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LANZAROTE COMMITTEE / COMITE DE LANZAROTE

Compilation of Replies to Question 9 (Criminalisation)

of the Thematic Questionnaire on the protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies (ICTs)

Compilation des réponses à la Question 9 (Incrimination)

du Questionnaire Thématique sur la protection des enfants contre l'exploitation et les abus sexuels facilités par les technologies de l'information et de la communication (TIC)

Question 9. Criminalisation

9.1. Does national law criminalise cases when adults:[1]

a. possess child self-generated sexually explicit images and/or videos?
b. distribute or transmit child self-generated sexually explicit images and/or videos to other adults?
c. distribute or transmit child self-generated sexually explicit images and/or videos to other children than those depicted on such images and/or videos?

9.2. Are there special circumstances (including alternative interventions) under which the above cases (9.1.a-c), although established in fact and in law, are not prosecuted and/or do not lead to conviction?

9.3. What are the legal consequences of the above behaviours (9.1.a-c)?

9.4. Does national law criminalise cases when adults:[2]

a. possess child self-generated sexual content?
b. distribute or transmit child self-generated sexual content to other adults?
c. distribute or transmit child self-generated sexual content to other children than those depicted such sexual content?

9.5. Are there special circumstances (including alternative interventions) under which the above cases (9.4.a-c), although established in fact and in law, are not prosecuted and/or do not lead to conviction?

9.6. What are the legal consequences of the above behaviours (9.4.a-c)?

9.7. Does national law criminalise cases when children:[3]

a. produce self-generated sexually explicit images and/or videos?
b. possess self-generated sexually explicit images and/or videos?
c. distribute or transmit self-generated sexually explicit images and/or videos of themselves to peers?
d. distribute or transmit self-generated sexually explicit images and/or videos of themselves to adults?
e. distribute or transmit self-generated sexually explicit images and/or videos of other children to peers?
f. distribute or transmit self-generated sexually explicit images and/or videos of other children to adults?

9.8. Are there special circumstances (including alternative interventions) under which the above cases (9.7.a-f), although established in fact and in law, are not prosecuted and/or do not lead to conviction?

9.9. What are the legal consequences of the above behaviours (9.7.a-f)?

[1] If the replies of Parties to the General Overview Questionnaire as regards the implementation of Article 20 of the Lanzarote Convention (see replies to question 16) are still valid, please refer to them. Otherwise, please up-date such replies in the context of this question.

[2] If the replies of Parties to the General Overview Questionnaire as regards the implementation of Article 20 of the Lanzarote Convention (see replies to question 16) are still valid, please refer to them. Otherwise, please up-date such replies in the context of this question.

[3] This question does not in any way suggest that these behaviours should be criminalised.

9.10. Does national law criminalise cases when children:[4]

a. produce self-generated sexual content?
b. possess self-generated sexual content?
c. distribute or transmit self-generated sexual content to peers?
d. distribute or transmit self-generated sexual content to adults?
e. distribute or transmit self-generated sexual content of other children to peers?
f. distribute or transmit self-generated sexual content of other children to adults?

9.11. Are there special circumstances or alternative interventions under which the above cases (9.10.a-f), although established in fact and in law, are not prosecuted and/ or do not lead to conviction?

9.12. What are the legal consequences of the above behaviours (9.10.a-f)?

[4] This question does not in any way suggest that these behaviours should be criminalised.

Question 9. Incrimination

9.1. Le droit interne érige-t-il en infraction pénale les cas dans lesquels des adultes[5] :

a. possèdent des images et/ou des vidéos sexuellement explicites autoproduites par des enfants ?
b. diffusent ou transmettent à d'autres adultes des images et/ou des vidéos sexuellement explicites autoproduites par des enfants ?
c. distribuent ou transmettent à d'autres enfants des images et/ou des vidéos sexuellement explicites autoproduites par des enfants ?

9.2. Existe-t-il des circonstances spéciales (y compris des interventions alternatives) dans lesquelles les cas précités (9.1.a-c), bien qu'ils soient établis en droit et en fait, ne font pas l'objet de poursuites et/ou n'aboutissent pas à une condamnation ?

9.3. Quelles sont les conséquences juridiques des comportements susmentionnés (9.1.a-c) ?

9.4. Le droit interne érige-t-il en infraction pénale les cas dans lesquels des adultes[6] :

a. possèdent des contenus à caractère sexuel autoproduits par des enfants ?
b. distribuent ou transmettent à d'autres adultes des contenus à caractère sexuel autoproduits par des enfants ?
c. distribuent ou transmettent à d'autres enfants des contenus à caractère sexuel autoproduits par des enfants ?

9.5. Existe-t-il des circonstances spéciales (y compris des interventions alternatives) dans lesquelles les cas précités (9.4.a-c), bien qu'établis en droit et en fait, ne font pas l'objet de poursuites pénales et/ou n'aboutissent pas à une condamnation ?

9.6. Quelles sont les conséquences juridiques des comportements susmentionnés (9.4.a-c) ?

9.7. Le droit interne érige-t-il en infraction pénale les cas dans lesquels des enfants[7] :

a. produisent des images et/ou des vidéos sexuellement explicites d'eux-mêmes ?
b. possèdent des images et/ou des vidéos sexuellement explicites autoproduites ?
c. distribuent ou transmettent à des pairs des images et/ou vidéos sexuellement explicites d'eux-mêmes autoproduites ?
d. distribuent ou transmettent à des adultes des images et/ou des vidéos sexuellement explicites d'eux-mêmes autoproduites ?
e. distribuent ou transmettent à des pairs des images et/ou des vidéos sexuellement explicites d'autres enfants autoproduites ?
f. distribuent ou transmettent à des adultes des images et/ou des vidéos sexuellement explicites d'autres enfants autoproduites ?

9.8. Existe-t-il des circonstances spéciales (y compris des interventions alternatives) dans lesquelles les cas précités (9.7.a-f), bien qu'établis en droit et en fait, ne font pas l'objet de poursuites pénales et/ou n'aboutissent pas à une condamnation ?

[5] Si les réponses des Parties au questionnaire « Aperçu général » concernant la mise en œuvre de l'article 20 de la Convention de Lanzarote (voir réponses à la question 16) demeurent valables, veuillez vous y référer. Dans le cas contraire, veuillez actualiser les réponses concernées dans le contexte de la présente question.

[6] Si les réponses des Parties au questionnaire de suivi général concernant la mise en œuvre de l'article 20 de la Convention de Lanzarote (voir réponses à la question 16) demeurent valables, veuillez vous y référer. Dans le cas contraire, veuillez actualiser les réponses concernées dans le contexte de la présente question.

[7] Cette question ne signifie nullement que les comportements concernés doivent être incriminés.

9.9. Quelles sont les conséquences juridiques des comportements susmentionnés (9.7.a-f) ?

9.10. Le droit interne érige-t-il en infraction pénale les cas dans lesquels des enfants[8] :

a. produisent des contenus à caractère sexuel autoproduits?
b. possèdent des images et/ou vidéos à caractère sexuel autoproduits?
c. distribuent ou transmettent à des pairs des contenus à caractère sexuel autoproduits ?
d. distribuent ou transmettent à des adultes des contenus à caractère sexuel autoproduits ?
e. distribuent ou transmettent à des pairs des contenus à caractère sexuel autoproduits d'autres enfants ?
f. distribuent ou transmettent à des adultes des contenus à caractère sexuel autoproduits d'autres enfants ?

9.11. Existe-t-il des circonstances spéciales ou des interventions alternatives dans lesquelles les cas précités (9.10.a-f) qui, bien qu'établis en droit et en fait, ne font pas l'objet de poursuites et/ou n'aboutissent pas à une condamnation ?

9.12. Quelles sont les conséquences juridiques des comportements susmentionnés (9.10.a-f) ?

[8] Cette question ne signifie nullement que les comportements concernés doivent être incriminés.

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ALBANIA / ALBANIE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes, the article 117 of the Penal Code provides that possessing materials related to child pornography is a crime that can be sentenced to jail from three to ten years. Although, this article does not mention specifically the possession of self-generated sexually explicit images, it is formulated in general terms that could be interpreted to cover self-generated sexually explicit images and/or videos.

Question 9.1.b.
Yes, based on the article 117 of the Penal Code distributing or transmit pornographic materials of children is forbidden by law and can be sentenced to jail from three to ten years. Although, this article does not mention specifically the distribution or transmission of self-generated sexually explicit images, it is formulated in general terms that could be interpreted to cover self-generated sexually explicit images and/or videos.

Question 9.1.c.
Yes, it is foreseen in the above-mentioned article 117/1

The relevant article (117) of the Criminal Code doesn't specify as to who receives the child pornography materials: all distribution and transmission are criminalized and thus point c) of the question can be considered covered by the legislation.

The article translated as following:

"Article 117 - Pornography

1. The production, distribution, advertising, import, sale and publication of pornographic materials in children's premises by any means or form constitutes criminal contravention and is punishable by up to two years of imprisonment.

2. Producing, importing, offering, making available, distributing, transmitting, using or possessing child pornography, as well as allowing access to it by any means or form, is punishable by imprisonment of three to ten years.

3. Recruitment, use, coercion or conviction of a child, participation in pornographic performances, or participation in pornographic performances involving children is punishable by five to ten years of imprisonment.

Question 9.2.
There is no information. Based on the legislation related to the above point there are no mitigating circumstances.

[9] The full replies submitted by States and other stakeholders are available at / Les réponses intégrales des Etats et autres parties prenantes sont disponibles ici : www.coe.int/lanzarote

Question 9.3.
For points **a**, **b and c**, the legal consequences are a sentence of imprisonment of 3-10 years according to the definition of point 2 of subsection 117 above.

Question 9.4.a.
The Criminal Code only mentions 'child pornography' without defining what it includes. It is up to the court to interpret what constitutes 'child pornography'. If the self-generated sexual content can be defined as 'child pornography' by the court, then it can be prosecuted under the article 117 of the Penal Code.

Question 9.4.b.
If the content can be defined as 'child pornography by the court, then it can be prosecuted under the article 117 of the Penal Code.

Question 9.4.c.
If the content can be defined as 'child pornography by the court, then it can be prosecuted under the article 117 of the Penal Code.

Question 9.5.
We are not aware of cases pertaining to 9.4 in our justice system.

Question 9.6.
The Criminal Code only mentions 'child pornography' without defining what it includes. It is up to the court to interpret what constitutes 'child pornography'. If the self-generated sexual content can be defined as 'child pornography' by the court, then it can be prosecuted under the article 117 of the Penal Code. In this case, it incurs 3 to 10 years of imprisonment.

Question 9.7.a-f.
Not specifically provided. But according to paragraph 2 of Article 117 / Criminal Code this relates to the age of criminal responsibility, if they are over 14 years – the age of criminal responsibility- potentially the child could be criminalized.

Question 9.8.
No information so far *(*In our knowledge such cases have not de facto been prosecuted. We are collecting more precise data on this point to provide the Lanzarote Committee).*

Question 9.9.
For children above the age of criminal responsibility (14 years old), the consequences could be imprisonment 3-10 years old.

Question 9.10.a-f.
The Criminal Code only mentions 'child pornography' without defining what it includes. It is up to the court to interpret what constitutes 'child pornography'. If the self-generated sexual content can be defined as 'child pornography' by the court, then it can be prosecuted under the article 117 of the Penal Code. In this case, it incurs 3 to 10 years of imprisonment.

Question 9.11.
No information so far (**We are still collecting information on this point)*

Question 9.12.
The Criminal Code only mentions 'child pornography' without defining what it includes. It is up to the court to interpret what constitutes 'child pornography'. If the self-generated sexual content can be

defined as ‘child pornography’ by the court, then it can be prosecuted under the article 117 of the Penal Code. In this case, it incurs 3 to 10 years of imprisonment.

Comments sent by / Commentaires envoyés par ECPAT, CRCA, ALO 116 and / et ANYN

Question 9.1.
No. The relevant article (117) of the Criminal Code doesn’t make the point when it comes to the question of who generated the image, the adult or the child. The article translated as following:
"Article 117 - Pornography

The production, distribution, advertising, import, sale and publication of pornographic materials in children's premises by any means or form constitutes criminal contravention and is punishable by up to two years of imprisonment.

Producing, importing, offering, making available, distributing, transmitting, using or possessing child pornography, as well as allowing access to it by any means or form, is punishable by imprisonment of three to ten years.

Recruitment, use, coercion or conviction of a child, participation in pornographic performances, or participation in pornographic performances involving children is punishable by five to ten years of imprisonment.

Question 9.2.
No.

Question 9.3.
See above.

Question 9.4.a.
In our understanding Article 117 of the Criminal Code lacks clarification when it comes to self-generated sexual content.

Question 9.4.b.-c.
Yes.

Question 9.5.
No. However Article 117 of the Criminal Code lacks clarification when it comes to self-generated sexual content.

Question 9.6.
See above.

Question 9.7.a.
No.

Question 9.7.b.
No, unless they are above 14 years old.

Question 9.7.c.
No, unless they are above 14 years old.

Question 9.7.d.
No.

Question 9.7.e.
No, unless they are above 14 years old.

Question 9.7.f.
No, unless they are above 14 years old.

Question 9.8.
Children below 14 years old do not have criminal responsibility.

Question 9.9.
Law stipulates that the child below do not hold criminal responsibility and alternative care shall be provided to them through education or medical services (depending on the case).

Question 9.1.
Same answers as question 9.7

Question 9.1.
Same as above.

Question 9.12.
Same as above.

ANDORRA / ANDORRE
State replies / Réponses de l'Etat

Question 9.1.a.
L'article 155.3 du Code Pénal établit que :
*« Quiconque offre**, possède**, cherche pour soi-même ou pour un tiers, ou accède moyennant la technologie de communication ou d'information à un matériel pornographique dans lequel apparaissent des **images de mineurs engagés dans des activités sexuelles explicites,** réelles ou liées à la réalité, ou toute autre représentation des parties sexuelles d'un mineur à des fins principalement sexuelles, **sera punie d'une peine de prison maximale de deux ans. La tentative est punissable**.»*

Toutefois, comme dans les réponses précédentes, le Code pénal ne fait pas de distinction en ce qui concerne la question de l'autoproduction par des enfants, et ce serait alors au juge d'appliquer la disposition. Dans ce cas-là, il est peu probable que l'origine de la production (autoproduite par des mineurs ou des adultes) ait une répercussion sur l'application de l'article et de la peine qu'encourrait la personne qui possède des images de ce type.

Question 9.1.b.
Pour ce qui est de la diffusion, c'est encore l'article 155, dans son paragraphe 2, qui s'applique ici. Voir encadré dans réponse 8 :

Article 155 CP

1. Quiconque capture des images d'un mineur ou d'une personne considérée juridiquement incapable dans l'intention de produire du matériel pornographique est puni d'une peine de prison maximale de deux ans. La tentative est punissable.

2. Quiconque recrute, utilise un mineur ou une personne juridiquement incapable à des fins pornographiques ou d'exposition ou favorise la participation et qui produit, acquiert, vend, importe, exporte, distribue, diffuse, cède ou expose par quelque moyen que ce soit du matériel pornographique dans lequel apparaissent des images de mineurs consacrés à des activités sexuelles explicites, réelles ou avec apparence de réalité, ou toute autre représentation des organes sexuels d'un enfant à des fins principalement sexuelles, doivent être punis d'une peine de prison d'un à quatre ans.
La tentative est punissable.
La proposition à travers les technologies de l'information et de la communication d'une réunion avec un mineur âgé de moins de quatorze ans, afin de commettre l'infraction décrite au paragraphe précédent, est considérée comme une tentative si la proposition a été suivie d'actes matériels qui conduisent à cette rencontre.

3. Quiconque offre, possède, cherche pour soi ou pour un tiers, ou y accède, moyennant la technologie de communication ou d'information, un matériel pornographique dans lequel apparaissent des images de mineurs engagés dans des activités sexuelles explicites, réelles ou liées à la réalité, ou toute autre représentation des organes sexuels d'un mineur à des fins principalement sexuelles, sera puni d'une peine de prison maximale de deux ans.
La tentative est punissable.

4. Toute personne ayant participé à des spectacles pornographiques impliquant une personne mineure ou juridiquement incapable, doit être condamnée à une peine de prison maximale de deux ans.

5. Lorsque le coupable de l'une des infractions prévues dans cet article obtient un avantage économique, outre les peines envisagées il sera condamné à une amende maximale de 30 000 euros.

Question 9.1.c.

Pour ce qui est de la distribution ou de la transmission, ce serait l'article 157.1 du Code pénal qui serait applicable.
« 157.1. *Toute personne qui vend directement, diffuse ou expose du matériel pornographique à des mineurs ou à des personnes considérées juridiquement incapables avec abus d'incapacité doit être punie d'une peine de prison maximale de deux ans et d'une amende pouvant aller jusqu'à 6000 euros, dont le montant peut être porté au double du produit tiré de l'infraction, ou que l'on prétendait obtenir. »*

Question 9.2.

L'article 26 du Code pénal andorran établit, en premier lieu, comme circonstance qui exclue ou modifie la responsabilité pénale, la minorité de l'âge pénal : « *au mineur qui n'a pas 18 ans et qui a commis une infraction pénale on lui appliquera ce qui est prévu dans la Loi qualifiée de la juridiction des mineurs* ». Par ailleurs, une personne qui a moins de 21 ans pourrait (mais c'est une possibilité laissée à la discrétion du juge) se voir également appliquer la Loi qualifiée de la juridiction des mineurs.

L'article 27 du Code pénal établit les circonstances « excluantes » de la responsabilité pénale.
« 27.1. Agir en défense de la personne ou de droits propres ou autres, lorsque :

- *a) il y a une agression illégitime*
- *b) il y a une besoin rationnel du moyen utilisé pour se défendre*
- *c) le mal causé par l'action de défense n'est pas disproportionné*
- *d) qu'il n'y ait pas eu de provocation suffisante de la part de la personne agressée qui s'est défendue.*

27.2 Agir dans l'exercice d'un devoir ou d'un droit légitime, fonction ou charge

27.3 Agir en cas de nécessité pour éviter un mal propre ou à un autre, lorsque les conditions sont remplies (…)
27.4. Commettre l'infraction pénale en ne pouvant pas comprendre l'illégalité de l'acte ou agir selon cette entente en raison d'une anomalie ou d'un trouble mental.
S'il s'agit d'un trouble mental transitoire, ce trouble n'exclut pas la responsabilité lorsqu'il a été causé par le sujet avec l'intention de commettre l'infraction criminelle ou s'il avait prévu ou aurait dû prévoir la commission.
27.5. Commettre l'infraction pénale dans un état d'intoxication complète provoqué par la consommation de boissons alcooliques, drogues toxiques ou autres qui produisent des effets analogues, à condition que le sujet ne l'ait pas recherché avec l'intention de commettre l'infraction criminelle ou s'il n'avait pas prévu ou aurait dû prévoir de commettre cette infraction. C'est également une circonstance excluante le fait d'être sous l'influence du syndrome d'abstinence à cause de la dépendance à ces substances, ce qui empêche le sujet de comprendre l'illégalité du fait ou d'agir en conformité avec cette compréhension.
27.6. Souffrir d'altérations de la perception depuis la naissance ou l'enfance qui empêchent de comprendre l'illicéité du fait ou d'agir avec cette compréhension. »

Question 9.3.
Dans le cas de la question 9.1.a précédente, les conséquences juridiques seront la peine de prison maximale de deux ans. La tentative est punissable.

Question 9.4.a-c.
Les réponses seront ici les mêmes que celles présentées à la question 9.1.

Question 9.5.
Les réponses seront ici les mêmes que celles présentées à la question 9.2.

Question 9.6.
Voir réponse 9.1.

Question 9.7.a-f.
Les réponses précédentes sont aussi valables ici.

Question 9.8.
Voir réponse à la question 9.2.

Question 9.9.a.
Dans le cas de la question 9.7.a précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Question 9.9.b.
Dans le cas de la question 9.7.b précédente, les conséquences juridiques seront la peine de prison d'un maximum de deux ans.

Question 9.9.c.
Dans le cas de la question 9.7.c précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Question 9.9.d.
Dans le cas de la question 9.7.d. précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Question 9.9.e.
Dans le cas de la question 9.7.e précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Question 9.9.f.
Dans le cas de la question 9.1.f. précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Dans les cas a), b), d) et f) précédents, si le délinquant obtient un avantage économique, une amende d'un maximum de 30.000 euros doit être imposée en sus des sanctions prévues.
La tentative est punissable dans tous les cas de figure.

Question 9.10.a.
Dans le cas de la question 9.7.a précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Question 9.10.b.
Dans le cas de la question 9.7.b précédente, les conséquences juridiques seront la peine de prison d'un maximum de deux ans.

Question 9.10.c.
Dans le cas de la question 9.7.c précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Question 9.10.d.
Dans le cas de la question 9.7.d. précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Question 9.10.e.
Dans le cas de la question 9.7.e précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Question 9.10.f.
Dans le cas de la question 9.1.f. précédente, les conséquences juridiques seront la peine de prison d'un à quatre ans.

Dans les cas a), b), d) et f) précédents, si le délinquant obtient un avantage économique, une amende d'un maximum de 30.000 euros doit être imposée en sus des sanctions prévues.
La tentative est punissable dans tous les cas de figure.

Question 9.11.
Voir réponse question 9.2.

Question 9.12.
Voir réponse question 9.9.

AUSTRIA / AUTRICHE
State replies / Réponses de l'Etat

Question 9.1.a-c.
The replies of Austria to the General Overview Questionnaire as regards the implementation of Article 20 of the Lanzarote Convention (see replies to question 16) are still valid:

Lit. a:
The following criminal offences of the Austrian Criminal Code correspond to the criminal offences of the Convention:
Article 18:
Par. 1:
The offence according to Article 18 par. 1 of the Convention is covered by Sections 206 and 207 of the CC which penalize any sexual contact with minors. Under Section 206 (severe sexual abuse of minors) anyone who has sexual intercourse or performs a sexual act equal to sexual intercourse with a minor, or induces a minor to perform a sexual act or to have a sexual act performed on him/her, is to be sentenced to imprisonment from one year up to ten years. A penalty increasing qualification applies if the offence results in a grievous bodily injury, a pregnancy or the death of the victim or the victim is set into a torturous state for a longer time or is humiliated in a special manner. In case of the death of the victim, the imposition of life imprisonment is also possible.
Section 207 (sexual abuse of minors) penalizes other sexual acts than the ones covered by Section 206 which are performed on minors, the basic penalty being imprisonment from six months up to five years. A penalty increasing qualification applies if the offence results in a grievous bodily injury, a pregnancy or the death of the victim or the victim is set into a torturous state for a longer time or is humiliated in a special manner. In case of the death of the victim, the imposition of life imprisonment is also possible.
Par. 2 1st indent:
Section 201 (Rape) penalizes sexual intercourse or sexual acts equal to sexual intercourse performed by using force, deprivation of liberty or dangerous threat. The offender is to be sentenced to imprisonment from one year up to ten years.
A penalty increasing qualification applies if the offence results in a grievous bodily injury, a pregnancy or the death of the victim or the victim is set into a torturous state for a longer time or is humiliated in a special manner. In case of the death of the victim, the imposition of life imprisonment is also possible.
Who, except of the cases mentioned in Section 201, coerces a person by using force or dangerous threat to perform a sexual act or have a sexual act performed on him/her, is to be punished for sexual coercion according to Section 202 of the CC. The basic penalty is imprisonment from six months up to five years. A penalty increasing qualification applies if the offence results in a grievous bodily injury, a pregnancy or the death of the victim or the victim is set into a torturous state for a longer time or is humiliated in a special manner. In case of the death of the victim, the imposition of life imprisonment is also possible.
If the victim of the rape or sexual coercion is under 14 years of age, the perpetrator is to be punished for both the rape/sexual coercion and the (severe) sexual abuse of minors.
Par. 2 2nd indent:
This provision is implemented by Section 212 of the CC (abuse of a position of authority). Section 212 par. 1 penalizes a person who performs a sexual act, has a sexual act performed on him/her, or with the intent to sexually stimulate himself/herself or a third person, induces the victim to perform a sexual act on himself/herself.
The perpetrator of the offence under par. 1 commits the offence against a person under age who is either related to him/her in degressive line, or his/her adopted child, stepchild or ward (subpar. 1) or against a person under age who is under the perpetrator's education, schooling or supervision (e.g. the perpetrator is a person cohabiting with the child, such as the mother's new partner) and the perpetrator abuses his/her position towards the victim (subpar. 2).
Par. 2 penalizes the same sexual acts as par. 1. However the perpetrator's position is different. Par. 2 applies if the perpetrator commits the sexual act as a doctor, psychologist, psychotherapist, nurse or pastor with a person he/she is in charge of professionally (subpar. 1), as an employee of an educational establishment with a person that is looked after in the establishment (subpar. 2) or as an official with a person entrusted to his/her care (subpar. 3).
Par. 2 applies regardless of the victim's age, whereas par. 1 only applies to persons under age.
If the victim is under 14 years of age, the perpetrator is to be punished for (severe) sexual abuse of minors (Sections 206 or 207) and abuse of a position of authority according to Section 212.
Par. 2 3rd indent:
The behaviour referred to in this provision is covered by Sections 205 and 207b par. 1 and 2 of the CC:
According to Section 205 par. 1 of the CC anyone who abuses a defenceless person or a person, who as a consequence of a mental disease, intellectual disability, deep disturbance of consciousness, or other grave psychic disturbance equivalent to one of these conditions, lacks the capacity either to appreciate

the meaning of his/her behaviour or to conform his/her conduct to this appreciation (= psychologically impaired person), by way of abusing this condition, thereby having sexual intercourse or performing a sexual act equal to sexual intercourse with the person, or, with the intent to sexually stimulate himself/herself or a third person, inducing the person to perform a sexual act or to have a sexual act performed on him/her, is to be sentenced to imprisonment from one year up to ten years.
Section 205 par. 2 of the CC penalizes other sexual acts than the ones covered by par. 1 of this provision which are performed on a defenceless or psychologically impaired person, the basic penalty being imprisonment from six months up to five years.
A penalty increasing qualification applies if the offence results in a grievous bodily injury, a pregnancy or the death of the victim or the victim is set into a torturous state for a longer time or humiliated in a special manner. In case of the death of the victim, the imposition of life imprisonment is also possible.
In addition, Section 207b of the CC aims to protect juveniles who have not yet completed the 16th or 18th year of age from sexual abuse. Par. 1 of the cited law protects juveniles under the age of 16 years who, for certain reasons, are not sufficiently mature to understand the meaning of a sexual act or to act according to this understanding or whose capability to do so is clearly limited. The penalty is imprisonment of up to one year.
Par. 2 of Section 207b of the CC applies if the perpetrator abuses a position of vulnerability of a juvenile under the age of 18 years for sexual acts. The penalty is imprisonment of up to three years.

Article 19:

Par. 1:

According to Section 215a par. 1 of the CC (promotion of prostitution and pornographic performances involving persons under age) anyone who recruits or offers or procures a person under age to a third party, regardless of whether he/she already engages in prostitution, to engage in prostitution or to participate in pornographic performances, or offers or procures such a person to another person for that purpose, is to be sentenced to imprisonment from six months up to five years. The same punishment shall be imposed on anyone who exploits a person under age engaged in prostitution or participating in a pornographic performance in order to obtain a pecuniary benefit for himself/herself or for a third party. Anyone who commits any of the aforementioned offences against a minor (under 14 years), as a member of a criminal organization, by using serious violence against a person, or in such a manner that the offence, either with intent or gross negligence, jeopardises the life of that person or results in a particularly severe disadvantage for him/her, is to be sentenced to imprisonment from one year up to ten years (Section 215a par. 2).

Par. 2:

According to Section 106 par. 1 subpar. 3 of the CC anyone who, by using force or dangerous threat, coerces a person into prostitution or into participating in pornographic performances is to be sentenced to imprisonment from six months up to five years. Anyone who commits such an offence against a minor (under 14 years) is to be sentenced to imprisonment from one year up to ten years (Section 106 par. 3 of the CC).
According to Section 215a par. 1 of the CC anyone who exploits a minor engaged in prostitution or participating in a pornographic performance in order to obtain a pecuniary benefit for himself/herself or for a third party is to be sentenced to imprisonment from six months up to five years. Anyone who commits such an offence against a minor (under 14 years) is to be sentenced to imprisonment from one year up to ten years (Section 215a par. 2 of the CC).

Par. 3:

According to Section 207b par. 3 of the CC anyone who induces an underage person to perform a sexual act or to have a sexual act performed on him/her by directly offering him/her money, is to be sentenced to imprisonment of up to three years.

Article 20:

Section 207a of the CC criminalizes all forms of production and distribution of pornographic representations of persons under age as well as the acquisition of such representations. A pornographic representation involving underage persons (*pornographische Darstellung Minderjähriger*) is defined in Austrian criminal law (Section 207a par. 4 of the CC) as the realistic representation of a sexual activity performed on a minor (person under 14 years) or of a minor on himself/herself, on another person or with an animal, as well as a realistic representation of activities involving a minor which, due to their nature, produce the impression of showing a sexual activity performed on a minor or a sexual activity performed by the minor on himself/herself, on another person or with an animal. In addition, this applies to all realistic representations of genitals or the pubic area, insofar as they are distorted for no purpose other than to arouse sensation, and independent from any other expressions of life for the sexual

stimulation of an observer, as well as to all visual representations, which as a result of a modification or not, under given circumstances convey the impression to be such a representation.
As regards persons under age who have reached the age of consent (14 to 18 years of age), generally the same applies as to minors under the age of consent, only that in this case the representation of the aforementioned sexual activities or aforementioned actions must be in the same way distorted for no purpose other than to arouse sensation, and independent from any other expressions of life for the sexual stimulation of an observer, to fulfil the elements constituting this offence.
The term "representation" comprises unmodified representations of real activities or real events with real persons or representations of real persons, as well as virtual pictures, i.e. representations which are based on a representation of real things and have been correspondingly altered or generated completely artificially. The Austrian law also penalizes the offence of "simulated pornography", i.e. representations of real events which involve a person under age in such a way that an objective observer gets the impression of a real sexual activity, even when the offender knows that, in actual fact, no sexual act has been performed.
Under Section 207a par. 1 anyone who produces, offers, procures, makes available, presents or otherwise makes accessible to a third party any pornographic material involving a person under age, is to be sentenced to imprisonment of up to three years.
Anyone who, for the purpose of dissemination, produces or imports, transports or exports a pornographic representation of a person under age or commits the act under par. 1 on a commercial basis, is to be sentenced to imprisonment from six months up to five years (Section 207a par. 2 first sentence). The perpetrator is to be sentenced to imprisonment from one year up to ten years if the offence is committed by a person who is a member of a criminal organization, in such a manner that it results in a particularly severe disadvantage for the person under age, or if the offender produces pornographic material involving a person under age by using serious violence, or if he/she, either with intent or by gross negligence, jeopardizes the life of the depicted person under age when producing the pornographic material (Section 207a par. 2 second sentence of the CC).
Procuring for oneself, possessing and knowingly obtaining access on the internet to any pornographic material involving a person under age is to be sentenced to imprisonment of up to one year, in case the depicted person is a minor (under 14 years) the term of imprisonment is up to two years (Section 207a par. 3 and par. 3a of the CC).
The punishability of the production and possession of pornographic representations of persons under age at the age of consent is excluded when it is targeted for the personal use by the person under age and done with his/her free consent (Section 207a par. 5 subpar. 1). The same applies to the production and possession of virtual pornographic materials showing persons under age at the age of consent, if no real pornographic material has been used in the process of production, and if targeted for own private use, provided that the act does not entail the risk of it being disseminated (Section 207a par. 5 subpar. 2).

Article 21:

Par. 1:

According to Section 215a par. 1 of the CC anyone who recruits or offers or procures a person under age to a third party, regardless of whether he/she already engages in prostitution, to engage in prostitution or to participate in pornographic performances, or offers or procures such a person to another person for that purpose, is to be sentenced to imprisonment from six months up to five years. The same punishment shall be imposed on anyone who exploits a minor engaged in prostitution or participating in a pornographic performance in order to obtain a pecuniary benefit for himself/herself or for a third party.
Anyone who commits any of the aforementioned offences against a minor (under 14 years), as a member of a criminal organization, by using serious violence against a person, or in such a manner that the offence, either with intent or gross negligence, jeopardises the life of that person or results in a particularly severe disadvantage for him/her, is to be sentenced to imprisonment from one year up to ten years (Section 215a par. 2).

Par. 2:

According to Section 106 par. 1 subpar. 3 of the CC anyone who, by using force or dangerous threat, coerces a person into prostitution or into participating in pornographic performances, is to be sentenced to imprisonment from six months up to five years. Anyone who commits such an offence against a minor (under 14 years) is to be sentenced to imprisonment from one year up to ten years (Section 106 par. 3 of the CC).
According to Section 215a par. 1 of the CC anyone who exploits a minor engaged in prostitution or participating in a pornographic performance in order to obtain a pecuniary benefit for himself/herself or for a third party is to be sentenced to imprisonment from six months up to five years. Anyone who

commits such an offence against a minor (under 14 years) is to be sentenced to imprisonment from one year up to ten years (Section 215a par. 2 of the CC).

Par. 3:

According to Section 215a para 2a of the CC anyone who knowingly attends pornographic performances involving a person underage is to be sentenced to imprisonment of up to one year. In case the person involved in the pornographic performance is a minor (under 14 years), the punishment shall be imprisonment of up to two years.

Article 22:

Section 208 of the CC protects persons under the age of 16 against moral endangerment. Par. 1 of the provision penalizes the performance of any act that is appropriate to endanger the moral, psychological or health development of a person under the age of 16 years, in front of a minor or a person under the age of 16 years who is under the perpetrator's education, schooling or supervision, with the intent to sexually stimulate himself/herself or a third person, unless according to the circumstances of the case the endangerment of the minor or the person under 16 years of age is excluded. The penalty is imprisonment of up to one year. Likewise is to be sentenced who, except of the case mentioned in par. 1, causes a minor to witness a sexual act with the intent to sexually stimulate himself/herself or a third person (Section 208 par. 2). Who, with the intent to sexually stimulate himself/herself, causes a minor to witness a criminal offence under Sections 201 to 207 or 207b of the CC is to be sentenced to imprisonment of up to two years (Section 208 par. 3 of the CC).

Article 23:

Section 208a par. 1 of the CC penalizes any person who with the intent to commit a criminal offence under Sections 201 to 207a par. 1 subpar. 1 of the CC,

1. by means of telecommunication or a computer systems or
2. in any other manner by way of deceiving about his/her intent

proposes or arranges a meeting to/with a minor and takes a concrete step leading to such a meeting. The penalty is imprisonment of up to two years.

Section 208a par. 1a of the CC criminalizes a person who contacts a minor by means of telecommunication or a computer system with the intent to commit a criminal offence under Section 207a par. 3 or par. 3a of the CC in relation to a pornographic representation (Section 207a par. 4) of that person. The penalty is imprisonment of up to one year or a fine of up to 360 daily rates.

According to Section 208a par. 2 of the CC shall not be punished under Section 208a par. 1 or par. 1a a person who voluntarily and before the authorities (Section 151 par. 3 of the CC) have learned of his/her offence, abandons his/her plans and informs the authority about his/her guilt.

Article 24:

Par. 1:

According to Section 12 of the CC not only the immediate offender, but also anyone who instigates another person to commit an offence, as well as any person who contributes to its commission by aiding and abetting, will face the same level of punishment. Therefore every person who causally contributes to the commitment of an offence is considered an offender, even if the different forms of participation are defined separately in the respective provision. The liability to penalty of two or more persons involved is independent of each other. Assisting offenders are thus also punishable if the immediate offender is exempted from criminal liability due to for example insanity defence, or is under the age of criminal liability (monistic model of perpetration -*funktionale Einheitstäterschaft*). Every offender is criminally liable for the committed offence by his/her individual guilt, and his/her activity must fulfil particular elements of criminal intent defined for the respective criminal offence.

Par. 2:

Pursuant to Section 15 of the CC the criminal liability for intentionally committed offences does not only refer to a perpetrated, but also to an attempted offence and participation in an attempt. The attempt is thus, generally speaking, punishable like a perpetrated offence. The fact that an attempted offence has not been completed is only a mitigating circumstance according to Section 34, subpar. 13 of the CC. The punishability of an attempt does not only apply to the person who directly undertook the attempt, but also to every person participating in the attempt. Inducing someone to, and assisting in an offence, which does not get beyond the stage of attempt, is punishable as an attempt to commit an offence. In addition, the attempted committal of an offence as well as the attempt to induce another person to commit an offence is also punishable. However, under Austrian law, the attempt to assist in the commission of an offence is not punishable, provided that the actual committal has not been at least attempted (impunity of attempted assistance).

Lit. b:
The above-mentioned criminal offences do not differ from the Lanzarote Convention benchmark.
Lit. c:
Section 214 of the CC penalizes procuring sexual contacts with persons under age in return for remuneration. Anyone who, with the aim of gaining a pecuniary or another advantage, arranges a personal contact between a minor and a third party for the performance of a sexual act, is to be sentenced to imprisonment from six months up to five years. If the person has reached the age of 14, the maximum term of imprisonment is reduced to two years.
Under Section 215 of the CC anyone who induces another person to engage in prostitution is to be sentenced to imprisonment of up to two years.
Furthermore, Section 216 of the CC (procurement) penalizes exploitation of a prostitute (this provision is construed neutrally as to gender). Section 217 (transnational prostitution trade) aims at protecting persons, irrespective of their age or gender or whether they are already engaged in prostitution or not, from being procured or recruited for prostitution in a foreign State.
Lit. d:
As mentioned above under Question 16 lit. a., most of the criminal offences related to sexual exploitation and sexual abuse of children provide for different terms of imprisonment according to whether the offence was committed against a minor or a person under age who has reached the age of sexual consent (e.g. Sections 106, 207a, 215a of the CC). As for the rest, the low age of victim may be regarded as an aggravating circumstance, since the Criminal Code (Section 33) does not provide for a closed list of aggravating circumstances.

However with the Criminal Law Amendment Act 2017, Federal Law Gazette.vol. I no. 117/2017, para. 5 was amended. A person is not liable under para. 1 and 3 of Art. 207a CC if the person produces or possesses a pornographic image of a person between the age of 14 and 18 with the consent of and for the private use by the minor or him/herself.

Question 9.2.
According to Arts. 198ff CCP, the Office of the Public Prosecutor and the court have to offer the suspect a so called "diversion measure" if the following prerequisites are met:
- the facts of the case are sufficiently clarified;
- a penalty does not seem indicated with a view to special or general prevention;
- the maximum penalty of the offence does not exceed five years of imprisonment;
- no serious fault is assumed;
- the act did not result in loss of life (with the exception of certain cases where a relative is killed as a result of the suspect's negligent behaviour).

There are four forms of diversion measures: payment of a sum of money (Art. 200), community service (Arts. 201 and 202 CCP), probation with the assistance of a probation officer and obligations (Art. 203 CCP), and victim-offender mediation.

(Art. 204 CCP). Diversion measures require the consent of the suspect. If the diversion measure was completed successfully, the charges are dropped with final effect.

Question 9.3.
In cases of crimes mentioned in 9.1.a the penalty is up to one year imprisonment or a fine up to 720 penalty units. In cases falling under 9.1.b and c the penalty is up to three years of imprisonment. Also see answer to question 9.2.

Question 9.4.a-b.
Other sexual content does not fall under the provision of Art. 207a CC.

Questions 9.4.c., 9.5., 9.6.
See answer to question 9.4.a and b.

Question 9.7.a., d.
With the Criminal Law Amendment Act 2017, Federal Law Gazette.vol. I no. 117/2017, which entered into force on the first of September 2017, a new para. 6 was introduced in Art. 207a CC to decriminalise such cases. This exception is applicable if a minor of or above the age of 14 produces or possesses a pornographic image of himself/herself or if the minor offers, provides, relinquishes, displays, or otherwise makes such an image available to others in the sense of para.1, para. 2 first alternatives or para. 3 of Art. 207a CC. The distribution is still punishable if it is done commercially (see Art. 70 CC).

Question 9.7.e, f.
There is no exception for those cases. Children over the age of 14 are punishable under Art 207a para 1 CC.

Questions 9.8.-9.9.:
Criminal acts committed by a minor under the age of fourteen years are exempt from all forms of criminal prosecution. In reaction to such acts, only measures to ensure and foster the personal development of the minor can be taken by a tutelage court/family court.

A juvenile (i.e. a person between the age of 14 and the age of 18) who commits an offence shall furthermore not be liable to punishment, if
1. he/she is for certain reasons not mature enough to be aware of the unlawfulness of the offence or to act accordingly;
2. he/she commits an offence while still under the age of sixteen, if there is not gross fault on his/her part and there are no specific reasons requiring the application of the criminal law relating to young offenders to prevent the young person from committing criminal acts.

The public prosecutor shall refrain from prosecuting a juvenile offender, if the offence carries merely a fine or a prison sentence not exceeding five years and if additional measures do not seem to be necessary in order to prevent the young offender from committing further criminal acts. But the alleged offender must in any event be prosecuted, if the offence has resulted in the death of a human being. On the same conditions the court shall by decision discontinue proceedings for a punishable act after initiation of a preliminary investigation or indictment until closing of the trial.

Where it seems necessary to formally inform the alleged offender of the wrongful character of certain acts such as the one in respect of which information was laid, and of any possible consequences thereof, the guardianship court shall do so upon a request by the public prosecutor.

In the Austrian legal system, there is no principal distinction in substantive law between offences committed by adults and those committed by juveniles. There are however important differences in the gravity of punishment that can be applied and the criminal procedure. As a general rule, in case of juvenile offenders the maximum term of a prison sentence and the maximum amount of fines to be determined on the basis of daily rates, shall be halved.

There is no minimum sentence.

See also the answer to 9.2.

Questions 9.10.-9.12:
These cases do not fall under Art. 207a CC.

BELGIUM / BELGIQUE
State replies / Réponses de l'Etat

Question 9.1.

Oui. a) à c) : La possession, la diffusion ou la transmission des images visées à l'article 383*bis*, § 4, du Code pénal (pas de distinction selon l'origine des images ; voir également la réponse sous 8.1.) est punissable, indépendamment de l'âge des destinataires (enfants ou majeurs), voir les §§ 1 et 2 de l'article 383*bis* du Code pénal :

« Art. 383bis.
§ 1. Sans préjudice de l'application des articles 379 et 380, quiconque aura sans droit exposé, offert, vendu, loué, transmis, fourni, distribué, diffusé, ou mis à disposition, ou remis du matériel pédopornographique ou l'aura produit, importé ou fait importer, sera puni de la réclusion de cinq ans à dix ans et d'une amende de cinq cents euros à dix mille euros.
§ 2. Quiconque aura sciemment et sans droit acquis, possédé du matériel pédopornographique ou y aura, en connaissance de cause, accédé par le biais des technologies de l'information et de la communication, sera puni d'un emprisonnement d'un mois à un an et d'une amende de cent euros à mille euros.
§ 4. Pour l'application du présent article, on entend par "matériel pédopornographique » :
1° tout matériel représentant de manière visuelle, par quelque moyen que ce soit, un mineur se livrant à un comportement sexuellement explicite, réel ou simulé, ou représentant les organes sexuels d'un mineur à des fins principalement sexuelles ;
2° tout matériel représentant de manière visuelle, par quelque moyen que ce soit, une personne qui paraît être un mineur se livrant à un comportement sexuellement explicite, réel ou simulé, ou représentant les organes sexuels de cette personne, à des fins principalement sexuelles ;
3° des images réalistes représentant un mineur qui n'existe pas, se livrant à un comportement sexuellement explicite, ou représentant les organes sexuels de ce mineur à des fins principalement sexuelles.»

Il convient de référer à la loi du 31 mai 2016 complétant la mise en œuvre des obligations européennes en matière d'exploitation sexuelle des enfants, de pédopornographie, de traite des êtres humains et d'aide à l'entrée, au transit et au séjour irréguliers, qui a modifié cet article. D'abord, pour s'aligner davantage sur le libellé de la Directive de 2011 (inspiré de la Convention de Lanzarote, de la Convention Cybercrime et du Protocole facultatif à la Convention des Nations Unies relative aux droits de l'enfant), la définition de la pédopornographie, est retravaillée sur base de celle prévue dans la Directive 2011/93/UE. Dans l'exposé des motifs, il est renvoyé au Rapport explicatif de la Convention de Lanzarote (n°136 à 143) qui précise de manière détaillée la portée des différents termes repris dans la Directive (offre ou mise à disposition, diffusion, transmettre, possession, le fait d'accéder, comportement sexuellement explicite).

Deuxièmement, la seule possession de telles images et / ou vidéos est incriminée.

En outre, pour les points b) et c) : on peut renvoyer à l'art.371/1 CP sur le voyeurisme pour les actions de diffusion, de distribution ou de transmission à d'autres personnes (adultes ou mineurs) :
Art. 371/1 CP. « Sera puni d'un emprisonnement de six mois à cinq ans quiconque aura :
1° observé ou fait observer une personne ou en aura réalisé ou fait réaliser un enregistrement visuel ou audio,
- directement ou par un moyen technique ou autre,
- sans l'autorisation de cette personne ou à son insu,
- alors que celle-ci était dénudée ou se livrait à une activité sexuelle explicite, et
- alors qu'elle se trouvait dans des circonstances où elle pouvait raisonnablement considérer qu'il ne serait pas porté atteinte à sa vie privée ;

2° montré, rendu accessible ou diffusé l'enregistrement visuel ou audio d'une personne dénudée ou se livrant à une activité sexuelle explicite, sans son accord ou à son insu, même si cette personne a consenti à sa réalisation.

Si ces faits ont été commis sur la personne ou à l'aide de la personne d'un mineur de plus de seize ans accomplis, le coupable subira la réclusion de cinq ans à dix ans.

La peine sera de la réclusion de dix ans à quinze ans, si le mineur était âgé de moins de seize ans accomplis.

Le voyeurisme existe dès qu'il y a commencement d'exécution. »

Question 9.2.

La formulation recourant au terme "de droit" dans l'article *383bis* du Code pénal, y inclus dans le § 2, fait écho au libellé de la Directive Abus sexuels dont le Considérant n°17 (inspiré du passage n°141 du Rapport explicatif de la Convention de Lanzarote) précise ce qui suit :

"(17) Dans le cadre de la pédopornographie, les termes "sans droit" permettent aux États membres de prévoir une défense pour les actes relatifs au matériel pornographique ayant, par exemple, un objectif médical, scientifique ou similaire. Ils permettent également de mener des activités en vertu de compétences légales nationales, telles que la détention légitime de pédopornographie par les autorités à des fins de poursuites pénales ou de prévention, de détection ou d'enquête pénale En outre, ils n'excluent pas les défenses légales ou les principes similaires applicables qui exemptent une personne de sa responsabilité dans certaines circonstances, par exemple dans le contexte d'activités de signalement de tels cas via des lignes d'urgence, téléphoniques ou via l'internet."

L'expression "sans droit" permet donc d'"exclure de la portée de l'article 383bis les représentations didactiques, artistiques ou scientifiques qui doivent permettre l'exemption de toute poursuite" (C. Falzone et F. Gazan, "La pornographie enfantine en Belgique", JT, n°6313 – 21/2008 – 31/05/2008, p. 357 et sv., notamment la note 39. Voir aussi la section "La dimension immunitaire" dans la contribution de 2013 d'I. Wattier aux Qualifications juridiques (p.18 et 19) et le Rapport explicatif de la Convention de Lanzarote (n°142) », DOC parlementaires 54 1701, page 14-15).

Dans un article de doctrine récent, l'exemple suivant est donné :

« La jurisprudence (supérieure) pourrait tenir compte de la consensualité dans le cadre de l'interprétation de notions telles que la « débauche » et les « bonnes mœurs ». Elle semble être suffisamment ouverte à cela. Concernant la diffusion et la possession de pédopornographie, la qualification actuelle du délit offre certainement un point de référence pour une telle interprétation.

Depuis la loi du 31 mai 2016, elle exige effectivement un caractère « illégal » pour le transfert comme pour la possession du matériel visé. Le caractère consensuel de la communication entre mineurs pourrait enlever cette illicéité. Si les mineurs sont trop jeunes (moins de seize ans) ou s'il devait y avoir une trop grande différence d'âge entre les personnes qui communiquent, on pourrait quand même encore toujours partir du principe que l'intéressé doit être protégé en punissant les faits. En juger autrement en agissant de manière répressive dans chaque cas, par exemple également lorsqu'il s'agit de mineurs considérés comme sexuellement majeurs, entraînerait qu'ils peuvent bel et bien poser des actes sexuels consensuels mais ne peuvent pas s'envoyer des images à caractère sexuel.

Il ne serait en tout cas pas insolite que la consensualité entraîne l'impunité de la communication lorsque nous examinons la communication éducative entre parent et enfant. Effectivement, on peut difficilement penser dans ce contexte que l'article 379, alinéa 1er, du Code pénal (incitation à la débauche) est violé. Dans la communication éducative entre parent et enfant, il ne sera en effet pas question de l'intention requise de « satisfaire les passions d'autrui ». Ce même contexte n'est cependant pas sans difficulté. La question se pose également de savoir si dans ce cas, il sera question d'une diffusion et d'une possession de pornographie enfantine au sens de l'article 383bis du Code pénal. Pensez au parent qui reçoit de la part de son enfant une photo des organes sexuels de celui-ci dans un contexte éducatif, et les transfère ensuite à l'autre parent. Avant la modification législative de cet article par la loi

du 31 mai 2016, il n'était pas évident d'échapper à cette qualification. Il aurait pu être considéré que le parent transférant la photo reçue à l'autre parent diffusait du matériel pornographique. En outre, la simple possession de cette photo risquait d'être punissable sur la base de l'article 383bis, § 2, du Code pénal. La seule manière d'échapper à cette incrimination était d'admettre que cette photo n'avait pas de caractère pornographique. En soi, cela est certainement défendable étant donné que la photo et son transfert n'ont pas l'intention d'être sexuellement stimulants ou autrement dit, d'exciter artificiellement les sens de la personne qui la regarde et d'offenser la pudeur du citoyen moyen en raison des attitudes ou comportements vicieux ou pervers qu'elle représente. Même s'il n'est pas sûr que chaque juge du fond aurait partagé cet avis. Il est à présent plus facile d'échapper à cette qualification du délit. En effet, elle exige à présent un caractère « illégal » pour le transfert comme pour la possession de la photo. En outre, la loi établit maintenant explicitement qu'une telle photographie n'équivaut à de la pornographie enfantine que si les organes sexuels apparaissent « à des fins principalement sexuelles ». Dans ce cas, on peut difficilement admettre qu'il s'agit de communication éducative telle que visée plus haut (A. DIERICKX, « Noopt nieuwe seksuele criminaliteit tot nieuwe seksuele misdrijven, Nullum Crimen, n° 3, 2017, p. 237-238). »

Enfin, il convient de rappeler le principe de l'opportunité des poursuites applicable en Belgique, principe qui est, depuis 1998, inscrit dans l'article 28quater du Code d'instruction criminelle :
« Compte tenu des directives de politique criminelle définies en vertu de l'article 143ter du Code judiciaire, le procureur du Roi juge de l'opportunité des poursuites. Il indique le motif des décisions de classement sans suite qu'il prend en la matière. Il exerce l'action publique suivant les modalités prévues par la loi. Le devoir et le droit d'information du procureur du Roi subsistent après l'intentement de l'action publique. Ce devoir et ce droit d'information cessent toutefois pour les faits dont le juge d'instruction est saisi, dans la mesure où l'information porterait sciemment atteinte à ses prérogatives, sans préjudice de la réquisition prévue à l'article 28septies, alinéa premier, et dans la mesure où le juge d'instruction saisi de l'affaire ne décide pas de poursuivre lui-même l'ensemble de l'enquête. »

Question 9.3.
Voir les **peines de privation de liberté et d'amende** prévues dans l'article 383bis, §§ 1, 2 (voir question 9.2.) et §3 :
« Art. 383*bis, § 3*, CP. *L'infraction visée sous le § 1er, sera punie de la réclusion de dix ans à quinze ans et d'une amende de cinq cents euros à cinquante mille euros, si elle constitue un acte de participation à l'activité principale ou accessoire d'une association, et ce, que le coupable ait ou non la qualité de dirigeant. »*

Des **interdictions spécifiques** peuvent aussi être prononcées :
Art. 382[10]. § 1er. Dans les cas visés aux articles 379 et 380, les coupables seront, en outre, condamnés à l'interdiction des droits énoncés à l'article 31, alinéa 1er [NB : =droits civils].
§ 2. Les tribunaux pourront interdire aux personnes condamnées pour une infraction prévue à l'article 380, §§ 1er à 3, pour un terme de un an à trois ans, d'exploiter, soit par eux-mêmes, soit par personne interposée, un débit de boissons, un bureau de placement, une entreprise de spectacles, une agence de location ou de vente de supports visuels, un hôtel, une agence de location de meublés, une agence de voyage, une entreprise de courtage matrimonial, une institution d'adoption, un établissement à qui l'on confie la garde des mineurs, une entreprise qui assure le transport d'élèves et de groupements de jeunesse, un établissement de loisirs ou de vacances, ou tout établissement proposant des soins corporels ou psychologiques, ou d'y être employés à quelque titre que ce soit.

En cas de seconde condamnation pour une infraction prévue à l'article 380, §§ 1er à 3, l'interdiction pourra être prononcée pour un terme de un an à vingt ans.

[10] *Renvoi contenu à l'art.383bis, §5*

En cas de condamnation pour une infraction prévue aux articles 379 et 380, §§ 4 et 5, l'interdiction pourra être prononcée pour un terme de un à vingt ans.

§ 3. Sans avoir égard à la qualité de la personne physique ou morale de l'exploitant, propriétaire, locataire ou gérant, le tribunal peut ordonner la fermeture de l'établissement dans lequel les infractions ont été commises, pour une durée d'un mois à trois ans.

Lorsque le condamné n'est ni propriétaire, ni exploitant, ni locataire, ni gérant de l'établissement, la fermeture ne peut être ordonnée que si la gravité des circonstances concrètes l'exige, et ce, pour une durée de deux ans au plus, après citation sur requête du ministère public, du propriétaire, de l'exploitant, du locataire ou du gérant de l'établissement.

La citation devant le tribunal est transcrite à la conservation des hypothèques de la situation des biens à la diligence de l'huissier auteur de l'exploit.

La citation doit contenir la désignation cadastrale de l'immeuble concerné et en identifier le propriétaire dans la forme et sous la sanction prévues à l'article 12 de la loi du 10 octobre 1913 portant des modifications à la loi hypothécaire et à la loi sur l'expropriation forcée et réglant à nouveau l'organisation de la conservation des hypothèques.

Toute décision rendue en la cause est mentionnée en marge de la transcription de la citation selon la procédure prévue par l'article 84 de la loi hypothécaire. Le greffier fait parvenir au conservateur des hypothèques les extraits et la déclaration selon laquelle aucun recours n'est introduit.

§ 4. L'article 389 est applicable à la présente disposition.

Art. 382bis. « Sans préjudice de l'application de l'article 382, toute condamnation pour des faits visés aux articles 371/1 à 377, 377quater, 379 à 380ter, 381 et ***383 à 387****, accomplis sur un mineur ou impliquant sa participation, peut comporter, pour une durée d'un an à vingt ans, l'interdiction du droit :*

1° de participer, à quelque titre que ce soit, à un enseignement donné dans un établissement public ou privé qui accueille des mineurs ;

2° de faire partie, comme membre bénévole, membre du personnel statutaire ou contractuel, ou comme membre des organes d'administration et de gestion, de toute personne morale ou association de fait dont l'activité concerne à titre principal les mineurs ;

3° d'être affecté à une activité qui place le condamné en relation de confiance ou d'autorité vis-à-vis de mineurs, comme membre bénévole, membre du personnel statutaire ou contractuel ou comme membre des organes d'administration et de gestion, de toute personne morale ou association de fait.

4° d'habiter, de résider ou de se tenir dans la zone déterminée désignée par le juge compétent. L'imposition de cette mesure doit être spécialement motivée et tenir compte de la gravité des faits et de la capacité de réinsertion du condamné.

L'article 389 est applicable à la présente disposition. »

Art. 388. « Dans les cas prévus au présent chapitre, les coupables pourront de plus être condamnés à l'interdiction des droits énoncés à l'article 31, alinéa 1er. [NB : il s'agit des droits civils]

En cas de condamnation par application des articles 386, alinéa 1er, ou 387 et si l'infraction a été commise dans l'exploitation d'un commerce de librairie, de bouquinerie ou de produits photographiques ou de matériel nécessaire à la réalisation de tout type de support visuel, ou d'une entreprise de spectacles, la fermeture de l'établissement pourra être ordonnée pour une durée d'un mois à trois mois.

En cas de deuxième condamnation du chef de l'un des faits visés à l'alinéa 2, commis dans le délai de trois ans à compter de la première condamnation, la fermeture pourra être ordonnée pour une durée de trois mois à six mois.

En cas de troisième condamnation du chef des mêmes faits, commis dans le délai de cinq ans à dater de la deuxième condamnation, la fermeture définitive pourra être ordonnée. Dans ce dernier cas, les cours et tribunaux pourront en outre interdire aux condamnés d'exploiter, soit par eux-mêmes, soit par personne interposée, une librairie, une bouquinerie, un commerce de produits photographiques ou de matériel nécessaire à la réalisation de tout type de support visuel, une entreprise de spectacles ou un ou plusieurs de ces commerces ou entreprises ou d'y être employés à quelque titre que ce soit.

Lorsque le condamné n'est ni propriétaire, ni exploitant, ni locataire, ni gérant de l'établissement, la fermeture ne peut être ordonnée que si la gravité des circonstances concrètes l'exige. Dans ce cas, l'article 382, § 3, alinéas 2 à 5, est applicable.

L'article 389 est applicable à la présente disposition. »

Art. 382ter[11]*. La confiscation spéciale visée à l'article 42, 1°, est appliquée même si la propriété des choses sur lesquelles elle porte n'appartient pas au condamné, sans que cette confiscation puisse cependant porter préjudice aux droits des tiers sur les biens susceptibles de faire l'objet de la confiscation. Elle doit également être appliquée, dans les mêmes circonstances, au bien meuble, à la partie de celui-ci, au bien immeuble, à la chambre ou à tout autre espace.*

Elle peut également être appliquée à la contre-valeur de ces meubles ou immeubles aliénés entre la commission de l'infraction et la décision judiciaire définitive.

En cas de saisie d'un bien immeuble, il est procédé conformément aux formalités de l'article 35bis du Code d'instruction criminelle.

Art. 389. « § 1er. La durée de l'interdiction prononcée en application des articles 378, 382, § 1er, 382bis et 388, alinéa 1er, courra du jour de la condamnation avec sursis ou du jour où le condamné aura subi ou prescrit sa peine d'emprisonnement non assortie du sursis et, en cas de libération anticipée, à partir du jour de sa mise en liberté pour autant que celle-ci ne soit pas révoquée.

Toutefois, l'interdiction prononcée en application de l'article 382, § 2, produira ses effets à compter du jour où la condamnation contradictoire ou par défaut sera devenue irrévocable.
§ 2. Toute infraction à la disposition du jugement ou de l'arrêt qui prononce une interdiction en application des articles visés au § 1er sera punie d'un emprisonnement d'un mois à six mois et d'une amende de cent euros à mille euros ou d'une de ces peines seulement.
§ 3. La fermeture prononcée en application des articles 382, § 3, et 388 produira ses effets à compter du jour où la condamnation contradictoire ou par défaut sera devenue irrévocable.
§ 4. Toute infraction à la disposition du jugement ou de l'arrêt qui ordonne la fermeture d'un établissement en application des articles visés au § 3 sera punie d'un emprisonnement de trois mois à trois ans et d'une amende de mille euros à cinq mille euros ou d'une de ces peines seulement. »

Les condamnations à des interdictions sont inscrites au **casier judiciaire** de l'intéressé.
En outre, l'article 382quater du Code pénal prévoit la possibilité pour le juge d'ordonner la transmission de la partie pénale du dispositif judiciaire à un employeur :
« Art. 382quater. *Lorsqu'un auteur qui est condamné pour des faits visés aux articles 372 à 377, 379 à 380ter et 381 est en contact, en raison de son état ou de sa profession, avec des mineurs et qu'un*

[11] *Renvoi contenu à l'art.383bis, §5.*

employeur, une personne morale ou une autorité qui exerce le pouvoir disciplinaire est connu, le juge peut ordonner la transmission de la partie pénale du dispositif de la décision judiciaire à cet employeur, cette personne morale ou ce pouvoir disciplinaire. Cette mesure est prise soit d'office, soit à la demande de la partie civile ou du ministère public dans une décision judiciaire spécialement motivée en raison de la gravité des faits, de la capacité de réinsertion ou du risque de récidive. »

Question 9.4.

Le droit interne ne prévoit pas d'infraction spécifique, sous réserve des infractions d'abus sexuels (art.372 et suivants), d'exploitation sexuelle (incitation à la débauche, exploitation de la débauche ou de la prostitution : art.379 et art.380, notamment §6), de voyeurisme (art.371/1), de diffusion d'images, etc. contraires aux bonnes mœurs (art.383).

A noter :
Les réponses sous la question 16 du questionnaire de suivi général demeurent valables, sauf pour les articles 372, alinéa 2, 380, § 6, 382quinquies (nouveau) et 383bis du Code pénal qui ont été modifiés par la loi du 31 mai 2016 susmentionnée et par la loi du 1er février 2016 modifiant diverses dispositions en ce qui concerne l'attentat à la pudeur et le voyeurisme. Nous joignons ces lois **en annexe**.

« Art. 371/1 CP (nouveau - sur le voyeurisme). Sera puni d'un emprisonnement de six mois à cinq ans quiconque aura :

1° observé ou fait observer une personne ou en aura réalisé ou fait réaliser un enregistrement visuel ou audio,

- directement ou par un moyen technique ou autre,
- sans l'autorisation de cette personne ou à son insu,
- alors que celle-ci était dénudée ou se livrait à une activité sexuelle explicite, et
- alors qu'elle se trouvait dans des circonstances où elle pouvait raisonnablement considérer qu'il ne serait pas porté atteinte à sa vie privée ;

2° montré, rendu accessible ou diffusé l'enregistrement visuel ou audio d'une personne dénudée ou se livrant à une activité sexuelle explicite, sans son accord ou à son insu, même si cette personne a consenti à sa réalisation.

Si ces faits ont été commis sur la personne ou à l'aide de la personne d'un mineur de plus de seize ans accomplis, le coupable subira la réclusion de cinq ans à dix ans.

La peine sera de la réclusion de dix ans à quinze ans, si le mineur était âgé de moins de seize ans accomplis.

Le voyeurisme existe dès qu'il y a commencement d'exécution.

« Art. 372, alinéa 2, CP. Sera puni de la réclusion de dix à quinze ans l'attentat à la pudeur commis, sans violences ni menaces, par tout ascendant ou adoptant sur la personne ou à l'aide de la personne d'un mineur, même âgé de seize ans accomplis. La même peine sera appliquée si le coupable est soit le frère ou la sœur de la victime mineure ou toute personne qui occupe une position similaire au sein de la famille, soit toute personne cohabitant habituellement ou occasionnellement avec elle et qui a autorité sur elle. »

« Art. 373. Sera puni d'un emprisonnement de six mois à cinq ans, l'attentat à la pudeur commis sur des personnes ou à l'aide de personnes de l'un ou de l'autre sexe, avec violence, contrainte, menace, surprise ou ruse, ou qui a été rendu possible en raison d'une infirmité ou d'une déficience physique ou mentale de la victime.

Si l'attentat a été commis sur la personne **ou à l'aide de la personne** d'un mineur de plus de seize ans accomplis, le coupable subira la réclusion de cinq ans à dix ans.

La peine sera de la réclusion de dix à quinze ans, si le mineur était âgé de moins de seize ans accomplis. »

« Art. 375, alinéa 2. Il n'y a pas consentement notamment lorsque l'acte a été imposé par violence, contrainte, menace, surprise ou ruse, ou a été rendu possible en raison d'une infirmité ou d'une déficience physique ou mentale de la victime. »

« Art. 380. § 6. Quiconque aura assisté, en direct, y compris au moyen des technologies de l'information et de la communication, à la débauche ou à la prostitution d'un mineur sera puni d'un emprisonnement de un mois à deux ans et d'une amende de cent euros à deux mille euros. »

« Article 383bis. § 1. Sans préjudice de l'application des articles 379 et 380, quiconque aura sans droit exposé, offert, vendu, loué, transmis, fourni, distribué, diffusé, ou mis à disposition, ou remis du matériel pédopornographique ou l'aura produit, importé ou fait importer, sera puni de la réclusion de cinq ans à dix ans et d'une amende de cinq cents euros à dix mille euros.

§ 2. Quiconque aura sciemment et sans droit acquis, possédé du matériel pédopornographique ou y aura, en connaissance de cause, accédé par le biais des technologies de l'information et de la communication, sera puni d'un emprisonnement d'un mois à un an et d'une amende de cent euros à mille euros.

§ 3. L'infraction visée sous le § 1er, sera punie de la réclusion de dix ans à quinze ans et d'une amende de cinq cents euros à cinquante mille euros, si elle constitue un acte de participation à l'activité principale ou accessoire d'une association, et ce, que le coupable ait ou non la qualité de dirigeant.

§ 4. Pour l'application du présent article, on entend par "matériel pédopornographique" :

1° tout matériel représentant de manière visuelle, par quelque moyen que ce soit, un mineur se livrant à un comportement sexuellement explicite, réel ou simulé, ou représentant les organes sexuels d'un mineur à des fins principalement sexuelles ;

2° tout matériel représentant de manière visuelle, par quelque moyen que ce soit, une personne qui paraît être un mineur se livrant à un comportement sexuellement explicite, réel ou simulé, ou représentant les organes sexuels de cette personne, à des fins principalement sexuelles ;

3° des images réalistes représentant un mineur qui n'existe pas, se livrant à un comportement sexuellement explicite, ou représentant les organes sexuels de ce mineur à des fins principalement sexuelles.

§ 5. Les articles 382, 382ter, 382quater, 382quinquies et 389 s'appliquent aux infractions visées aux paragraphes 1er à 3. »

Question 9.5.

Non. Il convient de rappeler le principe de l'opportunité des poursuites (voir point 9.2).

Question 9.6.

Voir les peines de privation de liberté et d'amende prévues par les articles concernés. Selon le cas, des circonstances aggravantes peuvent être appliquées.

Pour les interdictions, la fermeture, la transmission de la partie pénale du dispositif judiciaire à l'employeur et les mentions sur le casier judiciaire, voir les articles déjà cités.

Question 9.7.

Oui. Pour a), b), c), d), e) et f) : voir 383bis CP et l'explication donnée sous 9.2.

On peut aussi se référer aux articles suivants, selon les circonstances :

- art.380bis CP si les faits ont lieu dans un endroit public (ex. dans une « chatroom » ou via une application telle que Snapchat[12]) :

[12] Ann Dierickx, "Noopt nieuwe seksuele criminaliteit tot nieuwe seksuele misdrijven?", Nullum Crimin, 2017, p.235, nr. 81.

Art. 380bis. « Sera puni d'un emprisonnement de huit jours à trois mois et d'une amende de vingt-six euros à cinq cents euros, quiconque, **dans un lieu public** aura par paroles, gestes ou signes provoqué une personne à la débauche. La peine sera élevée au double si le délit a été commis envers un mineur. »

- art.379 CP relatif à l'incitation à la débauche, à la corruption ou à la prostitution de mineurs :
Art. 379. « Quiconque aura attenté aux mœurs en excitant, favorisant ou facilitant, pour satisfaire les passions d'autrui, la débauche, la corruption ou la prostitution d'un mineur de l'un ou de l'autre sexe, sera puni de réclusion de cinq ans à dix ans et d'une amende de cinq cents euros à vingt-cinq mille euros.

Il sera puni de la réclusion de dix ans à quinze ans et d'une amende de cinq cents euros à cinquante mille euros si le mineur n'a pas atteint l'âge de seize ans accomplis.
La peine sera de la réclusion de quinze ans à vingt ans et d'une amende de mille euros à cent mille euros, si le mineur n'a pas atteint l'âge de quatorze ans accomplis. »

- art.380, §6 : « Quiconque aura assisté, en direct, y compris au moyen des technologies de l'information et de la communication, à la débauche ou à la prostitution d'un mineur sera puni d'un emprisonnement de un mois à deux ans et d'une amende de cent euros à deux mille euros. »

-art. 385 en cas de diffusion large :

Art. 385. « Quiconque aura publiquement outragé les mœurs par des actions qui blessent la pudeur, sera puni d'un emprisonnement de huit jours à un an et d'une amende de vingt-six euros à cinq cents euros.
Si l'outrage a été commis en présence d'un mineur âgé de moins de seize ans accomplis, la peine sera d'un emprisonnement d'un mois à trois ans et d'une amende de cent euros à mille euros. »
- art.383 (outrage aux bonnes mœurs) : l'âge de la victime n'est pas un élément constitutif.
Pour c), on peut aussi renvoyer à l'article 383, alinéas 1 à 5, du Code pénal qui ne fait pas de distinction selon l'origine des contenus (produits par des majeurs/mineurs), mais requiert un élément de publicité ou un objectif de commerce ou de distribution. Voir supra, point 8.1.
Pour e) + f) : Ces comportements peuvent constituer des infractions à la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel. Cette loi exige un double consentement : la personne filmée doit donner son consentement indubitable pour être filmée et son consentement indubitable pour la diffusion/communication des images. En plus, dans le cas d'un mineur, un consentement légal n'est en principe pas possible ; l'enregistrement et la diffusion des images d'un mineur est donc d'office problématique. Voir l'article 39, 2°, de la loi de 8 décembre 1992.

« Art. 39. Est puni d'une amende de cent euros à cent mille euros :
2° le responsable du traitement, son représentant en Belgique, son préposé ou mandataire qui traite des données en dehors des cas prévus à l'article 5; »
Ils peuvent aussi être punis sur base de l'art.371/1 CP (voir supra sous 8.1.).
Les actes visés aux points c), d, e) et f) peuvent aussi être constitutifs de harcèlement, à l'encontre de majeurs comme de mineurs :

Art. 442bis. « Quiconque aura harcelé une personne alors qu'il savait ou aurait dû savoir qu'il affecterait gravement par ce comportement la tranquillité de la personne visée, sera puni d'une peine d'emprisonnement de quinze jours à deux ans et d'une amende de cinquante euros à trois cents euros, ou de l'une de ces peines seulement.
Si les faits visés à l'alinéa 1er sont commis au préjudice d'une personne dont la situation de vulnérabilité en raison de l'âge, d'un état de grossesse, d'une maladie, d'une infirmité ou d'une déficience physique ou mentale était apparente ou connue de l'auteur des faits, la peine minimale prévue à l'alinéa 1er sera doublée. »

En ce qui concerne les mineurs, la loi spéciale du 6 janvier 2014 relative à la 6ème réforme de l'Etat prévoit la communautarisation de la définition de la nature des mesures pouvant être prises à l'égard des mineurs ayant commis un fait qualifié d'infraction (objet, critères et conditions, durée, prolongation, révision, hiérarchie des mesures, organisation des services), des règles de dessaisissement, des règles de placement en établissement fermé et des établissements fermés, selon des modalités à détermine.

Les communautés sont donc actuellement en train d'élaborer leur propre législation.

Par conséquent, c'est toujours la loi de 1965 relative à la protection de la jeunesse et à la prise en charge des mineurs ayant commis un fait qualifié infraction (comme expliqué plus haut) et à la réparation du dommage causé par ce fait qui organise les règles de procédure en la matière. Au lieu d'être condamné à des peines de prisons etc. les mineurs reçoivent des mesures de garde, de préservation et d'éducation.

Question 9.8.
Voir l'explication donnée sous 9.2.

Si l'auteur est mineur, c'est la loi du 8 avril 1965 relative à la protection de la jeunesse et à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait qui est d'application. Celle-ci privilégie les mesures restauratrices, la diversification des mesures à disposition du parquet et du juge de la jeunesse, la responsabilité du jeune et le maintien dans le milieu de vie. Le mineur déféré au tribunal de la jeunesse peut faire l'objet de « mesures de garde, de préservation et d'éducation » que les communautés sont libres d'adapter maintenant qu'elles sont compétentes pour déterminer la nature des mesures. Aucune sanction pénale ne peut être prononcée à son encontre (pour le moment). Etant donné que les Communautés sont en train d'élaborer leur propre législation, il est possible que dans le futur cela change, mais pour le moment c'est toujours la loi de 1965 relative à la protection de la jeunesse et à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait qui organise les règles de procédure en la matière (comme expliqué précédemment).

Question 9.9.
Référence est faite à la réponse donnée à la question 9.8.

Question 9.10.a.
Rien de spécifique mais il peut être renvoyé à l'art.371/1, à l'art.383 ; voir supra.

Question 9.10.b.
non

Question 9.10.c.
non

Question 9.10.d.
non

Question 9.10.e.-f.
Voir art.371/1.

Question 9.11.
Si l'auteur est mineur, c'est la loi du 8 avril 1965 relative à la protection de la jeunesse et à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait qui est d'application. Celle-ci privilégie les mesures restauratrices, la diversification des mesures à

disposition du parquet et du juge de la jeunesse, la responsabilité du jeune et le maintien dans le milieu de vie. Le mineur déféré au tribunal de la jeunesse peut faire l'objet de « mesures de garde, de préservation et d'éducation » que les communautés sont libres d'adapter maintenant qu'elles sont compétentes pour déterminer la nature des mesures. Aucune sanction pénale ne peut être prononcée à son encontre.

En outre, ils peuvent aussi être considérés comme des mineurs en danger. Dans ce cas, ce sont vers les services d'aide des Communautés que les situations d'enfant en danger ou en difficulté seront prioritairement orientées.

Le juge de la jeunesse pourrait décider au moment que ces situations arrivent devant la cour qu'il s'agit des enfants en danger et donc qu'une mesure de protection prévue dans les décrets est mieux que de les traiter comme des auteurs.

Question 9.12.
Référence est faite à la réponse donnée à la question 9.11.

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE
State replies / Réponses de l'Etat

Question 9.1.
The Criminal Codes of both Entities and Brcko District generally criminalises cases when an adult records, possesses, imports, sells, shows or distributes sexually explicit images and/or videos depicting children, without specifying whether they were self-generated or not.

Question 9.2.
Yes, there are, in cases provided for by law (e.g. statute of limitation etc.).

Question 9.3.

Criminal Code of Federation of BiH

Article 189
Unauthorised Photographing and Filming
(1) Whosoever takes any photograph, film or other visual recording of another in his personal premises without that person's consent, or who passes on or displays such a photograph to a third person, or enables the third person in some other way to have direct access to the photograph, film or recording, shall be punished by a fine or imprisonment for a maximum term of three years.
(2) If the offence under paragraph 1 above is committed by any official in the course of his duty, he shall be punished by imprisonment for a term of between six months and three years.
(3) Whosoever takes any photograph, film or other visual recording of any child, with a view to developing photographs, audio-visual tapes or other pornographic materials, or who possesses, imports, sells, projects or otherwise deals in such material, shall be punished by imprisonment for a term of between one and five years.
(4) Any articles intended for or used in the commission of any offences under paragraphs 1 to 3 above shall be subject to forfeiture, and any articles produced through the commission of any offence under paragraph 1 to 3 above shall be subject to forfeiture and destruction. …

Article 211
Abuse of a Child or Juvenile for Pornography
(1) Whosoever photographs or films a child, with a view to developing photographs, audio-visual tapes or other pornographic materials or who possesses or imports or sells or deals in or projects such material,

or incites such persons to play in pornographic shows, shall be punished by imprisonment for a term of between one and five years.
(2) The articles intended or used for the commission of any offence under paragraph 1 above shall be subject to forfeiture and any articles produced as a result of the commission of an offence under paragraph 1 above shall be subject to forfeiture and destruction.

Article 212
Showing Pornography to a Child
(1) Whosoever sells, shows or renders available through public display or in any other manner, writings, pictures, audio-visual or other objects containing pornographic material to a child, shall be punished by a fine or imprisonment for a maximum term of one year.
(2) Any object used in committing the offence under the paragraph 1 above shall be subject to forfeiture.

Criminal Code of the Republika Srpska

Abuse of a Child for Pornography
Article 175(1-3)
(1) Whoever incites a child to participate in filming child pornography or whoever organises or enables filming of child pornography shall be punished by imprisonment for a term of be-tween six months and five years.
(2) Whoever, without authorization, films, produces, offers, makes available, distributes, promulgates, imports, exports, obtains for himself or another person, sells, gives, shows or possesses child pornography or knowingly access it by computer network, shall be punished by imprisonment for a term of between one and eight years.
(3) Whoever, by force, threat, deception, fraud, abuse of office or difficult circumstances of a child or abuse of relationship of dependence, forces or incites a child to filming child pornography shall be punished by imprisonment for a term of between two and ten years.

Showing Pornography to a Child
Article 177(1)
(1) Whosoever sells, gives, shows or renders available through public display, internet or other communication network or in any other manner, writings, photos, audio-visual or other ob-jects containing pornographic material or shows a pornographic show to a child under fifteen years of age shall be punished by imprisonment for a term of between six months and three years.

Use of Computer Network or Other Technical Means of Communication in Criminal Offences of Sexual Abuse and Exploitation of a Child
Article 178
(1) Whoever, by using computer network or communication by other technical means, arranges meeting with a child over fifteen years of age for sexual intercourse or an equivalent sexual act, or for production of pornographic material or for other types of sexual abuse and shows up at the arranged meeting point, shall be punished by imprisonment for a term of between one and five years.
(2) If the offence under paragraph 1 of this Article is committed against a child under fifteen years of age, the offender shall be punished by imprisonment for a term of between two and eight years.

Infringement of Child's Privacy
Article 189
(1) Whoever reveals or conveys information from child's personal or family life or, contrary to the regulations, publishes child's photography or discloses child's identity and thus causes his anxiety or exposes him to derision of his peers or others or endangers child's safety in any other way, shall be punished by a fine or imprisonment for a maximum term of one year.

(2) Whoever commits any offence under paragraph 1 of this Article by means of mass media, computer system or network, at a public gathering or by any other method which makes it accessible to a larger number of persons, shall be punished by a fine or imprisonment for a maximum term of two years
(3) Whoever commits any offence under paragraphs 1 and 2 of this Article as an official or while exercising his professional activities, shall be punished by a fine or imprisonment for a maximum term of three years.

Criminal Code of the Brcko District of BiH

Unauthorised Photographing and Filming
Article 186
(1) Whosoever takes any photograph, film or other visual recording of another in his personal premises without that person's consent, or who passes on or displays such a photograph to a third person, or enables the third person in some other way to have direct access to the photograph, film or recording, shall be punished by a fine or imprisonment for a maximum term of three years.
(2) If the offence under paragraph 1 above is committed by any official in the course of his duty, he shall be punished by imprisonment for a term of between six months and three years.
(3) Whosoever takes any photograph, film or other visual recording of any child, with a view to developing photographs, audio-visual tapes or other pornographic materials, or who possesses, imports, sells, projects or otherwise deals in such material, shall be punished by imprisonment for a term of between one and five years.
(4) Any articles intended for or used in the commission of any offences under paragraphs 1 to 3 above shall be subject to forfeiture, and any articles produced through the commission of any offence under paragraph 1 to 3 above shall be subject to forfeiture and destruction…

Abuse of a Child or Juvenile for Pornography
Article 208
(1) Whosoever photographs or films a child, with a view to developing photographs, audio-visual tapes or other pornographic materials or who possesses or imports or sells or deals in or projects such material, or incites such persons to play in pornographic shows, shall be punished by imprisonment for a term of between one and five years.
(2) The articles intended or used for the commission of any offence under paragraph 1 above shall be subject to forfeiture and any articles produced as a result of the commission of an offence under paragraph 1 above shall be subject to forfeiture and destruction.

Showing Pornography to a Child
Article 209
(1) Whosoever sells, shows or renders available through public display or in any other manner, writings, pictures, audio-visual or other objects containing pornographic material to a child, shall be punished by a fine or imprisonment for a maximum term of one year.
(2) Any object used in committing the offence under the paragraph 1 above shall be subject to forfeiture.

Question 9.4.
Answer 9.3. cites articles of the Codes defining criminal offenses and determining the level of prison sentences.

Question 9.5.
Yes, there are, in cases provided for by law (e.g. statute of limitation etc.).

Question 9.6.
Answer 9.3. cites articles of the Codes defining criminal offenses and determining the level of prison sentences.

Question 9.7.
Criminal Codes of the FBiH and Brcko District do not criminalise these cases at all, while the new RS Criminal Code recognises cases when children themselves produce self-generated sexually explicit content and distribute it (whether they participate alone or with other children), but does not criminalise them, i.e. does not consider the child criminally liable and does not prosecute him/her[13].

Question 9.8.
See answer 9.7.

Question 9.9.
See answer 9.7.

Question 9.10.
See answer 9.7.

Question 9.11.
See answer 9.7.

Question 9.12.
See answer 9.7.

BULGARIA / BULGARIE
State replies / Réponses de l'Etat

Question 9.1.
Yes, it does. The envisaged materials will be considered as pornographic material under Art. 93, para. 28. of the Criminal Code, according to which: *"Pornographic material" is material, produced in any way, which is indecent, unacceptable or incompatible with the public moral, with contents that expresses real or simulated molestation, copulation, sexual intercourse, including sodomy, masturbation, sexual sadism or masochism, or lascivious exhibition of the sexual organs of a person".* As it is obvious by the wording of the said provision *(which is of a general character – please, see above the explanation to the general character of some of the provisions of the Bulgarian Criminal Code)* it is irrelevant whether the materials *(i.e. images/videos/content)* are self-generated or not, as both hypothesis are covered. The possession and/or distribution and/or transmission of the types of images, videos, content, etc. envisaged in question 9.1. letters a), b) and c) are criminalised under Art. 159 of the Criminal Code. Please see below the text of the provision of Art. 159 of Criminal Code:

„Article 159
(Amended, SG No. 28/1982, SG No. 10/1993, SG No. 62/1997, SG No. 92/2002)
(1) (Amended, SG No. 38/2007) A person who produces, displays, presents, broadcasts, distributes, sells, rents or otherwise circulates a pornographic material, shall be punished by imprisonment of up to one year and a fine from BGN 1,000 to 3,000.
(2) (New, SG No. 38/2007, supplemented, SG No. 27/2009, amended, SG No. 74/2015) Anyone who distributes pornographic material by means of information or communication technology or in another similar manner shall be punished by imprisonment for up to two years and a fine from BGN 1,000 to 3,000.

[13] Article 175(5) of teh Code provides that: „The child shall not be punished for production or possession of self- generated sexually explicit images and/or videos involving him personally or him and another child if they self-generated and consensually possessed for thier own use exclusivly". The Code defines child pornography in the following wording: „any material that visually or in another way shows a child or realisti-cally presented non-existing child or a face that looks like a child, in a real or simulated (ex-plicit) obvious sexual act or that shows sex organs of children for sexual purposes."

(3) (Renumbered from paragraph 2 and amended, SG No. 38/2007) An individual who displays, presents, offers, sells, rents or distributes in another manner a pornographic material to a person who has not turned 16 years of age, shall be punished by imprisonment of up to three years and a fine of up to BGN 5,000.

(4) (Amended, SG No. 75/2006, renumbered from Paragraph 3, amended, SG No. 38/2007, SG No. 74/2015) For acts under Paragraphs 1 - 3, the punishment shall be imprisonment for up to six years and a fine of up to BGN 8,000, where:

1. a person who has not reached 18 years of age (or anyone who looks like such a person) has been used for the production of the pornographic material;

2. a person who does not understand the nature or meaning of the act has been used for the creation of the pornographic material;

3. the act has been committed by two or more persons;

4. the act has been committed repeatedly.

(5) (Renumbered from paragraph 4 and amended, SG No. 38/2007) Where acts under paras. 1 - 4 have been committed at the orders or in implementing a decision of an organized criminal group, punishment shall be imprisonment from two to eight years and a fine of up to BGN ten thousand (10,000), the court being also competent to impose confiscation of some or all the possessions of the perpetrator.

(6) (Renumbered from paragraph 5 and amended, SG No. 38/2007, SG No. 74/2015) Anyone who, by means of information or communication technology or otherwise, possesses or provides for himself/herself or to another person pornographic material for the production of which a person under 18 years of age (or anyone who looks like such a person) has been used shall be punished by imprisonment of up to one year or a fine of up to BGN 2,000.

(7) (New, SG No. 74/2015) The punishment under Paragraph 6 shall also be imposed on anyone who, by means of information or communication technology, has intentionally accessed pornographic material, for the production of which a person under 18 years of age (or anyone who looks like such a person) has been used.

(8) (New, SG No. 74/2015) In the cases under Paragraphs 1 - 7, the court may also impose a punishment which entails deprivation of rights under Article 37, Paragraph 1, sub-paragraphs 6 or 7.

(9) (Renumbered from Paragraph 6, SG No. 38 of 2007, renumbered from Paragraph 7, SG No. 74/2015) The object of criminal activity shall be confiscated to the benefit of the State, and where it is not found or has been expropriated, its money equivalent shall be awarded."

Question 9.2.

No, there are no special circumstances under which the above mentioned cases are not prosecuted and/or do not lead to conviction. All cases are duly investigated.

Question 9.3.

The legal consequences are that for such behaviours, which represent crimes of a general nature *(i.e. such for which, in all cases, the competent authorities – prosecution offices, are obliged by law to institute criminal proceedings)* are instituted criminal proceeding under the rules of the Criminal Procedure Code, perpetrators are held criminally responsible and once the commission of the offence is proven *(as proscribed by the Criminal Procedure Code)* – the latter are sentenced and serve their punishments.

Question 9.4.

Please see above the answer to Question 9.1. letters a), b) and c) as the reply to the present question is identical.

Question 9.5.

No, there are no special circumstances under which the above mentioned cases are not prosecuted and/or do not lead to conviction. All cases are duly investigated.

Question 9.6.
The legal consequences are that for such behaviours, which represent crimes of a general nature *(i.e. such for which, in all cases, the competent authorities – prosecution offices, are obliged by law to institute criminal proceedings)* are instituted criminal proceeding under the rules of the Criminal Procedure Code, perpetrators are held criminally responsible and once the commission of the offence is *proven (as proscribed by the Criminal Procedure Code)* – the latter are sentenced and serve their punishments.

Question 9.7.
Children are not punished for production and possession of self-generated sexually explicit images and/or videos. The Criminal Code is not applied in cases when children produce or possess such materials for their own use. The same, meaning that criminal responsibility is not applied to them, refers to cases envisaged under letters c) and d) – only adults *(under letter d) of the question)* are held criminally responsible in such cases under Art. 159, para. 6 of the Criminal Code, as they possess *(and/or distribute, transmit further)* such materials for the creation of which are used underaged persons. Concerning the questions envisaged under letters e) and f) – these cases should be examined case by case, depending on the concrete circumstances of each case, no general answer could be given. But it should be pointed out that in all cases adults, as mentioned above, will be held criminally responsible for the possession of such images/ videos for which creation are used children.

Question 9.8.
Please above the answer to Question 9.7.

Question 9.9.
Please above the answer to Question 9.7.

Question 9.10.
Please above the answer to Question 9.7. The answers are identical as what is applicable for „self-generated sexually explicit images and/or videos" is also applicable for „self-generated sexual content".

Question 9.11.
Please above the answer to Question 9.7. The answers are identical as what is applicable for „self-generated sexually explicit images and/or videos" is also applicable for „self-generated sexual content".

Question 9.12.
Please above the answer to Question 9.7. The answers are identical as what is applicable for „self-generated sexually explicit images and/or videos" is also applicable for „self-generated sexual content".

CROATIA / CROATIE
State replies / Réponses de l'Etat

Question 9.1.
Provisions of Article 163 of the Criminal Code prescribe a criminal offence of exploitation of children for pornography. Article 163 para 2 of the Criminal Code prescribes that the perpetrator who records, produces, offers, makes available, shares, imports, exports, procures for himself or another person, sells, gives, displays or possesses child pornography or knowingly obtains access, through information and communication technologies shall be punished by imprisonment for one to eight years. Furthermore, the provision of Article 166 of the Criminal Code prescribes serious criminal offences of sexual abuse and exploitation of a child. Pursuant to Article 166 para 1 of the Criminal Code, if, by the criminal offense referred to in Article 163 para 2 of the Criminal Code, a serious bodily injury is inflicted on the child or his physical or emotional development is impaired or the child is left pregnant, where a number of perpetrators participated in the act or the act is committed against a particularly vulnerable child or it is committed by a family member or a person with whom the child lives in a joint household or it is

committed in an especially cruel or especially degrading manner, the perpetrator shall be punished by imprisonment for three to fifteen years. In conclusion, the provision of Article 166 para 3 of the Criminal Code prescribes imprisonment for not less than 10 years of long-term imprisonment if, by the criminal offence referred to in Article 163 of the Criminal Code, a child dies.

Question 9.2.

No. The above acts are subject to criminal proceedings which the State Attorney, as the authorized prosecutor, initiates the procedure ex officio.

Question 9.3.

If the court in criminal proceedings determines the defendant committed a criminal offence, it shall render a judgment that the defendant is guilty and he shall be punished according to the limits of the prescribed punishment for the committed criminal offence. Besides the sentence for the committed criminal offence, the court can determine one of the following security measures for the defendant: prohibition from engaging in a certain duty or from exercising a certain profession, prohibition from accessing the internet and protective supervision after serving a full prison sentence. The court shall order the security measure of prohibition from fully or partially engaging in a certain duty or from exercising a certain profession referred to in Article 71 of the Criminal Code to the perpetrator who committed a criminal offence in carrying out his duty or activity if there is a danger that such a role could induce the perpetration of another criminal offence through the abuse of the duty or activity. The security measure shall be ordered for a period of one to ten years. To the perpetrator of the criminal offence referred to in Chapter XVII of the Criminal Code Criminal Offences of Sexual Abuse and Exploitation of Children, the court can order a prohibition from engaging in a duty or from exercising a profession where he is in regular contact with children even when these offences were not committed in carrying out duty or activity and it can be ordered for life. The court shall inform the competent authority for keeping the register of persons who engage in certain duties or activities about the final security measure. The court shall order the safety measure of prohibition from accessing the internet referred to in Article 75 of the Criminal Code to the perpetrator who committed a criminal offence via the internet if there is a risk of perpetration of another criminal offence through the abuse of the internet. The security measure shall be ordered for a period of six months to two years. The court shall inform the competent regulatory authority for electronic communication that will secure its implementation about the final security measure. The court shall order the safety measure of protective supervision after serving a full prison sentence referred to in Article 76 of the Criminal Code to the perpetrator if he was sentenced to prison in duration of five or more years for an intentional criminal offence or in duration of two or more years for an intentional violent criminal offence or other criminal offence referred to in Chapter XVII of the Criminal Code (Criminal Offences of Sexual Abuse and Exploitation of Children) and if the sentence was fully served because a suspended sentence was not imposed. The supervision of the convict shall begin upon leaving the prison. The supervision shall last for three years if the criminal offence is committed against a child. The court can prolong supervision before it ends for one more year on the proposal of a competent authority if without it there is a risk of perpetration of one of the criminal offences that caused the security measure to be ordered. Rehabilitation terms shall be calculated according to Article 19 para 6 in conjunction with Article 13 para 4 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation (Official Gazette 143/12, 105/15, 32/17). Provision of Article 19 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation prescribes rehabilitation. Provision of Article 19 para 1 prescribes that convicts shall be entitled to all rights of citizens established by the Constitution, law or other regulations and acquire all rights except the ones prohibited by a safety measure or by legal consequences of the sentence after an executed sentence, if the convict was pardoned or after the limitation period, after an executed long-term imprisonment or juvenile imprisonment. Provision of Article 19 para 4 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation prescribes that rehabilitation occurs by force of law for the perpetrator of the criminal offence provided that he is not re-convicted for a new criminal offence when the following terms pass:

twenty years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to long-term imprisonment, fifteen years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to imprisonment for a period of ten years or for a severe penalty, ten years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to imprisonment for a period of three years or for a severe penalty, five years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to imprisonment for a period of one year of for a severe penalty and juvenile imprisonment, three years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to imprisonment for a period of less than one year. In conclusion, the provision of Article 19 para 6 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation prescribes that rehabilitation for the perpetrators of criminal offences referred to in Article 13 para 4 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation which explicitly cites criminal offences referred to in Chapter XVII of the Criminal Code, Criminal Offences of Sexual Abuse and Exploitation of Children (including the criminal offence of Exploitation of Children for Pornography) shall be enforced by force of law upon expiration of double terms referred to in Article 19 para 4 of the Law on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation.

Question 9.4.

Namely, pursuant to provision of Article 163 para 6 of Criminal Code, child pornography is any material that visually or otherwise depicts a real child or a realistic image of a non-existent child or a person appearing to be a child, involved or engaged in real or simulated sexually explicit conduct, or any depiction of a child's sexual organs for sexual purposes. This provision defines child pornography as well as the explicitly mentioned material referred to as child pornography. Article 163 of the Criminal Code incriminates the exploitation of children for pornography, but not those behaviours whose content is not considered to be child pornography in the context of Article 163 para 6 of the Criminal Code.

Question 9.5.

The cases 9.4.a-c do not meet the requirements to be considered a criminal offence so the criminal proceedings are not initiated.

Question 9.6.

There are no legal consequences of the behaviours referred to in 9.4.a-c

Question 9.7.a.-b.

Provision of Article 163 para 5 of the Criminal Code prescribes that a child shall not be punished for producing and possessing pornographic material depicting him and another child, where this material is produced and possessed by them with their consent and solely for their own private use. In relation to the term "shall not be punished", everything mentioned in the answer 8.2.a) applies mutatis mutandis.

Question 9.7.c.-f.

Provision of Article 163 of Criminal Code prescribes the criminal offence of Exploitation of children for pornography. Article 163 para 2 of the Criminal Code prescribes that the perpetrator who records, produces, offers, makes available, shares, imports, exports, acquires for himself or another person, sells, gives, displays or possesses child pornography or consciously accesses it through information and communication technologies shall be punished by imprisonment for one to eight years. Consequently, the criminal offence referred to in Article 163 para 2 of the Criminal Code may be committed by juvenile offenders.

Question 9.8.

Yes, the provision of Article 7 of the Criminal Code prescribes that criminal legislation shall not be applied to a child who, at the time of committing a criminal offence, had not reached fourteen years of age. A child under the age of 14 can commit an unlawful act, and the cited provision expresses an inexcusable presumption that a child under the age of 14 is not capable of criminal responsibility or guilt. Pursuant to the provision of Article 49 of the Juvenile Courts Act, when, during the proceedings, it is established that a person concerned was, at the time when the criminal offence was committed, under fourteen years of age, criminal case shall be dismissed or criminal proceedings shall be dropped and the information on the offence and on the perpetrator shall be submitted to the centre of social welfare.

Question 9.9.

In the juvenile proceedings for all criminal offences, the authorized prosecutor is the State's Attorney. A person who at the time of the commission of the criminal offence has reached the age of fourteen and did not reach the age of twenty one shall be subject to the provisions of the Criminal Code, unless otherwise provided for in a special law. The special law is the Juvenile Courts Act (Official Gazette 84/11, 143/12, 148/13, 56/15) which regulates provisions for young offenders (juveniles, persons who, at the time when the offence was committed, had reached the age of fourteen and had not reached the age of eighteen and young adults, persons who, at the time when the offence was committed, had reached the age of eighteen and had not reached the age of twenty one). Correctional and safety measures may be applied to a minor who at the time when he committed an offence was between fourteen and sixteen of age (junior minor). Correctional measures shall be: court reprimand, special obligations, intensified care and supervision, intensified care and supervision with daily stay in a correctional institution, referral to a correctional institution, referral to a reformatory, referral to a special correctional institution. Correctional and safety measures may be applied to a minor who at the time when he committed an offence was between sixteen and eighteen years of age (senior minor) and he may be sentenced to juvenile imprisonment. Juvenile imprisonment may not be shorter than six months nor longer than five years, and its length shall be determined in full years and months. In case of a criminal offence carrying a long-term imprisonment or in case of two concurrent criminal offences carrying sentence of imprisonment of over ten years, juvenile imprisonment may last for up to ten years. The provisions of the Criminal Code are applicable to younger adults, subject to the conditions provided for by the Juvenile Courts Act and the provisions applicable to juvenile perpetrators of criminal offences. The court may apply to a young adult a correctional measure of special obligations, correctional measure of intensified supervision and juvenile imprisonment, and if the perpetrator attained twenty one years of age at the time of the trial, he may be referred to a correctional institution and a reformatory. With regard to security measures, the court may, besides a correctional measure or juvenile prison, order security measures to a minor according to the provisions of the Criminal Code, with the exception of the security measure of prohibition to engage in a duty or activity which may not be imposed to the minor or a person who committed a criminal offence as a young adult. As far as minors are concerned, the general provisions of the Criminal Code apply to their criminal liability and punishment, that is to say, if a juvenile imprisonment sentence is imposed on a minor or a young adult is sentenced to imprisonment, the rehabilitation terms are calculated in accordance with Article 19 para 6 in conjunction with Article 13 para 4 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation (Official Gazette 143/12, 105/15, 32/17). Provision of Article 19 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation prescribes rehabilitation. Provision of Article 19 para 1 prescribes that convicts shall be entitled to all rights of citizens established by the Constitution, law or other regulations and acquire all rights except the ones prohibited by a safety measure or by legal consequences of the sentence after a served full sentence, if the convict was pardoned or after the limitation period, after a fully served long-term imprisonment or juvenile imprisonment. Provision of Article 19 para 4 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation prescribes that rehabilitation occurs by force of law for the perpetrator of the criminal offence provided that he is not re-convicted for a new criminal offence when the following terms pass: twenty years from the date after serving a full sentence, after the statute of limitations has expired and

after the convict was pardoned when sentenced to long-term imprisonment, fifteen years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to imprisonment for a period of ten years or for a severe penalty, ten years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to imprisonment for a period of three years or for a severe penalty, five years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to imprisonment for a period of one year of for a severe penalty and juvenile imprisonment, three years from the date after serving a full sentence, after the statute of limitations has expired and after the convict was pardoned when sentenced to imprisonment for a period of less than one year. In conclusion, the provision of Article 19 para 6 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation prescribes that rehabilitation for the perpetrators of criminal offences referred to in Article 13 para 4 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation which explicitly cites criminal offences referred to in Chapter XVII of the Criminal Code, Criminal Offences of Sexual Abuse and Exploitation of Children shall be enforced by force of law upon expiration of double terms referred to in Article 19 para 4 of the Law on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation. The provision of Article 3 para 2 of the Act on the Legal Consequences of Condemnations, Criminal Records and Rehabilitation prescribes that records of correctional measures imposed on juveniles and young adults are kept by the ministry responsible for the social welfare affairs.

Question 9.10.

National law does not criminalise the above since it would not have been included in the definition of child pornography under Article 163 para 6 of the Criminal Code, which defines child pornography as any material that visually or otherwise depicts a real child or a realistic image of a non-existent child or a person appearing to be a child, involved or engaged in real or simulated sexually explicit conduct, or any depiction of a child's sexual organs for sexual purposes.

Question 9.11.

Criminal legislation of the Republic of Croatia does not criminalise behaviours described under the question 9.10.

Question 9.12.

There are no legal consequences for behaviours under 9.10. since criminal legislation of the Republic of Croatia does not criminalise them.

CYPRUS / CHYPRE

State replies / Réponses de l'Etat

Question 9.1.a.-c.

YES

Question 9.2.

YES, According to article 12 of L. 91(I)/2014 article on consensual sexual activities.

Question 9.3.

Child Pornography		
Obtaining or possessing of child pornography material	Imprisonment not exceeding ten (10) years If the victim is a child under thirteen (13) years old subject to life imprisonment	Fine not exceeding 600,000 €
Knowingly gaining access to child pornography via information and communication technologies	Imprisonment not exceeding ten (10) years If the victim is a child under thirteen (13) years old subject to life imprisonment	Fine not exceeding 600,000 €
Distribution, dissemination or broadcasting child pornography material	Imprisonment not exceeding fifteen (15) years If the victim is a child under thirteen (13) years old subject to life imprisonment	Fine not exceeding 600,000 €
Offering or providing or having child pornography material or providing information on how to obtain child pornography material	Imprisonment not exceeding fifteen (15) years If the victim is a child under thirteen (13) years old subject to life imprisonment	Fine not exceeding 600,000 €
Production of child pornography material	Imprisonment not exceeding twenty (20) years If the victim is a child under thirteen (13) years old subject to life imprisonment	Fine not exceeding 600,000 €
Child solicitation for sexual reasons		
Suggesting to a child that has not reached the age of consent, via information and communication technologies to meet him/her with the purpose of performing sexual activity with the child or the production of pornography material or the sexual exploitation of a child and the suggestion in question is followed by the performance of actions that lead to a meeting	imprisonment not exceeding ten (10) years	Fine not exceeding 600,000 €
Inviting or approaching via information and communication technologies a child that has not reached the age of consent and trying to obtain or to have access or obtain or succeed in obtaining access to child pornography	Imprisonment not exceeding ten (10) years	Fine not exceeding 600,000 €

Question 9.4.

YES

Question 9.5.
YES, According to article 12 of L. 91(I)/2014 article on consensual sexual activities.

Question 9.6.
Please see answer to Q.9.3.

Question 9.7.
YES except case under the provisions of the article 12 consensual sexual activities.

Question 9.8.
YES, According to article 12 of L. 91(I)/2014 article on consensual sexual activities.

Question 9.9.
Please see answer to Q.9.3

Question 9.10.
YES except case under the provisions of the article 12 consensual sexual activities.

Question 9.11.
YES, According to article 12 of L. 91(I)/2014 article on consensual sexual activities.

Question 9.12.
Please see answer to Q.9.3

Comments sent by / Commentaires envoyés par Commissioner for Children's Rights

Question 9.1. / Question 9.7.
National law does not criminalize the production and/or possession of self-generated sexually explicit images and/or videos when it involves children who have reached the age set in application of Article 18(2) where these images and/or videos are produced and possessed by them with their consent and solely for their own private use.

CZECH REPUBLIC / REPUBLIQUE TCHEQUE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes, according to Section 192(1) of the Criminal Code whoever possess photographic, film, computer, electronic or other pornographic works, displaying or otherwise using a child or a person that appears to be a child, will be sentenced to imprisonment for up to two years.

Section 192 Production and other Disposal with Child Pornography
(1) Whoever handles photographic, film, computer, electronic or other pornographic works, displaying or otherwise using a child, shall be sentenced to imprisonment for up to two years.

Question 9.1.b.
Yes, it would be criminalised as Production and other disposal with child pornography according to Section 192(3) of the Criminal Code. The provision states that whoever produces, imports, exports, transports, offers, makes publicly available, provides, puts into circulation, sells or otherwise procures photographic, film, computer, electronic or other pornographic works that display or otherwise use a

child or a person that appears to be a child, or whoever exploits such pornographic works, will be sentenced to imprisonment for six months to three years, to prohibition of certain activity or to confiscation of an item.

Section 192 Production and other Disposal with Child Pornography

(1) Whoever handles photographic, film, computer, electronic or other pornographic works, displaying or otherwise using a child, shall be sentenced to imprisonment for up to two years.

(2) The same sentence shall be imposed to anyone, who using information or communication technologies get the access to child pornography.

(3) Whoever produces, imports, exports, transports, offers, makes publicly available, provides, puts into circulation, sells or otherwise procures photographic, film, computer, electronic or other pornographic works that display or otherwise use a child or a person, who appears to be a child or whoever profits from such pornographic works, shall be sentenced to imprisonment for six months to three years, to prohibition of activity or to confiscation of a thing.

(4) An offender shall be sentenced to imprisonment for two to six years or to confiscation of property, if he/she commits the act referred to in Sub-section (3)

a) as a member of an organised group,

b) by press, film, radio, television, publicly accessible computer network, or in other similarly effective way, or

c) with the intention to gain substantial profit for him-/herself or for another.

(5) An offender shall be sentenced to imprisonment for three to eight years or to confiscation of property, if he/she commits the act referred to in Sub-section (3)

a) as a member of an organised group operating in more states, or

b) with the intention to gain extensive profit for him-/herself or for another.

Question 9.1.c.

Yes, such conduct is punished as Production and other disposal with child pornography according to Section 192(3) of the Criminal Code. Conduct described could be also assessed as an offence of Endangering a Child's Care according to Section 201(1) of the Criminal Code [“Whoever, even out of negligence, endangers the intellectual, emotional, or moral development of a child by enticing them to an indolent or immoral life (…) will be sentenced to imprisonment for up to two years.”]. In addition, the court may consider the fact that the offence was committed to the harm of a child as an aggravating circumstance according to Section 42 letter h. of the Criminal Code.

Section 201 Endangering a Child’s Care

(1) Whoever, even out of negligence, endangers the intellectual, emotional, or moral development of a child by

a) enticing them to an indolent or immoral life,

b) allowing them to lead an indolent or immoral life,

c) allowing them to obtain means for themselves or for others by a criminal activity or in another condemnable manner, or

d) seriously breaching his/her obligation to take care of them or another important obligation arising from parental responsibility,

shall be sentenced to imprisonment for up to two years.

(2) Whoever allows, even out of negligence, a child to play on vending machines equipped with a technical device affecting the outcome of the game and which provides the possibility of monetary winnings, shall be sentenced to imprisonment for up to one year, to a pecuniary penalty, or to prohibition of activity.

(3) An offender shall be sentenced to imprisonment for six months to five years, if he/she

a) commits the act referred to in Sub-section (1) or (2) out of a condemnable motive,

b) continues in commission of such an act for a long period of time,

c) commits such an act repeatedly, or

d) gains substantial profit for him-/herself or for another by such act.

Question 9.2.

The Criminal Code and the Criminal Procedural Code offer several alternatives such as waiver of punishment, conditional discontinuation of criminal prosecution, settlement and criminal order. In case of misdemeanour (all negligent criminal offences and such intentional criminal offences for which the Criminal Code stipulates a sentence of imprisonment with the upper limit of up to five years) the court may use so-called waiver of punishment regulated by Section 46 of the Criminal Code under the circumstances that it can be reasonably expected, with regard to the nature and seriousness of the offense committed and the current way of life of the offender, that merely discussing the matter in court will suffice to ensure their reformation and the protection of society. The offender has to regret having committed the act and demonstrates genuine efforts of reformation.

Conditional discontinuation of criminal prosecution (Section 307 – 308 of the Criminal procedural Code) is as a temporary decision associated with setting a probation period, subject to fulfilment of certain conditions and obligations imposed to the accused person. It is utilized in cases where given the circumstances of the case and personality of the accused person it is apparent that in the event of a condemning judgment a suspended sentence of imprisonment would be imposed and the accused person would most likely approve himself in the course of the probation period. The decision on conditional discontinuation of criminal prosecution may be issued under the following conditions:
- the proceeding in question deals with a misdemeanour,
- consent of the accused person and his confession to the act,
- compensation of damage by the accused person, if it was caused by the act, or entering into an agreement on the compensation of damage with the aggrieved person, or taking other necessary steps towards its compensation,
- surrendering any unjust enrichment gained by the act, and
- given the personality of the accused person and his/her previous life and circumstances of the case such decision may be deemed as sufficient.

In addition to fulfilment of the conditions above, it is possible to require that the accused person also to undertake that he/she will refrain from a certain activity in the course of the probation period, in connection to which he/she has committed the crime, or to deposit a financial sum for assistance to the victims of crime.

The settlement (Section 309 – 314 of the Criminal Procedural Code) is designed to facilitate settlement of the conflict between the offender and aggrieved person in social relationships. The accused person has to remedy all harmful effects incurred to the aggrieved person by the offence. The accused person may be imposed an obligation to additional monetary performance exceeding the framework of the damage caused, which serves for publically beneficial purposes.

Decision on settlement may be issued under the following conditions:
- the proceeding in question deals with a misdemeanour,
- consent of both the accused and aggrieved person,
- statement of the accused person that he/she has committed the act, for which he/she is being prosecuted, and there are no reasonable doubts that his declaration was made freely, solemnly and specifically,
- compensation of damage caused by the offence to the aggrieved person or necessary steps of the accused person towards its compensation, eventually another way of rectification of the harm incurred by the offense,
- surrender of unjust enrichment gained by the act, or taking other appropriate steps towards its surrendering,

- the accused person will deposit a financial sum to the account designated for assistance to the victims of crime, and such performance is not clearly disproportionate to the seriousness of the misdemeanour, and,
- given the nature and seriousness of the committed crime, the extent in which public interest was affected by the act and the personality of the accused person and his personal and property relations such manner of execution of the case may be deemed as sufficient.

Question 9.3.
The offender who committed behaviour described in 9.1.a-c could be sentenced to imprisonment for up to two years. If the offender commits described offences either as a member of an organized group, or by press, film, radio, television, publicly accessible computer network, or in other similarly effective way, or with the intention to gain substantial profit for himself or for another, he/she could be sentenced to imprisonment for two to six years or to confiscation of assets.

Question 9.4.
Czech Criminal Code does not differentiate whether the images showing children in sexually explicit positions are self-generated by children or taken by somebody else (as long as the person is criminally liable), if such images meet the definition of child pornography as explained in question 9.1.a. Therefore, the answers to questions 9.1.a-c are relevant also for questions 9.4.a-c.

Question 9.5.
Please see the answer to question 9.2.

Question 9.6.
The abovementioned behaviour is classified as committing of the criminal offence and is sanctioned according to the Criminal Code.

Please see the answer to question 9.3.

Question 9.7.a.
In general children are not criminally liable unless they reach the age of 15. When children between 15 to 18 years produce sexually explicit images and/or videos of themselves, it is not subject of criminal liability in accordance with the Criminal Code.

Question 9.7.b.
No, the child who commits such activity (possesses his/her own images/videos) is not criminally liable.

Question 9.7.c.-f.
Distribution or transmission of "self-generated sexually explicit images and/or videos" as stated in letters c.-f. is subject of criminal liability in line with Section 192(3) of the Criminal Code.

Question 9.8.
Waiver of punishment could be applied by the specialized youth courts in case of misdemeanours according to Section 11 of Act No 218/2003 Coll. the Justice over Juveniles Act if the offender regrets having committed the offence and demonstrates genuine efforts of reformation under following circumstances: a) it can be reasonably expected, with regard to the nature and seriousness of the offence committed and the current way of life of the offender, that merely discussing the matter in court will suffice to ensure their reformation and the protection of society; b) he/she has committed the offence for lack of knowledge of laws which is excusable regarding his/her age, mental maturity and environment he/she has been living in; c) the court accepts guarantee of the remedy of the child.

According to Section 70 of the Justice over Juveniles Act it is possible to apply waiver of prosecution which gives public prosecutor in pre-trial proceedings and the juvenile court in trial proceedings the possibility to waive criminal prosecution and at the same time discontinue criminal prosecution on the grounds of absence of public interest in further prosecution of the juvenile, of course if all statutory conditions are met.

The decision to waive criminal prosecution may be issued if the following conditions are met:
- the upper limit of an offence is imprisonment not exceeding three years,
- there is no public interest on further prosecution of the child,
- criminal prosecution would not be purposeful, and
- punishment is not necessary to turn the child away from committing other offenses.

Criminal prosecution may be waived especially in case the child has already undertaken a suitable probation program, has fully or in part compensated the damage caused by the offence and the aggrieved person agrees with such compensation, or if the child was reprehended with a warning and such solution may be considered sufficient in view of the purpose of the proceedings. A complaint is admissible against the resolution on waiver of criminal prosecution.

In case of child offenders it is possible to use also other divergences in the criminal proceedings which are offered by the Criminal Code and are described in details in answer to question 9.2.

Question 9.9.
The Youth Court can impose three kinds of measures to children between 15 to 18 years: educational measure, protective measures and criminal measure. Sentencing children to imprisonment shall be recognised as a last resort measure. The statutory penalty stipulated in the Criminal Code is half decreased in case of children.

Question 9.10.a.
No, the child who commits such activity (produces his/her sexual content) is not criminally liable.

Question 9.10.b.
No, the child who commits such activity (possesses his/her sexual content) is not criminally liable.

Question 9.10.c.
The child should by this behaviour commit the criminal offence under the Section 201 of the Criminal Code in connection with the Section 6 of the Act on Juvenile Justice.

Question 9.10.d.
No, the child who commits such activity (distributes or transmits his/her sexual content to adults) is not criminally liable.

Question 9.10.e.
The child should by this behaviour commit the criminal offence under the Section 192 and 201 of the Criminal Code in connection with the Section 6 of the Act on Juvenile Justice.

Question 9.10.f.
The child should by this behaviour commit the criminal offence under the Section 192 of the Criminal Code in connection with the Section 6 of the Act on Juvenile Justice.

Question 9.11.
Please see the answer to question 9.7.c-f.

Question 9.12.
Please see the answer to question 9.9.

If the child is criminally liable, than his/her behaviour is sanctioned according to the Criminal Code in connection with the Act on Juvenile Justice.

DENMARK / DANEMARK
State replies / Réponses de l'Etat

Question 9.1.
According to Section 235, Subsection 1 of the Danish Criminal Code, any person who distributes pornographic photographs or films or pornographic visual reproductions or similar recordings of persons under 18 years of age is sentenced to a fine or imprisonment for a term not exceeding two years, or in particularly aggravating circumstances to imprisonment for a term not exceeding six years. Situations endangering the life of a child, situations of aggravated assault, situations in which the child suffers serious harm, or distribution made in systematic or organised manner, are especially considered particularly aggravating circumstances.

According to Section 235, Subsection 2, any person who possesses or views, for value or through the internet or a similar system for dissemination of information, any pornographic photographs or films or other pornographic visual reproductions or similar recordings of persons under 18 years of age is sentenced to a fine or imprisonment for a term not exceeding one year.

According to Section 235, Subsection 3, the provision in Subsection 2 does not comprise the possession for personal use of child pornography involving a child over the age of consent (15 years of age) who has consented to such possession.

Furthermore, it should be noted that according to Section 264d the unlawful transmission of messages or images concerning another person's private affairs is punishable with a fine or imprisonment for a term not exceeding 6 months.

Question 9.2.
As a principal rule, the prosecution service prosecutes all criminal offences submitted to public prosecution. However, in a few exceptional cases the prosecution service may find that a criminal offence – due to specific circumstances regarding the offence - should not lead to indictment. Furthermore, the courts have freedom to assess evidence and can consequently acquit the defendant.

Question 9.3.
Possession, distribution or transmission of sexually explicit images, videos and other material depicting a child in a sexual suggestive way are criminalized in Section 235 of the Danish Criminal Code regarding possession and distribution of child pornography and Section 264 d regarding transmission of messages or images concerning another person's private affairs. The maximum penalty for violation of Section 235 is 2 years of prison or – in the case of aggravating circumstances – 6 years of prison. The maximum penalty for violation of Section 264 d is 6 months of prison. The Director of Public Prosecutions has composed a set of guidelines for the prosecutor's argument in court regarding the sentencing.

Question 9.4.
Section 235 of the Danish Criminal Code concerns "pornographic" material. This does not encompass non-pornographic naked posing etc. For more information on Section 235, please see answer to question 9.1.

However, according to Section 264d the unlawful transmission of messages or images concerning another person's private affairs is punishable with a fine or imprisonment for a term not exceeding 6 months. Whether the transmission is "unlawful" depends, inter alia, on whether the other person has given his or her consent.

Question 9.5.
Please see answer to question 9.1.

Question 9.6.
Please see answer to question 9.3.

Question 9.7.
The situations mentioned in question 9.7.a-d are not criminalised. The situations mentioned in question 9.7.e-f., where sexually explicit images and/or videos of other children are distributed or transmitted to others (peers or adults) are criminalised by Section 235 in the Danish Criminal Code (for more information, see the answer to question 9.1.). It should be noted that the age of criminal responsibility in Denmark is 15 years.

Question 9.8.
Please see answer to question 9.2.

Question 9.9.
Please see answer to question 9.3.

Question 9.10.
Please see answer to question 9.7.

Question 9.11.
Please see answer to question 9.2.

Question 9.12.
Please see answer to question 9.3.

ESTONIA / ESTONIE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes, depending on the circumstances of a specific case Penal Code § 133, 175, 178 and 178^1 may apply.

Question 9.1.b.
Yes, Article 178 (Penal Code), however depending on the circumstances of a specific case, Penal Code § 133 or § 175 (or even some other article of the Penal Code) may apply.

Question 9.1.c.
Yes, depending on the circumstances of a specific case Penal Code § 175, 178 and 178^1 may apply.

Yes, depends on the purpose of the activity. Depending on the age of the child whom the picture has been sent. In practice, it may happen that children from other countries are involved or fake identity on the other side of the screen. It may be the case that a picture of one child has been used for grooming the other child (by using the picture of one child, another identity may be created).

Question 9.2.

Each case needs to be viewed separately, taking into account the parties and the context. Whether the proceedings is not initiated because potential offender is younger than 14 years of age (non-subject) or proceedings have initiated to clarify the circumstances (including to identify person and age) and case will be closed, then in both cases the child protection will be informed.

In some cases, it is possible for the prosecutor's office to request termination of the criminal proceedings by a court. That would be theoretically possible in the case of 9.1. a, for example, if the adult possessing these images is a young adult (let's say 18-21 years of age) and if the child (whose self-generated sexually explicit images and/or videos we are talking about, i.e. the child who is depicted at these materials) is e.g. 17 years of age. So, these persons are close in age and in their degree of psychological and physical development or maturity, and the investigation during the criminal proceedings prove that these materials were created without any coercion/recruitment/violence etc. Also these persons are in a consensual relationship and the investigation leads to a conclusion that these materials were created as a part of/result of, which may be regarded as the normal discovery of sexuality.

In cases like that, the Code of Criminal Procedure § 202 or 203 may apply.

§ 202. Termination of criminal proceedings in case of lack of public interest in proceedings and negligible guilt
(1) If the object of criminal proceedings is a criminal offence in the second degree and the guilt of the person suspected or accused of the offence is negligible, and he or she has remedied or has commenced to remedy the damage caused by the criminal offence or has paid the expenses relating to the criminal proceedings, or assumed the obligation to pay such expenses, and there is no public interest in the continuation of the criminal proceedings, the prosecutor's office may request termination of the criminal proceedings by a court with the consent of the suspect or accused.
(2) In the event of termination of criminal proceedings, the court may impose the following obligation on the suspect or accused at the request of the prosecutor's office and with the consent of the suspect or accused within the specified term:
1) to pay the expenses relating to the criminal proceedings or compensate for the damage caused by the criminal offence;
[RT I 2007, 11, 51 - entry into force 18.02.2007]
2) to pay a fixed amount into the public revenues or to be used for specific purposes in the interest of the public;
3) to perform 10-240 hours of community service. The provisions of subsections 69 (2) and (5) of the Penal Code apply to community service;
4) to pass a specific social programme or undergo the prescribed addiction treatment and not to consume narcotics;
[RT I, 19.03.2015, 1 - entry into force 29.03.2015]
5) to participate in a social programme.
[RT I, 12.07.2014, 1 - entry into force 01.01.2015]
(3) The term for the performance of the obligations listed in clauses (2) 1)-3) of this section shall not exceed six months. The term for fulfilment of the obligations specified in clauses (2) 4) and 5) of this section shall not be longer than eighteen months.
[RT I, 19.03.2015, 1 - entry into force 29.03.2015]
(4) A request of a prosecutor's office shall be adjudicated by a ruling of a judge sitting alone. If necessary, the prosecutor and the suspect or accused and, at the request of the suspect or accused, also the counsel shall be summoned to the judge for the adjudication of the request of the prosecutor's office.
(5) If a judge does not consent to the request submitted by a prosecutor's office, he or she shall return the criminal matter on the basis of his or her ruling for the continuation of the proceedings.
(6) If a person with regard to whom criminal proceedings have been terminated in accordance with subsection (2) of this section fails to perform the obligation imposed on him or her, a court, at the

request of a prosecutor's office, shall resume the criminal proceedings by an order. In imposition of a punishment, the part of the obligations performed by the person shall be taken into consideration.
[RT I 2007, 11, 51 - entry into force 18.02.2007]
(7) If the object of criminal proceedings is a criminal offence in the second degree for which the minimum rate of imprisonment is not prescribed as punishment or only a pecuniary punishment is prescribed as punishment by the Special Part of the Penal Code, a prosecutor's office may terminate the criminal proceedings and impose the obligations on the bases provided for in subsections (1) and (2) of this section. The prosecutor's office may resume terminated criminal proceedings by an order on the bases provided for in subsection (6) of this section.

§ 203. Termination of criminal proceedings due to lack of proportionality of punishment
(1) If the object of criminal proceedings is a criminal offence in the second degree, the prosecutor's office may request termination of the criminal proceedings by a court with the consent of the suspect or accused and the victim if:
1) the punishment to be imposed for the criminal offence would be negligible compared to the punishment which has been or presumably will be imposed on the suspect or accused for the commission of another criminal offence;
2) imposition of a punishment for the criminal offence cannot be expected during a reasonable period of time and the punishment which has been or presumably will be imposed on the suspect or accused for the commission of another criminal offence is sufficient to achieve the objectives of the punishment and satisfy the public interest in the proceeding.
(2) A request of a prosecutor's office shall be adjudicated by a ruling of a judge sitting alone. If necessary, the prosecutor and the suspect or accused and, at the request of the suspect or accused, also the counsel shall be summoned to the judge for the adjudication of the request of the prosecutor's office.
(3) If a judge does not consent to the request submitted by a prosecutor's office, he or she shall return the criminal matter on the basis of his or her ruling for the continuation of the proceedings.
(4) If criminal proceedings were terminated taking into consideration a punishment imposed on the suspect or accused for another criminal offence and the punishment is subsequently annulled, the court may, at the request of the prosecutor's office, resume the criminal proceedings by an order.
(5) If criminal proceedings were terminated taking into consideration a punishment which will presumably be imposed on the suspect or accused for another criminal offence, the court may, at the request of the prosecutor's office, resume the criminal proceedings if the punishment imposed does not meet the criteria specified in clauses (1) 1) and 2) of this section.
(6) If the object of criminal proceedings is a criminal offence in the second degree for which the minimum rate of imprisonment is not prescribed as punishment or only a pecuniary punishment is prescribed as punishment by the Special Part of the Penal Code, the prosecutor's office may terminate the criminal proceedings on the bases provided for in subsection (1) of this section. The prosecutor's office may resume terminated criminal proceedings by an order on the bases provided for in subsections (4) and (5) of this section.
[RT I 2004, 46, 329 - entry into force 01.07.2004]

Question 9.3.
See the provisions of Penal Code.

Question 9.4.a.
Article 178 (Penal Code): possessing all self-generated sexual content of a child.

Question 9.4.b.-c.
Yes, the main article that criminalises this, is once again, PC § 178.

In addition to that, the aims and purpose of the activities may be different. The described activities may also fall under the Article 179 (Penal Code). If the aim is grooming, then the Article 178^1 (Penal Code)

may apply, where, for example, the adult transmitter/distributor is using the photo for keeping his/her real identity as a secret in order to win the trust of another child (who thinks that he/she is communicating with another child/peer). There may also be some financial interests involved and in that case Article 175 of the Penal Code may apply.

Question 9.5.
For example if there is no pornographic or erotic content (e.g. some nudity, but no posing or other activities/behaviour that provoke some sexual arousal). It depends on the context and on the factual circumstances of the concrete case. For example if the parents have a photo of their child, then this may not fall under prosecution.

Question 9.6.
See the provision in the Penal Code.

Question 9.7.a.
No, producing a self-generated sexually explicit images and/or videos is not criminalised. The aim of PC § 178 is not to criminalise such situations.

Question 9.7.b.
No, possessing a self-generated sexually explicit images and/or videos is not criminalised. The aim of PC § 178 is not to criminalise such situations.

Question 9.7.c.
It depends what is the purpose of distributing or transmitting the images and to whom these are distributed/transmitted. In general, the aim of PC § 178 is not to criminalise such situations, nevertheless, if we are talking about children older than 14 years of age (the age of criminal responsibility is 14 years), then it is theoretically possible to generate such cases where this could lead to criminal proceedings. For example when a child is grooming/luring another child using the self-generated images with a purpose of committing a crime against that other child.

Question 9.7.d.
It depends what is the purpose of distributing or transmitting the images. In general, the aim of PC § 178 is not to criminalise such situations.

Question 9.7.e.
It depends what is the purpose of distributing or transmitting the images and on the factual circumstances of the case.

Question 9.7.f.
It depends what is the purpose of distributing or transmitting the images and on the factual circumstances of the case.

Question 9.8.
Even if the child who is older than 14 years of age (age of criminal responsibility in Estonia) and commits a crime, then the aim is never just to convict and to punish. In case of children in conflict with law, the main purpose of both, the legal and social sphere/authorities, is to understand the reasons behind such behaviour and to help the child, also to assess the needs of the child.

Please see also answer 9.2 – in some cases, it is possible for the prosecutor's office to request termination of the criminal proceedings by a court. Then, the Code of Criminal Procedure § 202 or 203 may apply.

Question 9.9.
See the provision in the Penal Code.

Even if the child who is older than 14 years of age (age of criminal responsibility in Estonia) and commits a crime, then the aim is never just to prosecute and to punish. In case of children in conflict with law, the main purpose of both, the legal and social sphere/authorities, is to understand the reasons behind such behaviour and to help the child, also to assess the needs of the child.

Question 9.10.a.
No, producing self-generated sexual content is not criminalised. The aim of PC §178 is not to criminalise such situations.

Question 9.10.b.
No, possessing self-generated sexual content is not criminalised. The aim of PC §178 is not to criminalise such situations.

Question 9.10.c.
It depends what is the purpose of distributing or transmitting the self-generated sexual content and to whom this content is distributed/transmitted. In general, the aim of PC §178 is not to criminalise such situations, nevertheless, if we are talking about children older than 14 years of age (the age of criminal responsibility is 14 years), then it is theoretically possible to generate such cases where this could lead to criminal proceedings. For example when a child is grooming/luring another child using the self-generated sexual content with a purpose of committing a crime against that other child.

Question 9.10.d.
It depends what is the purpose of distributing or transmitting this content. In general, the aim of PC §178 is not to criminalise such situations.

Question 9.10.e.
It depends what is the purpose of distributing or transmitting this content and on the factual circumstances of the case.

Question 9.10.f.
It depends what is the purpose of distributing or transmitting this content and on the factual circumstances of the case.

Question 9.11.
Even if the child who is older than 14 years of age (age of criminal responsibility in Estonia) and commits a crime, then the aim is never just to convict and to punish. In case of children in conflict with law, the main purpose of both, the legal and social sphere/authorities, is to understand the reasons behind such behaviour and to help the child.

Please see also answer 9.2 – in some cases, it is possible for the prosecutor's office to request termination of the criminal proceedings by a court. Then, the Code of Criminal Procedure § 202 or 203 may apply.

Question 9.12.
See the provision in the Penal Code.

Even if the child who is older than 14 years of age (age of criminal responsibility in Estonia) and commits a crime, then the aim is never just to prosecute and to punish. In case of children in conflict with law, the main purpose of both, the legal and social sphere/authorities, is to understand the reasons behind

such behaviour and to help the child, also to assess the needs of the child.

FINLAND / FINLANDE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes, sanctioned pursuant to Chapter 17, Section 19 of the Criminal Code (*rikoslaki, strafflag)*. The text of the Criminal Code in English is appended as an annex to the replies.

Question 9.1.b.
Yes, sanctioned pursuant to Chapter 17, Section 18 or 18 a of the Criminal Code.

Question 9.1.c.
Yes, sanctioned pursuant to Chapter 17, Section 18 or 18 a of the Criminal Code.

Question 9.2.
No such special circumstances exist.

Question 9.3.
According to Chapter 17, section 18 of the Criminal Code, the penalty for distribution of a sexually offensive picture is a fine or imprisonment at most two years.

According to Chapter 17, section 18a of the Criminal Code, the penalty for aggravated distribution of a sexually offensive picture depicting a child is imprisonment at least 4 months and at most 6 years.

According Chapter 17, section 19 of the Criminal Code, the penalty for possession of a sexually offensive picture depicting a child is a fine or imprisonment at most one year.

Question 9.4.a.
No.

Question 9.4.b.
No.

Question 9.4.c.
No.

Question 9.5.
Not applicable (see replies to Question 9.4).

Question 9.6.
Not applicable (see replies to Question 9.4).

Question 9.7.
At the outset, the Government notes that in Finland, criminal liability under the Criminal Code begins at the age of 15 years.

Question 9.7.a.
Yes, it is sanctioned pursuant to Chapter 17, section 18 or Chapter 17, section 18a of the Criminal Code.

Question 9.7.b.
Yes, it is sanctioned pursuant to Chapter 17, section 19 of the Criminal Code.

Question 9.7.c.
Yes, it is sanctioned pursuant to Chapter 17, section 18 or Chapter 17, section 18a of the Criminal Code.

Question 9.7.d.
Yes, it is sanctioned pursuant to Chapter 17, section 18 or Chapter 17, section 18a of the Criminal Code.

Question 9.7.e.
Yes, it is sanctioned pursuant to Chapter 17, section 18 or Chapter 17, section 18a of the Criminal Code.

Question 9.7.f.
Yes, it is sanctioned pursuant to Chapter 17, section 18 or Chapter 17, section 18a of the Criminal Code.

Question 9.8.
No such special circumstances exist.

Question 9.9.
According to Chapter 17, section 18 of the Criminal Code, the penalty for distribution of a sexually offensive picture is a fine or imprisonment at most two years.

According to Chapter 17, section 18a of the Criminal Code, the penalty for aggravated distribution of a sexually offensive picture depicting a child is imprisonment at least 4 months and at most 6 years.

According Chapter 17, section 19 of the Criminal Code, the penalty for possession of a sexually offensive picture depicting a child is a fine or imprisonment at most one year.

Question 9.10.a.
No.

Question 9.10.ab
No.

Question 9.10.c.
No.

Question 9.10.d.
No.

Question 9.10.e.
No.

Question 9.10.f.
No.

Question 9.11.
Not applicable (see replies to Question 9.10.).

Question 9.12.
Not applicable (see replies to Question 9.10.).

Comments sent by / Commentaires envoyés par Save the Children Finland and / et Central Union for Child Welfare

Question 9.

In order to fight against the dissemination of illegal child sexual abuse material online, all kind of websites related to sexual abuse or offering an access to illegal material (e.g. "gateway sites") need to be confirmed as illegal activity under the Finnish law. As mentioned in the Declaration on web addresses advertising or promoting child sexual abuse material or images or any other offences established in accordance with the Lanzarote Convention (2016). As well as in the Directive 2000/31/EC (e-commerce): In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information. (art. 46).

There are also images that are not illegal child sexual abuse material under the Finnish law, but are clearly violating the rights of the child. Such images, so called Grey Area –images, are often posed depictions or everyday depictions of a child in a sexualised context.[14] As noticed recently, the phenomenon is rapidly growing and more and more of children's everyday depictions end up in websites used for people sexually interested in children. All images clearly violating the rights of the child need to be addressed as illegal.

Recommendation:
To make necessary legislative changes to effectively tackle sexual abuse and exploitation against children online, especially website connected to CSAM and everyday depictions of children used for sexual purposes

FRANCE

State replies / Réponses de l'Etat

Question 9.1.a.

Oui, le droit français érige en infraction pénale la seule détention par un adulte d'images ou de vidéos sexuellement explicites autoproduites par des enfants : l'article 227-23, cinquième alinéa, du code pénal (déjà cité) dispose : « *Le fait de consulter habituellement ou en contrepartie d'un paiement un service de communication au public en ligne mettant à disposition une telle image ou représentation, d'acquérir ou de détenir une telle image ou représentation par quelque moyen que ce soit est puni de deux ans d'emprisonnement et 30 000 euros d'amende.* »

Question 9.1.b.

Oui, le droit français érige en infraction pénale le fait de transmettre (à des adultes ou à des mineurs) des images et/ou des vidéos sexuellement explicites autoproduites par des enfants (article 227-23 premier alinéa du code pénal déjà cité).

[14] I-Kiz, 2016. Combat of the Grey Areas of Child Sexual Exploitation on the Internet. http://www.i-kiz.de/wp-content/uploads/2016_I-KiZ_Grey_Areas.pdf; IL (5.1.2018) Poliisilta varoitus lasten nettikäytöksestä: Selfie-kulttuuri sataa suoraan pedofiilien laariin. https://m.iltalehti.fi/digiuutiset/201801052200647897_dx.shtml?orig_ref=https%3A%2F%2Ft.co%2FIzfyEYwike

Question 9.1.c.
Oui, le droit français ne distingue pas dans la définition de l'infraction selon l'âge du destinataire. Toutefois si le destinataire est un mineur la qualification de corruption de mineur pourra être également envisagée.

Question 9.2.
Il n'existe pas de circonstance spéciale concernant les cas précités à la question 9. 1. où les poursuites n'aboutissent pas à une condamnation. Bien évidemment les causes générales applicables à toutes les infractions pénales peuvent conduire à une absence de « condamnation » (irresponsabilité de l'auteur en raison de son état mental, immunité de l'auteur en raison d'une immunité diplomatique (famille d'un diplomate par exemple), etc.)

Question 9.3.
Les conséquences juridiques des comportements susmentionnés sont une condamnation par la juridiction compétente (le tribunal correctionnel pour un majeur, le tribunal pour enfants pour un mineur). Une peine adaptée à la personnalité de l'auteur et proportionnée à la gravité des faits sera prononcée. Ces peines peuvent comprendre :

- une peine avec ou sans sursis à une peine d'emprisonnement ;
- une peine d'amende ;
- une ou plusieurs peines complémentaire (notamment en application de l'article 132-45 13° *« S'abstenir d'entrer en relation avec certaines personnes, dont la victime, ou certaines catégories de personnes, et notamment des mineurs, à l'exception, le cas échéant, de ceux désignés par la juridiction* ; »

Question 9.4.a.
S'il s'agit d'images ou de vidéos, la législation française érige en infraction pénale le fait de posséder des contenus à caractère sexuel autoproduits par des enfants. Le caractère « autoproduit » est sans incidence sur la qualification de l'infraction.

La législation française concerne les images et les vidéos et les messages textuels permettant de rentrer en contact par le biais des TIC avec des mineurs.

En dehors des cas précités (provocation ou apologie des agressions sexuelles, harcèlement sexuel) la législation française n'incrimine pas les « enregistrements sonores » ou des textes ne concernant pas la mise en relation par le biais des TIC.

Question 9.4.b.
Réponse identique au a)

Question 9.4.c.
Réponse identique au a)

Question 9.5.
Sans objet pour les faits décrits au 9.4.

Question 9.6.
Sans objet pour les faits décrits au 9.4.

Question 9.7.a.
La production en soi d'images ou de vidéos sexuellement explicites « d'eux-mêmes » par des mineurs n'est pas incriminée si elle n'est pas faite « en vue de sa diffusion ».

Question 9.7.b.
L'article 227-23 cinquième alinéa du code pénal qui définit l'infraction de « détention d'image(s) ou de vidéos pédopornographique(s) ne fait pas de distinction selon l'âge de l'auteur. L'article 227-23 du code pénal (déjà cité) dispose : « *Le fait de consulter habituellement ou en contrepartie d'un paiement un service de communication au public en ligne mettant à disposition une telle image ou représentation, d'acquérir ou de détenir une telle image ou représentation par quelque moyen que ce soit est puni de deux ans d'emprisonnement et 30 000 euros d'amende. »*

Question 9.7.c.
Oui l'article 227-23 du code pénal ne fait pas de distinction selon l'âge de l'auteur.

Question 9.7.d.
Oui (même article).

Question 9.7.e.
Oui (même article).

Question 9.7.f.
Oui (même article).

Question 9.8.
En France, le procureur de la République met en œuvre un principe d'opportunité des poursuites défini et exprimé aux articles 40 premier alinéa et 40-1 du code de procédure pénale qui disposent : « *Le procureur de la République reçoit les plaintes et les dénonciations et apprécie la suite à leur donner conformément aux dispositions de l'article 40-1. »*

Article 40-1 du code de procédure pénale *: « Lorsqu'il estime que les faits qui ont été portés à sa connaissance en application des dispositions de l'article 40 constituent une infraction commise par une personne dont l'identité et le domicile sont connus et pour laquelle aucune disposition légale ne fait obstacle à la mise en mouvement de l'action publique, le procureur de la République territorialement compétent décide s'il est opportun :*
1° Soit d'engager des poursuites ;
2° Soit de mettre en œuvre une procédure alternative aux poursuites en application des dispositions des articles 41-1, 41-1-2 ou 41-2 ;
3° Soit de classer sans suite la procédure dès lors que les circonstances particulières liées à la commission des faits le justifient. »

Le procureur de la République apprécie la suite à donner en tenant compte de l'âge de l'auteur, de l'âge de la victime, et de tous les critères qu'il estime pertinents.

Il n'existe pas de telles circonstances spéciales.

Question 9.9.
En cas de poursuite les conséquences sont une condamnation à une peine d'emprisonnement et/ou une peine d'amende (fonction de la nature des faits : peine encourue de un an d'emprisonnement à sept ans d'emprisonnement).

Pour les mineurs l'excuse de minorité entraine une division par deux de la peine encourue (sauf si le tribunal écarte l'excuse de minorité, ce qui est exceptionnel).

Question 9.10.
La législation française n'incrimine pas les enregistrements sonores à caractère pornographiques ou les textes à caractère pornographique ne comprenant pas d'image ou de vidéos. L'incrimination des messages permettant la mise en relation avec un mineur par le biais des TIC ne concernent que les majeurs.

Question 9.11.
Sans objet.

Question 9.12.
Aucune conséquence juridique pour les mineurs.

Comments sent by / Commentaires envoyés par Stop aux Violences Sexuelles

Question 9.1.a.
Oui

Question 9.1.b.
Oui

Question 9.1.c.
Oui

Question 9.2.
Nombreux classements sans suite en France, sur tous les aspects concernant les violences sexuelles

Question 9.3.
Fonction de la qualification des faits, barème spécifique mais encore de nombreux vides juridiques

Question 9.4.
Pas de distinction spécifique avec le caractère auto-produit

Question 9.5.
Idem 9.2

Question 9.6.
Fonction de la qualification des faits, barème spécifique mais encore de nombreux vides juridiques

Question 9.7.a.
Non

Question 9.7.b.
Oui mais l'excuse de minorité sera probablement invoquée pour les plus jeunes

Question 9.7.c.
Idem supra

Question 9.7.d.
Idem supra

Question 9.8.
Excuse de minorité

Alternatives aux poursuites

Question 9.9.
Réduction voire annulation des peines

Question 9.10.
Quasi absence de dispositions concernant les infractions sexuelles entre mineurs

Question 9.11.
Absences de dispositions = nombreux classements sans suite, au mieux rappels à la loi

Question 9.12.
Au mieux rappels à la loi

GEORGIA / GEORGIE
State replies / Réponses de l'Etat

Question 9.
Joint answer for questions under 8 and 9

According to Article 255 of the Criminal Code of Georgia purchase, storage, attendance on the demonstration, proposal, proliferation, transferring, advertising, making accessible of or using of a child pornographic work is criminalized and sanctioned by imprisonment up to three years. The production or sale of a child pornographic work is also punishable by imprisonment for five years (as a maximum sanction).

The present article also clarifies what should be considered as a child pornographic work and what does not fall within the scope of the present Article:

> *"A pornographic work containing images of minors shall mean a visual or audio-visual material produced by any method, also a staged performance which, by using various means, depicts the participation of minors or of characters with the appearance of a minor in the actual, simulated or computer-generated sexual scenes or displays genitalia of a minor for the gratification of a consumer's sexual needs. A work shall not be considered to be pornography if it has medical, scientific, educational or artistic value."*

Article 255^1 of Criminal Code of Georgia prohibits engaging of minor in illegal production of pornographic piece or other object, as well as in proliferation or advertising of such item or receiving benefit from such activities. Distributing, advertising of pornographic materials, making any commercial deals related to such materials or receiving any kind of benefit from this activity is also criminalized under Article 255^1 of CCG. Maximum sanction applied for these offences is also five years of imprisonment.
It should be noted that the above-mentioned crimes do not require any coercive means to be used against a minor for committing offences concerning child pornography. Therefore, the self-generated sexually explicit images and/or videos, sexual content and non-pictorial sexual contents fall under the definition of a pornographic work and committing any act determined under articles 255 and 255^1 of CCG by an adult or a minor from 14 years[15] is criminally sanctioned.

[15] Under article 33 of CCG a person who has not attained the age of 14 at the time of the commission of an unlawful act provided for by the CCG shall be considered to act without guilt.

Apart from it, the Government of Georgia respectfully clarifies that the CCG criminalizes the distribution and transmit of a child pornographic work to both adults and minors.

Apart from this, Article 255^2 of CCG imposes criminal liability for proposing meeting to underage person through any means of communication for any sexual purposes (purpose of commission of crime stipulated by Article 140 (Sexual Intercourse with a child under Sixteen) or Article 255, paragraph 3 CCG (Knowingly making or selling pornographic work containing images of minors)). Maximum sanction applied for these offences is three years of imprisonment.

Georgian legislation does not envisage any special circumstances to release a person from criminal liability for committing a crime under articles 255, 255^1 and 255^2.

GERMANY / ALLEMAGNE
State replies / Réponses de l'Etat

Question 9.1.

Item 11 letter a of the preliminary remarks of the Questionnaire states that "self-generated sexually explicit images and/or videos" refer to any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs made or apparently made by the children themselves on their own initiative.

By the sections 184b and 184c of the Criminal Code (StGB) (distribution, acquisition, and possession of child pornography, respectively of juvenile pornography), German criminal law distinguishes between child pornography (this being the depiction of persons under fourteen years of age) and juvenile pornography (this being the depiction of persons between the ages of fourteen and under eighteen years).

Section 184b of the Criminal Code (StGB) (distribution, acquisition, and possession of child pornography)

Pursuant to section 184b (1) no 1 of the Criminal Code (StGB), pornographic written materials shall be deemed to be child pornography if they relate to a) sexual activities performed by, on or in the presence of a person under the age of fourteen years (child), or b) the reproduction of a child in a state of full or partial undress in a posture unnaturally displaying sexual characteristics, or c) the lascivious reproduction of the unclothed genitalia or the unclothed buttocks of a child. In this context, it is irrelevant whether the child himself or herself has generated the child pornography or some other person. Pursuant to section 11 (3) of the Criminal Code (StGB), audiovisual media, data storage media, illustrations, and other depictions shall be equivalent to written material.

Pursuant to section 184b (1) of the Criminal Code (StGB), whosoever disseminates child pornography or makes it accessible to the general public (no 1), or whosoever undertakes to obtain possession for another of child pornography reproducing an actual or realistic activity (no 2), shall be liable to imprisonment from three months to five years. The liability to punishment shall be given regardless of whether the child pornography is disseminated to children or adults, respectively of whether possession is obtained for children or adults.

Pursuant to section 184b (3) of the Criminal Code (StGB), whosoever undertakes to obtain possession of child pornography reproducing an actual or realistic activity, or whosoever possesses such material, shall be liable to imprisonment not exceeding three years or a fine.

Section 184c of the Criminal Code (StGB) (distribution, acquisition, and possession of juvenile pornography)

The regulations governing the distribution, acquisition, and possession of juvenile pornography pursuant to section 184c of the Criminal Code (StGB) are comparable: Pursuant to section 184c (1) no 1 of the

Criminal Code (StGB), pornographic written materials shall be deemed to be juvenile pornography if they relate to a) sexual activities performed by, on or in the presence of a person who has reached the age of fourteen but is not yet eighteen years of age, or b) the reproduction of a person fourteen years of age but not yet eighteen years of age in a state of full or partial undress in a posture unnaturally displaying sexual characteristics. Section 184c (1) no 1 of the Criminal Code (StGB) also covers the display to the public for commercial purposes (*Zurschaustellung*) of unclothed genitalia (cf. Official Records of the German Parliament (BT-Drs.) 18/2601, page 30; Federal Court of Justice (*Bundesgerichtshof* – BGH), order of 7 December 1997 – 3 StR 567/97, at margin number 7, quoted in juris). As concerns the concept of written materials, the principle applies here, as it does in the case of section 184b of the Criminal Code (StGB), that audiovisual media, data storage media, illustrations, and other depictions are equivalent to written material as stipulated by section 11 (3) of the Criminal Code (StGB).

Pursuant to section 184c (1) of the Criminal Code (StGB), whosoever disseminates juvenile pornography or makes it accessible to the general public (no 1), or whosoever undertakes to obtain possession for another of juvenile pornography reproducing an actual or realistic activity (no 2), shall be liable to imprisonment not exceeding three years or to a fine. The act shall be liable to punishment under law independently of whether the juvenile pornography is disseminated to children or adults, respectively of whether possession is obtained for children or adults.

Pursuant to section 184c (3) of the Criminal Code (StGB), whosoever undertakes to obtain possession of juvenile pornography reproducing an actual activity, or whosoever possesses such material, shall be liable to imprisonment not exceeding two years or a fine.

Fundamentally, it is irrelevant whether the adolescent himself or herself or some other person produced the juvenile pornography. However, the regulations governing the production and possession of juvenile pornography, respectively governing the act of obtaining possession of juvenile pornography, pursuant to section 184c (4) of the Criminal Code (StGB) are not to be applied to acts taken by persons that relate to such juvenile pornography where they have produced it exclusively for their personal use with the consent of the persons depicted. Moreover, the depicted actors themselves will also be exempt from punishment under criminal law where they are found to possess the juvenile pornography.

Inasmuch as the self-generated sexually explicit images and/or videos are described in the introduction to the present Questionnaire as material depicting a child performing *real* or *simulated* sexually explicit acts, this requirement fundamentally is implemented by sections 184b and 184c of the Criminal Code (StGB). In general, the regulations cover *real*, *simulated* and *fictitious* child pornography and juvenile pornography. Where the possession of juvenile pornography is concerned, which is governed by section 184c (3) of the Criminal Code (StGB), Germany has availed itself of the reservation made in Article 20 paragraph 3 read in conjunction with paragraph 1 letter e of the Lanzarote Convention. Accordingly, section 184c (3) of the Criminal Code (StGB) refers solely to real juvenile pornography. In order to protect the legal interests given in this regard, it is not necessary to also include simulated juvenile pornography. Section 184c of the Criminal Code (StGB) serves the protection of minors and of adolescent actors against their commercial involvement in the pornography industry. Where the act of obtaining possession and the possession relate solely to simulated or fictitious juvenile pornography, no real actors exist who would need to be protected against gradually sliding into the pornography industry.

<u>Section 176 of the Criminal Code (StGB) (child abuse)</u>
With a view to Question 9.1 letter c, it should be added that forwarding or transmitting child pornography, respectively juvenile pornography, to persons under 14 years of age may constitute sexual abuse of children. Pursuant to section 176 (4) no 4 of the Criminal Code (StGB), whosoever influences a child by showing pornographic illustrations or images, by playing audio recordings with pornographic content, by making pornographic content accessible by way of information and communication technology, or by corresponding speech, shall be liable to imprisonment from three months to five years.

Question 9.2.

Even if the criminal investigations have resulted in establishing sufficient suspicion of an offence having been committed, the public prosecutor's office may refrain, for reasons entailed by the principle of discretionary prosecution, from prosecuting the offence or individual parts of the offence and may discontinue the criminal investigation if special pre-requisites are met in the specific individual case. Namely, the (partial) discontinuation of the investigation may be conceivable subject to the following pre-requisites as stipulated by the Code of Criminal Procedure (StPO):

- Section 153 of the Code of Criminal Procedure (StPO): Discontinuation if the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution;
- Section 153a of the Code of Criminal Procedure (StPO): Discontinuation, while imposing conditions and instructions, if these are of such a nature as to eliminate the interest in criminal prosecution and if the degree of guilt does not present an obstacle;
- Section 154 of the Code of Criminal Procedure (StPO): Dispensing with the prosecution of an offence if the penalty to be imposed therefor is not particularly significant when compared to a penalty which has been imposed upon the accused for another offence;
- Section 154a of the Code of Criminal Procedure (StPO): Limitation of prosecution to parts of an offence or other violations of the law through an offence if the penalty to be imposed for other parts of the offence or violations of law is not particularly significant in comparison
- Section 153c of the Code of Criminal Procedure (StPO): Dispensing with the prosecution of offences committed abroad, in particular in cases in which the prosecution under criminal law would result in inequitable hardship or if there is no public interest in obtaining punishment, or such public interest has ceased to exist.

In the cases governed by sections 153, 153a, 154, and 154a of the Code of Criminal Procedure (StPO), the court may also terminate the proceedings after charges have already been preferred, subject to the same pre-requisites.

I have attached for your information the regulations governing the discretionary withdrawal of prosecution set out in sections 153 to 154e of the Code of Criminal Procedure (StPO) in English.

Question 9.3.

As a rule, the law stipulates a term of imprisonment, and in some cases also a fine, for offences meeting the criteria described under Item 9.1: In this context, section 184b of the Criminal Code (StGB) (distribution, acquisition, and possession of child pornography) fundamentally stipulates a higher range of punishment than does section 184c of the Criminal Code (StGB) (distribution, possession, and acquisition of juvenile pornography). This is due to the fact that children (persons under fourteen years of age) merit a greater degree of protection than do juveniles (persons of fourteen years of age and under eighteen years of age); the reason being that adolescents are already able to exercise their sexual self-determination to a greater degree than children are.

The range of punishment is as follows for the individual offences:

Section 184b of the Criminal Code (StGB) (distribution, acquisition, and possession of child pornography)

Pursuant to section 184b (1) of the Criminal Code (StGB), whosoever meets the basic criteria defining the criminal offence shall be liable to imprisonment from three months to five years (dissemination and making accessible [no 1], obtaining possession regarding child pornography reproducing an actual or realistic activity [no 2], production without the intent to disseminate [no 3], producing, obtaining, supplying, stocking, offering, commending etc. with the intent to use [no 4]).

In the cases under subsection (1), the penalty pursuant to section 184b (2) of the Criminal Code (StGB) 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 if, in the cases of subsection (1) nos. 1, 2, and 4, the written material containing child pornography reproduces an actual or realistic activity.

Whosoever undertakes to obtain possession of child pornography reproducing an actual or realistic activity, or whosoever possesses such material, shall be liable, pursuant to section 184b (3) of the Criminal Code (StGB), to imprisonment not exceeding three years or a fine.

Section 184c of the Criminal Code (StGB) (distribution, acquisition, and possession of juvenile pornography)

Pursuant to section 184c (1) of the Criminal Code (StGB), whosoever meets the basic criteria defining the criminal offence shall be liable to imprisonment not exceeding three years or to a fine (dissemination and making accessible [no 1], obtaining possession regarding juvenile pornography reproducing an actual or realistic activity [no 2], production of juvenile pornography reproducing an actual activity without the intent to disseminate [no 3], producing, obtaining, supplying, stocking, offering, commending etc. with the intent to use [no 4]).

In the cases under subsection (1) above, the penalty pursuant to section 184c (2) of the Criminal Code (StGB) shall be imprisonment of three months to five 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 if, in the cases of subsection (1) numbers 1, 2, and 4, the written material containing juvenile pornography reproduces an actual or realistic activity.

Whosoever undertakes to obtain possession of juvenile pornography reproducing an actual activity, or whosoever possesses such material, shall be liable pursuant to section 184c (3) of the Criminal Code (StGB) to imprisonment not exceeding two years or a fine.

Besides imposing a penalty, respectively instead of imposing a penalty, the court also has the option of ordering measures of reform and prevention, provided the respective pre-requisites therefor are given. In this context, a mental hospital order pursuant to section 63 of the Criminal Code (StGB), a custodial addiction treatment order pursuant to section 64 of the Criminal Code (StGB), as well as an order for detention for the purpose of incapacitation pursuant to section 66 of the Criminal Code (StGB), are all conceivable.

From the perspective of family law, the following legal consequences are to be listed: The role of the state as an institution watching over parents, as this has been enshrined in constitutional law in Article 6 paragraph 2 of the Basic Law (*Grundgesetz* – GG), places the state under the obligation to protect children against any dangers to their best interests. Pursuant to section 1666 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), where the physical, mental or psychological best interests of the child or its property are endangered and the parents do not wish to avert the danger or are incapable of doing so, the family court must, *ex officio*, take the measures necessary to avert such danger. Where matters of care for the person of the child are concerned, the court may, pursuant to section 1666 (4) of the Civil Code (BGB), also undertake measures with effect against a third party for this purpose. Where necessary, therefore, the family court may also issue prohibitions to a third party pursuant to section 1666 (4) of the Civil Code (BGB) that are typical for the protection against violence, such as bans from certain public places and no-contact orders. In cases in which the measures imposed against the third party are not sufficient in order to alleviate the danger to the best interests of the child, then it may become necessary to additionally intervene with the right of custody if circumstances require.

Where the parents having the right of custody themselves pose the danger to the best interests of the child but are not willing to avert such danger or incapable of doing so, the family court is to take those measures *ex officio* against the parents having the right of custody that are necessary pursuant to section 1666 of the Civil Code (BGB). In this regard, the family court may be entitled and obligated in an individual case to remove custody from the parents as a whole or in part (for example as concerns the right to decide where the child should live) and to transfer custody to a legal guardian or curator.

Moreover, the Youth Welfare Office is under obligation, pursuant to section 42 (1) of Book VIII of the Social Code (*Sozialgesetzbuch* – SGB), to take a child or an adolescent into its care in one of the following cases, among others: if a) the child or the adolescent requests to be taken into care or b) the best interests of the child or of the adolescent are in imminent danger and require that the child or adolescent be taken into care and the persons entitled to care and custody of the child do not object to this being done or it is not possible to obtain a decision from a family court in due time.

Where the child no longer lives in a domestic community with the parent posing the danger to the best interests of the child, another conceivable measure may be to restrict or rule out parental rights of access. Pursuant to section 1684 (4), first sentence, of the Civil Code (BGB), the family court may restrict or rule out the right of contact or the enforcement of earlier decisions on the right of contact, to the extent that doing so is necessary for the best interests of the child. A decision restricting or ruling out the right of contact or the enforcement of such decision for a long period or permanently may only be made if the best interests of the child otherwise would be endangered (section 1684 (4), second sentence, of the Civil Code (BGB)). In this context, the family court in particular may order that contact is to take place only if a third party who is prepared to cooperate is present (so-called "*begleiteter Umgang*" (access to the child in the company of others), section 1684 (4), third and fourth sentences, of the Civil Code (BGB)). The independent court shall decide on a case-by-case basis whether the offences set out under Item 9.1 are an occasion to take the measures set out above.

From the perspective of the laws governing the criminal register, the following legal consequences are to be listed: Fundamentally, all convictions will be included in the certificate of good conduct (*Führungszeugnis*). However, the efforts pursued by the legislature to facilitate convicts' re-entry into working life and their reintegration into society is to be taken into account. While, according to the letter of the law, the certificate of good conduct is supposed to reflect "the content of the register as it concerns him/her" (this being the person filing the application for such a certificate), the certificate in actual fact will set out only a part of the entries that have been included in the register. Since previously convicted persons experience great difficulty in finding employment, especially in a tight labour market, and since the submission of a certificate of good conduct is increasingly becoming the rule as a condition for hiring, the legislature has sought to fundamentally assist convicts by having certain (first-time and/or minor) punishments not included in the certificate at all, while deleting others from the certificate after certain periods have lapsed (sections 32 to 38 of the Federal Central Criminal Register Act (*Bundeszentralregistergesetz* – BZRG)).

In this regard, however, certain sexual crimes constitute an exception, which, pursuant to section 32 (1) of the Federal Central Criminal Register Act (BZRG), are to be included in a certificate of good conduct **in all cases**, in other words also in those cases in which the conviction is non-recurrent and minor in nature. This concerns in particular section 174 of the Criminal Code (StGB) (abuse of position of trust), section 176 of the Criminal Code (StGB) (child abuse), section 177 of the Criminal Code (StGB) (sexual assault by use of force or threats; rape), section 180 of the Criminal Code (StGB) (causing minors to engage in sexual activity) and section 182 of the Criminal Code (StGB) (abuse of juveniles).

This exception was signed into law in 1998 against the backdrop of a series of lust murders of children that had been committed by repeat offenders. Similar considerations pursued in 2009 against the backdrop of the protection of minors then led to the introduction of the new format of an "expanded

certificate of good conduct" (*erweitertes Führungszeugnis*). In addition to the convictions to be included in a certificate of good conduct, this expanded certificate sets out certain sexual offences and violent crimes (strictly defined offences listed in a catalogue of criminal acts (*Katalogstraftaten*)); this will be the case also if the entry for one of the listed criminal acts is non-recurrent and minor. This also concerns offences covered by the regulations relevant to the present Questionnaire, such as section 184 of the Criminal Code (StGB) (distribution of pornography), sections 184a, 184b and 184c of the Criminal Code (StGB) (distribution of pornography depicting violence or sodomy as well as distribution, acquisition, and possession of child pornography, respectively juvenile pornography), section 184d of the Criminal Code (StGB) (distribution of pornographic performances by broadcasting, media services or telecommunications services) and section 201a (3) of the Criminal Code (StGB) (production and making accessible of images depicting the nudity of minors).

For the strictly defined offences listed in a catalogue of criminal acts (*Katalogstraftaten*) that entail terms of imprisonment longer than one year, the periods for which they will be included in the expanded certificate of good conduct (*erweitertes Führungszeugnis*) have been extended.

An expanded certificate of good conduct will be issued pursuant to section 30a of the Federal Central Criminal Register Act (BZRG) if

- This is required by a provision of the law, or if
- The certificate is to be submitted for purposes of activities (also volunteer activities) having to do with children and adolescents (supervising them, caring for them, rearing or educating them), or for activities entailing comparable opportunities to enter into contact with minors.

For such a certificate to be issued, a written request from the employer must be submitted to the Registry in which the employer confirms that the conditions for requiring such a certificate have been met. In this way, it is ensured that the rights of the parties affected are restricted only to an extent that is proportionate, i.e. that the restriction applies to certain fields that are relevant in terms of the protection of children and minors, even if this may mean, in certain individual circumstances, that it will be more difficult or impossible for a convict to find employment as a consequence of the information being provided on the certificate, or that an existing employment is jeopardised or terminated.

Question 9.4.

Item 11 letter b of the preliminary remarks of the Questionnaire states that "self-generated sexual content" refers to images, videos, and other material depicting a child in a sexual suggestive way (e.g. naked or semi-naked posing in order to provoke some sexual arousal") made or apparently made by the children themselves on their own initiative.

By sections 184b and 184c of the Criminal Code (StGB) (distribution, acquisition, and possession of child pornography, respectively of juvenile pornography), German criminal law distinguishes between child pornography (this being the depiction of persons under fourteen years of age) and juvenile pornography (this being the depiction of persons fourteen years of age and under eighteen years of age). The dissemination of child pornography and juvenile pornography, making it publicly accessible, undertaking to obtain possession for oneself or for another of child pornography and juvenile pornography and its possession are liable to punishment under criminal law pursuant to sections 184b, 184c of the Criminal Code (StGB) (for further details in this regard, see the answer provided to Question 9.1). Like the self-generated sexually explicit images and/or videos, other self-generated sexual content is also covered by sections 184b, 184c since it meets the criteria defining a criminal offence:

Section 184b of the Criminal Code (StGB) (distribution, acquisition, and possession of child pornography)

Pursuant to section 184b (1) no 1 of the Criminal Code (StGB), pornographic written materials shall be deemed to be child pornography if they relate to a) sexual activities performed by, on or in the presence

of a person under the age of fourteen years (child), or b) the reproduction of a child in a state of full or partial undress in a posture unnaturally displaying sexual characteristics, or c) the lascivious reproduction of the unclothed genitalia or the unclothed buttocks of a child. Pursuant to section 11 (3) of the Criminal Code (StGB), audio-visual media, data storage media, illustrations and other depictions shall be equivalent to written material.

To begin with, the depiction of a child in a lascivious manner is covered by section 184b (1) no 1 letter a of the Criminal Code (StGB). According to the past decisions of the Federal Court of Justice (BGH), the child is considered to be performing a sexual activity if it is taking a posture that is consciously sexualised, for example by spreading its legs (cf. Official Records of the German Parliament (BT-Drs.) 18/2601, p. 30; Federal Court of Justice (BGH), order of 7 December 1997 – 3 StR 567/97, at margin number 7, quoted in juris). Above and beyond this, section 184b (1) no 1 letter b of the Criminal Code (StGB) covers depictions of children who have not consciously taken the posture displaying sexual characteristics, for example because they are sleeping (cf. Official Records of the German Parliament (BT-Drs.) 18/2601, p. 30). Accordingly, the posture as such is the decisive aspect. Furthermore, conduct that is manifestly inappropriate for a child of the age concerned, in that it is sexually enticing, is likewise covered (cf. MüKo-Renzikowski, Munich Commentary on the Criminal Code (StGB), 3rd edition, section 184b at margin number 19). This means that in terms of the criteria defining a criminal offence, so-called model series, in which children are clothed in lingerie, for example, and assume a posture unnaturally displaying sexual characteristics, are also covered.

According to section 184b of the Criminal Code (StGB), it is irrelevant, where the liability of an act to punishment under law is concerned, whether the child himself or herself generated the child pornography or some other person did. Furthermore, it is irrelevant whether the perpetrator transmits the child pornography to other adults or to another child who has not been perpetuated in the self-generated sexual content.

Section 184c of the Criminal Code (StGB) (distribution, acquisition, and possession of juvenile pornography)

Pursuant to section 184c (1) no 1 of the Criminal Code (StGB), pornographic written materials shall be deemed to be juvenile pornography if they relate to a) sexual activities performed by, on or in the presence of a person who has reached the age of fourteen but is not yet eighteen years of age, or b) the reproduction of a person fourteen years of age but not yet eighteen years of age in a state of full or partial undress in a posture unnaturally displaying sexual characteristics. Just as is the case in section 184b (1) no 1 letters a and b of the Criminal Code (StGB), this covers cases in which a sexualised posture is taken, whether intentionally or unintentionally, that displays sexual characteristics. The same applies to conduct that is manifestly inappropriate for a child of the age concerned, in that it is sexually enticing (e.g. model series).

According to section 184c of the Criminal Code (StGB), it is irrelevant, where the liability of an act to punishment under law is concerned, whether the child himself or herself generated the child pornography or some other person did. Furthermore, it is irrelevant whether the perpetrator transmits the child pornography to other adults or to another child who has not been perpetuated in the self-generated sexual content.

Question 9.5.

The answer to Question 9.2. is included by reference.

Question 9.6.

Reference is made to the answer to Question 9.3.

Question 9.7.a. and b.

German law distinguishes between child pornography and juvenile pornography (for further details in this regard, see the answer provided to Question 9.1):

Section 184b of the Criminal Code (StGB) (distribution, acquisition, and possession of child pornography)

Pursuant to section 184b (1) no 3 of the Criminal Code (StGB), whosoever produces child pornography reproducing an actual activity shall be liable to imprisonment from three months to five years. Likewise, anyone will be liable to punishment under law pursuant to section 184b (1) no 4 of the Criminal Code (StGB) who produces child pornography in order to use such child pornography or copies made from such material, within the meaning of no 1 (disseminating or making accessible to the general public) or no 2 (obtaining possession) or of section 184d (1), first sentence, of the Criminal Code (StGB), or to facilitate such use by another, inasmuch as the offence is not liable to punishment pursuant to no 3. Whosoever undertakes to obtain possession of child pornography reproducing an actual or realistic activity, or whosoever possesses such material, shall be liable, pursuant to section 184b (3) of the Criminal Code (StGB), to imprisonment not exceeding three years or a fine.

Section 184c of the Criminal Code (StGB) (distribution, acquisition, and possession of juvenile pornography)

Pursuant to section 184c (1) no 3 of the Criminal Code (StGB), whosoever produces juvenile pornography reproducing an actual activity shall be liable to imprisonment not exceeding three years or to a fine. Likewise, anyone will be liable to punishment under law pursuant to section 184b (1) no 4 of the Criminal Code (StGB) who produces juvenile pornography in order to use such juvenile pornography, or copies made thereof, within the meaning of no 1 (disseminating or making accessible to the general public) or no 2 (obtaining possession) or of section 184d (1), first sentence, of the Criminal Code (StGB), or to facilitate such use by another, unless the offence is liable to punishment pursuant to no 3. Whosoever undertakes to obtain possession of juvenile pornography reproducing an actual activity, or whosoever possesses such material, shall be liable, pursuant to section 184c (3) of the Criminal Code (StGB), to imprisonment not exceeding two years or a fine.

Liability to punishment under law of children and adolescents pursuant to sections 184b, 184c of the Criminal Code (StGB)

Under German criminal law, persons under the age of fourteen years (children) cannot be liable to punishment. The reason is given in section 19 of the Criminal Code (StGB), which stipulates that the criminal responsibility of children is ruled out since they are incapable of appreciating the wrongfulness of their act or of acting in accordance with this insight (*schuldunfähig*). The consequence is that children cannot be liable to punishment under sections 184b, 184c of the Criminal Code (StGB) if they create or possess self-generated sexually explicit images and/or videos. However, the fact that children have committed an offence may give rise to the question being investigated of whether there are deficits in their child-rearing, which deficits would require the authorities to take action and the court to take measures pursuant to section 1666 of the Civil Code (BGB).

Adolescents are persons who have reached the age of fourteen and are under the age of eighteen. Other than children, they fundamentally are criminally responsible (*strafmündig*). As a consequence, adolescents creating or possessing self-generated sexually explicit images and/or videos fundamentally may be liable to punishment under law.

This is an aspect to be considered in particular where adolescents create or possess child pornography, respectively juvenile pornography depicting not the creators or possessors themselves, and instead other children or adolescents.

That having been said, a person will not be liable to punishment under law for the possession of child pornography if the possession concerns child pornography depicting that person himself or herself as a child. The reason is that in this case, the adolescent himself or herself is the victim who has kept the

documentation of the offence in his or her possession (cf. MüKo-Hörnle, Munich Commentary on the Criminal Code (StGB), 3rd edition, section 184b at margin number 49).

Where juvenile pornography is concerned, furthermore, exemption from punishment under law may arise pursuant to section 184c (4) of the Criminal Code (StGB). According to this stipulation of the law, section 184c (1) no 3 of the Criminal Code (StGB) (production of juvenile pornography) and section 184c (3) of the Criminal Code (StGB) (obtaining possession or possession of juvenile pornography) have no application to acts by persons relating to such juvenile pornography that they have produced exclusively for their personal use with the consent of the persons depicted. Moreover, an adolescent will be exempt from punishment under law in those cases in which the juvenile pornography depicting him or her was not generated by himself or herself, but is in his or her possession (cf. MüKo-Hörnle, Munich Commentary on the Criminal Code (StGB), 3rd edition, section 184c at margin number 20 with further references; Fischer, Commentary on the Criminal Code (StGB), 64th edition, section 184c at margin number 9, with different reasons being provided).

Question 9.7.c.-f.

While, pursuant to section 184b (1) no 1 and no 2 of the Criminal Code (StGB) respectively pursuant to section 184c (1) no 1 and no 2 of the Criminal Code (StGB), read in conjunction, as the case may be, with section 184d of the Criminal Code (StGB), forwarding or transmitting child pornography, respectively juvenile pornography, is liable to punishment under criminal law as a general rule (for further details, see the answer provided to Question 9.1). However, section 19 of the Criminal Code (StGB) stipulates that the criminal responsibility of persons under fourteen years of age is ruled out as they are incapable of appreciating the wrongfulness of their act or of acting in accordance with this insight (*schuldunfähig*). Accordingly, acts by which they forward and transmit self-generated child pornography showing themselves will be exempt from punishment just as the forwarding or transmission of child pornography, respectively juvenile pornography, will be that depicts other children, respectively adolescents. This applies both to the forwarding and transmission of such material to fellow adolescents and to adults.

Inasmuch as adolescents (persons who have reached the age of fourteen and under the age of eighteen) forward or transmit juvenile pornography depicting themselves or other children or adolescents to fellow adolescents or to adults, the following applies:

Since adolescents are persons who have reached the age of fourteen and are under the age of eighteen, they, other than are children, fundamentally are criminally responsible (*strafmündig*), which means that the acts constituting the offence of forwarding and transmitting depictions of child pornography, respectively juvenile pornography, fundamentally will lead to their being punished under law. The liability to punishment under law will arise independently of whether the self-generated child pornography, respectively juvenile pornography, depicts the adolescents themselves who have forwarded or transmitted the pornography or some other person. It is also irrelevant whether the juvenile pornography is disseminated to children, adolescents or adults, respectively whether the possession is obtained correspondingly.

The reason for which the adolescents may also be making themselves liable to punishment under law by disseminating a depiction of themselves that is classified as child pornography or juvenile pornography is to be seen in the legal interests protected by sections 184b and 184c of the Criminal Code (StGB): Section 184b (1) no 1 and no 2 of the Criminal Code (StGB) are intended to combat the market for products of child pornography. The protection afforded to the depicted actors accordingly does not relate to the individual child that is shown. Rather, the intention is to prevent new “goods” from being produced and children being sexually abused once again in order to obtain such goods. Moreover, the abstract danger cannot be ruled out that child pornography will incite consumers to themselves sexually abuse children (cf. MüKo-Hörnle, Munich Commentary on the Criminal Code (StGB), section 184b at margin number 1 et seqq.). By contrast, section 184c of the Criminal Code (StGB) focuses

primarily on the protection of minors. This regulation is intended to prevent adolescent actors from assisting with the production of pornography and to prevent the resulting images from being disseminated. This applies also in those cases in which the production and dissemination correspond to what the adolescent actor intends to achieve. While it is true that adolescents are able to exercise their sexual self-determination to a greater degree than children are, they nonetheless merit protection in order to ensure that they do not slide into the pornography industry and in order to protect them against the consequences of juvenile pornography depicting them being disseminated (cf. MüKo-Hörnle, Munich Commentary on the Criminal Code (StGB), 3rd edition, section 184c at margin number 5).

Where child pornography, respectively juvenile pornography, is forwarded or transmitted to a person under fourteen years of age, this may correspond to the criteria for an offence as set out in section 176 (4) no 4 of the Criminal Code (StGB) (child abuse). According to section 176 (4) no 4 of the Criminal Code (StGB), whosoever influences a child by showing pornographic illustrations or images, by playing audio recordings with pornographic content, by making pornographic content accessible by way of information and communication technology, or by corresponding speech will be liable to punishment under criminal law.

Question 9.8.

There are no "special" circumstances allowing prosecution to be refrained from in the cases listed under Item 9.7 inasmuch as the adolescents are liable to punishment under law for the conduct affected. However, it is generally possible to dispense with further formal criminal prosecution and conviction in the case of adolescents if supervisory measures have already been initiated or enforced otherwise and this is considered to be sufficient (sections 45, 47 Youth Courts Act (*Jugendgerichtsgesetz* – JGG)).

Question 9.9.

For a discussion of the matter from the perspective of criminal law and of the laws governing the criminal register, reference is made to the answer provided under Item 9.3.

From the perspective of family law, the following is to be noted: Where the physical, mental or psychological best interests of the child or its property are endangered and the parents do not wish to avert the danger or are incapable to do so, the family court must, pursuant to section 1666 of the Civil Code (BGB), take the measures necessary to avert the danger. Should no other aids and assistance be suitable, this may constitute, in an extreme case, the removal of custody from the parents as a whole or in part. However, in cases in which children or adolescents perpetrate deeds that are governed by criminal law, it will be necessary in each individual case to weigh the causes underlying this conduct and to determine the competencies and resources that are available to the parents to counteract it. Accordingly, it is not a concept of punishing the conduct by the minor that is being pursued in this context – it is the need to safeguard the best interests of the child, in particular maintaining the opportunities for development that the minor has with a view to the overriding objective of child-rearing, which is to ensure that the child develops a responsible personality and is able to live in a community.

Placing a child in an accommodation that is associated with the deprivation of liberty is, pursuant to section 1631b of the Civil Code (BGB), permissible only with the consent of the legal representative of the child and with the approval of the family court, if this measure is required in order to protect the child's best interests, in particular in order to avert a danger to the child himself/herself or to a third-party and if the danger cannot be remedied by other means, including by other public assistance. However, such a placement under civil law is not an instrument supplementing juvenile criminal law. Rightly, in these cases the focus is not placed on the prevention of crime or on the punishment of the minor for a wrongful act – which, as the case may be, will not be prosecutable under criminal law in light of the perpetrator not being criminally responsible (*strafunmündig*). Instead, the focus is placed on preventing dangers that may also be given in connection with the role as a perpetrator or victim. The approval by the family court requires a strict review of whether a placement in accommodations

depriving the child of his or her liberty is proportionate.

Question 9.10.
As concerns the question of to what extent sections 184b and 184c of the Criminal Code (StGB) also cover self-generated sexual content, reference is made to the answer provided to Question 9.4. Where the liability to punishment under criminal law for the production, possession, the forwarding and transmission of self-generated sexual content is concerned, reference is made to the answer provided to Question 9.7.

Question 9.11.
The answer to Item 9.8 is included by reference.

Question 9.12.
As concerns the consequences under criminal law and the laws governing the criminal register, reference is made to the answer provided under Item 9.3. As concerns the potential consequences under the laws governing parent and child matters, reference is made to the statements under Item 9.9.

GREECE / GRECE
State replies / Réponses de l'Etat

Question 9.
See answer to question 8:

Articles of the Penal Code
337 par. 3&4 of the PC, **Insult of sexual dignity**
339 par. 4 of the PC, **Seduction of Children**
342 par. 3 of the PC, **Abuse of minors in lewdness**
348 of the PC, **Facilitation of the licentiousness of others**
348A of the PC, **Child Pornography** (Article 348A of the PC is replaced as follows:

"1. Every person who deliberately makes, distributes, publishes, exhibits, imports in the Territory or exports from the Territory, offers, sells or distributes in any other manner, buys, is supplied with, obtains or possesses child pornography material, or disseminates or offers information in connection with the commitment of the above acts, will be punished by imprisonment not exceeding one year and pecuniary penalty of ten thousand up to one hundred thousand Euros

2. Every person who deliberately makes, offers, sells or distributes in any other manner, transmits, buys, is supplied with, or possesses child pornography material or disseminates information regarding the commitment of the above acts through a computer system or on the internet will be punished by a imprisonment of at least two years and pecuniary penalty of fifty thousand up to three hundred thousand Euros.

3. Child pornography material will be considered, in the sense of the previous paragraphs, the representation or the actual or visual depiction in an electronic or other means, of the body or part of the body of a child in a manner that expressly causes sexual arousal, and the actual or visual abusive act performed by or with a child.

4. The acts of the first and second paragraph will be punished by incarceration for a term not exceeding ten years and pecuniary penalty of fifty thousand up to one hundred thousand Euros : a) if committed by profession or habitually b) if the production of the child pornography material is connected with the exploitation of the need, mental or intellectual disease or physical dysfunction due to an organic disease of the minor or by exercising force or by threatening to exercise force on the minor or by using a child who is under ten years of age. If the act of case b) resulted into to causing severe physical damage of the sufferer, incarceration of at least ten years is imposed and pecuniary penalty of one hundred thousand up to five hundred thousand Euros, and if it resulted into causing death, life incarceration is imposed."

348B of the PC, **Attract children for sexual purposes**
348C of the PC, **Pornographic representations of minors**
349 par. 2 of the PC, **Pimping**

351 par. 6 of the PPC, **Trafficking**

Question 9.1.
Yes, all these behaviours are criminalized under article 348A "Child Pornography" of the Greek Penal Code (see also above)

Question 9.2.
No

Question 9.3.
Depending on the circumstances, like the age of the child, the imprisonment ranges from one to more than ten years, and the fine from ten thousand to half a million euro.

Question 9.4.
Yes, same as 9.1

Question 9.5.
No

Question 9.6.
Same as 9.3

Question 9.7.a.-d.
No, they are considered victims.

Question 9.7.e.-f.
Same as 9.1 (the law does not differentiate if the perpetrator is a minor or an adult).

Question 9.8.
Only for minor perpetrators, they may avoid imprisonment and instead do social work etc.

Question 9.9.
Same as 9.3, with the exception that minor perpetrators are prosecuted via the Court for Minors and the consequences can less severe.

Question 9.10.
Same as 9.7

Question 9.11.
Same as 9.8

Question 9.12.
Same as 9.9

HUNGARY / HONGRIE
State replies / Réponses de l'Etat

Question 9.1.
According to section 204 of the CC, the following acts are criminalised:
- obtaining/acquiring
- **possessing**
- making/producing

- offering
- **supplying/handing over/forwarding** (regardless of the person to whom it is given, and the age of such persons)
- making available (to a certain person(s))
- distributing
- trading/trafficking in
- making available to the general public
- providing material assistance to aforementioned acts
- persuading children to be depicted on pornographic materials/show (regardless of who makes the recording)
- giving a role to children / having children participate in a pornographic show
- participating in a pornographic show with involvement of children
- providing any means necessary for facilitating the production, distribution or trafficking in pornographic materials.

Thus, acts described in question 9.1.a-c. are punishable by the Hungarian CC.

Question 9.2.

There is no alternative interventions, the prosecutor of the case decides if they want to take the case to the court or not, then the judge decides in every specific case what should be the penalty based on the CC.

However, section 15 of the CC determines certain circumstances in which case the perpetrator might not end up convicted (grounds for the preclusion or limitation of punishability), these include for example: being a child; having mental disorder; or committing the crime under coercion and threat.

Moreover, section 25 determines the circumstances that terminates criminal liability (grounds for the termination of punishability) due to which the perpetrator might avoid being convicted, this can be the death of the perpetrator or the statute of limitation for the criminal offence.

Question 9.3.

According to section 204 of the CC, the following acts are punishable by imprisonment up to the following durations:

- obtaining/acquiring (3 yrs)
- **possessing** (3 yrs; 2-8 yrs if it committed against a person under the education, supervision, care or medical treatment of the offender, or by abusing any other relationship of power or influence over the victim)
- making/producing (1-5 yrs)
- offering (1-5 yrs)
- **supplying/handing over/forwarding** (regardless of the person to whom it is given, and the age of such persons) (1-5 yrs)
- making available (to a certain person(s)) (1-5 yrs)
- distributing (2-8 yrs)
- trading/trafficking in (2-8 yrs)
- making available to the general public (2-8 yrs)
- providing material assistance to aforementioned acts (1-5 yrs)
- persuading children to be depicted on pornographic materials/show (regardless of who makes the recording) (3 yrs)
- giving a role to children / having children participate in a pornographic show (1-5 yrs)
- participating in a pornographic show with involvement of children (3 yrs)

- providing any means necessary for facilitating the production, distribution or trafficking in pornographic materials (2 yrs).

Question 9.4.

Since "sexual content" refers to images, videos and other material depicting a child in a sexual suggestive way (e.g. naked or semi naked posing in order to provoke some sexual arousal"), depending on the circumstances of the criminal offence, and thus the content itself, if it can still be regarded as depicting sexuality in a seriously indecent straightforward manner and it is made in a manner that aims at arousing sexual desire, then it can result in the establishment of the criminal offence of child pornography (for this see Q. 9.1-3). However, a graphical depiction like a drawing or painting or sound recording cannot be subject to the criminal offence of child pornography.

Question 9.5.

See. Q. 9.4.

Question 9.6.

See Q. 9.4.

Question 9.7.

According to the rules of the Hungarian CC, a child who has not reached the age 14 cannot be punishable except for the most heinous cases of certain criminal offences (homicide, voluntary manslaughter, battery, robbery, acts of terrorism, plundering), when the age of criminal liability is 12. In case of child pornography, if the child committing any of the criminalised acts reached the age of 14 years but us under the age of 18 years, they shall be regarded as juvenile offenders, and are punishable, and special, more favourable rules apply to them.

Regarding the specific points the following can be established:

- point a: Children are not punishable if they produce sexual explicit images and/or videos of themselves, or of persons above the age of 18 y.o.. Children can be punishable, though, if they produce such images and/or videos of other persons under the age of 18 y.o.
- point b: same as in point a.
- points c-d: If a child distributes or transmits self-generated explicit images and/or videos in order to arouse their own sexual desires, then the criminal offence of indecent exposure can be established (section 205 of the CC). If the child distributes or transmits such self-generated sexual materials without the intent of arousing their own sexual desires, then the child cannot be held criminally liable. It does not matter to whom the materials are distributed or transmitted, and the age of such persons. However, the person receiving can be held criminally liable, if they have reached at least the age 14.
- points e-f: If the child distributes or transmits a self-generated sexual material which depicts another child, then they can be held criminally liable, if they have reached at least the age 14. It does not matter to whom the materials are distributed or transmitted, and the age of such persons. However, the person receiving can be held criminally liable, if they have reached at least the age 14.

Question 9.8.

See Q. 9.2.

Question 9.9.

See Q. 9. 3.

Question 9.10.

See. Q.9.4.

Question 9.11.
See. Q.9.4.

Question 9.12.
See. Q.9.4.

ICELAND / ISLANDE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes. Art. 210 a of the general penal code.

Question 9.1.b.
Yes. Art. 210 a and Art. 209 of the general penal code.

Question 9.1.c.
Yes. Art. 200.2, 201.2, 202.2, 210 a and Art. 209 of the general penal code.

Parag. 2 of Articles 200, 201 and 202 of the General Penal Code penalise all criminalise sexual harassment other than carnal intercourse or other sexual intimacy and sending unwanted sexually explicit images or videos could fall under those articles.

Art. 209 forbids hurting people's sense of modesty by means of lustful activity or it becomes a public scandal. Article 210A criminalises all possession of sexually explicit images/videos of children, regardless of how the material is made or comes into the individual's possession.

Article 210 parag. 2 of the Penal Code criminalises the hand out or distribution in another manner of such material, regardless of how the material is made or comes into the individual's possession.

Article 210 parag. – 2 also criminalises the delivery of pornographic publications, pornographic illustrations or other such articles to youths under the age of 18.

Article 99 parag. 1 in the Child Protection act criminalises subjecting a child to threats or intimidation or exhibiting other degrading conduct towards a child. Article 99 parag. 3 criminalises subjecting a child to aggressive, abusive or indecent behaviour or hurting or insulting the child.

Question 9.2.
According to Article 56 of The General Penal Code mediation is an option, especially in cases when the offender is under the age of 21.

According to Article 146 of Law of Criminal Procedure no. 88/2008 and Chapter VI. of The Penal Code the Prosecutor has the authority decide not to prosecute or delay prosecution of a criminal case in certain circumstances. Those circumstances do not exclude any type of offence and regarding circumstances in cases involving self-generated sexually explicit material can fall into that category.

Question 9.3.
The offences mentioned in question 9.1.a-c is punishable by fines or imprisonment for up to 2 years. For possession the punishment is fines or imprisonment for up to six months. If the violation is of gross manner the imprisonment can be up to 2 years. Anyone who by means of lustful activity hurts people's sense of modesty or becomes a public scandal shall be subject to imprisonment for up to 4 years, but imprisonment for up to 6 months or fines in case of a minor offence. Subjecting a child to threats or intimidation or exhibiting other degrading conduct towards a child is punishable by fines or op to three

years imprisonment. Anyone that Subjects a child to aggressive, abusive or indecent behavior or hurt or insults a child is liable to fines or imprisonment for up to two years. Sexual harassment is subjected to imprisonment for up to 2 years and up to 4 years imprisonment and in some instances if the child is younger than 16 years.

Question 9.4.
See answers to Questions 9.1. above and 8:

> Icelandic law does not criminalise self-generated sexually explicit material or content mentioned in questions 8.1 to 8.3 explicitly. However, it is considered that those acts are punishable under Articles 209, 210 and 210A of the Icelandic General Penal Code no. 19/1940 (Penal Code). There has been a criminal case where obtaining self-generated sexually explicit material and coercion by using that material has been found in breach of Articles 194 and 209 of the Penal Code and Article 99 parag. 3 of the Child Protection Act (see answer 11 for more details).
>
> Moreover, in both 2014 and 2015 members of parliament put forward proposals to amend the Penal Code to especially include self-generated sexual material. However, those proposals did not pass through the parliament.

Question 9.5.
To article 56 of the General penal code mediation is an option, especially in cases when the offender is under the age of 21.

The accused can also be subject to a parole period from one up to five years. Generally this period shall be laid down as 2 - 3 years. The Prosecutor shall, in each case, specify the point in time at which the period of suspension commences. When indictment is suspended, the conditions provided for in para 3, Art. 57 of The Penal Code, may be laid down as deemed suitable. The conditions may be altered during the period of suspension, including by an extension of the period, however no longer than a total of 5 years.

Question 9.6.
See answer to question 9.3. above.

Question 9.7.a.
No.

Question 9.7.b.
No.

Question 9.7.c.
Yes. Art. 209 of the general penal code.

Question 9.7.d.
Yes. Art. 209 of the general penal code.

Question 9.7.e.
Yes. Art. 209 of the general penal code (Child protection act art. 99, para 3)

Question 9.7.f.
Yes. Art. 209 of the general penal code (Child protection act art. 99, para 3)

Question 9.8.
Both Article 146 of Law of Criminal Procedure and Article 56 in Chapter VI. of The Penal Code specify special circumstances for suspending or cancels issuing an indictment. For example, Article 56 of the Penal Code allows for suspension of an indictment when offences are committed by young persons of the age of 15 - 21 years or when the situation of the offender is such that supervision or other measures under para. 3, Art. 57, may be considered more likely to have more durable result than a penalty, provided the offence is not such as to necessitate prosecution with a view to public interest.

Question 9.9.
Fines or prison up to four years.

Question 9.10.
The Penal Code or other legislation neither criminalizes nor decriminalizes the above acts. There have not been any cases where children are indicted for those acts.

Question 9.11.
According to Article 56 of the General Penal Code mediation is an option, especially in cases when the offender is under the age of 21.

Children that have shown the above behaviour could be considered to be placing their health and maturity at risk and if so should according to the Child Protection Act receive help and support from the CPS and in some instances Barnahus.
If the acts would be considered criminal then Article 146 of Law of Criminal Procedure no. 88/2008 and Article 56 in Chapter VI. of The Penal Code could also apply (see answers 9.8. and 99 for more details).

Question 9.12.
If considered criminal, as stipulated in answer 9.3., those acts would be punishable by fines or imprisonment for up to 2/3 years, and 4 years if the child is under the age of 16.

ITALY / ITALIE
State replies / Réponses de l'Etat

Question 9
Referring back to what was said in the answer to Question 8 of this thematic questionnaire (as well as to the answer to Question 20 of the General Overview Questionnaire), as regards the **criminalisation of sexual exploitation**, and in particular the production, transmission, circulation and possession of pedo-pornographic material, the Italian Criminal Code contains some specific rules (art. 600ter and art. 600quater), inspired by the Lanzarote Convention, which criminalise all forms of behaviours related to pedopornographic material:

- **Art. 600-ter. Child pornography**. "*Imprisonment from six to twelve years and a fine from 24,000 to 240,000 Euros shall be imposed on whoever: 1) availing himself of minors under eighteen, organises pornographic exhibits or performances or produces pornographic material; 2) recruits or induces minors under eighteen to participate in pornographic exhibits or performances or in any case obtains a profit from said performances. The same punishment shall be inflicted on those who trade in pornographic material, as mentioned under paragraph one. Whoever, apart from the cases specified under the first and second paragraphs, by any mean, also through information and communication technologies, distributes, spreads, circulates or publicises pornography as per paragraph one, i.e. distributes or spreads news or pieces of information aimed at soliciting or sexually exploiting minors under the age of eighteen, shall be punished by a term of imprisonment from one to five years and the payment of a fine from 2,582 to 51,645 Euros. Whoever, apart from the cases specified under paragraphs one, two and three, offers or gives to others, also for free, pornographic material as specified under paragraph one, shall be*

punished by imprisonment up to three years and the payment of a fine from 1,549 up to 5,164 Euros. In the cases specified under paragraphs three and four, the punishment shall be increased to an extent not exceeding two thirds, in the case in which the material is of a large quantity. Unless the act amounts to a more serious offence, whoever is present at pornographic exhibits or performances involving minors under eighteen shall be punished by imprisonment up to three years and by a fine from 1,500 to 6,000 Euros."

- **Art. 600-quater. Possession of pornographic material**. "*Whoever, in cases other than those set forth in Article 600-ter, intentionally obtains or possesses pornographic material made by using children under the age of eighteen, shall be imprisoned for up to three years and fined not less than 1,549 Euros. The sentence shall be increased by up to two thirds if the material in the individual's possession is of a large quantity.*"

As regards the **notion of child pornography** (which impacts on the punishability of the various criminal conducts punished by articles 600-ter and 600-quater), it must be pointed out that in Italian law **art. 600-ter of the Criminal Code** provides for the *definition of child pornography* - introduced by Law 172/2012, with which Italy has complied with the provisions of the Lanzarote Convention -: "*For the purposes of this Article, child pornography means any representation, by any means, of a minor under eighteen involved in explicit sexual activities, either real or simulated, or any representation of the sexual organs of a minor under eighteen for sexual purposes*". The case law (Corte di Cassazione - 3rd Criminal Section, Judgment of 1 February 2013, No.5143) stated that: "*For the purposes of articles 600-ter and 600-quater of the Criminal Code pedopornographic material means anything portraying or visually depicting a minor under 18 being implicated or involved in a sexually explicit conduct, which may consist merely in showing the genitals or the pubic region*". Consequently, any conduct related to any material other than the one defined above (such as images/videos of sexually evocative but not sexually explicit content and pedopornographic content) literally does not seem to fall within the scope of articles 600-ter and 600-quater; however it was clarified that it will be the judge, in each specific case, who will verify whether the material (image or video) is to be considered child pornography or not (Q. 9.4 a, b, c; 9.10 a, b, c, d, e, f).

As regards sexually evocative videos/audios/texts etc. involving minors, it should also be remembered that the Italian Criminal Code states that "*For the purposes of the criminal law, acts and objects are considered obscene when, as a shared feeling, they offend decency*" and that "*the work of art or the work of science is not considered obscene unless, for reasons other than the study, it is offered for sale, sold or otherwise procured to a minor under eighteen*" (art. 529). In respect to this material, the law provides for the criminal offense of obscene publications and performances (art. 528) committed by "*whoever, in order to trade or distribute or publicly display them, produces, imports, acquires, holds, exports, or circulates writings, drawings, images or other obscene acts of any kind*"; moreover, art. 725 of the Criminal Code punishes the public display, the offer for sale and the distribution of "*writings, drawings or any figurative object that offends public decency*".

As regards the definition of child pornography, it should also be noted that the above-mentioned concept is complemented by that of art. 600-quater.1 of the Criminal Code - Virtual Pornography. "*The provisions laid down in Articles 600-ter and 600-quater shall also apply when the pornographic material consists in virtual images obtained by using pictures of minors under the age of eighteen or parts thereof; however the penalty shall be decreased by a third. Virtual images cover images obtained through graphic techniques that are not associated, in whole or in part, with real situations, and the quality of their representation makes non-real situations appear as real ones"*. The case law (*Corte di Cassazione, 3rd Criminal Section, judgment of 9 May 2017, No. 22265)* has established that the concept of virtual pornographic material also includes graphic representations of fantasy, which represent sexual acts on minors, hence the possession of pedopornographic comics can give rise to the concerned criminal offense.

Regarding the **transmission or spread/circulation of pedopornographic material** it should also be remembered that the Italian Criminal Code punishes the "**incitement to practices of paedophilia and child pornography**" in art. 414-bis of the Criminal Code (see answer to Question 8 of this questionnaire) and the criminal offense of **corruption of a minor** (art. 609-quinquies) which foresees an imprisonment from one to five years, among other things, for anyone who shows to a minor under fourteen pornographic material, in order to induce her/him to commit or undergo sexual acts. Also in this case the punishment increases: a) if the offense is committed by more people who came together; b) if the offense is committed by a person who is part of a criminal organisation and in order to facilitate its activities; c) if the offense is committed with severe violence or if it leads to a severe injury of the minor due to the repetition of the behaviour; d) when the perpetrator is the ascendant, parent, adoptive parent, his/her partner, guardian, or other person to whom the minor is entrusted for reasons of care, education, instruction, supervision or custody, or who has a relationship of stable cohabitation with the minor.

In regard to the issue of **transmission, spread/circulation of pedopornographic material**, the Criminal Code also contains other provisions - not specifically intended to punish acts connected to child pornography or committed to the detriment of a minor - which could still be applied in certain cases where pedopornographic material is spread, even when self-generated by the minor him/herself, such as the **offence of defamation** (art 595) or the **offence of illicit interference in private life** (art. 615 bis). Also the provisions introduced by the Law 29 May 2017, No. 71, "*Child Protection Provisions to Prevent and Fight Cyberbullying*", such as the request for data shutdown, removal and blocking and the warning procedure against the perpetrator by the Chief of Police, could be applied in cases where self-generated pedopornographic material is spread in the context of cyberbullying (see answer to Question 3)

Finally, it should be pointed out that in relation to the circulation via ICTs of data concerning a minor, art. 167 of the Legislative Decree of 30 June 2003, No. 196 (Code on the Protection of Personal Data, the so-called Code of Privacy), under the heading "**Illicit Data Treatment**" punishes, if the fact does not constitute a more severe offence, whoever processes personal data in violation of the provisions of the legislative decree itself, in order to obtain a profit for him/herself or for anyone else or to harm others.

Given this specific legislative framework which criminalises any behaviour related to pedopornographic material, the Police, during its investigations, considers as punishable (and therefore initiates appropriate investigation procedures) - in cases of adults possessing self-generated pedopornographic images produced by a minor (Q 9.1 a) as provided by art. 600 quater - the distribution of such material (Q 9.1.b) as provided for in art. 600 ter and the conduct of adults showing or transmitting to minors such material (Q 9.1 c) as provided for in art. 609 quinques. Such behaviors are also pursued when they are connected to sexually evocative material (Q 9.4 a, b, c). The production and possession by a minor of self-generated pedopornographic material or sexually evocative material (9.7 a, b - Q. 9.10 a, b) are not punishable, while in theory, art. 600 ter of the Criminal Code punishes the distribution or transmission of self-generated pedopornographic material or sexually evocative material by the minor him/herself or by adults or other minors (Q 9.7 c, d, and f, 9.10 c, d, e, f).

In spite of the Police orientation on the persecution of these behaviours, the outcome of the criminal proceedings stemming from these incriminations before the Courts of first instance may differ from that of a conviction (Q 9.2, Q 9.5, Q 9.8, Q 9.11). In this sense it should be recalled that the most recent case-law considers these crimes to exist provided that the material is produced by a person other than the minor, since the law does not provide for the specific case of the child's self-generated material (see the answer to Question 8). However, we want to signal the judicial decisions concerning the substance which, in cases related to the production of pedopornographic material, highlight as relevant element the consent of the child (i.e. arguing that the production of self-generated pedopornographic material by a minor or more minors together who reached the age to validly express consent to sexual acts is not punishable), although this element is not actually expressly indicated in the provisions laid down by

articles 600ter and 600quater (Court of first instance of Florence, Judge for Preliminary Investigations, judgment No. 163 of 27.01.2015; Court of Appeal of Milan, judgment of 12.03.2014). The same jurisprudence, on the other hand, considers that the spread/circulation/advertising of self-generated pedopornographic material may be punishable even if it is produced by the minor (and not by using the minor), thus interpreting the above-mentioned provisions in the light of the internationally ratified and nationally transposed documents (first of all the Lanzarote Convention) and in the light of the need to combat the culture expressed with this material and the dangers to which it exposes minors.

As regards the **existence of circumstances which may mitigate or justify or otherwise lead to the non-punishability of child pornography-related cases** (Q 9.2, Q 9.5, Q 9.8, Q 9.11), it must first be stated once again that the scope of the provisions on adults' and minors' conducts inherent to self-generated pedopornographic material produced by the minors themselves varies in relation to the above-mentioned jurisprudential interpretations of the relevant provisions (articles 600ter and 600quater); therefore there can be - as mentioned above - cases in which such conducts are considered non-punishable. As regards cases where the offense of child pornography can, in theory, arise, the Criminal Code also explicitly provides that when crimes of sexual exploitation are committed against a minor under the age of eighteen, the perpetrator cannot plead, as justification, that he/she ignored the age of the victim, unless the ignorance was inevitable: this means that in cases of inevitable ignorance on the age of the child, the perpetrator cannot be punished (art. 602quater). Finally, in general, la absence of criminal liability - also in relation to crimes involving sexual exploitation - may arise from the lack of imputability of the perpetrator, based on any of the reasons expressly provided for in the Criminal Code, including mental incapacity (articles 85 et seq.) and being underage (which prevents criminal liability before 14 years, and limits it from 14 to 18 years - articles 97 and 98). It should also be recalled that the Criminal Code foresees a mitigating circumstance (by a third to half) for the perpetrator who seeks to prevent the criminal activity resulting in further consequences, by concretely helping the police or judiciary authority in the collection of conclusive evidence for the identification of the other perpetrators (art. 600-septies1). The Italian legislation is very strict in relation to these offenses and, except the application of this specific circumstance, it states that the generic mitigating circumstances (602-ter), other than those of the minor age (art. 98) and of the minimal importance in the participation to the offense (art. 114), cannot be considered equivalent or prevalent with respect to aggravating circumstances.

Regarding the **legal consequences of child pornography crimes** (Q 9.3, 9.6, Q 9.9, Q.9.12), it is first of all to be noted that these are the same for minors and adults who are considered to be perpetrators of child pornography crimes, except when different provisions foresee the possibility of an alternative definition of the proceedings for minors, provided for in the Juvenile Court's law (see Q. 10 in the General Overview Questionnaire on the "testing procedure in criminal proceedings against juvenile defendants"). In particular, in addition to the penalties provided by articles 600ter and 600quater above, the Italian Criminal Code foresees, in art. 602-ter, some aggravating circumstances such as the commission of sexual exploitation offenses: - by means of violence or threat; - by taking advantage of the situation of necessity of the child; - against a minor under the age of sixteen; - by an ascendant, adoptive parent, or his/her spouse or partner, by the spouse or relatives up to the second degree, by relatives up to the fourth degree, by the guardian or by the person to whom the minor has been entrusted for reasons of care, education, instruction, supervision, custody, employment; - by public officials or people in charge of public service in the exercise of their functions; - against a child in a state of infirmity or natural or provoked mental handicap; - through the administration of alcohol, narcotic, drugs or substances otherwise detrimental to the child's physical or mental health; - against three or more persons; - by more people together; - by a person who is part of a criminal organisation and in order to facilitate its activity; - with severe violence or if it leads to a severe injury of the child due to the repetition of the conduct; in cases where such offenses are committed by using means to prevent the identification of access data to telematic networks.

In addition to the aforementioned sanctions, among the legal consequences of child pornography related crimes there is also the application of **accessory penalties established by art. 600-septies.2 of the Criminal Code**, such as: 1) the loss of parental rights when being a parent represents an aggravating circumstance of the offense; 2) permanent exclusion from any office relating to the protection, guardianship or administration support; 3) loss of the right to food and exclusion from the succession of the offended person; 4) permanent interdiction, in the case of life imprisonment or imprisonment for a period not less than 5 years; Interdiction for 5 years, in case of conviction to imprisonment for 3 to 5 years. The conviction due to any of the afore-mentioned offences committed against minors leads, in any event, to the permanent exclusion from any office in the schools of all levels, as well as from any office or service in public or private institutions or structures traditionally attended by minors. Anyway, it is provided for the closure of the premises used for carrying out the offenses mentioned in this section, as well as the revocation of the operating license or authorization for radio and television broadcasters.

LATVIA / LETTONIE

State replies / Réponses de l'Etat

Question 9.1.a.

Yes, these actions are criminalized according to Part 2 of Section 166 of the Criminal Law, which stipulates that a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable.

The term child pornography is defined in a special law. According to Point 2 of Section 1 of the Law on Pornography Restrictions, child pornography is a pornographic performance where the child is involved, or material of a pornographic nature, in which a child is depicted or described. Child pornography is also regarded as any other performance or material which:

d) demonstrates, depicts or describes a child engaged in sexual activities or in a sexual pose or in clothing of an obscene nature, or for sexual purposes depicts or describes a child totally or partially without clothing,

e) completely or partially depicts a person's having the appearance of the child genitals or depicts or describes a person having the appearance of a child to be involved in sexual acts or sexual acts of gratification in unnatural way, sexual acts of gratification by masturbation or other sexual activities, as well as imitation of the specified activities, sexual acts of gratification in a violent manner, brutality in sexual activities (sadistic and masochistic activities), sexual acts of gratification with animals or necrophilia, or conduct mentioned or depicted in the form mentioned in this paragraph "a",

f) has realistic images of a real non-existent child's genitals or a non-existent child involved in sexual acts or sexual acts of gratification in unnatural way, sexual acts of gratification by masturbation or other sexual activities, as well as imitation of the specified activities, sexual acts of gratification in a violent manner, brutality in sexual activities (sadistic and masochistic activities), sexual acts of gratification with animals or necrophilia, or conduct mentioned or depicted in the form mentioned in this paragraph "a".

According to Point 1 of Section 1 of the Law on Pornography Restrictions, material of a pornographic nature is composition, printed matter, image, computer program, film, video or sound recording, television program, or radio program, 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:

d) genitals are completely or partially depicted;

e) sexual acts or sexual acts of gratification in an unnatural way, sexual acts of gratification by masturbation or sexual acts are depicted or described, or other sexual activities, as well as imitation of the specified activities are depicted or described;

f) 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.

In addition, Point 3 (a, h) of Section 1 of the Law in Pornography Restriction establish, that handling of pornographic nature which contain child pornography is:

a) purchasing (acquiring into ownership, possession or use) or,
h) storage.

Question 9.1.b.

Yes, these actions are criminalized according to Part 2 of Section 166 of the Criminal Law, which stipulates that a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable.

In relation to definition of child's pornography, please, see the answer to questions 9.1.a.

In addition, Point 3 (c, d, e, f, g) of Section 1 of the Law in Pornography Restriction establish, that handling of pornographic nature which contain child pornography is:

c) importation (physical movement in any way across the borders of Latvia from foreign countries),
d) distribution (trade, the putting into service for a fee or without a fee, demonstration in a public place or ensuring of access in a different manner),
e) dissemination in an electronic environment (the trade of material of a pornographic nature prepared in an electronic way, the transmission of the material itself or information prepared thereof, including downloading, communicating to the public, also uploading, utilising electronic communication networks or automated data processing systems or making material accessible in a different manner in any information circulation phase),
f) advertising (any form or any type of communication or event with an aim to promote the popularity of material of a pornographic nature or demand thereof, associated with economic activities performed with the purpose of acquiring profit),
g) propagation, distributing information regarding these materials (forwarding, transmission or offer of information independent of the type of device for the transmission of information or the ensuring of accessibility to information in any other way).

Question 9.1.c.

Yes, these actions are criminalized according to Part 2 of Section 166 and Section 162 of the Criminal Law. According to Part 2 of Section 166, a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable. In addition, according to Part 1 of Section 162 of the Criminal Law, a person who commits leading to depravity of a person who has not attained the age of sixteen years or who is in the state of helplessness, that is, for a person who commits acts of sexual nature without physical contact with the body of the victim for the purpose of sexual gratification or to rouse sexual instinct in the victim, if such act has been committed by a person who has attained the age of majority or it has been committed taking advantage of the state of helplessness of the victim or against the will of the victim by means of violence, threats or using trust, authority or exerting other influence over the victim, shall be held criminally liable.

In relation to definitions of child's pornography and handling of pornographic nature which contain child pornography, please, see the answer to questions 9.1.a. and 9.2.b.

Question 9.2.

According to Section 58 of the Criminal Law, a person who has committed a criminal violation or a less serious crime, except criminal offences resulting in death of a human being, if there is a settlement effected with the victim or with his or her representative and within the last year the person has not been released from criminal liability for committing an intentional criminal offence by reaching a settlement and has completely eliminated the harm caused by the criminal offences committed or has reimbursed for the losses caused, as well as a person who has given substantial assistance in the uncovering of a serious or especially serious crime which is more serious or dangerous than the crime committed by the person himself or herself, may be released from criminal liability. A person may also be released from criminal liability in particular cases provided for in the Special Part of the Criminal Law, and also if it is established that his or her rights to termination of criminal proceedings within reasonable time period have not been observed. In addition, Section 58.[1] stipulates that, a person who has committed a less serious crime, may be conditionally released from criminal liability by a public prosecutor if, taking into account the nature of the offence and the harm caused, information characterising the accused and other circumstances of the matter, a conviction has been acquired that the accused will not commit further criminal offences.

Part 1 of Section 379 of the Criminal Procedure Law stipulates, that an investigator with a consent of a supervising public prosecutor, public prosecutor or a court may terminate criminal proceedings, if:

1) a criminal offence has been committed that has the features of a criminal offence, but which has not caused harm that would warrant the application of a criminal punishment;
2) the person who has committed a criminal violation or a less serious crime has made a settlement with the victim or his or her representative in the cases determined in the Criminal Law;
4) it is not possible to complete the criminal proceedings within reasonable term;
5) the person committed the criminal offence during the time period when he or she was subject to human trafficking and was forced to commit the offence.

In addition, according to Part 1 of Section 415 of the Criminal Procedure Law, if a public prosecutor, taking into account the nature of and harm caused by a committed criminal offence, personal characterizing data, and other conditions of a case, achieves conviction that an accused will hereinafter not commit criminal offences, as well as in cases according to Part 1 of Section 415.[1] of the Criminal procedure law, if there exists the circumstances referred to in Section 415 of this Law, and a person who has been accused for committing a serious crime and has substantially assisted in the disclosure of a serious or especially serious crime that is more serious or dangerous than the criminal offence committed by such person him or herself, the prosecutor may terminate criminal proceedings, conditionally releasing from criminal liability.

Also, according to Part 1 of Section 410 of the Criminal Procedure Law, the Prosecutor General may terminate criminal proceedings, with a decision thereof, against a person who has substantially assisted in the disclosure of a serious or especially serious crime that is more serious or dangerous than a criminal offence committed by such person him or herself.

Question 9.3.

According to Part 2 of Section 166 of the Criminal Law, the applicable punishment for the actions mentioned in questions 9.1.a., 9.1.b., is the deprivation of liberty for a period of up to three years or temporary deprivation of liberty, or community service, or a fine, with or without the confiscation of property and with probationary supervision for a period of up to three years. In addition, according to Par 1 of Section 162 of the Criminal Law, the applicable punishment for actions mentioned in question 9.1.c. is the deprivation of liberty for a period of up to five years or temporary deprivation of liberty, or community service, or a fine, with probationary supervision for a period of up to five years. Part 2 of this Section establish that, for a person who commits mentioned criminal offence, if it has caused serious

consequences, or it has been committed on a minor, the applicable punishment is deprivation of liberty for a period up to seven years and with probationary supervision for a period up to five years.

Question 9.4.
Yes, these actions are criminalized. According to Law on Pornography Restrictions child pornography is 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 in which a child is depicted or described, or any other material in which 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.

Therefore, in relation to questions 9.4.a., 9.4.b. and 9.4.c., please, see the answers to questions 9.1.a., 9.1.b. and 9.1.c.

Question 9.5.
In relation to this question, please, see the answer to question 9.2.

Question 9.6.
In relation to this question, please, see the answer to question 9.3.

Question 9.7.a.
The child's self-generated sexually explicit image or video, in accordance with Point 2 of Section 1 of the Law on Pornography Restrictions (in relation to definition of child's pornography please, see answer to question 9.1.a) is interpreted as a material which contain child pornography, because the above-mentioned law does not provide exceptions whether the producer is the child himself or another person, for example, adult.

Therefore, unless they have not reached the age of criminal liability (14 years of age), these actions are criminalized according to Part 2 of Section 166 of the Criminal Law, which stipulates that a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable.

In relation to definition of child's pornography, please, see the answer to questions 9.1.a.

In addition, Point 3 (b) of Section 1 of the Law in Pornography Restriction establish, that handling of pornographic nature which contain child pornography is manufacture (creation, production, reproduction in any way with any technical resources).

Question 9.7.b.
Yes, unless they have not reached the age of criminal liability (14 years of age), these actions are criminalized according to Part 2 of Section 166 of the Criminal Law, which stipulates that a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable.

In relation to definition of child's pornography, please, see the answer to questions 9.1.a.

In addition, Point 3 (a, h) of Section 1 of the Law in Pornography Restriction establish, that handling of pornographic nature which contain child pornography is:

- purchasing (acquiring into ownership, possession or use) or,
- storage.

Question 9.7.c.

Yes, unless they have not reached the age of criminal liability (14 years of age), these actions are criminalized according to Part 2 of Section 166 of the Criminal Law, which stipulates that a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable.

In relation to definition of child's pornography, please, see the answer to questions 9.1.a.

In addition, Point 3 (c, d, e, f, g) of Section 1 of the Law in Pornography Restriction establish, that handling of pornographic nature which contain child pornography is:

c) importation (physical movement in any way across the borders of Latvia from foreign countries),
d) distribution (trade, the putting into service for a fee or without a fee, demonstration in a public place or ensuring of access in a different manner),
e) dissemination in an electronic environment (the trade of material of a pornographic nature prepared in an electronic way, the transmission of the material itself or information prepared thereof, including downloading, communicating to the public, also uploading, utilizing electronic communication networks or automated data processing systems or making material accessible in a different manner in any information circulation phase),
f) advertising (any form or any type of communication or event with an aim to promote the popularity of material of a pornographic nature or demand thereof, associated with economic activities performed with the purpose of acquiring profit),
g) propagation, distributing information regarding these materials (forwarding, transmission or offer of information independent of the type of device for the transmission of information or the ensuring of accessibility to information in any other way).

Question 9.7.d.

Yes, unless they have not reached the age of criminal liability (14 years of age), these actions are criminalized according to Part 2 of Section 166 of the Criminal Law, which stipulates that a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable.

In relation to definition of child's pornography, please, see the answer to questions 9.1.a.

In relation to definition of handling of pornographic nature which contains child pornography, please, see the answer to question 9.7.c.

Question 9.7.e.

Yes, unless they have not reached the age of criminal liability (14 years of age), these actions are criminalized according to Part 2 of Section 166 of the Criminal Law, which stipulates that a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable.

In relation to definition of child's pornography, please, see the answer to questions 9.1.a.

In relation to definition of handling of pornographic nature which contains child pornography, please, see the answer to question 9.7.c.

Question 9.7.f.

Yes, unless they have not reached the age of criminal liability (14 years of age), these actions are criminalized according to Part 2 of Section 166 of the Criminal Law, which stipulates that a person who commits visiting or demonstration of such pornographic performance or handling of such materials of pornographic nature which contain child pornography shall be held criminally liable.

In relation to definition of child's pornography, please, see the answer to questions 9.1.a.

In relation to definition of handling of pornographic nature which contains child pornography, please, see the answer to question 9.7.c.

Question 9.8.

We point out that in practice, from the point of view of the best interests of the child, a minor may not be held liable for the possession or production of material of the sexual nature of his own. However, the issue of prosecution of a minor for the distribution of sexually explicit material made by himself or another minor to another person is evaluated in each particular situation, taking into account precisely the best interests of the child and the interests of other persons, as well as the harm caused by the criminal offence.

In addition to the answer given to questions 9.2., we point out that, according to Point 3 of Part 1 of Section 379 of the Criminal Procedure Law, an investigator with a consent of a supervising public prosecutor, public prosecutor or a court may terminate criminal proceedings, if a criminal offence has been committed by a minor and special circumstances of the committing of the criminal offence have been determined, and information has been acquired regarding the minor that mitigates his or her liability.

Question 9.9.

According to Part 2 of Section 166 of the Criminal Law, the applicable punishment for the actions mentioned in questions 9.7.a-f, is the deprivation of liberty for a period of up to three years or temporary deprivation of liberty, or community service, or a fine, with or without the confiscation of property and with probationary supervision for a period of up to three years. As the perpetrator is a minor and criminal offence mentioned in Section 166 of above-mentioned law is a less serious crime, according to Part 2 of Section 65 of the Criminal Law for less serious crimes the punishment of deprivation of liberty shall not be applied for a minor. In addition, according to Part 4 of Section 65 of the Criminal Law, a fine is applicable only to those minors who have their own income. A fine applied to a minor shall be not less than one and up to fifty times the amount of the minimum monthly wage prescribed in the Republic of Latvia.

Question 9.10.

Yes, these actions are criminalized. According to Law on Pornography Restrictions child pornography is 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 in which a child is depicted or described, or any other material in which 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.

Therefore, in relation to questions 9.10.a., 9.10.b. 9.10.c., 9.10.d., 9.10.e., 9.10.f. please, see the answers to questions 9.7.a., 9.7.b., 9.7.c., 9.7.d., 9.7.e., 9.7.f.

Question 9.11.

In relation to this question, please, see answer to question 9.8.

Question 9.12.

In relation to this question, please, see the answer to question 9.9.

LIECHTENSTEIN
State replies / Réponses de l'Etat

Question 9.1.
As explained in the response to question 8.1, the possession, transfer, offering, passing on, or making accessible in any other manner a pornographic depiction of a minor to another person is punishable under § 219(1) StGB.

Question 9.2.
Theoretically alternative measures according to Chapter IIIa of the Code of Criminal Procedure ("Diversion") could be taken. In practice, however, adults are always prosecuted in such cases.

Question 9.3.
The sentence imposed under § 219 StGB is imprisonment of up to 10 years.

Question 9.4.
Yes, see the response to question 9.1.

Question 9.5.
Theoretically alternative measures according to Chapter IIIa of the Code of Criminal Procedure ("Diversion") could be taken. As a rule, such alternative measures are not considered and adults are always prosecuted in such cases.

Question 9.6.
The sentence imposed under § 219 StGB is imprisonment of up to 10 years.

Question 9.7.
Under § 219(6) StGB, criminal liability is excluded for the production or possession of child pornography material if production or possession of the pornographic depiction of an adolescent is with the adolescent's consent and for the adolescent's own use. According to the legal definition set out in § 74(1)(2) StGB, an adolescent is a person between the age of 14 and 18. The transfer of pornographic depictions by the adolescent depicted and the transfer of pornographic depictions of other adolescents or children by adolescents are, however, prohibited by criminal law.

Children under the age of 14 have not reached the age of criminal responsibility and thus cannot be held criminally responsible for the production, possession, or transfer of pornographic depictions of a minor (i.e. of a person who has not reached the age of 18), irrespective of whether the depictions are transferred to other children/adolescents or to adults.

Question 9.8.
Children (i.e. juveniles) between the age of 14 and 18 could be prosecuted specifically for the distribution of self-generated sexually explicit images of other children to peers or to adults. If the requirements of §22a Code of Criminal Procedure ("Diversion") are met (e.g. the suspect's culpability is not considered to be serious, the offence did not result in a person's death, and no sexual assault under § 201 StGB or sexual abuse of a defenceless or mentally impaired person under § 204 StGB has occurred), the Public Prosecutor will consider alternative measures, such as the measures described in §§ 22c, 22d, or 22f of the Code of Criminal Procedure (the payment of an amount of money, the performance of community service, the setting of a probation period, possibly in connection with supervised probation and compliance with duties).

Question 9.9.
See also the response to question 9.7. The severity of penalties for offences committed by adolescents is governed by § 6(4) of the Juvenile Court Act (LGBl. 1988 No. 39 as amended). The maximum custodial sentence under § 219 StGB is reduced by half.

Question 9.10.
See response to question 9.7.

Question 9.11.
See response to question 9.8.

Question 9.12.
See response to question 9.9.

LITHUANIA / LITUANIE
State replies / Réponses de l'Etat

Question 9.1.
Yes, Article 309 of the Criminal Code of the Republic of Lithuania „Possession of pornographic material" establishes:

Article 309 of the CC. Possession of Pornographic Material (...)
2. A person who **produces**, acquires, stores, demonstrates, advertises, offers or distributes pornographic material displaying a child or presenting a person as a child or, by means of information and communications technologies and other means, acquires or provides access to pornographic material displaying a child or presenting a person as a child, shall be punished by a fine or by a custodial sentence for a term of up to three years.
3. A person who, for the purpose of distribution, **produces** or acquires or distributes a large quantity of pornographic material displaying a young child, shall be punished by a custodial sentence for a term of up to five years.(...)"

Article 162 of the CC. Exploitation of a Child for Pornography
1. A person who **recruits**, forces to participate or **involves a child** in pornographic events or exploits the child for such purposes or exploits the child for the production of pornographic material or gains profit from such activities of the child, shall be punished by a custodial sentence for a term of up to eight years. (...)"

Article 153 of the Criminal Code „Sexual Molestation of a Person Younger than Sixteen Years Old" establishes: A person who moles a person younger than sixteen years old shall be punished by restriction of liberty or by arrest or by imprisonment for a term of up to five years.

Question 9.2.
No, there are only the general circumstances under which the above cases are not prosecuted and/or do not lead to conviction, established in Article 3 of the Code of Criminal Procedure of the Republic of Lithuania (e.g., limitation period for criminal liability, the death of the suspect, etc.) and in Articles 17 (Legal Incapacity) and 18 (Diminished Capacity) of the Criminal Code. According to Paragraph 2 of Article 17 of the Criminal Code, a person, found legally incapacitated by a court, shall not be held liable under this Code for a committed dangerous act. The court may apply to him the compulsory medical treatment provided for in Article 98 of this Code. A person, who has committed a misdemeanour, a negligent or minor or less serious premeditated crime and whom a court finds to be of diminished capacity, shall be liable under criminal law, however, a penalty imposed upon him may be commuted under Article 59 of this Code, or he may be released from criminal liability and be subject to the penal

sanctions provided for in Article 67 of this Code or the compulsory medical treatment provided for in Article 98 of this Code (Paragraph 2 of Article 18 of the Criminal Code).

Question 9.3.
A person shall be punished by imposing a fine or by imprisonment for a term of up to four years (Paragraph 2 of Article 309 of the Criminal Code). A person shall be punished by restriction of liberty or by arrest or by imprisonment for a term of up to five years (Article 153 of the Criminal Code).

Question 9.4.
Please see the answer to question 9.1.

Question 9.5.
Please see the answer to question 9.2.

Question 9.6.
Please see the answer to question 9.3.

Question 9.7.a.-e.
Taking into consideration the fact that, according to paragraph 1 of Article 13 of the Criminal Code, age at which a person becomes liable under the Criminal law is sixteen years, a person, who is sixteen years old and distributes or transmits self-generated sexually explicit images and/or videos of other children to peers, could be held liable under Article 153 of the Criminal Code if he distribute or transmit self-generated sexually explicit images of other children to child, younger than 16 years old or under Article 309 of the Criminal Code, if he distribute to transmit images to child, older than 16 years. Though, cases, as mentioned above, can be really complicated and the court shall take into account all the relevant circumstances (e.g., the purpose of the distribution, the nature of the relationship between persons, etc.).

Question 7.f.
Taking into consideration the fact that, according to Paragraph 1 of the Article 13 of the Criminal Code, age at which a person becomes liable under the Criminal law is sixteen years, a person, who is sixteen years old and distributes or transmits self-generated sexually explicit images and/or videos of other children to adults, could be held liable under Article 309 of the Criminal Code. Though, cases as mentioned above, can be really complicated and the court shall take into account all the relevant circumstances (e.g., the purpose of the distribution, the nature of the relationship between persons, etc.).

Question 9.8.
There are general circumstances, established in Article 3 of the Code of Criminal Procedure and in Article 17 and 18 of the Criminal Code, as well as special circumstances for minors, established in Article 93 of the Criminal Code:

1. A minor who commits a misdemeanour, or a negligent crime, or a minor or less serious premeditated crime for the first time may be released by a court from criminal liability where he:
    1) has offered his apology to the victim and has compensated for or eliminated, fully or in part, the property damage incurred by his work or in monetary terms; or
    2) is found to be of diminished capacity; or
    3) pleads guilty and regrets having committed a criminal act or there are other grounds to believe that in future the minor will abide by the law and will not commit new criminal acts.
    2. Having released a minor from criminal liability on the grounds provided for in paragraph 1 of this Article, a court shall impose against him the reformative sanctions provided for in Article 82 of this Code.

Question 9.9.
Please see the answer to question 9.3.

It should be noted that the peculiarities of criminal liability of minors are established in Chapter XI of the Criminal Code. For example, a court may impose a fixed-term imprisonment upon a minor when there is a basis for believing that another type of penalties is not sufficient to alter the minors criminal dispositions, or where the minor has committed a serious or grave crime. When a minor is sentenced to a fixed-term imprisonment, the minimum penalty shall be equal to one half of the minimum penalty provided for by the sanction of an article of this Code according to which the minor is prosecuted. Taking into consideration the fact that Article 153 and 309 of the Criminal Code do not established the minimum of a fixed-term imprisonment and Paragraph 2 of Article 50 of the Criminal Code stipulates that the penalty of a fixed-term imprisonment may be imposed for a period from three months up to twenty years, the minimum length of fixed-term imprisonment for minor, sentenced under Articles 153 0r 309 of the Criminal Code, is 1.5 months.

Question 9.10.
Please see the answer to question 9.7.

Question 9.11.
Please see the answer to question 9.8.

Question 9.12.
Please see the answer to question 9.9.

LUXEMBOURG
State replies / Réponses de l'Etat

Question 9.1.
Il est renvoyé à la réponse 16 du questionnaire *« Aperçu général »* concernant la mise en œuvre de l'article 20 de la Convention de Lanzarote :

> a.
> **Abus sexuels :** Art. 18.1 et 18.2 de la Convention.
> Les comportements décrits au présent article sont érigés en infraction par les articles 372 et 375 du Code pénal luxembourgeois.
>
> Les articles 372 et 375 du Code pénal disposent ce qui suit :
>
> « Art. 372. (L. 21 février 2013) 1° Tout attentat à la pudeur, commis sans violence ni menaces sur des personnes de l'un ou de l'autre sexe sera puni d'un emprisonnement d'un mois à deux ans et d'une amende de 251 à 10 000 euros.
>
> 2° L'attentat à la pudeur, commis avec violence ou menaces sur des personnes de l'un ou de l'autre sexe sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 20 000 euros.
>
> 3° L'attentat à la pudeur, commis sur la personne ou à l'aide de la personne d'un enfant de l'un ou de l'autre sexe, âgé de moins de seize ans sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 50 000 euros.
>
> La peine sera la réclusion de cinq à dix ans, si l'attentat a été commis avec violence ou menaces ou si l'enfant était âgé de moins de 11 ans.

Art. 375. (L. 16 juillet 2011) Tout acte de pénétration sexuelle, de quelque nature qu'il soit et par quelque moyen que ce soit, commis sur une personne qui n'y consent pas, notamment à l'aide de violences ou de menaces graves, par ruse ou artifice, ou en abusant d'une personne hors d'état de donner un consentement libre ou d'opposer la résistance, constitue un viol et sera puni de la réclusion de cinq à dix ans.

Est réputé viol commis en abusant d'une personne hors d'état de donner un consentement libre tout acte de pénétration sexuelle, de quelque nature qu'il soit et par quelque moyen que ce soit, commis sur la personne d'un enfant âgé de moins de seize ans. Dans ce cas, le coupable sera puni de la réclusion de dix à quinze ans. »

Prostitution enfantine : Art 19.1, 19.2 et 19.3 de la Convention.
Les comportements décrits au présent article sont érigés en infraction par l'article 379 du Code pénal.

L'article 379 du Code pénal dispose ce qui suit :

« Art. 379. (L. 21 février 2013) Sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 50 000 euros:

1° quiconque aura excité, facilité ou favorisé la débauche, la corruption ou la prostitution d'un mineur âgé de moins de dix-huit ans;

2° quiconque aura recruté, exploité, contraint, forcé, menacé ou eu recours à un mineur âgé de moins de dix-huit ans à des fins de prostitution, aux fins de la production de spectacles ou de matériel à caractère pornographique ou aux fins de participation à de tels spectacles, aura favorisé une telle action ou en aura tiré profit;

3° quiconque aura assisté à des spectacles pornographiques impliquant la participation d'un mineur âgé de moins de dix-huit ans;

4° quiconque aura contraint ou forcé un mineur âgé de moins de dix-huit ans à se livrer à des activités sexuelles avec un tiers ou de le menacer à de telles fins.

La tentative sera punie d'un emprisonnement de six mois à trois ans.

Le fait sera puni de la réclusion de cinq à dix ans s'il a été commis envers un mineur âgé de moins de seize ans, et de la réclusion de dix à quinze ans s'il a été commis envers un mineur de moins de onze ans.

La tentative sera punie d'un emprisonnement de six mois à quatre ans, si le fait a été commis envers un mineur âgé de moins de seize ans et d'un emprisonnement de six mois à cinq ans s'il a été commis envers un mineur de moins de onze ans. »

Pornographie enfantine : Art. 20.1, 20.2, 20.3, 20.4, 20.5 et 20.6. de la Convention.
Les comportements décrits au présent article sont érigés en infraction par les articles 383bis, 383ter, 384 du Code pénal.

Les articles 383bis, 383ter, 384 du Code pénal disposent ce qui suit :

« Art. 383bis. (L. 16 juillet 2011) Les faits énoncés à l'article 383 seront punis d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 75 000 euros, s'ils impliquent ou présentent des mineurs ou une personne particulièrement vulnérable, notamment en raison de sa situation administrative illégale ou précaire, d'un état de grossesse, d'une maladie, d'une infirmité ou d'une déficience physique ou mentale.

La confiscation des objets prévus à l'article 383 sera toujours prononcée en cas de condamnation, même si la propriété n'en appartient pas au condamné ou si la condamnation est prononcée par le juge de police par l'admission de circonstances atténuantes.

Art. 383ter. (L. 16 juillet 2011) Le fait, en vue de sa diffusion, de fixer, d'enregistrer ou de transmettre l'image ou la représentation d'un mineur lorsque cette image ou cette représentation présente un caractère

pornographique est puni d'un d'emprisonnement d'un mois à trois ans et d'une amende de 251 à 50 000 euros.

Le fait d'offrir, de rendre disponible ou de diffuser une telle image ou représentation, par quelque moyen que ce soit, de l'importer ou de l'exporter, de la faire importer ou de la faire exporter, est puni des mêmes peines.

Les faits seront punis d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 100 000 euros lorsqu'il a été utilisé, pour la diffusion de l'image ou de la représentation du mineur à destination d'un public non déterminé, un réseau de communications électroniques.

La tentative des délits prévus aux alinéas précédents est punie des mêmes peines.

Art. 384. (L. 21 février 2013) Sera puni d'un emprisonnement d'un mois à trois ans et d'une amende de 251 à 50 000 euros, quiconque aura sciemment acquis, détenu ou consulté des écrits, imprimés, images, photographies, films ou autres objets à caractère pornographique impliquant ou présentant des mineurs.
(L. 16 juillet 2011) La confiscation de ces objets sera toujours prononcée en cas de condamnation, même si la propriété n'en appartient pas au condamné ou si la condamnation est prononcée par le juge de police par l'admission de circonstances atténuantes. »

Participation d'un enfant à des spectacles pornographiques : Art. 21.1, 21.2, 21.3 de la Convention.
Les comportements décrits au présent article sont érigés en infraction par l'article 379 du Code pénal.

L'article 379 du Code pénal dispose ce qui suit :

« Art. 379. (L. 21 février 2013) Sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 50 000 euros :

1° quiconque aura excité, facilité ou favorisé la débauche, la corruption ou la prostitution d'un mineur âgé de moins de dix-huit ans;

2° quiconque aura recruté, exploité, contraint, forcé, menacé ou eu recours à un mineur âgé de moins de dix-huit ans à des fins de prostitution, aux fins de la production de spectacles ou de matériel à caractère pornographique ou aux fins de participation à de tels spectacles, aura favorisé une telle action ou en aura tiré profit;

3° quiconque aura assisté à des spectacles pornographiques impliquant la participation d'un mineur âgé de moins de dix-huit ans;

4° quiconque aura contraint ou forcé un mineur âgé de moins de dix-huit ans à se livrer à des activités sexuelles avec un tiers ou de le menacer à de telles fins.

La tentative sera punie d'un emprisonnement de six mois à trois ans.

Le fait sera puni de la réclusion de cinq à dix ans s'il a été commis envers un mineur âgé de moins de seize ans, et de la réclusion de dix à quinze ans s'il a été commis envers un mineur de moins de onze ans.

La tentative sera punie d'un emprisonnement de six mois à quatre ans, si le fait a été commis envers un mineur âgé de moins de seize ans et d'un emprisonnement de six mois à cinq ans s'il a été commis envers un mineur de moins de onze ans.

Corruption d'enfant : Art. 22 de la Convention.
Les comportements décrits au présent article sont couverts par les dispositions de l'article 372 du Code pénal.

L'article 372 du Code pénal dispose que :

« Art. 372. (L. 21 février 2013) 1° Tout attentat à la pudeur, commis sans violence ni menaces sur des

personnes de l'un ou de l'autre sexe sera puni d'un emprisonnement d'un mois à deux ans et d'une amende de 251 à 10 000 euros.

2° L'attentat à la pudeur, commis avec violence ou menaces sur des personnes de l'un ou de l'autre sexe sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 20 000 euros.

3° L'attentat à la pudeur, commis sur la personne ou à l'aide de la personne d'un enfant de l'un ou de l'autre sexe, âgé de moins de seize ans sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 50 000 euros.

La peine sera la réclusion de cinq à dix ans, si l'attentat a été commis avec violence ou menaces ou si l'enfant était âgé de moins de 11 ans. »

Par ailleurs, l'article 379 du Code pénal dispose que « sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 50 000 euros:
1° quiconque aura excité, facilité ou favorisé la débauche, la corruption ou la prostitution d'un mineur âgé de moins de dix-huit ans;… . »

Sollicitation d'enfants à des fins sexuelles : Art. 23 de la Convention.
Les comportements décrits au présent article sont érigés en infraction par l'article 385-2 du Code pénal.

L'article 385-2 du Code pénal dispose ce qui suit :

« Art. 385-2. (L. 16 juillet 2011) Le fait pour un majeur de faire des propositions sexuelles à un mineur de moins de seize ans ou à une personne se présentant comme telle en utilisant un moyen de communication électronique est puni d'un emprisonnement d'un mois à trois ans et d'une amende de 251 à 50 000 euros.

Il sera puni d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 75 000 euros lorsque les propositions ont été suivies d'une rencontre. »

Complicité et tentative :

Complicité : En droit luxembourgeois, la complicité est régie par les articles 67 à 69 du Code pénal qui disposent ce qui suit :

« Art. 67. Seront punis comme complices d'un crime ou d'un délit:

Ceux qui auront donné des instructions pour le commettre;

Ceux qui auront procuré des armes, des instruments ou tout autre moyen qui a servi au crime ou au délit, sachant qu'ils devaient y servir;

Ceux qui hors le cas prévu par le paragraphe 3 de l'article 66, auront, avec connaissance, aidé ou assisté l'auteur ou les auteurs du crime ou du délit dans les faits qui l'ont préparé ou facilité, ou dans ceux qui l'ont consommé.

Art. 68. Ceux qui, connaissant la conduite criminelle des malfaiteurs exerçant des brigandages ou des violences contre la sûreté de l'Etat, la paix publique, les personnes ou les propriétés, leur auront fourni habituellement logement, lieu de retraite ou de réunion, seront punis comme leurs complices.

Art. 69. Les complices d'un crime seront punis de la peine immédiatement inférieure à celle qu'ils encourraient s'ils étaient auteurs de ce crime, d'après la graduation prévue par l'article 52 du présent code.

La peine prononcée contre les complices d'un délit n'excédera pas les deux tiers de celle qui leur serait appliquée s'ils étaient auteurs de ce délit. »

Tentative : Au Luxembourg, la tentative est régie par les articles 51 à 53 du Code pénal.

« Art. 51. Il y a tentative punissable, lorsque la résolution de commettre un crime ou un délit a été manifestée par des actes extérieurs qui forment un commencement d'exécution de ce crime ou de ce délit, et qui n'ont été suspendus ou n'ont manqué leur effet que par des circonstances indépendantes de la volonté de l'auteur.

Art. 52. (L. 7 juillet 2003) La tentative de crime est punie de la peine immédiatement inférieure à celle du crime même.

Est considérée comme immédiatement inférieure:

a) A la peine de la réclusion à vie, celle de la réclusion de vingt à trente ans ;
b) A la peine de la réclusion de vingt à trente ans, celle de la réclusion de quinze à vingt ans ;
c) A la peine de la réclusion de quinze à vingt ans, celle de la réclusion de dix à quinze ans ;
d) A la peine de la réclusion de dix à quinze ans, celle de la réclusion de cinq à dix ans ;
e) A la peine de la réclusion de cinq à dix ans, celle d'un emprisonnement de trois mois au moins.

Art. 53. La loi détermine dans quels cas et de quelles peines sont punies les tentatives de délits. »

De manière générale, on peut retenir que la tentative d'un crime est toujours punissable alors que la tentative d'un délit ne l'est que si la loi le prévoit expressément.

L'article 24 paragraphe 2 de la Convention prévoit une obligation pour les Etats parties d'ériger en infraction pénale toute tentative intentionnelle de commettre l'une des infractions prévues dans la Convention.

En ce qui concerne les infractions prévues à l'article 20 paragraphe 1. e) et f) de la Convention (possession de pornographie enfantine et accès à de la pornographie enfantine) ainsi qu'à l'article 23 de la Convention. (Sollicitation d'enfants à des fins sexuelles), une réserve est faite, alors qu'il y a impossibilité matérielle de prouver les tentatives de ces infractions.

En ce qui concerne la prostitution enfantine, l'article 379 du Code pénal dispose que :

« La tentative sera punie d'un emprisonnement de six mois à trois ans.

La tentative sera punie d'un emprisonnement de six mois à quatre ans, si le fait a été commis envers un mineur âgé de moins de seize ans et d'un emprisonnement de six mois à cinq ans s'il a été commis envers un mineur de moins de onze ans »

En ce qui concerne la pornographie enfantine, l'article 383ter du Code pénal dispose que « La tentative des délits prévus aux alinéas précédents est punie des mêmes peines. »

En ce qui concerne la participation d'un enfant à des spectacles pornographiques, l'article 379 du Code pénal dispose que :
« La tentative sera punie d'un emprisonnement se six mois à trois ans. La tentative sera punie d'un emprisonnement de six mois à quatre ans, si le fait a été commis envers un mineur âgé de moins de seize ans et d'un emprisonnement de six mois à cinq ans s'il a été commis envers un mineur de moins de onze ans ».

b.
En ce qui concerne **la pornographie enfantine**, l'article 384 du Code pénal vise tout type de consultation et ne se limite pas à incriminer, le fait d'accéder, en connaissance de cause et par le biais des technologies de communication et d'information, à de la pornographie enfantine.

En ce qui concerne **la sollicitation d'enfants à des fins sexuelles** : Le champ d'application de cette infraction va plus loin que le texte de la Convention en ce que le simple fait de faire des propositions à un mineur de moins de seize ans, constitue en lui seul une infraction pénale, indépendamment de la question de savoir si lesdites propositions sexuelles ont été suivies d'une rencontre ou non. La loi pénale prévoit une aggravation des peines lorsque les propositions ont été suivies d'une rencontre.

Cette extension est justifiée par le fait que l'enfant peut également être impliqué avant même qu'il y ait une rencontre dans la production de pornographie enfantine, par exemple en envoyant des photos personnelles compromettantes prises à l'aide d'un appareil photo numérique, une webcam ou une caméra de téléphone mobile, ce qui offre à la personne sollicitant l'enfant un moyen de le contrôler en le menaçant.

Cette disposition luxembourgeoise va encore plus loin que le texte de la Convention, en ce qu'elle incrimine également « la sollicitation » à l'égard d'une personne qui se présente comme mineur de 16 ans, alors qu'en réalité elle ne l'est pas.

c.

L'article 383 du Code pénal tel qu'issu de la loi du 16 juillet 2011 portant approbation de la Convention de Lanzarote incrimine « le fait soit de fabriquer, de transporter, de diffuser par quelque moyen que ce soit et quel qu'en soit le support un message à caractère violent ou pornographique ou de nature à porter gravement atteinte à la dignité humaine, soit de faire commerce d'un tel message, (…) lorsque ce message est susceptible d'être vu ou perçu par un mineur. »

d.

L'âge de la victime influe sur la détermination du degré de gravité de l'infraction. A titre d'exemple, l'infraction de l'attentat à la pudeur est passible de la réclusion de 5 à 10 ans, lorsque l'attentat a été commis sur un enfant âgé de moins de 11 ans. De même, l'exploitation des mineurs à des fins sexuels sera punie de la réclusion de cinq à dix ans s'il a été commis envers un mineur âgé de moins de seize ans, et de la réclusion de dix à quinze ans s'il a été commis envers un mineur de moins de onze ans.

Question 9.2.

En ce qui concerne les infractions précitées (9.1. a-c et 9.4. a-c) bien qu'elles soient établies en droit et en fait, ne peuvent faire l'objet de poursuites ou n'aboutissent pas à une condamnation au Luxembourg, lorsqu'elles ont été commises à l'étranger, qu'une instruction est diligentée et que le procès fut soldé par un jugement d'acquittement à l'étranger. L'action publique est alors définitivement éteinte sans qu'aucune infraction n'a été reconnue en fait et retenue en droit.

Un jugement d'acquittement ou de condamnation coulé en force de chose jugée, empêche en vertu du principe *« non bis in idem »,* de nouvelles poursuites pénales à charge d'une même personne pour des mêmes faits.

L'article 5 du Code de procédure pénale luxembourgeois dispose ce qui suit :

Article 5 Code de procédure pénale

« […] (L. 31 mai 1999) Tout Luxembourgeois qui, hors du territoire du Grand-Duché s'est rendu coupable d'un fait qualifié délit par la loi luxembourgeoise peut être poursuivi et jugé dans le Grand-Duché de Luxembourg si le fait est puni par la législation du pays où il a été commis.

Toutefois, […] aucune poursuite n'aura lieu lorsque l'inculpé jugé en pays étranger du chef de la même infraction, aura été acquitté.

Il en sera de même lorsque, après y avoir été condamné, il aura subi ou prescrit sa peine ou qu'il aura été gracié.

Toute détention subie à l'étranger par suite de l'infraction qui donne lieu à la condamnation dans le Grand-Duché, sera imputée sur la durée des peines emportant privation de liberté […] ».

Article 7-5 Code de procédure pénale

« (L. 29 mars 2013) Les condamnations définitives prononcées à l'étranger sont assimilées quant à leurs effets aux condamnations prononcées par les juridictions luxembourgeoises, sauf en matière de réhabilitation, pour autant que les infractions ayant donné lieu à ces condamnations sont également punissables suivant les lois luxembourgeoises. »

Question 9.3.

Les conséquences juridiques qu'encourent les adultes sont visées aux articles 383ter, 384 et 386 du Code pénal luxembourgeois.

L'article 383ter du Code pénal dispose ce qui suit :

Article 383ter Code pénal

« (L. 16 juillet 20119 Le fait, en vue de sa diffusion, de fixer, d'enregistrer ou de transmettre l'image ou la représentation d'un mineur lorsque cette image ou cette représentation présente un caractère pornographique est puni d'un emprisonnement d'un mois à trois ans et d'une amende de 251 à 50 000 euros.

Le fait d'offrir, de rendre disponible ou de diffuser une telle image ou représentation, par quelque moyen que ce soit, de l'importer ou de l'exporter, de la faire importer ou de la faire exporter, est puni des mêmes peines.

Les faits seront punis d'un emprisonnement d'un à cinq ans et d'une amende de 251 à 100 000 euros lorsqu'il a été utilisé, pour la diffusion de l'image ou de la représentation du mineur à destination d'un public non déterminé, un réseau de communications électroniques.
La tentative des délits prévus aux alinéas précédents est punie des mêmes peines. »

L'article 384 du Code pénal dispose ce qui suit :

Article 384 Code pénal

« (L. 21 février 2013) Sera puni d'un emprisonnement d'un mois à trois ans et d'une amende de 251 à 50 000 euros, quiconque aura sciemment, acquis, détenu ou consulté des écrits, imprimés, images, photographies, films, ou autres objets à caractère pornographique impliquant ou présentant des mineurs.

(L. 16 juillet 2011) La confiscation de ces objets sera toujours prononcée en cas de condamnation, même si la propriété n'en appartient pas au condamné ou si la condamnation est prononcée par le juge de police par l'admission de circonstances atténuantes. »

L'article 386 du Code pénal luxembourgeois dispose ce qui suit :

Article 386 Code pénal

« Dans les cas prévus au présent chapitre, les coupables pourront de plus, être condamnés à l'interdiction des droits indiqués aux numéros 1, 3, 4, 5 et 7 de l'article 11.

(L. 21 février 2013) Ils pourront également être condamnés à l'interdiction pour une durée de dix ans au plus, d'exercer une activité professionnelle, bénévole ou sociale impliquant un contact habituel avec des

mineurs. Toute violation de cette interdiction est punie d'un emprisonnement de deux mois à deux ans. »

Article 11 Code pénal

« (L. 13 juin 1994) Toute décision de condamnation à la réclusion de plus de dix ans prononce contre le condamné l'interdiction à vie du droit :

1° de remplir des fonctions, emplois ou offices publics ;

3° de porter aucune décoration ;

4° d'être expert, témoin instrumentaire ou certificateur dans les actes ; de déposer en justice autrement que pour y donner de simples renseignements ;

5° de faire partie d'aucun conseil de famille, de remplir aucune fonction dans un régime de protection des incapables mineurs et majeurs, si ce n'est à l'égard de leurs enfants et sur avis conforme du juge des tutelles et du conseil de famille, s'il en existe ;

7° de tenir école ou d'enseigner ou d'être employé dans un établissement d'enseignement. »

Question 9.4.
Il est renvoyé à la réponse 16 du questionnaire *« Aperçu général »* concernant la mise en œuvre de l'article 20 de la Convention de Lanzarote.

Question 9.5.
Voir notre réponse sous 9.2.

Question 9.6.
Voir notre réponse sous 9.3.

Question 9.7.
Dans notre législation actuelle il n'existe pas de droit pénal pour mineurs. Les comportements concernés sont érigés en infraction pénale en application du Code pénal luxembourgeois. Pour ce fait, il est renvoyé à la réponse 16 du questionnaire *« Aperçu général »* concernant la mise en œuvre de l'article 20 de la Convention de Lanzarote (*voir ci-dessus sous Question 9.1*).

Question 9.8.
En ce qui concerne les infractions pénales précitées (9.7. a-f et 9.10. a-f) bien qu'établies en droit et en fait, ne font l'objet de poursuites et/ou n'aboutissent pas à une condamnation du mineur capable de discernement, lorsque le Tribunal de la jeunesse prend à l'égard du mineur une mesure alternative ou lorsque le Parquet recommande au mineur de s'adresser à un service de médiation.

La mission du Tribunal de la jeunesse consiste essentiellement à assurer que la garde, la préservation ou l'éducation de tout mineur qui comparait devant lui est garantie. Si un mineur a commis une infraction, le Tribunal de la jeunesse peut prendre à son égard l'une des mesures énumérées à l'article 1er de la loi du 10 août 1992 relative à la protection de la jeunesse.

Article 1er Loi du 10 août 1992 relative à la protection de la jeunesse

« Le Tribunal de la jeunesse prend à l'égard des mineurs qui comparaissent devant lui des mesures de garde, d'éducation et de préservation.

Il peut selon les circonstances :

1° les réprimander et les laisser ou les rendre aux personnes qui en ont la garde en leur enjoignant, le cas échéant, de mieux les surveiller à l'avenir ;

2° les soumettre au régime de l'assistance éducative ;

3° les placer sous surveillance chez toute personne digne de confiance ou dans tout établissement approprié, même à l'étranger, en vue de leur hébergement, de leur traitement, de leur éducation, de leur instruction ou de leur formation professionnelle ;
4° les places dans un établissement de rééducation de l'Etat.
Le Tribunal peut subordonner le maintien du mineur dans son milieu notamment à l'une ou plusieurs des conditions suivantes.

a. fréquenter régulièrement un établissement scolaire d'enseignement ordinaire ou spécial ;

b. accomplir une prestation éducative ou philanthropique en rapport avec son âge et ses ressources ;

c. se soumettre aux directives pédagogiques et médicales d'un centre d'orientation éducative ou d'hygiène mentale.

Il peut à tout moment soumettre au régime de l'assistance éducative les mineurs qui ont fait l'objet d'une des mesures prévues ci-dessus sous 3° et 4°.

Les mesures ordonnées par le Tribunal de la jeunesse prennent fin de plein droit à la majorité.

Toutefois, le juge de la jeunesse peut, de l'accord de l'intéressé et si l'intérêt de ce dernier l'exige, prolonger l'une ou l'autre des mesures prévues ci-dessus pour un terme ne pouvant dépasser sa vingt et unième année. La mesure prend fin à l'expiration du délai fixé en accord avec l'intéressé ou lorsque celui-ci atteint l'âge de vingt et un an. Il peut y être mis fin d'office à tout moment par le juge de la jeunesse. Il doit y être mis fin à la demande de l'intéressé. »

Cependant, avant de convoquer un mineur ayant commis une infraction devant le Tribunal de la jeunesse, le Procureur d'État peut, en se rapportant au principe de l'opportunité des poursuites, recommander au mineur de s'adresser à un service de médiation réparatrice.

Dans ce cas, la médiation a un triple rôle :

1) de responsabiliser le jeune vis-à-vis de son acte ;
2) de reconnaître la victime en tant que telle et ;
3) de permettre une rencontre entre l'auteur et la victime en offrant un lieu pour une réconciliation possible.

Question 9.9.
Les conséquences juridiques qu'encourent les mineurs capables de discernement et ses parents sont visées à l'article 32 et 40 de la loi du 10 août 1992 relative à la protection de la jeunesse.

L'article 32 dispose ce qui suit :

Article 32 Loi du 10 août 1992 relative à la protection de la jeunesse

« Si le mineur a commis un fait qualifié infraction et s'il était âgé de plus de 16 ans accomplis au moment du fait, le ministère public près le tribunal de la jeunesse peut, s'il estime inadéquate une mesure de garde, de préservation ou d'éducation, demander par voie de requête au juge de la jeunesse l'autorisation de procéder suivant les formes et compétences ordinaires. Le juge de la jeunesse statue sur la requête par une ordonnance motivée et sans se prononcer sur la réalité des faits.

La décision accordant ou refusant cette autorisation est notifiée au mineur, aux parents, tuteurs ou autres personnes qui en ont la garde, par lettre recommandée du greffier avec avis de réception.
Le Tribunal de la jeunesse, saisi d'une affaire par citation du ministère public peut, lorsqu'il estime inadéquate une mesure de garde, de préservation ou d'éducation se dessaisir et renvoyer l'affaire au ministère public pour être procédé à l'égard du mineur suivant les formes et compétences ordinaires. La juridiction de droit commun saisie ne peut pas se dessaisir pour cause de minorité. »

L'article 40 dispose ce qui suit :

Article 40 Loi du 10 août 1992 relative à la protection de la jeunesse

« Dans tous les cas où un mineur a commis un fait constituant une infraction d'après la loi pénale, et quelle que soit la mesure prise à son égard, si le fait a été facilité par un défaut de surveillance, la personne qui a la garde du mineur est punie d'une amende de 250 francs à 2 500 francs et d'un emprisonnement d'un jour à sept jours, ou d'une de ces peines seulement, sans préjudice des dispositions du code pénal et des lois spéciales concernant la participation. »

Question 9.10.
Voir notre réponse sous 9.7.

Question 9.11.
Voir notre réponse sous 9.8.

Question 9.12.
Voir notre réponse sous 9.9

MALTA / MALTE
State replies / Réponses de l'Etat

Question 9.1.-9.3.
No answer to these questions / pas de réponses à ces questions.

Question 9.4.
This is covered by article 208 A (1B) of the Criminal Code, which states that:

"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, shall on conviction, be liable to imprisonment for a term from not exceeding three years".

Therefore this offence carries a maximum punishment of not more than 3 years imprisonment.

Question 9.5.
Provided there is reasonable suspicion that a person is an accomplice to the commission of, or may have committed, a crime, he will only avoid prosecution if he pleads insanity (not able to stand trial) and is eventually declared of unsound mind by the Court. In such a case, the person is securely kept at a Psychiatric Hospital until he is discharged following a declaration by professionals that he is of sound mind. Upon discharge, a person can be subjected to stand trial again. A person can be declared to have been of unsound mind during the commission of the offence per se, in which case he will be acquitted. Other reasons which halt the prosecution of a case is the issue of prescription, i.e. when a case becomes time barred.

With specific reference to minors, according to Maltese law a minor is deemed criminally responsible at the age of 14.

Moreover, article 37 (1) of the Criminal Code further states that:

The minor under sixteen years of age shall also be exempt from criminal responsibility for any act or omission done without any mischievous discretion.

(2) In the case where the act or omission is committed by a minor who is aged between fourteen to sixteen years of age with mischievous discretion and in the case where the minor is aged between sixteen and eighteen years, the applicable penalty shall be decreased by one or two degrees

Question 9.6.
Imprisonment for a period of not more than three years upon conviction. The convicted person may also be listed in the Offenders Register for the protection of minors. The upkeep of such register is regulated by the Protection of Minors (Registration) Act, Chapter 518 of the Laws of Malta.

Question 9.7.
Article 208 A1 speaks of **any person**, therefore it covers children as well. It stipulates that:

"Any citizen or permanent resident of Malta whether in Malta or outside Malta, as well as any person in Malta, who makes or produces or permits to be made or produced any indecent material or produces, distributes, disseminates, imports, exports, offers, sells, supplies, transmits, makes available, procures for oneself or for another, or shows such indecent material…".

According to Maltese law a minor is deemed criminally responsible at the age of 14.

Moreover, article 37 (1) of the Criminal Code further states that:

The minor under sixteen years of age shall also be exempt from criminal responsibility for any act or omission done without any mischievous discretion.

(2) In the case where the act or omission is committed by a minor who is aged between fourteen to sixteen years of age with mischievous discretion and in the case where the minor is aged between sixteen and eighteen years, the applicable penalty shall be decreased by one or two degrees.

Question 9.8.
Same answer to question 9.7. above.

Question 9.9.
Same answer to question 9.7. above.

Question 9.10.
The possession *per se* (and the transmission thereof) of child pornography is considered as an illegal act in Malta, and any person who is found in possession of same is prosecuted. Generally, the law does not distinguish between minors and adults. Minors are only spared prosecution if they have not reached the age of 14, or if they have done so, the prosecution should prove that the minor has acted with mischievous discretion.

Question 9.11.
Same answer to question 9.5. above

Question 9.12.
Imprisonment (minimum 12 months – maximum 5 years).

REPUBLIC OF MOLDOVA / REPUBLIQUE DE MOLDOVA
State replies / Réponses de l'Etat

Question 9.1.a.
The domestic law of the Republic of Moldova criminalizes the illegal actions of adults in the Article 208[1] Criminal Code of the Republic of Moldova, "Child Pornography", underlining the offense of "Producing, distributing, spreading, importing, exporting, offering, selling, procuring, changing, using or **holding images or other representations** of one or more children involved in **explicit**, real or simulated **sexual activities**, or images or other representations of a child's sexual organs represented by lascivious or obscene manner, **including in electronic form**."

Question 9.1.b.
The Criminal Legislation of the Republic of Moldova establishes and criminalizes in the Article 208[1] CC of the Republic of Moldova "Child Pornography" - "Producing, distributing, **spreading**, importing, exporting, **offering**, selling, procuring, changing, using or holding **images or other representations** of one or more children involved in explicit, real or simulated **sexual activities**, or images or other representations of a child's sexual organs represented by lascivious or obscene manner, **including in electronic form**."

Under the Art. 16 of the Criminal Code of the Republic of Moldova, the subject of the offense is the person who at the time of committing the offense reached the age of 16.

Question 9.1.c.
The Criminal Code of the Republic of Moldova establishes and criminalizes in the Article 208[1] Criminal Code of the Republic of Moldova the "Child Pornography - Producing, distributing, **spreading**, importing, exporting, **offering,** selling, procuring, changing, using or holding **images or other representations** of one or more children involved in explicit, real or simulated **sexual activities**, or images or other representations of a child's sexual organs represented by lascivious or obscene manner, **including in electronic form**."

The legislator does not establish in this legal norm the subject of the offense other than the adult or a person who at the time of the committed act was 16 years old. According to the legislation in force, the subject of this offense (less serious offense, in accordance with the Article 16 of the Criminal Code of the Republic of Moldova) is the person who at the time of committing the offense reached the age of 16. Under these circumstances, were the distribution and provision of **self-generated sexually explicit images and/or videos** committed by a person under the age of 16, the latest could not be held liable.

Question 9.2.
In the situations referred to in point 9.1 a-c, the **Moldovan Criminal Law** in art. 35, paragraph d) of the Criminal Code, namely "*Circumstances that eliminate the criminal nature of an act*" exclude situations when the person was physically or mentally constrained to commit the offense.

Question 9.3.
The legal consequences for committing the offenses referred to in section **9.1 a-c** are: criminal punishment with 1-3 years of imprisonment, fine for the legal person, with the deprivation of the right to exercise a certain activity.

Question 9.4.a.
The domestic law of the Republic of Moldova criminalizes the illegal actions of adults in Article 208[1] Criminal Code of the Republic of Moldova the "Child Pornography" highlighting in the objective side of the offense the "Producing, distributing, spreading, importing, exporting, offering, selling, procuring, changing, using or **holding** images or other representations of one or more children involved in explicit, real or simulated sexual activities, or **images or other representations of a child's sexual organs represented by lascivious or obscene manner, including in electronic form.**"

Question 9.4.b.
The Criminal Code of the Republic of Moldova establishes and criminalizes in the Article 208[1] Criminal Code of the Republic of Moldova, the "Child Pornography - Producing, distributing, **spreading**, importing, exporting, **offering**, selling, procuring, changing, using or holding images or other representations of one or more children involved in explicit, real or simulated sexual activities, or **images or other representations of a child's sexual organs represented by lascivious or obscene manner, including in electronic form**."

The legislator does not establish in this legal norm the subject of the offense other than the adult or the person who at the time of the committed act was 16 years old. According to the legislation in force, the subject of this offense (less serious offense, in accordance with the Article 16 of the CC of the Republic of Moldova) is the person who at the time of committing the offense reached the age of 16 years. Under these circumstances, were the distribution and provision of **self-generated sexually explicit images and/or videos** committed by a person under the age of 16, the latest could not be held liable.

Question 9.4.c.
The Criminal Code of the Republic of Moldova establishes and criminalizes in the Article 208[1] Criminal Code of the Republic of Moldova the "Child Pornography - Producing, distributing, **spreading**, importing, exporting, **offering**, selling, procuring, changing, using or holding images or other representations of one or more children involved in explicit, real or simulated sexual activities, or **images or other representations of a child's sexual organs represented by lascivious or obscene manner, including in electronic form**."

The legislator does not establish in this legal norm the subject of the offense other than the adult or a person who at the time of the committed act was 16 years old. According to the legislation in force, the subject of this offense (less serious offense, in accordance with the Article 16 of the Criminal Code of the Republic of Moldova) is the person who at the time of committing the offense reached the age of 16 years. Under these circumstances, were the distribution and provision of **self-generated sexually explicit images and/or videos** committed by a person under the age of 16, the latest could not be held liable.

Question 9.5.
In the situations referred to in point 9.1 a-c, the Moldovan Criminal Law in art. 35, paragraph d) of the Criminal Code, namely "Circumstances that eliminate the criminal nature of an act" exclude situations

when the person was physically or mentally constrained to commit the offense.

Question 9.6.
The legal consequences for committing the offenses referred to in section 9.1 a-c are: criminal punishment with 1-3 years of imprisonment, fine for the legal person, with the deprivation of the right to exercise a certain activity.

Question 9.7.
For the point *9.7 (a-f),* as well as according to the provisions of the art. 21, par. 1) of the Criminal Code of the Republic of Moldova, persons who at the time of committing the offense reached the age of 16 are liable for criminal responsibility.

Even if in the preliminary remarks of the Questionnaire it was mentioned that by the term "child" - it is understood the person who is less than 18 years old, we note that according to the legislation of the Republic of Moldova the minors ranged from 16-18 years old, committing offenses, can be subject to criminal liability for the commission of the offense.

Question 9.8.
Under the conditions referred to in point *9.7 a-f*, the Moldovan criminal law in art. 35, paragraph d) of the Criminal Code, namely "Circumstances that eliminate the criminal nature of an act" exclude situations when the person was physically or mentally constrained to commit the offense.

Question 9.9.
The legal consequences for committing the offenses referred to in point *9.7 a-f* are: criminal punishment with 1-3 years of imprisonment, fine for the legal person, with the deprivation of the right to exercise a certain activity.

Question 9.10.
The Criminal Code of the Republic of Moldova, on equal terms, establishes criminal liability for persons aged between 16 and 18 (*for the offense committed under Article 208¹ Criminal Code of the Republic of Moldova, mentioned above*) committing offenses, just as for adults. For children under the age of 16, they cannot be subject to criminal liability. These provisions apply to all unlawful actions provided in point 1-f of point 9.10.

Question 9.11.
Under the art. 35, paragraph d) of the Criminal Code, namely "Circumstances that eliminate the criminal nature of an act" exclude situations when the person was physically or mentally constrained to commit the offense.

Question 9.12.
The legal consequences for committing the offenses referred to in *point 9.7 a-f* are: criminal punishment with 1-3 years of imprisonment, fine for the legal person, with the deprivation of the right to exercise a certain activity.

Replies sent by / Réponses envoyées par La Strada

Question 9.1.a.
Possessing of sexually explicit images, videos depicting a child is criminalized under the art. 208/1 of the Criminal Code of Moldova. There is no any specification to whether these images, videos which are possessed by the adult are child self-generated or not.

Question 9.1.b.
The act of distribution is also criminalized under art. 208/1 of the national law. The law does not make any specifications to whether these distributed images, videos are child-self generated or not.

Question 9.1.c.
The act of distribution is criminalized irrespective of the ultimate receiver (i.e. children depicted or not in the actual images, videos). The distribution of sexually explicit images and/or videos depicting a child to other children will be considerate as corruption of children (under the Convention's provisions) or as perverted actions (under national provisions - art. 175 Criminal Code of the Republic of Moldova - exposure, indecision, obscene or cynical conversation with the victim regarding sexual intercourse, determination of the victim to attend or assist to pornographic performances, the provision of pornographic material to the victim, as well as other sexual acts).

Question 9.2.
There are no special circumstances that will allow avoiding the prosecution for adults in cases 9.1. a-c. Though, the law is uncertain regarding the children of age 14 who under the current criminal law can be convicted if self-generating and distributing/posting/sending sexually explicit images, videos to other children. Even if a child of age 14 may be convicted as being subject of pervert actions (art. 175 of Criminal Code of Republic of Moldova), in case they self-produced sexual images or contents and distributed them to other children, there are not any specifications in the law regarding the intention of committing the crime. Therefore, "La Strada" recommends that the national law be supplemented in order to specify the intention of distributing or possessing those images.

Question 9.3.
For behaviour described in 9.1. a), b), the national law provides for 1 to 3 years imprisonment or a fine or deprivation from exercising a certain activity/position. For behaviour described in 9.1. c), the law provides for 3 to 7 years imprisonment.

Question 9.4.
The action of intentionally obtaining access through information and communication technology, to child pornography was introduced in law. Currently, the provisions of article 208/1 of the Criminal Code of the Republic of Moldova criminalize the production, distributing, offering or making available, importing, exporting, offering, selling, purchasing, changing, using or holding images or other representations of one or more children involved in explicit, real or simulated sexual activities or images or other representations of organs sexual intercourse of a child, represented in a lascivious or obscene manner, including in electronic form.

Question 9.5.
The national law does not provide special circumstances under which the above cases (9.4. a-c) are not prosecuted or do not lead to conviction.

Question 9.6.
For the behaviour described in 9.4. a-b, the national law provides for 1 to 3 years imprisonment and a fine imposed to legal entities with deprivation from exercising a certain activity/position. For behaviour described in 9.4.c., the law provides for 3 to 7 years imprisonment.

Question 9.7.a.
According to current national law, when a child of age 16 to 18 produces self-generated sexually explicit images, this behaviour is subject to punishment (committing the crime of child pornography). There is no any specification in the Criminal Law about the special subject for child pornography that will provide that child of age 16 to 18 cannot be punished for self–generated content. Thus, "La Strada" recommends that the national criminal law is supplemented to make clarity in this sense.

Question 9.7.b.
Possession by a child of age 16 to 18 of self-generated sexually explicit images and or/videos is criminalized according to national law (committing the crime of child pornography).

Question 9.7.c.
According to national criminal law, a child of age 14 who distributes or transmits self-generated sexually explicit images and/or videos of themselves to a child up to 16 years old may be convicted for committing the crime of pervert actions (corruption of children - art. 22 of the Lanzarote Convention). The problem is that the caw does not contain clear provision about the intention of sending that images and content.

Question 9.7.d.
According to national law a child of age 16 who distributes or transmits self-generated sexually explicit images, videos (of themselves) may be convicted (for committing the crime of child pornography). The current law is not specific about the person to whom the images, videos are distributed/transmitted. However, the child could be a victim in this situation as he/she could distribute/transmit these images, videos upon request/demand of the adult. Referring to these cases, the law criminalizes all situations when the adult demand/request self-generated sexually explicit images, videos of children (for committing the crime of grooming, pervert actions or other offenses of sexually exploitation or sexual abuse of children).

Question 9.7.e.
If self-generated sexually explicit images and/or videos (the law does not make any specifications regarding whether the image, video depicts him/herself or another child) is distributed or transmitted by a child who turned 14 to a child up to 16 years old, this behaviour is criminalized by national law as pervert actions (art. 175 Criminal Code of the Republic of Moldova).

Question 9.7.f.
As in case of behaviour 9.7.d – the child will not be convicted, but if the adult demanded the sexually explicit images and/or videos of other children, he may be subject of one of the crimes under national law.

Question 9.8.
There are no special circumstances.

Question 9.9.
For behaviour described in 9.7. a-f, the national law provides for 1 to 3 years imprisonment (in case of child pornography – art. 208/1 CC of RM) or 3 to 7 years imprisonment (in case of pervert actions – art. 175 CC of RM).

Question 9.10.
The national law lacks clear legal provisions regarding images, videos and other materials depicting a child in a sexual suggestive way (to provoke arousal) as it provided by the Lanzarote Convention. Thus, the national law is uncertain about the sexual content, as the article criminalizing child pornography refers only to images, videos, movies, photos, drawings or others depicting a child involved in explicit, real or simulated sexual activities or pictures or other images of genital organs of a child represented in a lustful or indecent manner.

Question 9.11.
As there are no provisions in the national law about self-generated sexual content that depicts a child in a suggestive way without being sexually explicit, the behaviours described in 9.10 a-f are not criminalized and thus the question 9.11. is not applicable.

Question 9.12.

As there are no provisions in the national law about self-generated sexual content that depicts a child in a suggestive way without being sexually explicit, the behaviours described in 9.10 a-f are not criminalized and thus the question 9.11. is not applicable.

MONACO

State replies / Réponses de l'Etat

Question 9.1.

Les Autorités monégasques prennent acte de ce que le questionnaire invite expressément les Etats Parties à se référer aux réponses apportées au **questionnaire de suivi général concernant la mise en œuvre de l'article 20 de la Convention** (spécialement à la question 16), sauf actualisation des réponses concernées dans le contexte de la présente question**. Aussi le Gouvernement Princier réitèrera-t-il *ne varietur,* aux éléments *de* réponses communiquées dans le document référencé T-ES(2014)GEN-MC, Question 16, pp.31 à 36) :**

Pour l'ensemble des catégories d'infractions déclinées dans ce paragraphe, la tentative et les actes de complicité sont réprimés.

Les abus sexuels

- L'article 261 du Code pénal réprime : *« Tout attentat à la pudeur, consommé ou tenté sans violence sur la personne d'un mineur de l'un ou l'autre sexe, au-dessous de l'âge de seize ans accomplis, sera puni de la réclusion de cinq à dix ans. Sera puni de la même peine l'attentat à la pudeur commis par tout ascendant sur la personne d'un mineur, même âgé de plus de seize ans, mais non émancipé par le mariage. »*

- L'article 263 dispose : « *Quiconque aura commis un attentat à la pudeur, consommé ou tenté avec violence, contre un individu de l'un ou l'autre sexe, sera puni de la réclusion de cinq à dix ans.*

Si le crime a été commis sur la personne d'un mineur au-dessous de l'âge de seize ans accomplis, le coupable subira la peine de la réclusion de dix à vingt ans. »

Ainsi, le fait d'avoir des relations sexuelles avec un mineur de moins de 16 ans même si elles sont consenties constitue un crime, que l'auteur soit majeur ou mineur.

- En revanche, ne sont pas réprimés les attentats à la pudeur commis sans violence sur des mineurs de plus de 16 ans sauf recours aux dispositions de l'article 273 du Code pénal réprimant plus spécifiquement d'avoir des relations immorales avec un mineur, s'il a été séduit, soit à l'aide de manœuvres frauduleuses, soit en abusant de son autorité de droit ou de fait. Dans ce cas, la poursuite n'aura lieu que sur la plainte du mineur séduit, de ses père, mère ou tuteur.
- Ensuite, l'article 262 du Code pénal réprime le viol, défini comme tout acte de pénétration sexuelle, de quelque nature qu'il soit et par quelque moyen que ce soit, commis sur la personne d'autrui, par violence, contrainte, menace ou surprise. Cet article précise :

« Est en outre un viol tout acte de pénétration sexuelle, de quelque nature qu'il soit et par quelque moyen que ce soit, commis sur un mineur par :

1°) toute personne ayant un lien de parenté avec la victime, qu'il soit légitime, naturel ou adoptif, ou un lien d'alliance ;

2°) toute personne vivant avec lui sous le même toit ou y ayant vécu durablement et qui exerce ou a exercé à son égard une autorité de droit ou de fait.

Quiconque aura commis le crime de viol sera puni de la réclusion de dix à vingt ans.

Si le viol a été commis sur la personne d'un mineur au-dessous de l'âge de seize ans ou dans les conditions définies au troisième alinéa, le coupable encourra le maximum de la réclusion à temps.

Il en est de même si le viol a été commis sur une personne dont la vulnérabilité ou l'état de dépendance étaient apparents ou connus de son auteur. »

- Les peines encourues pour les crimes d'attentats à la pudeur et de viol sont aggravées par l'article 264 du Code pénal :

« *Si les coupables sont les ascendants de la personne sur laquelle a été commis l'attentat, s'ils sont de la classe de ceux qui ont autorité sur elle, s'ils sont ses instituteurs ou ses serviteurs à gages, ou serviteurs à gages de personnes ci-dessus désignées, s'ils sont fonctionnaires ou ministres d'un culte ou si le coupable, quel qu'il soit a été aidé dans son crime par une ou plusieurs personnes, la peine sera la réclusion de dix à vingt ans dans les cas prévus aux articles 261 (1er alinéa) et 263 (1er alinéa) et du maximum de la réclusion à temps dans les cas prévus aux articles 262 (1er alinéa) et 263 (2e alinéa).* »

Mais, la loi monégasque ne prévoit pas d'aggravation spécifique lorsque l'auteur abuse « d'une situation de particulière vulnérabilité de l'enfant, notamment en raison d'un handicap physique ou mental ou d'une situation de dépendance tel que prévu à l'article 18 de la convention. » La répression est celle du principe général.

L'âge de 16 ans est un seuil retenu par la loi tantôt pour incriminer, tantôt pour aggraver la sanction d'abus sexuels commis à l'encontre de mineurs.

- La loi monégasque incrimine également de manière très large aux articles 265 et 266 du Code pénal une infraction non mentionnée dans l'encadré de la question 16.

L'article 265 énonce :

« *Est puni d'un emprisonnement de six mois à trois ans et de l'amende prévue au chiffre 3 de l'article 26 :*
4°) quiconque organise ou facilite l'exploitation sexuelle de mineurs sur le territoire ou hors du territoire de la Principauté.

Ces deux peines seront encourues alors même que les divers actes qui sont les éléments constitutifs des infractions auraient été accomplis dans des pays différents.

La tentative et la préparation des délits prévus par le présent article sont punies des mêmes peines que les délits eux-mêmes. »

Cette incrimination est aggravée par l'article 266 :

« Dans les cas prévus à l'article précédent, la peine est de cinq à dix ans d'emprisonnement :
1°) lorsque le délit a été commis, tenté ou préparé par un ascendant légitime, naturel ou adoptif de la victime ou par une personne qui a autorité sur elle ou abuse de l'autorité que lui confèrent ses fonctions ;
2°) lorsque le mineur a été mis en contact avec l'auteur des faits grâce à l'utilisation, pour la diffusion de messages à destination d'un public non déterminé, d'un réseau de communications électroniques ;
3°) lorsque les faits sont commis à l'intérieur d'un établissement accueillant habituellement des mineurs ou à l'occasion des entrées ou sorties de mineurs, aux abords d'un tel établissement ;
4°) lorsque le délit a été commis à l'encontre d'un mineur dont la vulnérabilité ou l'état de dépendance était apparent ou connu de l'auteur ;
5°) lorsque le délit a été commis avec l'emploi de la contrainte, de violences ou de manœuvres dolosives.

La peine est de dix à vingt ans de réclusion et de l'amende prévue au chiffre 4 de l'article 26 lorsque la victime de l'infraction est un mineur au-dessous de l'âge de seize ans accomplis. »

La prostitution enfantine

La répression de la prostitution enfantine est régie par les articles 268 à 269-1 du Code pénal.

- L'article 268 dispose :

« Sont considérés comme proxénètes et punis d'un emprisonnement de six mois à trois ans et de l'amende prévue au chiffre 3 de l'article 26 ceux qui, de quelque manière que ce soit :
1°) embauchent, entraînent ou détournent une personne en vue de la prostitution ou exercent sur elle une pression pour qu'elle se prostitue ou continue à le faire ;
2°) aident ou assistent la prostitution d'autrui ou la protègent ;
3°) partagent les produits de la prostitution ou reçoivent sciemment sous une forme quelconque des subsides de personnes se livrant à la prostitution ;

4°) ne peuvent justifier de ressources correspondant à leur mode d'existence tout en étant en relation habituelle avec une ou plusieurs personnes se livrant à la prostitution.

Est assimilé au proxénétisme, et puni des mêmes peines, le fait, par quiconque, de quelque manière que ce soit :
1°) de faire office d'intermédiaire entre deux personnes dont l'une se livre à la prostitution et l'autre exploite ou rémunère la prostitution d'autrui ;
2°) de faciliter à un proxénète la justification de ressources fictives. »

- L'article 269 du Code pénal prévoit les aggravations suivantes:

« Le proxénétisme est puni de cinq à dix ans d'emprisonnement et de l'amende prévue au chiffre 3 de l'article 26 lorsqu'il est commis :
1°) à l'égard d'un mineur ;
2°) à l'égard d'une personne dont la particulière vulnérabilité, notamment du fait de son âge, d'une maladie, d'une infirmité, d'une déficience physique ou psychique ou d'un état de grossesse, est apparente ou connue de son auteur ;
3°) à l'égard de plusieurs personnes ;
4°) par un ascendant légitime, naturel ou adoptif de la personne qui se prostitue ou par une personne qui a autorité sur elle ou abuse de l'autorité que lui confèrent ses fonctions ou l'état de dépendance matérielle ou psychologique dans lequel se trouve placée, vis-à-vis d'elle, la personne qui se prostitue ;
5°) avec l'emploi de la contrainte, de violences ou de manœuvres dolosives ;
6°) par plusieurs personnes agissant en qualité d'auteur ou de complice, sans qu'elles constituent une bande organisée.

Le proxénétisme est puni de dix à vingt ans de réclusion et de l'amende prévue au chiffre 4 de l'article 26 lorsqu'il est commis à l'égard d'un mineur au-dessous de l'âge de seize ans accomplis ou en bande organisée ».

- Enfin, l'article 269-1 du Code pénal énonce :

« *L'utilisation d'un mineur aux fins d'activités sexuelles, en offrant ou en promettant de l'argent ou toute autre forme de rémunération, de paiement ou d'avantage, que cette rémunération, ce paiement, cette promesse ou cet avantage soit fait au mineur ou à un tiers, est puni d'un emprisonnement de trois à cinq ans et de l'amende prévue au chiffre 3 de l'article 26. »*

La pornographie enfantine

- L'article 294-3 du Code pénal contribue à incriminer chacun des aspects de la production, de la possession et de la diffusion de pornographie enfantine afin de protéger les mineurs contre toute forme d'exploitation sexuelle, ceux-ci devant être préservés aussi bien en tant qu'acteurs qu'en tant que spectateurs de ce processus.

A cet effet, cet article sanctionne plusieurs comportements – dont notamment le fait de fixer, enregistrer, produire de la pornographie enfantine – ainsi que toutes les formes de diffusion et de transmission de la pornographie enfantine.

L'article 294-3 du Code pénal prévoit en outre une aggravation des peines encourues lorsqu'un réseau de communications a servi pour la diffusion de l'image ou de la représentation d'un mineur. Ainsi dispose-t-il :

« Le fait, en vue de sa diffusion, de fixer, d'enregistrer, de produire, de se procurer ou de transmettre l'image ou la représentation d'un mineur lorsque cette image ou cette représentation présente un caractère pornographique est puni d'un emprisonnement de trois à cinq ans et de l'amende prévue au chiffre 3 de l'article 26. La tentative est punie des mêmes peines.
Le fait, sciemment, d'offrir ou de diffuser une telle image ou représentation, par quelque moyen que ce soit, de l'importer ou de l'exporter, de la faire importer ou de la faire exporter, est puni des mêmes peines.

Le fait de détenir sciemment une telle image ou représentation est puni de six mois à deux ans d'emprisonnement et de l'amende prévue au chiffre 2 de l'article 26.
Le fait d'accéder, en connaissance de cause, à une telle image ou représentation, est puni des mêmes peines.

- Les peines sont portées de cinq à dix ans d'emprisonnement et à l'amende prévue au chiffre 4 de l'article 26 lorsqu'il a été utilisé, pour la diffusion de l'image ou de la représentation d'un mineur à destination d'un public non déterminé, un réseau de communications électroniques.

Les dispositions du présent article sont également applicables aux images pornographiques d'une personne dont l'aspect physique est celui d'un mineur, sauf s'il est établi que cette personne était âgée de dix-huit ans accomplis au jour de la fixation ou de l'enregistrement de son image.

« Au sens du présent article, sont considérées comme des images à caractère pornographique :
1°) l'image ou la représentation d'un mineur subissant ou se livrant à un comportement sexuellement explicite ;
2°) l'image ou la représentation d'une personne qui apparaît comme un mineur subissant ou se livrant à un comportement sexuellement explicite ;
3°) l'image réaliste représentant un mineur se livrant à un comportement sexuellement explicite.

L'expression "image réaliste" désigne, notamment, l'image altérée d'une personne physique, en tout ou partie créée par des méthodes numériques.

Les dispositions du présent article ne s'appliquent pas si les images ou représentations d'images ont été collectées pour la constatation, la recherche ou la poursuite des infractions pénales. »

- Une incrimination spécifique, non listée dans les incriminations énumérées à la question 16, a également été créée par la loi monégasque :

L'article 294-4 du Code pénal dispose :

« Lorsque les images ou représentations prévues à l'article précédent ont été portées à leur connaissance à l'occasion de leur activité professionnelle, les opérateurs ou prestataires de services chargés de l'exploitation de réseaux et de services de télécommunications et de communications électroniques, ou un de leurs agents, sont tenus de procéder aux opérations tendant à interdire l'accès du public à de telles images, et de les mettre à disposition de l'autorité judiciaire, pour les besoins de la recherche, de la constatation et de la poursuite des infractions pénales.
La méconnaissance des obligations prévues à l'alinéa précédent est punie d'un emprisonnement d'un an et de l'amende prévue au chiffre 4 de l'article 26, sans préjudice des peines encourues par les auteurs, coauteurs ou complices des infractions visées aux alinéas un à cinq de l'article précédent. »

La participation d'un enfant à des spectacles pornographiques

Ce délit est incriminé à l'article 294-5 du Code pénal :

« *Est puni d'un emprisonnement de trois à cinq ans et de l'amende prévue au chiffre 3 de l'article 26 :*
1°) le fait de contraindre un mineur à regarder ou à participer à des scènes ou spectacles pornographiques ou d'en tirer profit ou d'exploiter un mineur de toute autre manière à cette fin ;
2°) le fait de recruter, avec l'emploi de la contrainte, de violences ou de manœuvres dolosives, un mineur pour qu'il assiste ou participe à des scènes ou spectacles pornographiques ou de favoriser la participation d'un mineur à de tels spectacles ;
3°) le fait d'assister à des spectacles pornographiques impliquant la participation de mineurs.

Est puni des mêmes peines le fait d'amener intentionnellement un mineur à assister ou à participer à des activités sexuelles. »

La corruption d'enfants

L'article 265 dispose :

« Est puni d'un emprisonnement de six mois à trois ans et de l'amende prévue au chiffre 3 de l'article 26 :
1°) quiconque attente aux mœurs, en incitant habituellement à la débauche ou à la corruption de mineurs de l'un ou l'autre sexe, ou en favorisant ou facilitant habituellement ces agissements. Les mêmes peines sont applicables si l'attentat est perpétré, même occasionnellement, sur un mineur au-dessous de l'âge de seize ans accomplis ;
2°) quiconque, pour satisfaire les passions d'autrui, embauche, entraîne ou détourne, même avec son consentement, une personne mineure en vue de la débauche ;
3°) quiconque, pour satisfaire les passions d'autrui, embauche, entraîne ou détourne, par fraude ou à l'aide de violences, menaces, abus d'autorité ou tout autre moyen de contrainte une personne majeure en vue de la débauche ;
(…)
Ces deux peines seront encourues alors même que les divers actes qui sont les éléments constitutifs des infractions auraient été accomplis dans des pays différents.

La tentative et la préparation des délits prévus par le présent article sont punies des mêmes peines que les délits eux-mêmes. »

Les dispositions aggravantes de l'article 266 sont applicables.

La sollicitation d'enfants à des fins sexuelles

L'article 294-6 du Code pénal énonce :
« Le fait pour un majeur de proposer intentionnellement, par l'emploi d'un réseau de communications électroniques, une rencontre à une personne, en connaissance de sa qualité de mineur dans le but de commettre à son encontre toute infraction à caractère sexuel punie d'une peine d'emprisonnement supérieure ou égale à trois ans, est passible d'un emprisonnement de six mois à deux ans et de l'amende prévue au chiffre 2 de l'article 26.
Lorsque cette rencontre a eu lieu, les peines sont portées de trois à cinq ans d'emprisonnement et à l'amende prévue au chiffre 4 de l'article 26. »

Même si le droit interne n'utilise pas le terme « auto produite », les articles de lutte contre la pornographie enfantine ont un champ d'application générale permettant la poursuite pénale des personnes possédant, diffusant transmettant, distribuant les images et/ou vidéos sexuellement explicites d'un enfant. Il en est de même pour le contenu sexuellement explicite.

Question 9.2.
Il n'existe aucune circonstance spéciale justifiant que les cas précités (9.1.a-c) ne fassent pas l'objet de poursuites pénales et/ou n'aboutissent pas à une condamnation.

En revanche, la condamnation prononcée peut contraindre à un suivi thérapeutique seul ou assorti d'une peine d'emprisonnement (ferme ou sursis)

Question 9.3.
No answer to this question / Pas de réponse à cette question.

Question 9.4.
Les Autorités monégasques prennent acte de ce que le questionnaire invite expressément les Etats Parties à se référer aux réponses apportées au **questionnaire de suivi général concernant la mise en œuvre de l'article 20 de la Convention** (spécialement à la question 16), sauf actualisation des réponses concernées dans le contexte de la présente question. **Aussi le Gouvernement Princier renvoie-t-il, sans modification aux éléments *de* réponses communiquées dans le document référencé T-ES(2014)GEN-MC, Question 16, pp.31 à 36,** *reproduites ci-dessus sous 9.1*.

Le droit interne ne dispose pas d'infraction pénale dédiée concernant la production, la possession, par des enfants d'images et/ou vidéos sexuellement explicites autoproduites ou de contenus à caractère sexuel autoproduits.

La distribution ou la transmission à des pairs ou à des adultes d'images et/ou vidéos sexuellement explicites autoproduites ou de contenus à caractère sexuel autoproduits tombent sous le coup des qualifications pénales déjà évoquées supra.

Il en va de même si les images et/ou vidéos sexuellement explicites autoproduites ou des contenus à caractère sexuel autoproduits transmis ou distribués concerne d'autres enfants.

Question 9.5.
Il n'existe aucune circonstance spéciale justifiant que les cas précités (9.4.a-c) ne fassent pas l'objet de poursuites pénales et/ou n'aboutissent pas à une condamnation.

En revanche, la condamnation prononcée peut contraindre à un suivi thérapeutique seul ou assorti d'une peine d'emprisonnement (ferme ou sursis).

Question 9.6.
No answer to this question / Pas de réponse à cette question

Question 9.7.
De tels comportements ne sont pas érigés, en droit interne, en infraction pénale.

Question 9.8.
Il n'existe aucune circonstance spéciale justifiant que les cas précités (9.7.a-f) ne fassent pas l'objet de poursuites pénales et/ou n'aboutissent pas à une condamnation.

Pour mémoire, le parquet général apprécie l'opportunité des poursuites en tentant compte de chaque situation notamment la transmission, par l'enfant, d'images et/ou vidéos sexuellement explicites autoproduites ou de contenus à caractère sexuel autoproduits. Un signalement au Juge Tutélaire pourra être privilégié afin d'appréhender les raisons de tels actes et d'apporter le soutien psychologique et/ou social nécessaire.

Question 9.9.
No answer to this question / Pas de réponse à cette question

Question 9.10.
No answer to this question / Pas de réponse à cette question

Question 9.11.
Il n'existe aucune circonstance spéciale justifiant que les cas précités (9.10.a-f) ne fassent pas l'objet de poursuites pénales et/ou n'aboutissent pas à une condamnation.

Question 9.12.
No answer to this question / Pas de réponse à cette question

MONTENEGRO
State replies / Réponses de l'Etat

Question 9.1.
The Criminal Code of Montenegro criminalizes cases defined in the questions a, b, and c of this Questionnaire in the sense that Article 211, paragraph 3 stipulates as a special criminal offense exploiting a child for the production of pictures, making available, distribution, import, export, obtaining for themselves or others, selling, giving, displaying, publicly exhibiting or owning images, audio-visual or other objects of pornographic content.

Question 9.2.
The Criminal Code of Montenegro does not contain any other special circumstances related to the exemption from liability for committed criminal offenses of child pornography beside general grounds for the exclusion of unlawfulness (legitimate self-defence, extreme necessity and force and threat). However, the Criminal Code of Montenegro provides in Article 47 the grounds for remission of punishment:

1. Punishment may also be remitted by court where a perpetrator committed an offence by negligence and where the consequences of that offence affect the perpetrator to an extent that imposition of such punishment would not serve its purpose.
2. Punishment may also be remitted by court where a perpetrator committed a criminal offence punishable by maximum five year prison term provided that after the commission but before he learned he was uncovered he had eliminated the consequences of the offence or had compensated the damage inflicted by the criminal offence.

Question 9.3.
The legal consequence of the aforementioned behaviour is a judgment imposing a sentence of imprisonment ranging from three months to ten years.

Question 9.4.
The Criminal Code of Montenegro criminalizes cases defined in the questions a, b, and c of this Questionnaire, in the sense that Article 211, paragraph 3, stipulates as a special criminal offense exploiting a child for the production of pictures, production, making available, distribution, import, export, obtaining for themselves or others, selling, giving, displaying, publicly exhibiting or owning images, audio-visual or other objects of pornographic content.

Question 9.5.
The Criminal Code of Montenegro does not contain any other special circumstances related to the exemption from liability for committed criminal offenses of child pornography beside general grounds for the exclusion of unlawfulness (legitimate self-defence, extreme necessity and force and threat). However, the Criminal Code of Montenegro provides in Article 47 the grounds for remission of punishment:

1. Punishment may also be remitted by court where a perpetrator committed an offence by negligence and where the consequences of that offence affect the perpetrator to an extent that imposition of such punishment would not serve its purpose.
2. Punishment may also be remitted by court where a perpetrator committed a criminal offence punishable by maximum five year prison term provided that after the commission but before he learned he was uncovered he had eliminated the consequences of the offence or had compensated the damage inflicted by the criminal offence.

Question 9.6.

The legal consequence of the abovementioned behaviour is a judgment imposing prison sentences ranging from three months to ten years.

Question 9.7.

The Act on Treatment of Juveniles in Criminal Proceedings stipulates that a person who at the time of commission of an unlawful act which is qualified by law as a criminal offence is younger than 14 (a child) may not be tried in criminal proceedings nor may be subject of sanctions and measures provided for by this Law. The Act further distinguishes between a younger juvenile (14 to 16 years of age) and a juvenile (16 to 18 years of age), who may be tried in criminal proceedings and pronounced diversion measures (warning or attendance order) or criminal sanctions (correctional measures, a juvenile detention term, or security measures). A younger juvenile may only be sanctioned by correctional measures. An older juvenile may be sanctioned by correctional measures and, by exception and under conditions set by this Act, may also be sanctioned by a juvenile detention term. A juvenile may also, under conditions set by the law, be sanctioned by the security measures, save for the ban on engagement in a profession, business or duty and publication of the judgment. A juvenile may not be sanctioned by suspended sentence and court admonition.

Question 9.8.

The Law on Treatment of Juveniles in Criminal Proceedings stipulates that a person who at the time of commission of an unlawful act which is qualified by law as a criminal offence is younger than 14 (a child) may not be tried in criminal proceedings nor may be subject of sanctions and measures provided for by this Law.

Question 9.9.

The law distinguishes between a younger juvenile (14 to 16 years of age) and a juvenile (16 to 18 years of age), who may be tried in criminal proceedings and pronounced diversion measures (warning or attendance order) or criminal sanctions (correctional measures, a juvenile detention term, or security measures). A younger juvenile may only be sanctioned by correctional measures. An older juvenile may be sanctioned by correctional measures and, by exception and under conditions set by this Act, may also be sanctioned by a juvenile detention term. A juvenile may also, under conditions set by the law, be sanctioned by the security measures, save for the ban on engagement in a profession, business or duty and publication of the judgment. A juvenile may not be sanctioned by suspended sentence and court admonition. A person who, at the time of the commission of a criminal offense was younger than 14, does not have legal consequences for the abovementioned behaviour.

Question 9.10.

The Act on Treatment of Juveniles in Criminal Proceedings stipulates that a person who at the time of commission of an unlawful act which is qualified by law as a criminal offence is younger than 14 (a child) may not be tried in criminal proceedings nor may be subject of sanctions and measures provided for by this Law. The Act further distinguishes between a younger juvenile (14 to 16 years of age) and a juvenile (16 to 18 years of age), who may be tried in criminal proceedings and pronounced diversion measures (warning or attendance order) or criminal sanctions (correctional measures, a juvenile detention term, or security measures). A younger juvenile may only be sanctioned by correctional measures. An older

juvenile may be sanctioned by correctional measures and, by exception and under conditions set by this Act, may also be sanctioned by a juvenile detention term. A juvenile may also, under conditions set by the law, be sanctioned by the security measures, save for the ban on engagement in a profession, business or duty and publication of the judgment. A juvenile may not be sanctioned by suspended sentence and court admonition.

Question 9.11.
The Law on Treatment of Juveniles in Criminal Proceedings stipulates that a person who at the time of commission of an unlawful act which is qualified by law as a criminal offence is younger than 14 (a child) may not be tried in criminal proceedings nor may be subject of sanctions and measures provided for by this Law.

Question 9.12.
The law distinguishes between a younger juvenile (14 to 16 years of age) and a juvenile (16 to 18 years of age), who may be tried in criminal proceedings and pronounced diversion measures (warning or attendance order) or criminal sanctions (correctional measures, a juvenile detention term, or security measures). A younger juvenile may only be sanctioned by correctional measures. An older juvenile may be sanctioned by correctional measures and, by exception and under conditions set by this Act, may also be sanctioned by a juvenile detention term. A juvenile may also, under conditions set by the law, be sanctioned by the security measures, save for the ban on engagement in a profession, business or duty and publication of the judgment. A juvenile may not be sanctioned by suspended sentence and court admonition. A person who, at the time of the commission of a criminal offense was younger than 14, does not have legal consequences for the abovementioned behaviour.

Comments sent by / Commentaires envoyés par NGO Parents

Question 9.
We believe that the country must urgently take on certain steps in order to adequately protect children, which is not the case currently, while we would like to stress inappropriately low penalties, which almost encourage perpetrators to commit those crimes.

We have requested on many occasions to have more severe penalty policy, as a way of tackling this problem, which can be achieved through the amendments of the Criminal Law. We talked about this issue with DPM and Justice Minister Zoran Pazin, who declared readiness for joint activities in this area. During 2018, with the help of the first licensed lobbyist in Montenegro, who offered his help on a voluntary basis, the NGO Parents will try to initiate necessary changes.

We find that, regarding the penalties envisaged by the current law, the problem is that the lower threshold is too low. The span between maximum and minimum penalty envisaged by the law is too wide, and that gives the opportunity to courts to sentence perpetrators to milder sentences. That, also, contributes to encouraging perpetrators to commit those crimes, since they know in advance that they will not be adequately punished in case they are caught. Therefore it is necessary to raise lower threshold in order to send a clear message to potential perpetrators.

NETHERLANDS / PAYS-BAS

State replies / Réponses de l'Etat

Question 9.1.
Yes. The possession, distribution or transmitting of child pornography to other persons (adults or children) is criminalized in article 240b of the Dutch Criminal Code (in the Title on sexual offences).

Question 9.2.
Yes, in very light cases of child pornography, if the adult has only downloaded only a few images, there's an alternative intervention, called INDIGO-afdoening (Initiative doing nothing is not an option). It is a conditional discharge, with the condition that the suspect will undergo treatment (in the very near future) to prevent the behavior from happening again.

Question 9.3.
According to article 240b of the Dutch Criminal Code the penalty for possession, distribution or transmitting is imprisonment for a maximum period of 4 years or a maximum fine of the 5th category (€ 82,000.-).

If it's a habit or a profession then the penalty can be according to article 240b of the Dutch Criminal Code imprisonment for a maximum period of 8 years or a maximum fine of the 5th category (€ 82,000.-).

Question 9.4.
If an image or video will be seen as child pornography depends on the specific character of the picture (the pose or position, emphasis on the genitals) of the involved child and the context (clothes, attributes, environment, creation process), whether it must be seen as an normal image of a minor (naked or semi-naked) in family setting or not. Besides the explicit sexual images, also will those images that are produce in a way that generates sexual stimuli, that have an unmistakable sexual bearing, be seen as child pornography. In the designation child pornography of the Prosecution Office is defined what is child pornography (the criteria are based on case law of the Supreme Court).

It is irrelevant whether the child himself or herself generated the child pornography or some other person did. Furthermore, it is irrelevant whether the perpetrator transmits the child pornography to other adults or to a child who has not been perpetuated in the self-generated sexual content.

Question 9.5.
Yes, very light cases of child pornography, if the adult has only downloaded only a few images, can be dealt with an alternative intervention. Like the so called INDIGO-afdoening (Initiative doing nothing is not an option). It is a conditional discharge, after a short criminal investigation, with the condition that the suspect will undergo treatment (in the very near future) to prevent the behavior from happening again. This leaves more time for the identification of victims and the investigation in more tougher cases (the producers and child abusers etc.).

Question 9.6.
According to article 240b of the Dutch Criminal Code the penalty for possession, distribution or transmitting is imprisonment for a maximum period of 4 years or a maximum fine of the 5th category (€ 82,000.-).

If it's a habit or a profession then the penalty can be according to article 240b of the Dutch Criminal Code imprisonment for a maximum period of 8 years or a maximum fine of the 5th category (€ 82,000.-).

Question 9.7.
Producing, distributing, procuring (for oneself or another), possessing and obtaining (including downloading or watching the material real time) access to child pornography is criminalized in article 240b of the Dutch Criminal Code. Child pornography is defined as an image or data carrier containing an image of a minor (not reached the age of 18) involved or seemingly involved in sexual behavior. It's an offence, even if it's self-generated images and/or videos whether there is consent or not. It is irrelevant whether the child itself distributes or transmits the child pornography to an adult or to a child.

The Prosecution Office and the police have made a guidance for the disposal of those kind of sexting cases (www.om.nl/onderwerpen/sexting). The purpose of the policy is to prevent victimization, new offenders, the safety of those involved and if possible damage repairs.

The way that the depicted person is compromised in his or her interest, is a guiding principle in the assessment to prosecute the suspect or not. Assessment factors are the nature of the sexting material, the extent of voluntariness in the production, the way and seriousness of the distribution and the relation between the involved persons. Determinants of the voluntariness are if there is an unequal relation (f.e. because of an age difference) or if there was mutual consent (not by pressure of coercion).

If the person depicted has not reached the age of 12, there will be assumed it's an unequal situation and there will be an criminal investigation. If the person is older than the police will talk with the youngsters involved and will confiscate the data carrier(s). It will depend on the individual circumstances what decision the police and Prosecution Office will take.

Question 9.8.
No answer to this question / Pas de réponse à cette question

Question 9.9.
The choice for an intervention is always a tailor-made approach. The aim is that cases in which the material is produced voluntarily, in an affective and consensual relation are not prosecuted.

In the investigation and prosecution phase there are three categories of cases. Category 3 are the lightest cases that will only be dealt with an alternative intervention. The material is produced or seemed to be produced voluntarily, the involved are both minors (or there is an age difference of at most 5 years) and there are no aggravating circumstances. In case of a category 2 (the motive is bullying, libel, slander, blasphemy or harassment) can also be chosen for not criminal proceedings, like a conditional discharge or a settlement with the Public Prosecution Service (OM-afdoening) and/or a Halt-intervention. In 2017 a specific alternative intervention was developed, the Halt-intervention "Respect online" especially for lighter cases of sexting. This intervention will not be visible in the judicial documentation and will have no consequences for a future request of a certificate of good behaviour ('VOG'). Category 1 cases, the heaviest cases will be prosecuted (circumstances can be that the victim has not reached the age of 12 or the age difference exceeds 5 year, there is a dependency relationship, there are commercial elements or coercion etc.). Because of reasons of protection the prosecution can be for a lighter sexual offence than child pornography or for another criminal crime.

The basic team of the police knows the living context of the persons involved. This information is used by the handling of the case, the choice of an alternative intervention.

An alternative intervention can concern the suspect, the victim or the direct social environment. An alternative intervention can be used by the police or one of the network partners (for example, education on school or a talk with the involved youngsters and their caretakers to warn them about the risks of their behavior and the consequences of recidivism or to refer them to psychotherapeutic help or social care or mediation).

Question 9.10.
In case the material is determined as child pornography see 9.7.

Question 9.11.
In case the material is determined as child pornography see 9.8.

Question 9.12.
In case the material is determined as child pornography see 9.9.

NORTH MACEDONIA / MACEDOINE DU NORD
State replies / Réponses de l'Etat

Question 9.1.
In terms of this question we would like to make reference to the replies to the General Overview Questionnaire as regards to the implementation of Article 20 of the Convention:

> Article 119 point (24) contains a definition of child pornography: "under the child pornography means pornographic material that visually displays obvious sexual acts with a minor or older person who looks like a minor, or show minor or adult person seems like a minor in apparent sexual position, or realistic images that show obvious sexual acts with a minor or show minor or adult person who looks like a minor in apparent sexual position."
>
> Article 20 is embedded in article 193-A: Production and distribution of child pornography:
> While it provides punishment of the following actions:
> (1) A person who produces child pornography in order for its distribution or transfer or offers or otherwise making available child pornography shall be punished with imprisonment of at least five years.
> (2) A person who purchased child pornography for himself or another or possess child pornography, shall be punished with imprisonment from five to eight years.
> (3) If the crimes referred to paragraphs (1) and (2) of this article is committed through computeric systems or other means of mass communication, shall be punished with imprisonment of at least eight years.
> (4) If the crime of this article is performed by a legal person, shall be punished by a fine.

Question 9.2.
The aforementioned criminal acts are prosecuted ex officio. Pursuant to the Law on Criminal Procedure, the Public Prosecutor's Office shall be obliged to initiate criminal prosecution if there is evidence of a committed criminal act being prosecuted ex officio, except otherwise laid down by this law. Also, Article 42 stipulates that the Public Prosecutor's Office may cancel the criminal prosecution until the end of the criminal procedure, in cases laid down by law.

Question 9.3.
A prison sentence is imposed for the above-mentioned criminal acts. If the act was committed by a legal entity a fine is imposed. Also, the items used for the perpetration of the criminal act are seized.

Question 9.4.
See reply to question 9.1.

Question 9.5.
See reply to question 9.2 (A prison sentence is imposed for the above-mentioned criminal acts. If the act was committed by a legal entity a fine is imposed. Also, the items used for the perpetration of the criminal act are seized.)

Question 9.6.
See reply to question 9.3.

Question 9.7.
Both children and adults may be perpetrators of the aforementioned criminal acts because the law uses an impersonal pronoun for perpetrators of these criminal acts: 'One who...'

If the perpetrator is an adult, the provisions of the Criminal Code and Law on Criminal Procedure shall apply.

If the perpetrator is a child the provisions of the Law on Juvenile Justice (Official Gazette of the Republic of Macedonia No.148/2013) shall apply.

Question 9.8.

The Law on Juvenile Justice entails forms of restorative justice. Article 19 lays down a definition of a child at risk:

- A child at risk is a child at the age of at least seven, but under the age of 18 who has a physical or mental disability, who is a victim of violence; who has been educationally or socially neglected; who is in such a state that aggravates or impedes the exercising of the upbringing by the parent, or the legal guardian; who has been excluded from the educational and upbringing system; who was drawn into begging, vagrancy or prostitution; who uses drugs and other psychotropic substances and precursors or alcohol; and who due to such a situation, in the context of a law, is or may become a victim or a witness to an act defined by law as a criminal act.

- A child at risk up to 14 years of age is a juvenile who at the time of perpetrating an act defined by law as a criminal act for which a fine or a prison sentence of over three years has been imposed or an act defined by law as a misdemeanour has reached seven, but not 14 years of age and

- A child at risk between 14 and 18 years of age is a juvenile who at the time of perpetrating the act defined by law as a criminal act for which a fine or a prison sentence of over three years has been imposed or an act defined by law as a misdemeanour, was at the age of 14, but had not reached 18 years of age.

Chapter II of this Law lays down provisions for measures for assistance and protection. In accordance with these provisions, the measures for assistance and protection shall be applied for a child at risk under the age of 14 and a child at risk over 14 years of age only if the centre for social work assesses that the risk situation is reflected in the development of the personality of the child and the proper upbringing thereof. The measures may be applied for the parent or legal guardian if they have neglected or misused their rights and obligations regarding the protection of the personality, the rights and the interests of the child. The measures for assistance and protection are laid down by law in the area of education, health, social, family and other forms of protection. (Article23)

These provisions stipulate that the Centre for Social Work shall be informed about an act of a child at risk under the age of 14, which is defined by law as a criminal act for which a prison sentence of over three years has been stipulated, as well as if there are other persons involved in perpetrating of this act, against whom a court procedure may be initiated, and about an act of a child of over 14 years of age, defined by law as a criminal act for which a prison sentence of up to three years or a fine has been stipulated, and the Centre shall initiate a classified procedure for determining the factual circumstances of the specific risk event or risk state. The team of experts of the Centre shall implement a Plan on the Measures and Activities for an individual work with a child and a parent with an aim of removing the reasons for the child's behaviour and the risk state.

If the parent does not implement the plan of the Centre, in case of having a child at risk of over 14 years of age, and if the Centre, after all attempts, fails to implement it, within seven days as of establishing such a circumstance, shall inform the competent judge about the child, and the judge, within three days shall adopt a decision on application of the measures contained in the Plan, provided with guidelines by the Centre. If the parent does not act in accordance with the court's decision, the court shall inform the Public Prosecutor's Office about further acting thereof.

Also, if through the act, defined by law as a criminal act or a misdemeanour, the child at risk acquired proceeds of crime or caused damage to another person, the Centre for Social Work shall perform a mediation procedure between the child at risk or the child's parent or legal guardian and the harmed person for mutual reconciliation and a promise that the act will not be perpetrated again as well as for returning the proceeds of crime or compensating for the caused damage.

Question 9.9.
If the perpetrator is an adult, a prison sentence is imposed for the above mentioned criminal acts. A fine is imposed if the perpetrator of the criminal act is a legal entity. Also, the items used for the perpetration of the criminal act are seized.

If the perpetrator is a child the provisions of the Law on Juvenile Justice shall be applicable: Article 34 of this Law contains provisions on sanctions for children and the purpose thereof: A child between the age of 14 and 16 may be imposed only educational sanctions for an act determined as a criminal act.

A child between the age of 16 and 18, for an act determined as a criminal act, may be imposed educational sanctions, and exceptionally may be imposed a sanction or an alternative measures. A child between the age of 16 and 18 may be exempt from punishment under the general conditions laid down in the Criminal Code.

Question 9.10.
See reply to question 9.7.

Question 9.11.
See reply to question 9.8.

Question 9.12.
See reply to question 9.9.

NORWAY / NORVEGE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes, see Section 311 c) of the Norwegian Penal Code.

Question 9.1.b.
Yes, see Section 311 b) of the Norwegian Penal Code.

Question 9.1.c.
Yes, see Section 311 b) of the Norwegian Penal Code.

Distributing or transmitting child self-generated sexually explicit images and/or videos to children under the age of 16 years old, can also be punishable according to other sections of the Penal Code Section – for example Section 305.)

Question 9.2.
No

Question 9.3.
Such conduct is punishable by a penalty of a fine or imprisonment for a term not exceeding three years, see Section 311 of the Norwegian Penal Code.

Question 9.4.a.
Yes, see Section 311 c) of the Norwegian Penal Code.

Question 9.4.b.
Yes, see Section 311 b) of the Norwegian Penal Code.

Question 9.4.c.
Yes, see Section 311 b) of the Norwegian Penal Code.

Cf. response under 9.1, distributing or transmitting child self-generated sexually explicit images and/or videos to children under the age of 16 years old, can also be punishable according to other sections of the Penal Code Section – for example Section 305.

Question 9.5.
No

Question 9.6.
Such conduct is punishable by a penalty of a fine or imprisonment for a term not exceeding three years, see Section 311 of the Norwegian Penal Code.

Question 9.7.a.
All forms of conduct described above is punishable pursuant to Section 311 of the Norwegian Penal code, if the child is 15 years old or more.

Question 9.7.b.
Children under the age of 15 years are not liable for punishment. According to the preliminary works of the Penal Code Section 311, which is meant to protect the child (the intention is not to punish the same child that the law is meant to protect). For children 15 years or older, they can be liable for punishment if the image or video show other children in addition to themselves.

Question 9.7.c.
They can be liable for punishment if they send self-generated material to other children that have not consented to it, cf. Penal Code Section 305 (Sexually offensive conduct, etc. directed at a child under 16 years of age).

Question 9.7.d.
They can also be liable for punishment if they send self-generated material to other adults that have not consented to it Section 298 (Sexually offensive conduct in public or without consent). In practice this section is seldom in use.

Question 9.7.e.
They can be liable for punishment if they send self-generated material depicting other children to their peers, cf. Penal Code Section 311. Cf. Section 311 the penalty may be waived for a person who takes and possesses a picture / material of a person between 16 and 18 years of age if this person consented and the two are approximately equal in age and development.

Question 9.8.
It follows from Section 311 paragraph 4, that penalty may be waived for a person who takes and possesses a picture of a person between 16 and 18 years of age if this person consented and the two are approximately equal in age and development.

Since 2014 young offenders, aged between 15 and 18, can be sentenced to youth sentence/punishment or youth follow-up. Youth sentence/punishment is an alternative to prison for young offenders who has committed serious or repeated crime. This is based on a court decision. The duration can be from six months to three years. Youth follow-up is for young offenders that have committed less serious crimes and are considered to be at risk for committing further crime and has a need for follow up measures and support. The youth follow-up can be decided by the court or by prosecutors, and has a maximum duration of one year.

These alternative interventions focus on reintegration and rehabilitation of young offenders, and they are tailored to the needs of each individual youth and the crime committed. The National Mediation Service (NSM) is in charge of these alternative interventions for young offenders. The NSM also offers restorative justice processes in criminal cases as well as cases referred to them by the public.

Sexual offences make up approximately 2% of the youth sentence and youth follow-up cases each year. Due to the current case management system used by the NSM it is not possible to provide exact statistics concerning the number youth sentence or youth follow-up cases are directly related to the production, possession or distribution of sexually explicit images/videos. However, by manually going through the sexual crime cases of these alternative interventions, NSM reports that many cases have elements of production, possession and distribution of sexually explicit images/videos of themselves or others.

In general, NSM has seen an increase in other types of cases related to production, possession and distribution of sexually explicit images, of adults and children. The number of cases registered under "sexually explicit images" tripled from 2015 to 2016, and doubled from 2016 to 2017. This development has stabilized, with numbers for 2017 and 2018 being almost identical.

Question 9.9.

Such behaviours are punishable by a penalty of a fine or imprisonment for a term not exceeding three years, cf. Section 311 of the Norwegian Penal Code. Possible legal consequences are youth sentence and youth follow-up, as described in 9.8.

It may be noted that Section 52 a of the Norwegian Penal Code stipulates that offenders beyond the age of 18 years may be sentenced to a youth sentence instead of imprisonment.

Question 9.10.a.

All forms of conduct described above is punishable pursuant to Section 311 of the Norwegian Penal could if the child is 15 years old or more.

However, according to the preliminary works of the Penal Code Section 311, Section 311 is meant to protect the child, and it is not meant to punish the same child that the law is meant to protect.

Question 9.10.b.

Children under the age of 15 years are not liable for punishment. For children 15 years or older, they can be liable for punishment if the image or video show other children in addition to themselves. Cf. Section 311 the penalty may be waived for a person who takes and possesses a picture of a person between 16 and 18 years of age if this person consented and the two are approximately equal in age and development.

Question 9.10.c.

A child between 15 and 18 years can be liable for punishment if they send self-generated material to peers that have not consented to it, cf. Penal Code Section 311.

Question 9.10.d.
They can also be liable for punishment if they send self-generated material to other adults that have not consented to it Section 298 (Sexually offensive conduct in public or without consent).

Question 9.10.e.
A child between 15 and 18 years can be liable for punishment if they send self-generated material showing other children to peers, cf. Penal Code Section 311. Cf. Section 311 the penalty may be waived for a person who takes and possesses a picture of a person between 16 and 18 years of age if this person consented and the two are approximately equal in age and development.

Question 9.11.
It follows from Section 311 paragraph 4, however, that the penalty may be waived for a person who takes and possesses a picture of a person between 16 and 18 years of age if this person consented and the two are approximately equal in age and development. See also reply under 9.8.

Question 9.12.
Such behaviours are punishable by a penalty of a fine or imprisonment for a term not exceeding three years, see Section 311 of the Norwegian Penal Code. It may be noted that Section 52 a of the Norwegian Penal Code stipulates that offenders beyond the age of 18 years may be sentenced to a youth sentence instead of imprisonment.

POLAND / POLOGNE
State replies / Réponses de l'Etat

Question 9.1.
Reply provided in reply to General Overview Questionnaire remains valid.

According to Art. 202 § 3 – 4a:

- § 3. Whoever, in order to disseminate, produces, records or imports, keeps or holds or distributes or publicly presents the pornographic content in which a minor participates (…), shall be subject to the penalty of the depravation of liberty for a term between 2 and 12 years.
- § 4. Whoever records pornographic content in which a minor participates, shall be subject to the penalty of the deprivation of liberty for a term of between 1 to 10 years.
- § 4a. Whoever imports, keeps or holds or obtains access to pornographic content in which a minor under 15 years of age participates, shall be subject to the penalty of the deprivation of liberty for a term of between 3 months to 5 years.

Criteria according to which such material will assessed (whether it falls within the definition of pornography) are presented under point 8.1:

> According to the provisions of Polish Penal Code (hereinafter "the PC") penalisation of acts against sexual liberty and decency (implementing Art. 20 of the Lanzarote Convention) depends on pornographic character of the content of the material involved.
>
> The PC does not provide any legal definition of "pornographic content". This is done by jurisprudence. According to the well-established line of reasoning of the Supreme Court the key elements of such definition are: (1) the content being contained in a fixed form (eg. film, photographs, magazines, books, images) or not (eg. live shows), (2) the content presents human sexual acts (especially showing the sexual organs of a person in their sexual functions), both in non-contradictory aspects of their biological orientation and human sexual behaviour contrary to the patterns of sexual behaviour approved in society, (3) the nature of pornography manifests in the transmission of a particular idea (the content), rather than merely a documented record of a particular factual event. Those criteria allow to differentiate the

"pornography" (acts related to which are penalised) from other types of behaviours and materials.

As explained under point 8.1 the fact that such content was self-generated by a minor does not influence its assessment as a pornography.

Question 9.2.
There are no such special circumstances in the criminal law. In most cases where self-generated sexually explicit (but not pornographic) content is found, a family court and social service will be informed.

Question 9.3.
All those acts may constitute criminal offences with sanctions described under point 9.1.

Question 9.4.
Reply provided in reply to General Overview Questionnaire remains valid.

All such acts are penalised (details provided under point 9.1).

Question 9.5.
There are no such special circumstances in the criminal law.

Question 9.6.
All those acts shall constitute criminal offences with sanctions described under point 9.1.

Question 9.7.
With respect to criteria for assessment whether such self-generated material falls within the definition of pornography (as described under point 8.1) all above mentioned acts may constitute a criminal offence, as the age of criminal liability in Poland is 17, and term "minor" (in line with Lanzarote Convention's definition of a child) refers to person under 18 years.

Definitions of those criminal offences are provided under point 9.1.

It is therefore possible to prosecute person under 18 years old for acts described in points (a) to (d).

However, according to general rules of the PC, there is a requirement of minimal degree of social gravity (social harm) of the offence. The social gravity is assessed by prosecutor/court individually in each case.

Acts described in points € and (f), that involve a third-party minor, may more likely fall under the provisions of the PC, as the social gravity of such acts is much greater.

Question 9.8.
See above.

In most cases where self-generated sexually explicit (but not pornographic) content is found, a family court and social service will be informed. This applies also to cases when participating minor is under 17 years (cannot be criminally liable).

Question 9.9.
All those acts may constitute criminal offences with sanctions described under point 9.1.

Question 9.10.
With respect to criteria for assessment whether such self-generated material falls within the definition of pornography (as described under point 8.1) all above mentioned acts may constitute a criminal

offence, as the age of criminal liability in Poland is 17, and term "minor" (in line with Lanzarote Convention's definition of a child) refers to person under 18 years.

Distinction between acts described in points (a) to (d) and points (e) and (f) – made under point 9.7 – remains valid.

Question 9.11.
See above.

In most cases where self-generated sexual (but not pornographic) content is found, a family court and social service will be informed. This applies also to cases when participating minor is under 17 years (cannot be criminally liable).

Question 9.12.
All those acts may constitute criminal offences with sanctions described under point 9.1.

PORTUGAL
State replies / Réponses de l'Etat

Question 9.1.a.
The Portuguese Criminal Code criminalizes possession of any pornographic material, consisting of photographs, films and recordings that involve children (Article 176, n. 1, d), Criminal Code). Furthermore, the law prohibits the possession with intent to distribute of pornographic material with "*realistic representation of children*" (Article 176, n. 4, Criminal Code).

Question 9.1.b.
The Criminal Code criminalizes the distribution, import, export, disclosure, view or transfer of any pornographic material that involve children (Article 176, n.1 c).

Question 9.1.c.
The Portuguese Criminal Code criminalizes distribution, import, export, disclosure, view or transfer of any pornographic material that involve children (Article 176, n. 1 c).

Question 9.2.
All cases are prosecuted due to the legality principle.

However, prosecution may not take place in cases of non-existence of criminal liability (f.i. psychic anomaly) or in cases of exception of unlawfulness (rules of consent), article 141, 5 Code of penal procedure)

In cases of prosecution, it is also possible to apply the provisional suspension of the procedures with the imposition of rules of conduct: according to Article 282/8, of the Code of Criminal Procedure, the prosecution can choose, in the interest of the victim and when the victim is a child, to suspend the procedure, as long as the offender has no prior convictions and has never benefited from this measure.

Question 9.3.
For the mere possession of pornographic material involving children, the penalties are one month to 2 years of prison, or up to 5 years of prison if the act was committed with intention to profit (Article 176/5/7, Criminal Code). The mentioned penalties are aggravated by one third if the offender has a close family relationship to the victim or if the offender takes advantage of a relationship of legal, co-habitational, hierarchical, economical or work nature (Article 177/1, Criminal Code).

For the possession with intent to distribute or the act of distribution of pornographic material involving children, by an adult to other adults or children, the penalties are 1 to 5 years of prison, or 1 to 8 years of prison if executed professionally or with intention to profit (Article 176/1/c/d/2, Criminal Code). The mentioned penalties are aggravated by one third if the offender has a close family relationship to the victim or if the offender takes advantage of a relationship of legal, co-habitational, hierarchical, economical or work nature, if committed jointly by 2 or more persons, or if the victim is less than 16 years old (Article 177/1/4/6, Criminal Code). The penalties are aggravated by half if the victim is less than 14 years old (Article 177/7, Criminal Code).

If the possession with intent to distribute and/or distribution are related to pornographic material containing "realistic representation of children" the penalty is 1 to 2 years of prison (Article 176/4, Criminal Code).

Question 9.4.a.
Portuguese criminal law prohibits the mere possession of any pornographic materials consisting of photographs, films and recordings that involve children (Article 176/5, Criminal Code), regardless of how the material was produced. Law also prohibits the possession with intent to distribute of pornographic material with "realistic representation of children" (Article 176/4, Criminal Code).

Question 9.4.b.
Please see answer a).

Question 9.4.c.
Please see answer a).

Question 9.5.
Please see answer 9.2.

Question 9.6.
The consequences are the same as those described in the answer to 9.3.

Question 9.7.a.
In accordance with Article 19 of the Criminal Code, criminal responsibility begins at the age of 16. In this context, if the child is 16 or older it follows from the wording of Article 176, Criminal Code, that the conduct is criminalised.

Youngsters from 16 to 21 years old can benefit from the special regime foresee in Decree-Law 401/82, 23 September.

Children between 12 and 16 years old, that commit crimes against sexual self-determination and freedom, may be subjected to several measures established in Law 166/99 (14 September) – admonition, restriction of the right to drive, compensation to the offended, community payback or community service, conduct constraint, imposition of duties, training, education and internment. These measures are applied taking into account the severity of the act committed.

Question 9.7.b.
This subject is not specifically addressed. Please see previous answer.

Question 9.7.c.
Please see answer b).

Question 9.7.d.
Please see answer b).

Question 9.7.e.
Please see answer b).

Question 9.7.f.
Please see answer b).

Question 9.8.
Please see answer 9.2.

Question 9.9.
Please see answer 9.3.

Children between 12 and 16 years old, that commit crimes against sexual self-determination and freedom, may be subjected to several measures established in Law 166/99 (14 September) – admonition, restriction of the right to drive, compensation to the offended, community payback or community service, conduct constraint, imposition of duties, training, education and internment. These measures are applied taking into account the severity of the act committed.

Question 9.10.a.
Please see answer 9.7.

As abovementioned, "sexual content" in the Portuguese criminal law refers to pornographic materials consisting of photographs, films and recordings that involve children (Article 176/5, Criminal Code). The law prohibits the possession with intent to distribute of pornographic material with "realistic representation of children" (Article 176/4, Criminal Code).

Question 9.10.b.
See the preceding answer.

Question 9.10.c.
See the preceding answer.

Question 9.10.d.
See the preceding answer.

Question 9.10.e.
See the preceding answer.

Question 9.10.f.
See the preceding answer.

Question 9.11.
Please see answer 9.2

Question 9.12.
Please see answer 9.3.

ROMANIA / ROUMANIE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes, the possession of child self-generated sexually explicit images and/or videos is criminalised under art. 374 of the Criminal Code, cited above.

Question 9.1.b.
Yes, the distribution or transmission **to any other person** (adult or child) of child self-generated sexually explicit images and/or videos is criminalised under art. 374 of the Criminal Code.

Question 9.1.c.
Yes, the distribution or transmission **to any other person** (adult or child) of child self-generated sexually explicit images and/or videos is criminalised under art. 374 of the Criminal Code.

Question 9.2.
No, there are no special cases of non-prosecution of the above-mentioned cases. They are subject to the general regulations in criminal matters, with no exception.

Question 9.3.
The above behaviours are sanctioned with prison within the limits provided in the text of article 374 of the Criminal Code.

Also, according to the general regulations of the Criminal Code, when applying an imprisonment sentence, the court may also apply a complementary sentence of up to 5 years which will be enforced after the execution of the prison sentence[16].

[16] Criminal Code:
ART. 55*)
Complementary penalties
The complementary penalties are:
a) ban on the exercise of certain rights;
b) military demotion;
c) publication of judgment to convict.
ART. 66
Content of the complementary penalty of receiving a ban on the exercise of a number of rights
(1) he complementary penalty of a ban on the exercise of a number of rights consists of a ban, for one to five years, on the exercise of one or several of the following rights:
a) right to be elected to the ranks of public authorities or any other public office;
b) right to take a position that involves exercise of State authority;
c) right of a foreign citizen to reside on Romanian territory;
d) right to vote;
e) parental rights;
f) right to be a legal guardian or curator;
g) the right to take the position, exercise the profession or perform the activity they used in order to commit the offense;
h) the right to own, carry and use any category of weapons;
i) the right to drive certain categories of vehicles as established by the Court;
j) the right to leave Romanian territory;
k) the right to take a managerial position with a public legal entity;
l) the right to be in certain localities as established by the Court;
m) the right to be in certain locations or attend certain sports events, cultural events or public gatherings, as established by the Court;
n) the right to communicate with the victim or the victim's family, with the persons together with whom they committed the offense or with other persons as established by the Court, or the right to go near such persons;
o) the right to go near the domicile, workplace, school or other locations where the victim carries social activities, in the conditions established by the Court.
(2) When the law mandates a ban on the right to take a public position, the Court shall rule to ban the exercise of the rights

The complementary sanctions can be:
- ban on the exercise of certain rights;
- military demotion;
- publication court decision.

The complementary sentence of banning certain rights can consist in banning, on a period of 1 to five years, of one or more of the following rights:
- right to be elected to the ranks of public authorities or any other public office;
- right to hold a position that involves exercise of State authority;
- right of a foreign citizen to reside on Romanian territory;
- right to vote;
- parental rights;
- right to be a legal guardian or curator;
- the right to take the position, exercise the profession or perform the activity they used in order to commit the offense;
- the right to own, carry and use any category of weapons;
- the right to drive certain categories of vehicles as established by the Court;
- the right to leave Romanian territory;
- the right to take a managerial position with a public legal entity;
- the right to be in certain localities as established by the Court;
- the right to be in certain locations or attend certain sports events, cultural events or public gatherings, as established by the Court;
- the right to communicate with the victim or the victim's family, with the persons together with whom they committed the offense or with other persons as established by the Court, or the right to go near such persons;
- the right to go near the domicile, workplace, school or other locations where the victim carries social activities, in the conditions established by the Court.

Question 9.4.
Yes, all the conduits above described are sanctioned in the national legislation according to art. 374 of the Criminal Code, as citated in the previous answers.

The legal texts that we provided for question 16 of the General overview questionnaire have been updated, by Emergency ordinance 18/2016 for amending and completing the Law no. 286/2009 on the Criminal Code, Law no. 135/2010 on the Criminal Procedure Code, as well as for the completion of art. 31 par. (1) of the Law no. 304/2004 on judicial organization (texts were reproduced on question 8.1).

The ordinance ensured the fully transposition in national legislation of the Directive 2011/93 of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JAI and also ensured the complete alignment to the Convention.

Therefore, a number of legal provisions regarding the incriminations of art. 18-23 of the Convention were amended and updated to the standards of the convention and those of the directive and the answers to 16.b) are no longer valid.

stipulated at par. (1) lett. a) and lett. b).
(3) The exercise of the rights stipulated at par. (1) lett. a) and lett. b) shall be banned together.
(4) The penalty stipulated at par. (1) lett. c) shall not be ruled where there is probable cause to believe the person's life might be at risk or that the person might be subjected to torture or other inhuman or degrading treatment in case they are expelled.
(5) When the ban regards one of the rights stipulated at par. (1) lett. n) and lett. o), the Court shall specifically customize the content of that penalty so as to consider the circumstances of the case.

On comparison to the answers to question 16.b of the general overview questionnaire, in the context of the present question:
- having recourse to child prostitution is now incriminated, regardless if it is committed within the context of human trafficking or not;
- possessing child pornography is now criminalized no matter what the purpose of the possession is;
- Procurement of child pornography is now incriminated no matter what the means of the procurement were.

For the content of the legal texts, see answer to question 8.1.

Question 9.5.
No, there are no special cases of non-prosecution of the above-mentioned cases. They are subject to the general regulations in criminal matters, with no exception.

Question 9.6.
The above behaviours are sanctioned with prison within the limits provided in the text of article 374 of the Criminal Code.

Also, according to the general regulations of the Criminal Code, complementary sanctions can be imposed to the person convicted to prison.

For details, see answer to question 9.3.

Question 9.7.a.
Children are not prosecuted for producing self-generated sexually explicit images and/or videos when they are the subject of the images/videos.

If the images/videos have another child as a protagonist, the child perpetrator is subject to educative measures if he/she is criminal responsible, as described in the answer to question 9.9.

Question 9.7.b.
Children are not prosecuted for possessing self-generated sexually explicit images and/or videos when they are the subject of the images/videos.

If the images/videos have another child as a protagonist, the child perpetrator is subject to educative measures if he/she is criminal responsible, as described in the answer to question 9.9.

Question 9.7.c.
Children are not prosecuted for distributing or transmitting self-generated sexually explicit images and/or videos of themselves to peers.

Question 9.7.d.
Children are not prosecuted for distributing or transmitting self-generated sexually explicit images and/or videos of themselves to adults.

Question 9.7.e.
Children are prosecuted for distributing or transmitting self-generated sexually explicit images and/or videos of other children if they are criminally responsible, as described in the answer to question 9.9.

Question 9.7.f1.

Children are prosecuted for distributing or transmitting self-generated sexually explicit images and/or videos of other children if they are criminally responsible, as described in the answer to question 9.9.

Question 9.8.

No, there are no special cases of non-prosecution of the above-mentioned cases. They are subject to the general regulations in criminal matters, with no exception.

Question 9.91.

The rules on criminal liability regarding children (persons under 18 years old) provided by the Romanian Criminal Code are as follows[17]:

[17] Legal provisions mentioned above:
TITLE V*)
Underage offenders
CHAPTER I
Rules on criminal liability of an underage offender
ART. 113 Criminal liability limits
(1) A juvenile who has not turned 14 years of age does not have criminal liability.
(2) A juvenile who is between 14 and 16 years of age shall have criminal liability if proven they committed the act with discernment.
(3) A juvenile who turned 16 shall have criminal liability as under the law.

ART. 114 Consequences of criminal liability
(1) A juvenile who, at the time of the offense, is aged between 14 and 18, shall be subject to a non-custodial educational measure.
(2) The juvenile referred to in par. (1) may be subject to custodial educational measures in the following cases:
a) the juvenile committed another offense for which an educational measure was taken and served or the service of which started before the commission of the offense for which the juvenile is subject to trial;
b) the penalty required by law for the committed offense is a term of imprisonment of seven years or more, or life imprisonment.

ART. 115
Educational measures
(1) Educational measures are non-custodial or custodial.
1. The non-custodial educational measures are:
a) civic traineeship;
b) supervision;
c) weekend isolation;
d) assistance on a daily basis.
2. The custodial educational measures are:
a) confinement in an educational centre;
b) confinement in a detention centre.
(2) The educational measures to be taken against a juvenile shall be chosen in terms of Art. 114, according to the criteria stipulated in Art. 74.

ART. 116
Assessment report
(1) For the purpose of assessing a juvenile, according to the criteria laid down in Art. 74, the court shall require the Probation Service to draft a report also including justified recommendations on the nature and duration of social reintegration programs that the juvenile should follow, as well as any other obligations imposed on a juvenile by the Court.
(2) The compliance assessment report or the enforcement of educational measures and imposed obligations shall be prepared by the Probation Service in all cases in which the court orders the educational measure or the change or cessation of fulfillment of the imposed obligations, except as provided in Art. 126, when such report shall be drafted by the educational or detention centre.

CHAPTER II Rules on non-custodial educational measures
ART. 117 Civic traineeship
(1) The educational measure of civic traineeship consists of a juvenile's obligation to participate in a program not exceeding 4 months, which would help them understand the legal and social consequences they are exposed to when perpetrating offenses and would make them accountable for their future behavior.
(2) The Probation Service shall coordinate the organization, the juvenile's participation and the supervision during such civic

traineeship, without affecting the juvenile's school or professional program.
ART. 118 Supervision
The educational measure of supervision consists of controlling and guiding a juvenile throughout their daily program, for a time period between two and six months, under the supervision of the Probation Service, in order to ensure their participation in school or vocational courses and to prevent them from engaging in certain activities or from contacting certain persons that might affect their reformation process.
ART. 119 Weekend isolation
(1) The educational measure of weekend isolation consists of a juvenile's obligation not to leave their domicile on Saturdays and Sundays, for a time period between 4 and 12 weeks, unless, in this period, they are required to participate in certain programs or to carry out certain activities imposed by the court.
(2) Supervision is performed under the coordination of the Probation Service.
ART. 120 Assistance on a daily basis
(1) The educational measure of assistance on a daily basis consists of a juvenile's obligation to follow a schedule set by the Probation Service, which contains the timetable and conditions for conducting activities as well as the prohibitions imposed on the juvenile.
(2) The educational measure of assistance on a daily basis is enforced for a period between 3 and 6 months and supervision is performed under the coordination of the Probation Service.
ART. 121 Obligations imposed on a juvenile
(1) During the service of non-custodial educational measures, the court may impose on a juvenile one or more of the following obligations:
a) take classes in school or a vocational training;
b) not to cross the territorial limit set by the Court, without the Probation Service's approval;
c) not to be in certain places or at certain sporting cultural events or other public meetings indicated by the Court;
d) to stay away from and not communicate with the victim or members of their family, the participants in the offense or other persons indicated by the Court;
e) to report to the Probation Service on the dates set by the latter;
f) to comply with medical control, treatment or care measures.
(2) In determining the obligation set forth by par. (1) lett. d), the court effectively customizes the content of such obligation, considering the circumstances of the case.
(3) Supervision of fulfillment of the obligations imposed by the Court is performed under the coordination of the Probation Service.
(4) During the service of a non-custodial educational measure, the Probation Service has to notify the court if:
a) reasons justifying either the change of the obligations imposed by the court or cessation of some of them appeared;
b) a supervised person violates the conditions of the educational measure's service or fails to meet their obligations, under the established terms.
(…)
CHAPTER III
Rules on custodial educational measures

ART. 124
Internment in educational centers
(1) The educational measure represented by the internment in educational centers consists of the internment of underage offenders in institutions specialized in the recovery of underage offenders, where the latter attend educational and professional training programs in accordance to their skills, as well as social reintegration programs.
(2) Internment in educational centers is ordered for a time period between one and three years.
(3) If, during the internment period, an underage offender commits a new offense or is tried for a previously committed multiple offense, the court may sustain the measure of internment in an educational center, extending the duration of such measure without exceeding the maximum duration provided by law, or may replace it by the measure of internment in a detention center.
(4) If, during the internment period, an underage offender proves a continuous interest in acquiring knowledge and professional training, and shows obvious progress in view of social reintegration, following service of at least half of the internment period, the court may order as follows:
a) replacement of the internment by the educational measure of daily assistance for a period equal to the duration of the internment still to be served, but no more than six months, if the person admitted to a medical facility has not turned 18;
b) release from the educational center, if the person admitted to a medical facility has turned 18.
(5) Simultaneously with such replacement or release, the court shall order the observance of one or several obligations provided under Art. 121, until reaching the duration of internment.
(6) If an underage offender, in ill-faith, does not observe the conditions for the service of the measure of daily assistance or the obligations ordered, the court shall reconsider the replacement or release, and shall order service of the remaining measure of internment in an educational center.
(7) If, until the completion of the internment period, the person not having turned 18, with respect to whom the measure of internment in an educational center was replaced by the measure of daily assistance, commits a new offense, the court shall reconsider the replacement and shall order as follows:

The child who has not reached the age of 14 is not criminally liable, as there is a legal absolute presumption of him/her not having enough discernment.

The child aged between 14 and 16 years is held criminally liable only if it is proven that he/she committed the offence with discernment.

The child who has reached the age of 16 is held criminally liable, except the case in which it is proven, that he/she did not have discernment when the act committed.

Children who are criminally responsible can be imposed educative measures[18]. The educative measures can be either custodial, or non-custodial. As a rule, the child shall usually be subject to a non-custodial educational measure. The custodial educational measures can be imposed to child offenders in the following cases:
- he/she also committed another offense for which an educational measure was taken and served or the service of which started before the commission of the offense for which the juvenile is subject to trial;
b) the penalty required by law for the committed offense is a term of imprisonment of seven years or more, or life imprisonment.

The non-custodial educative measures are, in increasing order of their gravity:
a) civic traineeship
The educational measure of the civic traineeship consists in the child's obligation to participate in a program lasting up to 4 months to help them understand the legal and social consequences they face in committing crimes and to make them more responsible to their future behaviour.

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a) service of the remaining initial internment measure, with a possibility of extension until reaching the maximum provided by law;
b) internment in a detention center.

ART. 125
Internment in detention centers
(1) The educational measure of internment in detention centers consists of the internment of an underage offender in an institution specialized in the recovery of underage persons, under guard and monitoring, while attending intensive social reintegration programs, as well as educational and professional training programs tailored according to their skills.
(2) Internment is ordered for a time period between 2 and 5 years, except for the case when the penalty provided by law for the committed offense is a term of imprisonment of 20 years or more, or life imprisonment, in which case internment is ordered for no less than 5 and no more than 15 years.
(3) If, during the internment period, an underage offender commits a new offense or is tried for a previously committed multiple offense, the court shall increase the measure of internment, without exceeding the maximum provided under par. (2), established considering the most serious penalty provided by law for the committed offenses. The measure of internment served until the date of the court order shall be deducted from the educational measure.
(4) If, during the internment period, an underage offender proves a continuous interest in acquiring knowledge and professional training, and shows obvious progress in view of social reintegration, following the service of at least half of the internment period, the court may order:
a) replacement of the internment by the educational measure of daily assistance for a period equal to the duration of the internment still to be served, but no more than six months, if the interned person has not turned 18;
b) release from the detention center, if the interned person has turned 18.
(5) Concurrently with the replacement or release, the court shall order the observance of one or several obligations provided under Art. 121, until reaching the duration of internment.
(6) If an underage offender, in ill-faith, does not observe the conditions for service of the measure of daily assistance or the obligations ordered, the court shall reconsider the replacement or release, and shall order service of the remaining measure of internment in a detention center.
(7) If, until completion of the internment period, a person not having turned 18, in whose respect a measure of internment in a detention center was replaced by a measure of daily assistance, commits a new offense, the court shall reconsider the replacement and shall order:
a) service of the remaining initial internment measure in a detention center;
b) extension of such internment as provided under par. (3).

b) supervision
Supervision consists in controlling and guiding the minor in his daily program, for a period of two to six months, under the coordination of the probation service, in order to ensure participation in school or vocational training and to prevent certain activities or the contact of the child with certain people which could affect the educational process.

c) weekend isolation
This measure consists in the minor's obligation not to leave the home on Saturdays and Sundays for a period of between 4 and 12 weeks, unless he or she is required to attend certain programs or to carry out certain activities imposed by the court.

d) daily assistance
Daily assistance consists in the obligation of the minor to observe a program established by the probation service, which contains the timetable and the conditions for carrying out the activities, as well as the prohibitions imposed on the minor for a period between 3 and 6 months.

The custodial educative measures are:
- internment in an educative centre for a duration of one to 3 years
- internment in a detention centre, on a period from 2 to 5 years, or, exceptionally, from 5 to 15 years. The measure of internment in a detention centre shall be disposed on a period of 5 to 15 years only in the hypothesis of very serious crimes, for which the law stipulates life detention or prison for at least 20 years.

- The child under 14 years old who committed a criminal act and does not have criminal liability can be subject to special protection measures: the placement or specialized surveillance.

The placement consists in a special protection measure, of entrusting the custody of the child, on a temporary base, to either a member of the family, a maternal assistant, or a residential specialized institute.
The measure of specialized surveillance consists in keeping the child in his/her family, under the condition of observing one or more obligation, such as: attending school courses; use of day-care maintenance services; following medical treatments, counselling or psychotherapy; the interdiction of attending certain places or to have relationships with certain persons.

Question 9.10.a.
No, national law does not criminalise such acts, when the child is the subject of the content.

Question 9.10.b.
No, national law does not criminalise such acts if the child is the subject of the content.

Question 9.10.c.
No, national law does not criminalise such acts, if the child is the subject of the content.

Question 9.10.d.
No, national law does not criminalise such acts, if the child is the subject of the content.

Question 9.10.e.
Distributing or transmitting self-generated sexual content of other children to peers is criminalised in national law, if the perpetrator has criminal liability, as described in the answer at question 9.9.

Question 9.10.f.
Distributing or transmitting self-generated sexual content of other children to adults is criminalised in national law, if the perpetrator has criminal liability, as described in the answer at question 9.9.

Question 9.11.
No, there are no special cases of non-prosecution of the above-mentioned cases. They are subject to the general regulations in criminal matters.

Question 9.12.
See answer for question 9.9.

RUSSIAN FEDERATION / FEDERATION DE RUSSIE
State replies / Réponses de l'Etat

Question 9.1.a.
Russian national legislation does not criminalize the possession of child pornography for personal purposes (without the purpose of dissemination, public demonstration or advertising).

Question 9.1.b.-c.
Yes, adults' actions, specified in par 9.1.b.c. are subject for criminalization under the national law – art 242, 131-135,137 of the Criminal Code of the Russian Federation

Upon request, we can provide data on specific cases and court decisions. The data was provided by the Supreme Court of the Russian Federation.

Question 9.2.
The situations indicated in the question are not considered separately in the Criminal Code of the Russian Federation.

Question 9.3.
See replies to 9.1-9.2

Question 9.4.
Russian national legislation does not criminalize the possession of child pornography for personal purposes (without the purpose of dissemination, public demonstration or advertising).

Adults' actions, specified in par 9.1.b.c. are subject for criminalization under the national law – art. 242,131-135,137 of the Criminal Code of the Russian Federation

Upon request, we can provide data on specific cases and court decisions. The data was provided by the Supreme Court of the Russian Federation.

Question 9.5.
The situations indicated in the question are not considered separately in the Criminal Code of the Russian Federation.

Question 9.6.
See replies to 9.1-9.5

Question 9.7.
In the Criminal Code of the Russian Federation there are no specific norms that cover exclusively the above situations.

Russian national legislation does not criminalize the possession of child pornography for personal purposes (without the purpose of dissemination, public demonstration or advertising).

In case the distributed products fall under the pornographic qualification according to the Russian legislation, criminal liability is set forth at 18 (art 242 of Criminal Code).

The Russian Investigative Committee specifies that in some cases, criminal responsibility for creating and distributing sexual content may start at 14. This is possible if the teenager over 14 sends his/her own or other person's pornographic images or other pornographic content to a person under the age of 12. In this case, the above teenager's actions can be qualified under item "b" of part 4 of art. 132 of the Criminal Code of the Russian Federation that establishes criminal liability for violent acts of a sexual nature committed against a person due to age not being able to understand the nature and significance of the acts committed with him/her and therefore being in a helpless state.

Question 9.8.

Yes, the rule of art. 90 of the criminal Code can be applied (coercive child rearing measures can be applied (art 90 of the Criminal Code), including the following:

a) warning;
b) transfer under supervision of parents or persons who replace them, or a specialized state body;
c) the assignment of the obligation to redress the damage caused;
d) restriction of leisure and the establishment of special requirements for the behavior of a minor.

Question 9.9.

See the replies to par. 9.7 -9.8

Question 9.10.

In the Criminal Code of the Russian Federation there are no specific norms that cover exclusively the above situations.

Russian national legislation does not criminalize the possession of child pornography for personal purposes (without the purpose of dissemination, public demonstration or advertising).

In case the distributed products fall under the pornographic qualification according to the Russian legislation, criminal liability is set forth at 16 (art 20 of Criminal Code).

In certain cases, criminal responsibility for creating and distributing sexual content may start at 14. This is possible if a teenager over 14 sends his/her own or other person's pornographic images or other pornographic content to a person under the age of 12. In this case, the above teenager's actions can be qualified under item "b" of part 4 of art. 132 of the Criminal Code of the Russian Federation that establishes criminal liability for violent acts of a sexual nature committed against a person due to age not being able to understand the nature and significance of the acts committed with him/her and therefore being in a helpless state.

Question 9.11.

Yes, see the Criminal Procedural Code, art 427 (Termination of criminal prosecution with the use of compulsory childrearing measures) and the Criminal Code of the Russian Federation, art 90 (Use of compulsory child rearing measures).

Question 9.12.

See the replies to 9.10-9.11.

SAN MARINO / SAINT-MARIN
State replies / Réponses de l'Etat

On account of the answer to question 8 above, questions 9.1.b. and 9.2.c. can be answered positively, being the dissemination and transmission of child pornographic material criminally sanctioned, when destined both to adults and to other children.

On the contrary, San Marino legislation does not explicitly sanction the mere possession of child pornographic material. The Government adopted a draft law for the transposition, through parliamentary procedure, of the provisions contained in the Council of Europe Convention on Cybercrime (Budapest Convention) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, signed by the Republic of San Marino on 17 March 2017. Such draft law envisages an amendment of Art. 177 ter of the Criminal Code, in order to sanction also the mere possession of child pornographic material, irrespective of the medium used.

Question 9.2.
As highlighted in the answer to question 8.1, the only offences that are not prosecuted are those committed in a foreign territory by or to the detriment of a San Marino citizen when the following conditions are met:

1) the San Marino citizen or the foreigner was tried and acquitted abroad;
2) the individual, who has been sentenced abroad, has fully served the sentence imposed upon conviction, though the punishment was less severe than that envisaged by San Marino Criminal Code;
3) the individual, who has been sentenced abroad, has served a part of the sentence imposed upon conviction, if said part is equivalent to the entire punishment envisaged by San Marino Criminal Code.

Question 9.3.
There are no consequences.

Question 9.4.
On account of the answer to question 8 above, questions 9.4 b) and 9.4 c) can be answered positively, being the dissemination and transmission of child pornographic material criminally sanctioned, when destined both to adults and to other children.

On the contrary, San Marino legislation does not explicitly sanction the mere possession of child pornographic material. The Government adopted a draft law for the transposition, through parliamentary procedure, of the provisions contained in the Council of Europe Convention on Cybercrime (Budapest Convention) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, signed by the Republic of San Marino on 17 March 2017. Such draft law envisages an amendment of Art. 177 ter of the Criminal Code, in order to sanction also the mere possession of child pornographic material, irrespective of the medium used.

Question 9.5.
As indicated above, the only offences that are not prosecuted are those committed in a foreign territory by or to the detriment of a San Marino citizen when the following conditions are met:

1) the San Marino citizen or the foreigner was tried and acquitted abroad;
2) the individual, who has been sentenced abroad, has fully served the sentence imposed upon conviction, though the punishment was less severe than that envisaged by San Marino Criminal Code;

3) the individual, who has been sentenced abroad, has served a part of the sentence imposed upon conviction, if said part is equivalent to the entire punishment envisaged by San Marino Criminal Code.

Question 9.6.
There are no consequences.

Question 9.7.
Without prejudice to the answers to previous questions, under San Marino Criminal Code, the age of criminal liability is set at 14 years (previously such age was 12 years; since 2014 – in response to various requests by some international bodies – the age of criminal liability was raised to 14 years). The punishment is reduced by one to two degrees in case of minors over 14 but below 18, for whom the judge has established full possession of their faculties.

Question 9.8.
As indicated above, the only offences that are not prosecuted are those committed in a foreign territory by or to the detriment of a San Marino citizen when the following conditions are met:

1) the San Marino citizen or the foreigner was tried and acquitted abroad;
2) the individual, who has been sentenced abroad, has fully served the sentence imposed upon conviction, though the punishment was less severe than that envisaged by San Marino Criminal Code;
3) the individual, who has been sentenced abroad, has served a part of the sentence imposed upon conviction, if said part is equivalent to the entire punishment envisaged by San Marino Criminal Code.

Question 9.9.
There are no consequences.

Question 9.10.
Without prejudice to the answers to previous questions, under San Marino Criminal Code the age of criminal liability is set at 14 years (previously such age was 12 years; since 2014 – in response to various requests by some international bodies – the age of criminal liability was raised to 14 years). The punishment is reduced by one to two degrees in case of minors over 14 but below 18, for whom the judge has established full possession of their faculties.

Question 9.11.
As indicated above, the only offences that are not prosecuted are those committed in a foreign territory by or to the detriment of a San Marino citizen when the following conditions are met:

1) the San Marino citizen or the foreigner was tried and acquitted abroad;
2) the individual, who has been sentenced abroad, has fully served the sentence imposed upon conviction, though the punishment was less severe than that envisaged by San Marino Criminal Code;
3) the individual, who has been sentenced abroad, has served a part of the sentence imposed upon conviction, if said part is equivalent to the entire punishment envisaged by San Marino Criminal Code.

Question 9.12.
There are no consequences.

SERBIA / SERBIE
State replies / Réponses de l'Etat

Question 9.1.a.-b.
a and b. under Article 185, paragraph 4 of the Criminal Code, whoever obtains for himself or another, possesses, sells, shows, publicly exhibits or electronically or otherwise makes available pictures, audio-visual or other items of pornographic content resulting in the exploitation and abuse of a juvenile is classified as a punishable criminal offence.

Question 9.1.c.
Ministry of Justice Answer:

Criminal code, Showing, Procuring and Possessing Pornographic Material and Minor Person Pornography

Article 185
(1) Whoever sells, shows or publicly displays or otherwise makes available texts, pictures, audio-visual or other items of pornographic content to a minor or shows to a minor a pornographic performance, shall be punished with a fine or imprisonment up to six months.
(2) Whoever uses a minor to produce photographs, audio-visual or other items of pornographic content or for a pornographic show, shall be punished with imprisonment of six months to five years.
(3) If the act specified in paragraph 1 and 2 of this article is committed against child, the offender shall be punished for the act specified in paragraph 1 with imprisonment of six months to three years, and for the act specified in paragraph 2 with imprisonment of one to eight years.
(4) Whoever procures for himself or another and possesses, sells, shows, publicly exhibits or electronically or otherwise makes available pictures, audio-visual or other items of pornographic content resulting from abuse of minor person, shall be punished with imprisonment of three months to three years.
(5) Whoever uses the means of information technologies to deliberately access the photographs, audio-visual or other items of pornographic content resulting from the abuse of a minor* shall be punished with a fine or imprisonment of up to six months.*
(6) The items of pornographic content resulting from the abuse of a minor (child pornography) shall be considered to include each material that is visually representing a minor involved in actual or simulated sexually explicit behaviour, as well as each instance of displaying of a child's genitals for sexual purposes.*
(7)* Items specified in paragraphs 1 through 4 of this Article shall be confiscated.

Public Prosecutor Answer:

Under Article 185, paragraph 1 of the Criminal Code whoever selling, showing or public displays or otherwise making available texts, pictures, audio-visual or other items of pornographic content to a minor or showing to a child a pornographic performance is classified as a criminal offence under criminal code.

NGO Astra Answers:

The Criminal Code in Article 185 introduces the crime of "Display, acquisition and possession of pornographic material and exploitation of a minor for pornography" and in Article 185b "Utilization of a computer network, or other means of communication to commit offences against sexual freedom of a minor." The following behaviours are declared as prohibited: Display, acquisition and possession of pornographic material and exploitation of a minor in pornography (Article 185), taking advantage of computer network, or other means of communication to commit offences of sexual abuse of a minor (Article 185b).

Question 9.2.
Public Prosecutor Answer:

Under Art. 283 of the Criminal Procedure Code the public prosecutor may defer prosecution for criminal offences punishable by a fine or a term of imprisonment of up to five years if the suspect accepts a criminal prosecution for criminal offences for which pecuniary fine is provided for or accepts one or more of the following obligations:
1) to rectify the detrimental consequence caused by the commission of the criminal offence or indemnify the damage caused;
2) to pay a certain amount of money to the benefit of a humanitarian organisation, fund or public institution;
3) to perform certain community service or humanitarian work;
4) to fulfil maintenance obligations which have fallen due;
5) to submit to an alcohol or drug treatment programme;
6) to submit to psycho-social treatment for the purpose of eliminating the causes of violent conduct;
7) to fulfil an obligation determined by a final court decision, or observe a restriction determined by a final court decision.

In the order deferring criminal prosecution the public prosecutor will determine a time limit during which the suspect must fulfil the obligations undertaken, with the proviso that the time limit may not exceed one year.
If the suspect meets the obligations so imposed upon them, the public prosecutor shall dismiss the criminal complaint by a ruling and notify the injured party.

Question 9.3.
Public Prosecutor Answer:

The referred to acts have characteristics of criminal offence of showing, procurement and possession of pornographic material and exploitation of a minor for pornographic purposes, as referred to in Art. 185 of the CC, in particular

NGO Astra Answers:

Presentation, acquisition and possession of pornographic material and the exploitation of a minor for pornography
Article 185

(1) Who sells, displays, or publicly presents or otherwise makes available texts, images, audio-visual or other objects of pornographic content to the juvenile, or portrays a pornographic performance, shall be punished by a fine or imprisonment for up to six months.
(2) Whoever uses a child to produce pictures, audio-visual or other pornographic content or pornographic performances shall be punished by imprisonment for a term between six months and five years.
(3) If the act referred to in paragraph 1. and 2. of this Article are performed against the child, the offender shall be punished for the offense referred to in paragraph 1 by imprisonment of six months to three years, and for the offense referred to in paragraph 2 by imprisonment of one to eight years.
(4) Whoever acquires for himself or another, owns, sells, displays, publicly exhibits or electronically or otherwise makes available images, audio-visual or other objects of pornographic content created by the exploitation of a minor, shall be punished by imprisonment of three months to three years.
(5) Who, through the use of information technology means, consciously accesses images, audio-visual or other objects of pornographic content created by the exploitation of a minor, shall be punished by

a fine or imprisonment for up to six months.
(6) Items of pornographic content created by the exploitation of a minor (child pornography) shall be any material that visually depicts a minor person dealing with real or simulated sexually explicit behavior, as well as any display of the child's sexual organs for sexual purposes.
(7) Items referred to in Paragraphs 1 to 4 of this Article shall be confiscated.

Incitement of a minor to be present during the sexual acts
Article 185a

(1) Whoever persuade a child to attend rape, intercourse or other sexual action, shall be punished by imprisonment for one to eight years.
(2) If the offense referred to in paragraph 1 of this Article has been committed by the use of force or threat, the offender shall be punished by imprisonment of two to ten years.

Utilizing a computer network or communication with other technical means for the commission of criminal offenses against sexual freedom against a minor
Article 185b

(1) Who in the intention of committing the criminal offense referred to in Art. 178 (4), 179 (3), (180), 1st and 2nd, 181st, 2 and 3, 182, paragraph 1, 183, paragraph 2, 184, paragraph 3, 185, paragraphs 2 and 185a of this Code, using a computer network or communication by other technical means, arrange with a minor meeting and appear at the agreed place for the meeting, shall be punished by imprisonment of six months to five years and a fine.
(2) Whoever commits the act referred to in paragraph 1 of this Article to the child, shall be punished by imprisonment for one to eight years.

Question 9.4.a.-b.
Public Prosecutor Answer:

a and b under Article 185, paragraph 4 of the Criminal Code, whoever obtains for himself or another, possesses, sells, shows, publicly exhibits or electronically or otherwise makes available pictures, audio-visual or other items of pornographic content resulting in the exploitation and abuse of a juvenile is classified as a punishable criminal offence.

Question 9.4.c.
Public Prosecutor Answer:

Under Article 185, paragraph 1 of the Criminal Code whoever selling, showing or public displays or otherwise making available texts, pictures, audio-visual or other items of pornographic content to a minor or showing to a child a pornographic performance is classified as a criminal offence under criminal code.

NGO Astra Answers:

The Criminal Code in Article 185 introduces the crime of "Display, acquisition and possession of pornographic material and exploitation of a minor for pornography" and in Article 185b "Utilization of a computer network, or other means of communication to commit offences against sexual freedom of a minor." The following behaviours are declared as prohibited: Display, acquisition and possession of pornographic material and exploitation of a minor in pornography (Article 185), taking advantage of computer network, or other means of communication to commit offences of sexual abuse of a minor (Article 185b).

Question 9.5.
Public Prosecutor Answer:

See point 9.2

Question 9.6.
Public Prosecutor Answer:

See point 9.3.

NGO Astra Answers:

See the answer to question 9.3.

Question 9.7.a.
Public Prosecutor Answer:

The production of such materials by a minor is not punishable/sanctioned, unless in case of sexual exploitation and abuse of the minor.

Question 9.7.b.
Minors who are 14 years of age and are older are criminally liable, i.e. they shall be on legal gronds subjected to criminal proceedings and a sentence shall be pronounced in case the material is produced on the basis of an abuse and exploitation of a minor.

Question 9.7.c.
There is criminal liability if a minor who has completed 14 years of age has made available to their peers such material produced by him/herself.

Question 9.7.d.
There are no elements of criminal offence in the referred to actions.

Question 9.7.e.
There is criminal liability if a minor who is at least 14 make available in any fashion whatsoever, the referred to material.

Question 9.7.f.
Public Prosecutor Answer:

There are no elements of criminal offence in the referred to actions.

Ministry of Justice Answer:

The Law on Juvenile Offenders and Criminal Protection of Juveniles, states the following:

Article 2:

A person who at the time of the commission of an unlawful act, in the law envisaged as a criminal offense, has not reached the age of fourteen years, cannot be imposed to criminal sanctions or apply other measures provided for by this law.

NGO Astra Answers:

If a child appears as the perpetrator of the offense, possession, acquisition and display of pornographic content and exploitation of another child for pornography, the Law on Juvenile Offenders and Criminal Protection of Juveniles (Official Gazette No. 85/2005) is applied. The criminal procedure itself, as well as the sanctions provided for, differs from the criminal procedure that is conducted against adults.

Question 9.8.
Public Prosecutor Answers:

In accordance of the Law on Juvenile Criminal Offenders and Criminal Law Protection of Juveniles, one or more diversion orders may be applied to a juvenile offender for criminal offences punishable by a fine or imprisonment of up to five years.

The relevant state prosecutor for juveniles or a Juvenile judge may apply a diversion order to a juvenile.

The requirements to apply a diversion order are: juvenile's confession of a criminal offence and his attitude towards the offence and the injured party.

The purpose of diversion order is to avoid instituting criminal proceeding against a juvenile or to suspend proceeding and/or, by application of the diversion order, to influence proper development of a juvenile, enhance his personal responsibility in order to avoid a relapse into crime in future.

Diversion orders include:
1) Settlement with the injured party so that by compensating the damages, apology, work or otherwise, the detrimental consequences would be alleviated either in full or partly;
2) Regular attendance of classes or work;
3) Engagement, without remuneration, in the work of humanitarian organisations or community work (welfare, local or environmental);
4) Undergoing relevant check-ups and drug and alcohol treatment programs;
5) Participation in individual or group therapy at suitable health institution or counselling centre.

NGO Astra Answers:

According to this law the child until the age of 14 years cannot be criminally responsible, while the children between 14 to 16 as well as the between 16 to 18 years of age are criminally liable.

Question 9.9.
Public Prosecutor Answer:

Educational measures, juvenile detention and security measures, stipulated by the Criminal Code, may be pronounced to juvenile offenders, with the exception of restraint to be engaged in his occupation, business activities or duties.

Only educational measures may be pronounced to younger juveniles (between 14 and 16 years of age). Educational measures and exceptionally juvenile prison may be pronounced to elder juveniles (between 16 and 18 years of age).

NGO Astra Answers:

According to Law on Juvenile Offenders and Criminal Protection of Juveniles (Official Gazette No. 85/2005) children who have committed a criminal offense may be sentenced to the following penalties,

depending on the severity of the offense: educational measure, educational order, juvenile prison, and security measures.

Question 9.10.a.
Public Prosecutor Answers

The production of the referred to material is by a minor is not criminalized.

Question 9.10.b.
Possession of own photographs of the referred to content is not a criminal offence. There is criminal liability if a minor who is 14 possesses such a type of material only if the material consists of pictures/images or audio and visual content produced by another minor.

Question 9.10.c.
There is criminal liability if a minor who is 14 years of age makes available in any manner whatsoever the referred to material generated by him/herself to the peers.

Question 9.10.d.
These acts are not criminal offences.

Question 9.10.e.
There is criminal liability if a minor who is 14 years of age makes available in any manner whatsoever the referred to material generated by him/herself to the peers.

Question 9.10.f.
These acts are not criminal offences

NGO Astra Answers:

Children who committed the crime described in the Criminal code are prosecuted as specified in The Law on Juvenile Offenders and Criminal Protection of Juveniles.

Question 9.11.
Public Prosecutor Answers:

See point 9.8.

NGO Astra Answers:

The same as in the question 9.8.

Question 9.12.
Public Prosecutor Answers:

See point 9.9.

NGO Astra Answers:

The same as in the question 9.9.

SLOVAK REPUBLIC / REPUBLIQUE SLOVAQUE
State replies / Réponses de l'Etat

Question 9.1.a.
Article 370 of the Criminal Code regulates criminal offence of possession of child pornography and attendance at a pornographic performance involving a child. The Criminal Code does not regulate details related to the content of child pornography, therefore possession of "child self-generated sexually explicit images and/or videos" is regulated by the pertinent provision as well as such images and/or videos created by different person.

Question 9.1.b.
Article 369 of the Criminal Code defines criminal offence of dissemination of child pornography. In line with this article, acting when person breeds, transfers, detains, makes available or otherwise expands child pornography is punishable.

Question 9.1.c.
For case of distribution and broadcasting these images and/or videos to other children than children depicted on the images and/or videos, it is possible to apply Article 369 of the Criminal Code defining criminal offence of dissemination of child pornography. In line with this article, acting when person breeds, transfers, detains, makes available or otherwise expands child pornography is punishable. The pertinent provision does not specify recipients of such materials, therefore the pornographic material could be distributed also to other children than children depicted on the images and/or videos. Simultaneously, the above-mentioned conduct shall be subsumed under the body of the criminal offence of corrupting morals in accordance with Article 372 of the Criminal Code- acting when person offers, leaves or sells pornography to children, or exhibits pornography or otherwise makes pornography available at places accessible to children.

Question 9.2.
The fact whether particular cases are prosecuted or lead to conviction depends on particular consideration of individual case.

Article 40 para. 1 of the Criminal Code regulates institute of waiver of punishment which is permissible for offenders who commit minor offence without causing **grievous bodily harm or death and there must be all the other conditions fulfilled in line with this article. The waiver of punishment means that the criminal proceedings itself is sufficient for remedy of the offender as well as protection of society. If the pertinent provision is applied, the court rules the offender is recognised guilty but there is no punishment imposed on the offender.**

An act, which otherwise gives raise to criminal liability, is not considered as criminal offence if there are some of circumstances excluding unlawfulness of this act (Articles 24-30, of the Criminal Code) present.

Different circumstances that do not enable criminal prosecution and conviction of the offender are insanity of the offender according to Article 23 of the Criminal Code (No person incapable of judging the seriousness of an act, which otherwise gives rise to criminal liability, at the time of its commission, or to exercise self-restraint because of mental disorder may be held criminally liable for such an offence, unless the Criminal Code provides otherwise.) and inadmissibility of criminal prosecution according to Article 9 of the Act No. 301/2005 Coll. the Criminal Procedure Code (hereinafter as "Criminal Procedure Code"), mainly limitation of criminal proceedings according to Article 87 of the Criminal Code or finding a minor offence of lesser seriousness in line with Article 10 para. 2 of the Criminal Code. (The Act shall not constitute a minor offence if it is of lesser seriousness in view of the mode of its commission and consequences, the circumstances of its commission, the degree of causation, and the motivation of the offender. Note: According to the Criminal Code, a minor offence is an offence committed by negligence

or an intentional criminal offence, for which the Criminal Code sets out a maximum statutory penalty of not more than five years.)

Question 9.3.
Legal consequences of unlawful conduct stated in 9.1.a-c encompass the criminal prosecution of offenders- adult persons. When there are justified reasons, the offender is remanded in custody. If his guilt is proved, the offender is convicted to certain punishment or protective measure which could be imposed individually or together with the punishment. The offender also faces to punishment of prohibition to undertake certain activities forevermore in line with Article 61 para. 4 of the Criminal Code, punishment of forfeiture of a thing which had been used or stated for commission of the offence in line with Article 60 para. 4 of the Criminal Code.

The statutory penalties for punishment of imprisonment in accordance with the Criminal Code are as follows:

- Dissemination of child pornography according to Article 369 of the Criminal Code
  - punishment of imprisonment of 1 to 5 years
  - commission of the offence by acting in a more serious manner or publicly: punishment of imprisonment of 3 to 8 years
  - gaining larger benefits by committing the offence: punishment of imprisonment of 4 to 10 years
  - gaining benefits of significant extent by committing the offence: punishment of imprisonment of 7 to 12 years

- Possession of child pornography and attendance on pornographic performance involving a child according to Article 370 of the Criminal Code
  - punishment of imprisonment up to 2 years

Question 9.4.
Legal order of the Slovak Republic criminalises acting of adults when possess or distribute or transmit "self-generated sexual content" to other adults or other children if this material may be subsumed under the legal term "child pornography" (see reply to question 8.1.b.). If the sexual content is not created for purposes of gratifying sexual desire to another, therefore possession and distribution of such content it is not subject of criminal liability in accordance with the Criminal Code. In accordance with the above mentioned, replies to questions 9.1. a., b., c. are proportionately applied for these questions.

Question 9.5.
With regard to replies to question 9.4. - reply to question 9.2. is equally applied for this question.

Question 9.6.
With regard to replies to question 9.4. - reply to question 9.3. is equally applied for this question.

Question 9.7.a.
Child production of "self-generated sexually explicit images and/or videos" itself is not subject of criminal liability in accordance with legal order of the Slovak republic.

Question 9.7.b.
In general, possession of "self-generated sexually explicit images/or videos" in line with legal term "child pornography" is subject to criminal liability in accordance with Article 370 para. 1 of the Criminal Code as a criminal offence of possession of child pornography and attendance on pornographic performance involving a child. However, this shall not be applied to person who possesses child pornography made by him.

In line with Article 127 para. 1 of the Criminal Code, for the purposes of criminal proceedings a child is defined as a person under the age of 18 years, unless stated otherwise. Age category for the criminal liability in the Slovak Republic is stated for age 14 years old, for criminal offence of sexual abuse according to Article 201 of the Criminal Code it is 15 years old. With regard to the above mentioned, each person of age 14 (respectively 15) is criminally liable. The Criminal Code punishes each offender who conducts unlawfully as stated above mentioned and is minimum 14 years old. Who does not reach the age 14 years in a time of the commission of the criminal offence is not criminally liable (Article 22 para. 1 of the Criminal Code).

Question 9.7.c.-f.

Distribution or transmission of "self-generated sexually explicit images and/or videos" as stated as in letters c.-f. is subject of criminal liability in line with Article 369 of the Criminal Code as a criminal offence of dissemination of child pornography.

In line with Article 127 para. 1 of the Criminal Code, for the purposes of criminal proceedings a child is defined as a person under the age of 18 years, unless stated otherwise. Age category for the criminal liability in the Slovak Republic is stated for age 14 years old, for criminal offence of sexual abuse according to Article 201 of the Criminal Code it is 15 years. With regard to the above mentioned, each person of age 14 (respectively 15) is criminally liable. The Criminal Code punishes each offender who conducts unlawfully as stated above mentioned and is in age 14 years minimum. Who does not reach the age 14 years in a time of the commission of the criminal offence is not criminally liable (Article 22 para. 1 of the Criminal Code).

Question 9.7.b.-f.

National law of the Slovak Republic allows criminal liability of minors- offenders who reach the age of 14 years old. Category of minors is from 14 up to 18 years old. In line with Article 95 of the Criminal Code, it is obligatory to examine level of intellectual and moral maturity to ascertain their criminal liability, more specifically whether they are able to manage their conduct and recognise its unlawfulness. It is always necessary to examine subjective element of the criminal offence and motive of conduct **to avoid unreasonable criminal prosecution of children**.

Question 9.8.

Criminal prosecution of children (youthful offenders) depends on reaching the age of 14 years (Article 22 of the Criminal Code). Criminal liability of child is excluded if child in age between 14 and 15 years is not able to manage his conduct and recognise its unlawfulness (Article 95 of the Criminal Code, Article 338 of the Criminal Procedure Code) with regard to his level of intellectual and moral maturity. Another circumstance excluding unlawfulness of an act is stated in Article 10 para. 2 of the Criminal Code as an evaluation of seriousness of the act. In line with Article 95 para. 2 of the Criminal Code, minor offence whose elements are regulated in the Criminal Code, is not a criminal offence when committed by youth and is of lesser seriousness.

The fact whether particular cases are prosecuted or lead to conviction depends on particular consideration of individual case.

Article 98 of the Criminal Codes regulates institute of waiver of punishment which is permissible for youth offenders who commits minor offence with **all the other conditions fulfilled in line with this article. The waiver of punishment means that the criminal proceedings itself is sufficient for remedy of youth offender as well as protection of society. If the pertinent provision is applied, the court rules the youth offender is recognised guilty but there is no punishment imposed on the offender. Under the conditions stated in Article 98 of the Criminal Code, court may conditionally waive of the punishment of youth offender when considers as necessary to observe behaviour of youth for certain**

period of time, in line with Article 101 of the Criminal Code. In this case, court could simultaneously impose re-education measures under the Article 106 and following of the Criminal Code.

An act, which otherwise gives raise to criminal liability, is not considered as criminal offence if there are some of circumstances excluding unlawfulness of an act (Articles 24 -30, of the Criminal Code) present.

Question 9.9.

Criminal prosecution of children (youth offenders) in the age from 14 up to 18 years is regulated in Articles 94-121 of the Criminal Code and Articles 336-347 of the Criminal Procedure Code. Criminal prosecution could lead to an indictment or an agreement of guilt and punishment with accused minor with his legal representative present and subsequently to punishment ruled by the court. The statutory penalty for youth offenders is half decreased (Article 117 of the Criminal Code), maximum of a decreased statutory penalty cannot exceed 7 years and minimum of a decreased statutory penalty cannot exceed 2 years. The court could also impose punishment of prohibition to undertake certain activities (Article 112 of the Criminal Code) or protective re-education (Article 102 of the Criminal Code).

Question 9.10.a.

Child production of "self-generated sexual content" itself is not subject of criminal liability in accordance with legal order of the Slovak republic.

Question 9.10.b.

In general, possession of "self-generated sexual content" in line with legal term "child pornography" is subject to criminal liability in accordance with Article 370 para. 1 of the Criminal Code as a criminal offence of possession of child pornography and attendance on pornographic performance involving a child. However, this shall not be applied to person who possesses child pornography made by him.

There is also specific situation when person possesses "self-generated sexual content" that had not been created for the purpose to gratify sexual desire to another. Therefore, if person possesses "self-generated sexual content" that would be possible to subsume under the term child pornography according to Article 132 para. 4 of the Criminal Code, it does not have to necessarily entail it is a child pornography unless this content has been created for the purpose of gratifying sexual desire to another.

In line with Article 127 para. 1 of the Criminal Code, for the purposes of criminal proceedings a child is defined as a person under the age of 18 years, unless stated otherwise. Age category for the criminal liability in the Slovak Republic is stated for age 14 years old, for criminal offence of sexual abuse according to Article 201 of the Criminal Code it is 15 years old. With regard to the above mentioned, each person of age 14(respectively 15) is criminally liable. The Criminal Code punishes each offender who conducts unlawfully as stated above mentioned and is minimum 14 years old. Who does not reach the age 14 years in a time of the commission of the criminal offence is not criminally liable (Article 22 para. 1 of the Criminal Code).

Question 9.10.c.-f.

Distribution or transmission of "self-generated sexual content" as stated as in letters c.-f. is subject of criminal liability in line with Article 369 of the Criminal Code as a criminal offence of dissemination of child pornography.

In line with Article 127 para. 1 of the Criminal Code, for the purposes of criminal proceedings a child is defined as a person under the age of 18 years, unless stated otherwise. Age category for the criminal liability in the Slovak Republic is stated for age 14 years old, for criminal offence of sexual abuse according to Article 201 of the Criminal Code it is 15 years. With regard to the above mentioned, each person of age 14 (respectively 15) is criminally liable. The Criminal Code punishes each offender who conducts unlawfully as stated above mentioned and is in age 14 years minimum. Who does not reach

the age 14 years in a time of the commission of the criminal offence is not criminally liable (Article 22 para. 1 of the Criminal Code).

Question 9.11.
Reply to question 9.8. is equally applied for this question (taking into consideration reply to question 8.1.b.).

Question 9.12.
Reply to question 9.9. is equally applied for this question (taking into consideration reply to question 8.1.b.).

SLOVENIA / SLOVENIE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes, provided the images/videos correspond to the material in Art 176/3 of the Criminal Code.[19]

Question 9.1.b.
Yes, provided the images/videos correspond to the material in Art 176/3 of the Criminal Code.[20]

Question 9.1.c.
Yes, provided images/videos correspond to the material in Art 176/3 of the Criminal Code.[21]

Question 9.2.
No reply to this question / Pas de réponse à cette question

Question 9.3.
The adult offenders are in breach of the Criminal Code.

Question 9.4.a.
Yes, provided the relevant content corresponds to the material in Art 176/3 of the Criminal Code.

Question 9.4.b.
Yes, provided the relevant content corresponds to the material in Art 176/3 of the Criminal Code.

Question 9.4.c.
Yes, provided the relevant content corresponds to the material in Art 176/3 of the Criminal Code.

Question 9.5.
No reply to this question / Pas de réponse à cette question

[19] Art 176/ (3) of Criminal Code: *Whoever produces, distributes, sells, imports or exports pornographic or other sexual material depicting minors or their realistic images, supplies it in any other way, or possesses such material, or discloses the identity of a minor in such material shall be subject to the same sentence as in the preceding paragraph.*
[20] Art 176/ (3) of Criminal Code: *Whoever produces, distributes, sells, imports or exports pornographic or other sexual material depicting minors or their realistic images, supplies it in any other way, or possesses such material, or discloses the identity of a minor in such material shall be subject to the same sentence as in the preceding paragraph.*
[21] Art 176/ (3) of Criminal Code: *Whoever produces, distributes, sells, imports or exports pornographic or other sexual material depicting minors or their realistic images, supplies it in any other way, or possesses such material, or discloses the identity of a minor in such material shall be subject to the same sentence as in the preceding paragraph.*

Question 9.6.
By the above behaviours a violation of criminal code is constituted, provided the relevant materials correspond to the material in Art 176/3 of the Criminal Code.[22]

Question 9.7.
No.

Question 9.8.
See answer above (9.7)

Question 9.9.
Distribution of such material in the context of Art 176/3 of the Criminal Code[23] is illegal. The material, if confiscated in illegal possession/distribution is put in ICSE database by the police.

Question 9.10.
No. (Nota bene: we understand that these questions cover the same behaviour as Question 10 below).

Question 9.11.
See answer above (9.10).

Question 9.12.
Distribution of such material in the context of Art 176/3 of the Criminal Code[24] is illegal.

Comments sent by / Commentaires envoyés par the Association against Sexual Abuse

Question 9.1.a.
Yes, the possession of these materials is also punishable and sanctioned in criminal law.

Question 9.1.b.-c.
It is also a crime to distribute these materials. If they are distributed by children aged over 14 who are already criminally responsible.

Question 9.2.
No.

Question 9.3.
As this is a violation of the law, the consequences can be imposed as sanctions in relation to a violation of the relevant legislation. In the cases of minors, it can also be in a form of various actions (notice, reprimand, etc.).

[22] Art 176/ (3) of Criminal Code: *Whoever produces, distributes, sells, imports or exports pornographic or other sexual material depicting minors or their realistic images, supplies it in any other way, or possesses such material, or discloses the identity of a minor in such material shall be subject to the same sentence as in the preceding paragraph.*
[23] Art 176/ (3) of Criminal Code: *Whoever produces, distributes, sells, imports or exports pornographic or other sexual material depicting minors or their realistic images, supplies it in any other way, or possesses such material, or discloses the identity of a minor in such material shall be subject to the same sentence as in the preceding paragraph.*
[24] Art 176/ (3) of Criminal Code: *Whoever produces, distributes, sells, imports or exports pornographic or other sexual material depicting minors or their realistic images, supplies it in any other way, or possesses such material, or discloses the identity of a minor in such material shall be subject to the same sentence as in the preceding paragraph.*

Question 9.4.
Yes, if the content and conduct comply with the content of Article 176 of the Criminal Code.

Question 9.5.
No.

Question 9.6.
As this is a violation of the law, the consequences can be imposed as sanctions in relation to a violation of the relevant legislation. In the cases of minors, it can also be in a form of various actions (notice, reprimand, etc.).

Question 9.7.
No, when it comes to children under the age of 14 who are criminally irresponsible, but the centre for social work is notified. There are no criminal sanctions.

Question 9.8.
No, except for children under the age of 14.

SPAIN / ESPAGNE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes. When dealing with possession of child pornography, the Spanish legislation does not make any distinction based on the origin of the material or the way it has been generated.

Article 189.1.b) of the Penal Code (PC) regarding possession aimed at distribution states "A prison sentence of one to five years shall be handed down to: Whoever produces, sells, distributes, displays, offers or facilitates the production, sale, diffusion or display by any medium of child pornography, or material for the preparation for which minors or persons with disabilities requiring special protection have been used, or possesses such material for such purposes, even though the material is of foreign or unknown origin."

Regarding possession for personal use only Article 189.5. 1º PC states "Whoever possesses or acquires child pornography for his own use, or material for the preparation whereof minors or persons with disabilities requiring special protection have been used, shall be punished with a prison sentence of three months to a year or with a fine of six months to two years."

However, if the possessed material for sole personal use involves children who have reached the age of 16 (legal age for sexual activities) where these images are possessed by them with their consent and solely for their own private use, this conduct would not be punishable according to General Prosecution Office Instruction 2/2015 on Child Pornography Crimes after Act 1/2015 amending Spanish Penal Code (page 26).

Though this conduct would be formally a crime, it would not be unlawful as the legal interest protected by the law (sexual integrity/indemnity of the child) would not be damaged.

Question 9.1.b.
Yes. When dealing with distribution or transmission of child pornography, the Spanish legislation does not make any distinction based on the origin of the material or the way it has been generated.

Distribution and transmission of child pornography is criminalised in Article 189.1. b) PC (see above).

Question 9.1.c.
The previous provision would be also applied for distributing or transmitting child pornography to children.

Question 9.2.
The Spanish Criminal Law is ruled by principle of legality. Under no circumstance these cases would not be prosecuted.

Question 9.3.
See answer to Q 9.1.

Except from the case of possession exclusively for personal use (Article 189.5.1º), there are **aggravating circumstances** applicable to conducts described in 189.1 b).

These circumstances are established in **article 189.2 PC**: "Whoever perpetrates the deeds foreseen in Section 1 of this Article shall be punished with a prison sentence of five to nine years if any of the following circumstances concurs:

a) If using children under the age of sixteen years;

b) If the deeds are particularly degrading or humiliating in nature;

c) If the pornographic material displays minors or persons with disabilities requiring special protection who are victims of physical or sexual violence;

d) If the offender has endangered the life or health of the victim, intentionally or due to gross negligence;

e) If the deeds are especially serious in view of the financial value of the pornographic material;

f) If the culprit is a member of an organisation or association, even on a temporary basis, dedicated to carrying out such activities;

g) If the offender is an ascendant, tutor, carer, minder, teacher or any other person in charge, de facto, even on a provisional basis, or de jure, of the minor or person with disabilities requiring special protection, or any other member of the family who lives with him and who has abused his recognised position of trust or authority;

h) If the aggravating circumstance of recidivism concurs.

Question 9.4.
Answers to question 9.1 are also applicable for these cases.

Question 9.5.
Answer to question 9.2 is applicable.

Question 9.6.
Answer to question 9.3 is applicable.

Question 9.7.
Criminal responsibility in the Spanish Law applies only to children above 14 years.

Question 9.7.a.
Not in case they produce self-generated sexually explicit images and/or videos of themselves.

In any other case, the conduct would be punishable unless the images depict a person who has reached the age of 16 and are produced with his/her consent and the images are not intended to be distributed, but only to be possessed for the producer's personal use.

Question 9.7.b.
Yes. However, if the possessed material for sole personal use involves children who have reached the age of 16 (legal age for sexual activities) where these images are possessed by them with their consent and solely for their own private use, this conduct would not be punishable according to General Prosecution Office Instruction 2/2015 on Child Pornography Crimes after Act 1/2015 amending Spanish Penal Code (page 26).

Question 9.7.c.
Though not specifically foreseen by the Law, these cases are not excluded from the application of the abovementioned provisions.

Question 9.7.d.
Though not specifically foreseen by the Law, these cases are not excluded from the application of abovementioned provisions.

Question 9.7.e.
Yes, provided that the offender is above 14 years old.

Question 9.7.f.
Yes, provided that the offender is above 14 years old.

Question 9.8.
It depends on the circumstances. In juvenile jurisdiction it is possible not to prosecute the offender (from 14 to 18 years old) provided that it has been the first offence committed by him/her, the offence is not serious, and has been committed without violence or intimidation.

In this jurisdiction it is also possible not to go ahead with the prosecution once the proceeding has begun regarding not serious offences and taking into account other circumstances such as: hearing the victim, first offence, having paid civil responsibility…

Extra judicial measures are specifically applicable to offences committed through ICTs. These measures aim at repairing the victim that can "forgive" the offender but only in cases of isolated conducts.

Question 9.9.
Juvenile Jurisdiction is flexible regarding these crimes bearing in mind the lack of maturity of the offender.

The General Prosecution Office Instruction 9/2011 advocates for case by case measures depending on the seriousness of the conduct and the effects including the possibility above mentioned of putting an end to the prosecution once the proceeding has started or not even prosecuting at all in minor offences.

The Technical Team's (integrated by a psychologist, an educator and a social worker) report will be extremely valuable in order to determine if there are educational or psychological circumstances that could require specific professional treatment.

Question 9.10.
Answer to question 9.7 is applicable.

Question 9.11.
Answer to question 9.8 is applicable.

Question 9.12.
Answer to question 9.9 is applicable.

SWEDEN / SUEDE
State replies / Réponses de l'Etat

Question 9.1.a.
Yes, Sweden has very far-reaching criminalisation of all conceivable forms of engagement with child pornography pictures. According to Chapter 16, Section 10a of the Swedish Penal Code it is criminal to portray a child in a pornographic picture, to make such a picture available to some other person, to acquire or offer such a picture, to facilitate in any way dealing in such pictures, or to possess such a picture. Since 1 July 2010, viewing child pornographic pictures that the viewer has acquired access to is also a crime of child pornography. This includes, of course, so called web-viewing without possession. All kinds of pictures are covered by the regulation, for example pictures in printed publications, pictures in video recordings and pictures that are communicated on the Internet.

Question 9.1.b.
Yes, see answer above (9.1.a).

It could also be considered as sexual molestation. According to Chapter 6, Section 10 of the Swedish Penal Code a person who exposes himself or herself to another person in a manner that is likely to cause discomfort or who otherwise by word or deed molests a person in a way that is likely to violate that person's sexual integrity, shall be sentenced for sexual molestation to a fine or imprisonment for at most two years.

Question 9.1.c.
Yes, see answer above (9.1.a and 9.1 b)

Question 9.2.
According to Chapter 16 Section 10 b of the Swedish Penal Code the prohibitions in Section 10 a against depiction and possession do not apply to a person who produces a pornographic picture, if the difference in age and development between the child and the person who produces the picture is minor and the circumstances otherwise do not warrant the person who has committed the act being convicted of a crime. Furthermore, the prohibitions in Section 10 a against depiction and possession do not apply to a person who draws, paints or in some other similar hand-crafted fashion produces a picture of the kind described in the first paragraph as long as it is not intended for dissemination, transfer, granted use, exhibition or in any other way be made available to others. Even in other cases the act shall not constitute a crime if, having regard to the circumstances, it is justifiable.

Question 9.3.
Acts of child pornography are punishable with imprisonment for at most two years, or, if the crime is petty, to a fine or imprisonment for at most six months. Acts of gross child pornography are punishable with imprisonment of at least six months and at most six years.

Acts of sexual molestation are punishable with a fine or imprisonment for at most two years.

Question 9.4.a.
See the answer above (9.1a).

Question 9.4.b.
It could be considered as sexual molestation, (see above 9.1b). See also the answer to 9.1a.

Question 9.4.c.
It could be considered as sexual molestation, (see above 9.1b). See also the answer to 9.1a.

Question 9.5.
See the answer above (9.2)

Question 9.6.
See the answer above (9.3)

Question 9.7.a.
No, not if it is images and/or videos of themselves. But if it is images and/or videos of another child, see answer above (9.1.a).

Question 9.7.b.
No, not if it is images and/or videos of themselves. But if it is images and/or videos of another child, see answer above (9.1.a).

Question 9.7.c.
Yes, it could be considered as sexual molestation, see above (9.1b).

Question 9.7.d.
Yes, it could be considered as sexual molestation, see above (9.1b).

Question 9.7.e.
Yes, see answer above (9.1a and 9.1b).

In addition, a new penalty provision on unlawful violation of privacy (Chapter 4, Section 6 c) has been proposed. The new provision is to apply to a person who violates another person's private life by spreading e.g. images or other information about someone's sex life or images of someone's naked body. The new legislation is proposed to enter into force on 1 January 2018.

Question 9.7.f.
Yes, see answer above (9.1a and 9.1b).

In addition, a new penalty provision on unlawful violation of privacy (Chapter 4, Section 6 c) has been proposed. The new provision is to apply to a person who violates another person's private life by spreading e.g. images or other information about someone's sex life or images of someone's naked body. The new legislation is proposed to enter into force on 1 January 2018.

Question 9.8.
See the answer above (9.2).

Furthermore, according to Chapter 1 Section 6 of the Swedish Penal Code, no sanction shall be imposed upon a person for an offence committed before the age of fifteen.

Question 9.9.
See the answer above (9.3)

Furthermore, according to Chapter 1 Section 6 of the Swedish Penal Code, no sanction shall be imposed upon a person for an offence committed before the age of fifteen.

Question 9.10.a.
See the answer above (9.1a)

Question 9.10.b.
See the answer above (9.1a)

Question 9.10.c.
Yes, it could be considered as sexual molestation, see above (9.1b).

Question 9.10.d.
Yes, it could be considered as sexual molestation, see above (9.1b).

Question 9.10.e.
Yes, it could be considered as sexual molestation, see above (9.1b). See also the answer to 9.1a

In addition, a new penalty provision on unlawful violation of privacy (Chapter 4, Section 6 c) has been proposed. The new provision is to apply to a person who violates another person's private life by spreading e.g. images or other information about someone's sex life or images of someone's naked body. The new legislation is proposed to enter into force on 1 January 2018.

Question 9.10.f.
Yes, it could be considered as sexual molestation, see above (9.1b). See also the answer to 9.1.a.

In addition, a new penalty provision on unlawful violation of privacy (Chapter 4, Section 6 c) has been proposed. The new provision is to apply to a person who violates another person's private life by spreading e.g. images or other information about someone's sex life or images of someone's naked body. The new legislation is proposed to enter into force on 1 January 2018.

Question 9.11.
See the answer to 9.2.

Furthermore, according to Chapter 1 Section 6 of the Swedish Penal Code, no sanction shall be imposed upon a person for an offence committed before the age of fifteen.

Question 9.12.
See the answer to 9.3.

Comments sent by / Commentaires envoyés par ECPAT Sweden

Questions 9.1. and 9.4.
All acts of dealing with child sexual abuse material are unlawful according to Swedish law: portraying, disseminating, selling, possessing, as well as viewing such an image. An image is considered "child pornography" if a child is depicted and if the image, according to "common language and general values" is pornographic. Regarding the act of portraying or producing "child pornography", all children under 18 are covered by this provision, regardless of sexual maturity. However, regarding all other acts (disseminating, selling, possessing, or viewing an image) it must be apparent from either the content

itself that the child portrayed is under the age of 18, or from the context information of the image, for example its title. This means that an image or video of a pubescent child under the age of 18 might not be considered child pornography.

Images such as nude images of a child which do not focus on genitalia, are not always considered child pornography, even when placed in a sexual context. See below for more details.

In January 2018, a new law entered into force which concerns invasion of privacy. This new offence criminalises the invasion of another person´s private life through the dissemination of material of private or personal nature, such as nude images.

Question 9.2.

In 2017, ECPAT Sweden published a report titled "I gråzonen" (In the Grey Area), which concerns acts of sexual exploitation which are considered legal in Sweden. Through our hotline, we encounter images and videos of children which are published in a sexualised context, but which are not in themselves illegal. This includes, for example, images of children who are naked, published on websites containing legal (adult) pornographic material, or where sex toys are sold. The fact that such images are published and spread in a sexualised context, constitutes a serious violation of the individual child's right to integrity.

The report shows that there is a wide range of images, including self-generated images, which are not considered illegal by the police, regardless of the context in which they are published. In the report, we asked both criminal investigators and prosecutors specialised in child sexual exploitation material to analyse fictitious images of children, published in different contexts online. Our analysis shows that some images were considered illegal by prosecutors, but not by the criminal investigators, which suggests that a large amount of images will never be subjected to any investigation, although a prosecutor might have considered them illegal at a later stage.

Questions 9.3. and 9.6.

In ECPAT Sweden´s opinion, the legal consequences of crimes related to child sexual abuse material (child pornography) do not fully reflect the seriousness of the crime and the violations of the rights of the child. Acts of gross child pornography should not be punished with prison sentences of less than 12 months. Prison sentences of less than 12 months in Sweden often result in conditional sentences.

The child pornography crime is placed under the chapter in the Swedish Penal Code dealing with crimes against public order. ECPAT Sweden has long argued that it should be placed under chapter 6 of the Swedish Penal Code instead, where all other sexual offences are placed.

SWITZERLAND / SUISSE

State replies / Réponses de l'Etat

Nos réponses au questionnaire « Aperçu général » concernant la mise en œuvre de l'art. 20 de la Convention de Lanzarote (cf. réponses à la question 16) demeurent valables :

> Les infractions aux art. 18 à 23 de la convention figurent au titre 5 CP (infractions contre l'intégrité sexuelle). L'art. 24 de la convention est mis en œuvre aux art. 22, 24 et 25 CP.
>
> Le message concernant l'approbation de la convention de Lanzarote et sa mise en œuvre (http://www.admin.ch/opc/fr/federal-gazette/2012/7051.pdf) comporte une description détaillée des dispositions d'application de la convention (pp. 7087 à 7107). Les modifications du code pénal qui y sont proposées (notamment des art. 195, 196 et 197) sont entrées en vigueur sous cette forme le

1er juillet 2014).

Abus sexuels (article 18)
Ch. 1 let. a
Art. 187 ch. 1 CP

Ch. 1 let. b
- Art. 189, 190 CP
- Art. 188, 192, 193 CP
- Art. 191 CP

Prostitution enfantine (article 19)
Ch. 1 let. a
Art. 195 let. a CP

Ch. 1 let. b
Art. 187, 189, 190, 195 let. a CP

Ch. 1 let. c
Art. 196 CP

Pornographie enfantine (article 20)
L'ensemble des infractions considérées figurent à l'art. 197 CP.

Participation d'un enfant à des spectacles pornographiques (article 21)
Ch. 1 let. a :
Art. 197 Abs. 3 CP.

Ch. 1 let. b :
Art. 187, 189, 190 CP.

Ch. 1 let. c :
Art. 197 Abs. 5 CP.

Corruption d'enfants (article 22)
Art. 187 ch. 1 CP.

Sollicitation d'enfants à des fins sexuelles (article 23)
Le droit pénal suisse ne prévoit pas une incrimination spécifique. Les actes décrits à l'art. 23 de la convention sont sanctionnés par les articles 187, ch. 1, al. 1/art. 22 al 1, CP (tentative d'actes d'ordre sexuel avec des enfants) et 197, al 4/art. 22 al. 1, CP (tentatives de la fabrication de pornographie enfantine). Le Tribunal fédéral s'est clairement positionné, dans sa jurisprudence, sur la délimitation entre actes préparatoires non répréhensibles et tentative punissable. Selon cette définition, il y a tentative punissable dès que le suspect rejoint le lieu de rendez-vous. Selon le droit suisse, est déjà punissable, quiconque, en dialoguant avec un enfant sur Internet :
– confronte celui-ci à des textes ou des représentations pornographiques (art. 197, ch. 1, CP) ;
– entraîne celui-ci à commettre un acte d'ordre sexuel sur lui-même et l'observe, par ex. au moyen d'une caméra (art. 187, ch. 1, 2e phrase, CP) ;
– mêle celui-ci à un acte d'ordre sexuel (art. 187, ch. 1, 3e phrase, CP), parce qu'il commet un acte d'ordre sexuel devant lui ou parce que l'enfant perçoit un tel acte, sans qu'il y ait contact physique entre l'auteur et la victime.

Complicité et tentative (article 24)
La complicité, l'instigation et la tentative, dont l'art. 24, par. 1 et 2, de la convention demande la punissabilité, sont régies en Suisse par les articles 22, 24 et 25 CP. Elles sont punissables si elles concernent un délit ou un crime. Comme les infractions visées par la convention sont aussi des délits ou des crimes au sens du droit suisse, la complicité et la tentative liées à ces derniers sont également poursuivies pénalement.

Reste à examiner la punissabilité de la participation à une tentative de commission d'acte d'ordre sexuel avec des enfants (art. 187, ch. 1, al. 1, CP) et de fabrication de pornographie enfantine (art. 197, al. 4, P-CP). Comme indiqué plus haut, on s'appuiera sur ces infractions pour mettre en œuvre, en Suisse, l'obligation de déclarer punissable la sollicitation d'enfants à des fins sexuelles (art. 23 de la convention). L'instigation consiste à faire naître l'intention de commettre un acte répréhensible. La complicité est le fait de prêter une assistance secondaire, mais intentionnelle, à un tiers dans la commission intentionnelle d'un acte. En vertu du principe d'accessoriété, l'instigation et la complicité sont réalisées dès qu'il y a tentative de commettre l'infraction principale. Tant l'instigateur que le complice d'une tentative d'infraction principale sont punissables.

Le par. 3 de l'art. 24 dispose que chaque Partie peut se réserver le droit de ne pas appliquer le par. 2 de l'art. 24 de la convention, à savoir renoncer à déclarer punissable la tentative de sollicitation d'enfants à des fins sexuelles. La Suisse fait application de cette réserve, du fait qu'elle ne punit pas la « tentative de tentative ».

Selon l'article 47 CP, le juge fixe la peine d'après la culpabilité de l'auteur. Il prend en considération les antécédents et la situation personnelle de ce dernier ainsi que l'effet de la peine sur son avenir (al. 1). La culpabilité est déterminée par la gravité de la lésion ou de la mise en danger du bien juridique concerné, par le caractère répréhensible de l'acte, par les motivations et les buts de l'auteur et par la mesure dans laquelle celui-ci aurait pu éviter la mise en danger ou la lésion, compte tenu de sa situation personnelle et les circonstances extérieure (al. 2). Dans ce sens le juge doit prendre en considération l'âge de l'enfant.

Question 9.1.a.
La possession de représentations de cette nature est punissable en vertu de l'art. 197, al. 4, CP.

Question 9.1.b.
La transmission de représentations de cette nature à d'autres adultes est punissable en vertu de l'art. 197, al. 4, CP.

Question 9.1.c.
La transmission de représentations de cette nature à des mineurs est punissable en vertu de l'art. 197, al. 4, CP.

Question 9.2.
Le droit pénal suisse prévoit aux art. 52 CP (absence d'intérêt à punir) et 53 CP (réparation) et à l'art. 8 CPP (renonciation à toute poursuite pénale) différents instruments qui permettent aux autorités compétentes de renoncer, **à certaines conditions**, à la poursuite pénale, à l'accusation ou l'une condamnation d'un auteur adulte.

Selon l'art. 197, al. 9, CP, les objets et représentations visés aux al. 1 à 5 qui présentent une valeur culturelle ou scientifique digne de protection ne sont pas de nature pornographique.

Question 9.3.
La peine encourue pour les infractions relevant de l'art. 197, al. 4, CP est une peine privative de liberté de cinq ans au plus ou une peine pécuniaire si les représentations ont pour contenu des actes d'ordre sexuel effectifs avec des mineurs.

Question 9.4.
Nos réponses au questionnaire « Aperçu général » concernant la mise en œuvre de l'art. 20 de la Convention de Lanzarote (cf. réponses à la question 16) demeurent valables (*reproduites ci-dessus*).

Cf. réponses aux questions 9.1. a.) à c.)

Question 9.5.
Cf. réponse à la question 9.2.

Question 9.6.
Cf. réponse à la question 9.3.

Question 9.7.a.
La réponse à cette question dépend de l'âge de l'enfant : il faut distinguer entre les enfants de 10 à 15 ans et ceux qui ont 16 ou 17 ans.

L'art. 197, al. 8, CP prévoit que le *mineur âgé de 16 ans ou plus* qui produit, possède ou consomme des objets ou des représentations, avec le consentement d'un autre mineur âgé de 16 ans ou plus, n'est pas punissable. En d'autres termes, si A, 16 ans, fabrique une image ou vidéo pornographique de B, 17 ans, avec son consentement, A n'est pas punissable.

Même si la chose ne ressort pas expressément de la formulation de l'art. 197, al. 8, CP, il doit en aller de même, à notre avis, lorsque B fabrique une image pornographique de lui-même : le selfie pornographique est moins grave que la fabrication d'une image de même nature d'une personne tierce. Dans ce cas, le risque est également moins grand que l'image soit diffusée sans le consentement de l'intéressé et lui soit dommageable. Si la première situation n'est pas punissable, la seconde – celle du selfie – ne devrait pas l'être non plus.

Lorsque, en revanche, des *enfants de 10 à 15 ans* fabriquent des images et/ou des vidéos pornographiques d'eux-mêmes, l'art. 197, al. 8, CP n'est pas applicable ; ces enfants se rendent donc punissables. Ils ne sont pas encore majeurs au plan sexuel. On suppose par conséquent qu'ils ne sont pas en mesure, de par leur âge, d'évaluer les risques et les dangers (diffusion involontaire) que la fabrication d'une image ou d'une vidéo pornographique peut receler.

Question 9.7.b.
Il ressort de la réponse à la question 9.7.a.) que la possession d'images ou de vidéos de cette nature n'est pas punissable pour les adolescents de 16 ou 17 ans, tandis qu'elle l'est pour les enfants de 10 à 15 ans.

Question 9.7.c.
La transmission de représentations de cette nature ne devrait pas être punissable si les faits se produisent entre deux, ou plus, mineurs de 16 ou 17 ans dans la situation couverte par l'art. 197, al. 8, CP. La transmission d'images et/ou de vidéos de cette nature à des tierces personnes qui n'y ont pas participé – indépendamment de leur âge – est punissable en vertu de l'art. 197, al. 4, CP.

Question 9.7.d.
La transmission de représentations de cette nature à des adultes est punissable en vertu de l'art. 197, al. 4, CP.

Question 9.7.e.
La transmission de représentations de cette nature est punissable en vertu de l'art. 197, al. 4, CP, sous réserve de l'art. 197, al. 8, CP.

Question 9.7.f.
La transmission de représentations de cette nature est punissable en vertu de l'art. 197, al. 4, CP.

Question 9.8.

Les mineurs produisant et partageant ces contenus sont souvent victimes eux-mêmes d'une extorsion ou d'un adulte qui se fait passer pour un enfant. Dans ces cas, les enfants font l'objet de poursuites pénales, mais en règle générale ne subissent pas de condamnation.

Il existe aussi des motifs d'exemption de peine dans le droit pénal des mineurs (art. 5 de la procédure pénale applicable aux mineurs [PPMin], art. 8, al. 2 à 4, CPP, art. 21 DPMin) ; ces motifs sont plus larges que dans le droit pénal des adultes. Contrairement à ce dernier, le droit pénal des mineurs prévoit l'instrument de la médiation.

Art. 21 Droit pénal des mineurs, DPMin : Exemption de peine

[1] L'autorité de jugement renonce à prononcer une peine :

a. si la peine risque de compromettre l'objectif visé par une mesure de protection déjà ordonnée ou qui sera ordonnée dans la procédure en cours;
b. si la culpabilité du mineur et les conséquences de l'acte sont peu importants;
c. si le mineur a réparé lui-même le dommage dans la mesure de ses moyens ou a fourni un effort particulier pour compenser le tort causé, si la réprimande visée à l'art. 22 est la seule peine envisageable et si l'intérêt public et l'intérêt du lésé à poursuivre le mineur pénalement sont peu importants;
d. si le mineur a été directement atteint par les conséquences de son acte au point qu'une peine serait inappropriée;
e. si le mineur a déjà été suffisamment puni par ses parents, par une autre personne responsable de son éducation ou par des tiers; ou
f. si une période relativement longue s'est écoulée depuis l'acte, si le comportement du mineur a donné satisfaction et si l'intérêt public et l'intérêt du lésé à poursuivre le mineur pénalement sont peu importants.

Question 9.9.

Le droit pénal des mineurs contient d'un côté des sanctions telles que des mesures de protection (surveillance, assistance personnelle, traitement ambulatoire ou placement, art. 12 à 15 DPMin), de l'autre des peines (réprimande, prestation personnelle, et pour les jeunes dès 15 ans amende de 2 000 francs au plus ou peine privative de liberté d'un an au plus, art. 22 à 25 DPMin).

Il faut toutefois souligner que le droit pénal des mineurs est un *droit pénal axé sur l'auteur*. Les objectifs préventifs spéciaux occupent le premier plan : il s'agit d'empêcher les auteurs mineurs, par des peines adaptées à leur âge ou des mesures éducatives ou thérapeutiques, de commettre d'autres infractions. Les sanctions sont davantage adaptées aux besoins personnels de l'enfant ou de l'adolescent que fixées en fonction de la gravité de l'infraction commise ou de la culpabilité.

Question 9.10.

Cf. réponses à la question 9.7.

Question 9.11.

Cf. réponse à la question 9.8.

Question 9.12.

Cf. réponse à la question 9.9.

TURKEY / TURQUIE
State replies / Réponses de l'Etat

Before starting our replies under the question of "Criminalisation" we would like to remind that remarks and comments stated below are only for information purposes. As it belongs to judicial authorities to make a trial for every individual case and to interpret and apply the law, our remarks are not absolute legal evaluations. Only aim of these explications is to present articles which should be examined in such cases and to indicate such articles which tackle with matters included in this questionnaire. Examining an act and applying the convenient article of criminal code is under competence of the judiciary.

Question 9.1.
Relevant paragraphs of article 226 of Turkish Criminal Code is as follows:

"…
(3) A person who uses children in the production of obscene written or audio-visual materials shall be sentenced to a penalty of imprisonment for a term of five to ten years and a judicial fine of up to five thousand days. Any person who conveys such material into the country, who copies or offers for sale such material or who sells, transports, stores, exports, retains possession of such material or offers such material for the use of others shall be sentenced to a penalty of imprisonment for a term of two to five years and a judicial fine of up to five thousand days."

…
(5) Any person who broadcasts or publishes the materials described in sections three and four or who acts as an intermediary for this purpose or who ensures children see, hear or read such materials shall be sentenced to a penalty of imprisonment for a term of six to ten years and a judicial fine of up to five thousand days.

Question 9.2.
We state alternative intervention and other special circumstances below for cases where such acts are realised by children.

Question 9.3.
Stated above under 9.1.

Question 9.4.
We refer to our answer under 9.1.

Question 9.5.
We state alternative intervention and other special circumstances below for cases where such acts are realised by children

Question 9.6.
Stated above under 9.1.

Question 9.7.
Before starting our replies, it should be noted that law does not regulate specifically committing of acts stated above by a child. We would also like to reiterate again that it is to judicial authorities to interpret and evaluate every act that can constitute a crime and to decide under which article such an act falls with. Our remarks are not absolute legal evaluations. Only aim of these explications is to present articles which should be examined in such cases and to indicate which articles tackle with cases included in the questionnaire.

Question 9.7.a.-b.
Producing or possessing self-generated images or videos of herself/himself does not constitute a crime under Turkish Law.

Question 9.7.c.-d.
Relevant paragraphs of article 226 of Turkish Criminal Code is as follows:

"…
(3) A person who uses children in the production of obscene written or audio-visual materials shall be sentenced to a penalty of imprisonment for a term of five to ten years and a judicial fine of up to five thousand days. Any person who conveys such material into the country, who copies or offers for sale such material or who sells, transports, stores, exports, retains possession of such material or offers such material for the use of others shall be sentenced to a penalty of imprisonment for a term of two to five years and a judicial fine of up to five thousand days."

…
(5) Any person who broadcasts or publishes the materials described in sections three and four or who acts as an intermediary for this purpose or who ensures children see, hear or read such materials shall be sentenced to a penalty of imprisonment for a term of six to ten years and a judicial fine of up to five thousand days."

On the other hand, pursuant to the article 105 of Turkish Criminal Code, titled "sexual harassment", *"Any person, who harasses sexually another person, shall be punishable by imprisonment for a term between three months and two years or by a fine, upon the complaint of the victim; where the act is committed against a minor, the perpetrator shall be punishable by imprisonment from six months to three years.". Moreover, if this crime is committed against a child or committed via ICT it is an aggravated circumstance.*

Therefore in order to accept that "to distribute or transmit self-generated sexually explicit images and/or videos of themselves by a child to adults or children" is a crime under the article 105, it must be established that the intent of the child is "sexually harassing". If such an intention does not exist, this crime will not occur.

Question 9.7.e.-f.
In this case, this act is firstly a crime under paragraph 1 of article 226 as it is explained for questions "c" and "d". Moreover, distributing or transmitting self-generated sexually explicit images of other people, including children, is also a crime under paragraph 2 of the article 134 of Turkish Criminal Code, which states: "*revealing illegally images or sounds related to the private life of persons is punished with prison between 2 and 5 years*". Therefore, distributing or transmitting self-generated sexually explicit images and videos of other children to peers or adults may constitute a crime under Turkish criminal law.

Question 9.8.
We would like to indicate also that Turkish legislation does not use terms such as "criminal", "suspect" or "accused" for children. It uses instead "child pushed to crime". This explains how our criminal legislation approaches children who committed crime by considering all factors that pushed a child to commit a crime and determining her or his criminal liability accordingly, without omitting alternative interventions and measures.

Where a child is under investigation, criminal procedure against her or him is conducted by special offices within law enforcement, child bureaus of public prosecution offices and they are judged by juvenile courts. There are a number of procedural guaranties and alternative interventions for children pushed to crime. Pursuant to the article 21 of Child Protection Code, no child can be put under detention for a crime of which upper limit for imprisonment sentence is not more than five years.

Criminal liability of children is regulated under the article 31 of Turkish Criminal Code. Pursuant to the first paragraph of the article, Minors under the age of twelve are exempt from criminal liability. Therefore, if a child who commits the acts stated above is under twelve years old, she/he shall not be penalised. While such minors cannot be prosecuted, supporting measures in respect of minors may be imposed.

Where a minor is older than twelve, but younger than fifteen, at the time of an offence, and he is either incapable of appreciating the legal meaning and consequences of his act or his capability to control his behaviour is underdeveloped then he shall be exempt from criminal liability. Where the minor has the capability to comprehend the legal meaning and result of the act and to control his behaviours in respect of his act, the penalty to be imposed shall be reduced by half, save for the fact that for each act such penalty shall not exceed seven years. However, such minors may be subject to measures specific to children.

Where a minor is older than fifteen but younger than eighteen years at the time of the offence the penalty to be imposed shall be reduced by one-third, save for the fact that the penalty for each act shall not exceed twelve years.

As the law indicates, where the criminal responsibility of a child does not exist, court can decide for security measures specific to children. These measures are in the Code of Child Protection. They aim firstly at protecting a child within her or his family where possible and in compatible with best interests of the child. These measures are as follows:
- Counselling: (for children and persons responsible of their care.)
- Education
- Care of child (in cases where persons who are charged with care of the child does not fulfil their obligation)
- Health care and rehabilitation.

These measures are not only applicable for children of whom criminal liability is not accepted but also for other children who are held responsible.

Other than the measures stated above, there are also other alternative interventions for children: such as:
- Pursuant to the article 253 of Criminal Procedure Code, where a crime committed by a child and the child is sentenced by imprisonment up to three years, law gives possibility for reconciliation with the victim of the crime. In this case, even if the prosecution of the crime is not depended upon complaint of the victim, there is possibility of reconciliation for the child with the victim.

Regarding crimes which are out of scope of reconciliation, there is a possibility of suspending induction of criminal case under certain circumstances, stated below in the text of article 171 of Criminal Procedure Code. In this case, time of monitoring for children is three years instead of five, which is foreseen for adults.

- Where a child is sentenced to sentence of imprisonment which is two years or less, criminal court may decide, under certain conditions, not to pronounce verdict and if the child does not commit a crime for three years, (this monitoring duration is five years for adults) the verdict is abolished automatically. Court can also decide to monitoring of the child such as appointing a tutor or an social expert etc. to guide the child.

- If conditions of legal remedy for postponing the verdict are not present in a case, court can decide for suspension of the sentence. For this suspension, the sentence accorded against a child by court must be less than three years. (it is two years for adults).

There are also certain guaranties and rights for children in the execution phase of sentence but as they are out of scope of the question, we are not indicating them. The court may assign an expert to counsel the child within the probation period. This expert shall: give guidance to the offender designed to aid the person to act responsibly and refrain from negative behaviour; meet and discuss with the authorities of the educational institution or work place of the offender; prepare a report, every three months, on the development, behaviour, social adaptation and sense of responsibility of the offender and convey these reports to the judge.

Question 9.9.
We refer to our replies under 9.7. above.

Question 9.10.
We refer to our replies under 9.7. above.

Question 9.11.
We refer to our replies under 9.8. above.

Question 9.12.
We refer to our replies under 9.7. above.

UKRAINE
State replies / Réponses de l'Etat

Question 9.1.
Article 301 of the CCU. Import, manufacture, sale and distribution of pornographic items:

1. Importation into Ukraine of works, images or other objects of a pornographic nature for the purpose of marketing or distribution or their production, storage, transportation or other transmission for the same purpose, or their sale or distribution, as well as forcing to participate in its creation - shall be punished by a fine of fifty to one hundred tax-free minimum incomes, or imprisonment for a term up to six months, or restraint of liberty for a term up to three years.

2. The same acts committed in relation to cinematographic and video products, computer programs of a pornographic nature, as well as sales to minors or the distribution of works, images or other objects of a pornographic nature among them - shall be punished by a fine of one hundred to three hundred tax-free minimum incomes, or restraint of liberty for a term up to five years, or imprisonment for the same term.

3. Acts described in paragraphs 1 or 2 of this article, that were committed repeatedly or by a prior conspiracy by a group of persons, or included receiving a large amount of income - shall be punished by imprisonment for a term of three to seven years with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

4. Actions described in paragraphs 1 or 2 of this article that were committed in respect of works, images or other objects of a pornographic nature containing child pornography, or forcing minors to participate in the creation of works, images or cinema and video products, computer programs of pornography - shall be punished by imprisonment for a term of five to ten years, with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

5. The actions described in part four of this article, that were committed repeatedly or by prior conspiracy by a group of persons, or including the receipt of a large amount of income - shall be punished by imprisonment for a term of seven to twelve years with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

Question 9.2

Does not exist, as there are no incentive rules in accordance with Article 301 of the CCU that exempt individuals from criminal liability under the said article.

Question 9.3.

According to Article 301 of the CCU. Import, production, sale and distribution of pornographic items:

1. Importation into Ukraine of works, images or other objects of a pornographic nature for the purpose of marketing or distribution or their production, storage, transportation or other transmission for the same purpose, or their sale or distribution, as well as forcing to participate in its creation - shall be punished by a fine of fifty to one hundred tax-free minimum incomes, or imprisonment for a term up to six months, or restraint of liberty for a term up to three years.

2. The same acts committed in relation to cinematographic and video products, computer programs of a pornographic nature, as well as sales to minors or the distribution of works, images or other objects of a pornographic nature among them - shall be punished by a fine of one hundred to three hundred tax-free minimum incomes, or restraint of liberty for a term up to five years, or imprisonment for the same term.

3. Acts described in paragraphs 1 or 2 of this article, that were committed repeatedly or by a prior conspiracy by a group of persons, or included receiving a large amount of income - shall be punished by imprisonment for a term of three to seven years with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

4. Actions described in paragraphs 1 or 2 of this article that were committed in respect of works, images or other objects of a pornographic nature containing child pornography, or forcing minors to participate in the creation of works, images or cinema and video products, computer programs of pornography - shall be punished by imprisonment for a term of five to ten years, with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

5. The actions described in part four of this article, that were committed repeatedly or by prior conspiracy by a group of persons, or including the receipt of a large amount of income - shall be punished by imprisonment for a term of seven to twelve years with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

Question 9.4.

According to Article 301 of the CCU. Import, production, sale and distribution of pornographic items:

1. Importation into Ukraine of works, images or other objects of a pornographic nature for the purpose of marketing or distribution or their production, storage, transportation or other transmission for the same purpose, or their sale or distribution, as well as forcing to participate in its creation - shall be punished by a fine of fifty to one hundred tax-free minimum incomes, or imprisonment for a term up to six months, or restraint of liberty for a term up to three years.

2. The same acts committed in relation to cinematographic and video products, computer programs of a pornographic nature, as well as sales to minors or the distribution of works, images or other objects of a pornographic nature among them - shall be punished by a fine of one hundred to three hundred tax-free minimum incomes, or restraint of liberty for a term up to five years, or imprisonment for the same term.

3. Acts described in paragraphs 1 or 2 of this article, that were committed repeatedly or by a prior conspiracy by a group of persons, or included receiving a large amount of income - shall be punished by imprisonment for a term of three to seven years with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

4. Actions described in paragraphs 1 or 2 of this article that were committed in respect of works, images or other objects of a pornographic nature containing child pornography, or forcing minors to participate in the creation of works, images or cinema and video products, computer programs of pornography - shall be punished by imprisonment for a term of five to ten years, with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

5. The actions described in part four of this article, that were committed repeatedly or by prior conspiracy by a group of persons, or including the receipt of a large amount of income - shall be punished by imprisonment for a term of seven to twelve years with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

Question 9.5.

Does not exist, as there are no incentive rules in accordance with Article 301 of the CCU that exempt individuals from criminal liability under the said article.

Question 9.6.

According to Article 301 of the CCU. Import, production, sale and distribution of pornographic items:

1. Importation into Ukraine of works, images or other objects of a pornographic nature for the purpose of marketing or distribution or their production, storage, transportation or other transmission for the same purpose, or their sale or distribution, as well as forcing to participate in its creation - shall be punished by a fine of fifty to one hundred tax-free minimum incomes, or imprisonment for a term up to six months, or restraint of liberty for a term up to three years.

2. The same acts committed in relation to cinematographic and video products, computer programs of a pornographic nature, as well as sales to minors or the distribution of works, images or other objects of a pornographic nature among them - shall be punished by a fine of one hundred to three hundred tax-free minimum incomes, or restraint of liberty for a term up to five years, or imprisonment for the same term.

3. Acts described in paragraphs 1 or 2 of this article, that were committed repeatedly or by a prior conspiracy by a group of persons, or included receiving a large amount of income - shall be punished by imprisonment for a term of three to seven years with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

4. Actions described in paragraphs 1 or 2 of this article that were committed in respect of works, images or other objects of a pornographic nature containing child pornography, or forcing minors to participate in the creation of works, images or cinema and video products, computer programs of pornography - shall be punished by imprisonment for a term of five to ten years, with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

5. The actions described in part four of this article, that were committed repeatedly or by prior conspiracy by a group of persons, or including the receipt of a large amount of income - shall be punished by imprisonment for a term of seven to twelve years with the deprivation of the right to occupy certain positions or to be engaged in certain activities for a term up to three years.

Question 9.7.

The National Police of Ukraine constantly controls the state of pre-trial investigation in criminal proceedings in which juvenile offenses are committed, as well as criminal proceedings in which crimes committed against minors. The National Police of Ukraine is taking measures to increase the effectiveness of this category criminal proceedings investigation. Enforcement of the requirements of the articles set in Chapter 38 of the Criminal Procedure Code of Ukraine "Criminal proceedings against minors", in particular, part two of Article 484 of the Criminal Procedure Code of Ukraine, according to which criminal proceedings against a minor, including, if the criminal proceedings carried out, against several persons, at least one of whom is a minor, is carried out by an investigator who is specifically authorized by the head of the pre-trial investigation body to execute pre-trial investigations of minors. During the pre-trial investigation, the investigator and all other persons participating in it are obliged to carry out procedural actions in the manner that the least violates the usual way of life of a minor and corresponds to his age and psychological peculiarities; to explain the essence of procedural actions, decisions and their importance, listen to his arguments while making procedural decisions and take all other measures aimed to avoid the negative impact on the minor.

On this issue, the legislator has defined a list of articles in the Criminal Code of Ukraine regarding criminal liability for this type of crime. In particular, Article 301 of the CCU defined crimes related to the import, manufacture, sale and distribution of pornographic items.

In investigating criminal proceedings, the investigator is guided solely by the CCU and the Criminal Procedural Code of Ukraine.

In accordance with the article, 18 of CCU a criminal offender shall mean a sane person who has committed a criminal offense at the age when criminal liability may rise under this Code.

Article 22 of the CCU stipulates that persons who have reached the age of 16 years before the commission of a criminal offense shall be criminally liable.

Article 301 of CCU stipulates that persons who have reached the age of 16 years shall be criminally liable.

Question 9.8.
No reply to this question / Pas de réponse à cette question

Question 9.9.
No reply to this question / Pas de réponse à cette question

Question 9.10.
No reply to this question / Pas de réponse à cette question

Question 9.11.
No reply to this question / Pas de réponse à cette question

Question 9.12.
No reply to this question / Pas de réponse à cette question

Comments sent by / Commentaires envoyés par La Strada

Question 9.1.
Under Article 301 of the Criminal Code of Ukraine, criminal liability exists for importation, making, sale or distribution of pornographic items, including those depicting children. Person older than 16 years may be prosecuted for importation, making, sale or distribution of pornographic items.

Question 9.2.
There are no such circumstances.

Question 9.3.
For the above behaviour and, subject to the provisions of Articles 301.1-4 of the Criminal code of Ukraine:

1. Importation into Ukraine for sale or distribution purposes, or making, transportation or other movement for the same purposes, or sale or distribution of pornographic images or other items, and also compelling others to participate in their making, – shall be punishable by a fine of 50 to 100 tax-free minimum incomes, or arrest for a term up to six months, or restraint of liberty for a term up to three years.

2. The same actions committed in regard to pornographic motion pictures and video films, or computer programs, also selling pornographic images or other items to minors or disseminating such images and items among them, – shall be punishable by a fine of 100 to 300 free-tax minimum incomes, or restraint of liberty for a term up to five years, or imprisonment for the same term.

3. Any such acts as provided for by paragraph 1 or 2 of this Article, if repeated, or committed by a group of persons upon their prior conspiracy, or aimed at obtaining big profit, – shall be punishable by imprisonment for a term of three to seven years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

4. Acts provided for in paragraphs 1 and 2 of this Article committed in regard to pornographic works, images or other items containing child pornography, or compelling minors to participate in making pornographic works, images or motion and video films, computer programs, – shall be punishable by imprisonment for a term 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.

Question 9.4.
Currently, the Criminal Code of Ukraine imposes criminal liability for importation, making, sale or distribution of pornographic items, including those depicting children.

Question 9.5.
No reply to this question / Pas de réponse à cette question

Question 9.6.
The consequences of the above behaviour may entail prosecution under Article 301.4 of the Criminal Code of Ukraine:
Acts provided for in paragraphs 1 and 2 of this Article committed in regard to pornographic works, images or other items containing child pornography, or compelling minors to participate in making pornographic works, images or motion and video films, computer programs, –
shall be punishable by imprisonment for a term 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.

Question 9.7.
Under Article 6 of the Family Code of Ukraine, a person that has not attained the full age enjoys a child's legal status.

Article 22 of the Criminal code of Ukraine stipulates that persons who have reached the age of 16 years before the commission of a criminal offence shall be criminally liable.

Commission of a crime under Article 301 of the Criminal Code of Ukraine (importation, making, sale or distribution of pornographic items) entails criminal liability for persons who have reached the age of 16.

Question 9.8.
There are no special circumstances.

Question 9.10.
Under Article 6 of the Family Code of Ukraine, a person that has not attained the full age enjoys a child's legal status.

Article 22 of the Criminal code of Ukraine stipulates that persons who have reached the age of 16 years before the commission of a criminal offence shall be criminally liable.

Commission of a crime under Article 301 of the Criminal Code of Ukraine (importation, making, sale or distribution of pornographic items) entails criminal liability for persons who have reached the age of 16.

Comments sent by / Commentaires envoyés par the Parliament Commissioner for Human Rights

Question 9.
In 2012, the Law of Ukraine No. 4988-VI ratified the Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse.

However, the Criminal Procedural Code of Ukraine still needs to be finalized to fully comply with the provisions of the Optional Protocol to the Convention on the Rights of the Child on the trafficking of children, child prostitution and child pornography, and the Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse.

In particular, the norms of the said Code do not provide the participation in investigatory (search) activities and in the course of judicial review of adults to whom a child trusts. It is not ensured that there is no contact between witnesses, victims and suspects accused in the premises of law enforcement and judicial authorities, as provided by the norms of the Convention.

It should be noted that several attempts have been made to amend certain legislative acts of Ukraine in connection with the ratification of the Convention (No. 9434, No. 2016, and No. 2242). However, none of the bills was adopted.

Comments sent by / Commentaires envoyés par "ROZRADA" (centre of practical psychology)

Question 9.1.
There are some points in Criminal code of Ukraine but it is necessary to provide constantly deep analysis of Criminal Code points and do changes in it in correspondence with contemporary challenges. It is not enough all that we have now.

Question 9.2.
It seems that there are a lot of such cases. They must be finalised and changed in the contemporary context.

Question 9.3.
It is known that such cases are very difficult to take to punishment.

Question 9.4.
We only know that investigators, persecutors, judges and attorneys are not ready to work with such cases.

Question 9.5.
Really there are a lot of such cases.

Question 9.6.
Situation is very indefinite.

Question 9.7.
We know that there are special department in police and Special services that expose such cases, visit houses of such teenagers' houses and withdraw their computers and carriers of information. Later they investigate the case and do conversations with teenager and his/her parents if this case was the first.

Question 9.8.
Yes, there are such cases.

Question 9.9.
These consequences are quite different in in the different situations and different corpus delict.

Question 9.10.
We don't know exactly.

Question 9.11.
We think that police and Special services have the different reactions and have their department instructions. Society in general has not wide shared information.

Question 9.12.
We have a special law about children pornography (2010) and a Law about social moral. There are some legal consequences in general. It seems that these laws both need the serious changes in this context.

There are such cases.