does not prevent the initiation of criminal proceedings

### ***b) Compliance of draft law with LC provisions***

Paragraph 3 Article 3 Law on the Protection of Childhood already provides for the principles of non-discrimination and access to free legal aid. The amendments proposed to this Article introduce a presumption of minority where a person's age is uncertain and provides for the specific protections afforded to children apply to that person until their age is ascertained.

The draft amendments refer to this law and "other legislative acts", this appears to be sufficiently wide to ensure that all relevant safeguards would apply to the person whose age is in doubt pending verification.

### ***c) Recommendations***

None.

## **10) Awareness raising among relevant professionals (Paragraphs 7-10 Article 10 Law on the Protection of Childhood)**

### ***a) Relevant LC provisions***

Article 5 LC establishes the standards relevant to the recruitment, training and awareness raising of persons working in contact with children.

This provision refers specifically to raising awareness about the protection and rights of children, how to identify and report any suspicion of CSEA.

The provision specifically identifies the following sectors:

- Education;
- Health;
- Social protection;
- Judicial;
- Law-enforcement;
- Sport;
- Culture;
- Leisure.

Article 5 paragraph 3 LC specifically requires Parties to provide for the mandatory screening of persons who accede to these professions to ensure that they have not been convicted of CSEA.

Article 37 paragraph 1 LC establishes an obligation for Parties to collect and store data on the identity and genetic profile of persons convicted of CSEA (in accordance with data protection rules). This is a necessary precursor to be able to screen professionals who work with children.

The Lanzarote Committee found in its 2<sup>nd</sup> implementation report that Ukraine implements preventive activities in primary schools and some form of sexual education in schools. In that same report, the Lanzarote Committee urged Ukraine as a Party "*that limit[s] mandatory screening only to specific professionals to extend such*



*screening to the recruitment of all professionals (public or private) in regular contact with children; (R19)".*

Denying persons convicted of CSEA from access to professionals in regular contact with children is a key safeguard to prevent and protect children from sexual abuse.

#### ***b) Compliance of draft amendments with LC provisions***

The new paragraphs 7-10 Article 10 Law on the Protection of Childhood imposes an obligation to be aware of *"the information on protecting children from all forms of violence"* on employees in relevant sectors, however the law is silent as to the obligations of employees in the judicial and law enforcement sectors.

They also impose an obligation on employers to raise awareness about child protection among their employees who come into contact with children. The amendments identify the authorities responsible organising these awareness raising activities at national and regional level. The amendments also integrate prevention and awareness raising activities into nation-wide programmes for child protection.

The amendments also introduce a prohibition for persons included in the *"Unified Register of Persons Convicted for Crimes Against Sexual Freedom and Sexual Integrity"* from working with children. The provision is silent as to the implementation of this prohibition and how employers can check whether a prospective employee is included in this register.

#### ***c) Recommendations***

**The draft amendments appear to strengthen the protection of children from CSEA, the authorities are encouraged to ensure that adequate procedures are introduced to ensure employers and professional bodies can effectively screen professionals as part of recruitment and accreditation procedures.**

### **11) Protection of child victims or witnesses of sexual abuse (Draft Article 30<sup>2</sup> Law on the Protection of Childhood)**

#### ***a) Relevant LC provisions***

Article 10 LC requires Parties to take the necessary steps to ensure co-ordination and collaboration between relevant agencies at both national and local level. These agencies include: education, health, social services, law-enforcement and judicial authorities.

Articles 30 and 31 LC set down the general principles and measure for protection of victims and witnesses of CSEA. Article 35 LC establishes the specific standards applicable to interviews with the child.

#### ***b) Compliance of draft amendments with LC provisions***

Draft Article 30<sup>2</sup> Law on the Protection of Childhood introduces a legal obligation for the State to protect children from sexual abuse and to protect children who have suffered or witnessed such abuse. This provision also creates a mandate for the

Cabinet of Ministers of Ukraine to approve procedures for the identification and care for children who have suffered sexual abuse.

This amendment also creates a legislative foundation for co-operation between several relevant ministries and central-executive authorities to approve a procedure for detecting and interviewing child victims or witnesses of CSEA using child-friendly methods. These include authorities responsible for family and children, education and science, health and law-enforcement.

The amendment also requires several central-executive authorities to co-ordinate to provide medical and psychological care to child victims and witnesses of CSEA. These are the authorities responsible for family and children, education and science, and health care.

The amendment also mandates local executive authorities and local self-government authorities to organise all aspects of specialised victim support services to facilitate “questioning” of child victims or witnesses of CSEA.

### *c) Recommendations*

**The authorities are encouraged to consider including judicial authorities in these co-ordination and cooperation mechanisms, particularly in the development of procedures for interviewing children to ensure that evidence gathered during such interviews is admissible as evidence in court without the need for the child to be re-questioned in person in court.**

## Conclusion

The amendments proposed mark strong progress towards strengthening the protection of children from CSEA in Ukraine. Notably the amendments introduce a number of key offences relating to: corporate criminal liability, grooming, possession of CSAM, live performances by children, including in the digital environment. The amendments also introduce a number of fundamental safeguards linked to: modifying the limitation period, providing clear definitions of CSEA, introducing the presumption of minority in a number of settings.

The amendments provide legislative foundations for a number of important safeguards to strengthen the prevention of CSEA including: awareness raising among professionals, prohibiting persons present on the register of sex offenders from exercising certain professions and co-ordination and cooperation among relevant authorities.

Whilst these amendments mark strong progress there are a number of problematic issues that remain outstanding. There appears to be uncertainty about the ages of children covered by various provisions, this would benefit from clarification. The amendments also introduce new conditions to certain offences that unnecessarily restrict the scope of application, notably as regards Articles 155 paragraph 2 CC and 301<sup>1</sup> paragraph 2 CC. The new offences introduced in relation to corporate criminal liability, grooming, possession of CSAM, and participation of children in pornographic

performances would benefit from revision to ensure that they fully implement all of the provisions set down by the relevant articles of the LC.

The introduction of a statutory duty for co-operation between relevant authorities marks a milestone in strengthening the response to CSEA. The challenge for the authorities once these amendments enter into force will be to ensure the effective implementation of these new mechanisms in terms of ensuring they are appropriately resourced, staff are trained and sustainable relationships are built between agencies to facilitate co-operation in the field of child protection in the long run.