**Austrian comments on the DRAFT Guidelines on the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography**

**ad para. 53 of the draft:**

The Committee is of the view that the term „sexual activities“ in Article 2 letter b of the OPSC should include the „lascivious exhibition of the genitals or the pubic area of the child“. In this context we would like to point out that according to Article 2 letter b child prostitution means „the use of a child in sexual activities for remuneration or any other form of consideration“. The term „sexual activities“ is further used in the definition of child pornography. Article 2 letter c of the OPSC defines child pornography as

1. Any representation (…) of a child engaged in (…) **sexual activities** or

1. Any representation of the **sexual parts** of a child for primarily sexual purposes. If the definition of sexual activities included the exhibition of the genitals or the pubic area of the child anyway, it would not make sense to explicitly mention the representation of the sexual parts of the child in Article 2 letter c. Likewise, there is no obvious reason why the definitions of sexual activities in letter b (child prostitution) and letter c (child pornography) should be different.

On a regional level, the live exhibitions of the genitals or the pubic area of a child are covered by the provisions on pornographic performances (Article 2 letter e and Article 4 of the EU Directive 2011/93/EU on combating sexual abuse and sexual exploitation and child pornography, and replacing Council Framework Decision 2004/68/JHA; Article 21 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201). Article 2 letter e of the Directive 2011/93/EU makes clear that live exhibitions also include means of information and communication technology.

**ad footnote 21 to para. 53 of the draft:**

In footnote 21 the Committee points out that the Lanzarote Convention and its Explanatory Report provide one of the few legal definitions of „sexual activities“. However, there is no legal definition of sexual activities in the Lanzarote Convention. The Explanatory Report (para. 127) therefore states: „The term ‘sexual activities’ is not defined by the Convention. The negotiators preferred to leave to Parties the definition of the meaning and scope of this term.“

**ad para.61 of the draft:**

1. According to the Committee’s proposal drawings and cartoons can be regarded as child pornography in the sense of Article 2 letter c of the OPSC. In this context, we would like to point out that the definition of child pornography in the more recent EU Directive 2011/93/EU comprises

1. depictions of a real child (Article 2 letter c (i) and (ii)

1. depictions of any person appearing to be a child (Article 2 letter c (iii)

2. realistic images of a child (Article 2 letter c (iv).

As far as drawings and cartoons do not contain realistic images, we do not see the necessity to treat them as child pornography.

2. According to the Committee “live performances” should also be regarded as child pornography. Austria is of the view that this goes beyond the text of Article 2 letter c of the OPSC as a live performance cannot be regarded as a **representation**. In more recent regional legal instruments live performances are therefore covered by separate provisions with the title “pornographic performances” (cf. Article 2 letter e and Article 4 of the Directive 2011/93/EU; Article 21 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

**ad para. 92 of the draft:**

The Committee encourages States parties to establish universal jurisdiction for all offences covered by the OPSC to enable the investigation and prosecution regardless of the nationality or habitual residence of the alleged offender and victim.

Austria is of the view that the concept of universal jurisdiction is a problematic one as it interferes with the sovereignty of other States and it does not solve the practical problems related to the commission of offences via ICTs (e.g. how to get evidence in cross-border cases, trace the perpetrator etc.). It is therefore crucial to make use of the already existing principles of jurisdiction. In this case, there should not be a need for universal jurisdiction.

**ad para. 98 of the draft:**

The draft reads as follows: *„….it may be necessary to first provide the victim with a period of time to receive the necessary support,* ***before launching a criminal prosecution****.”*

This might be detrimental to the victims’ interests:

In general, prosecution should be carried out without delay. A quick and efficient prosecution of the alleged offender certainly is in the best interest of the victim. This is not only in line with Article 8 para 1 letter g of the OPSC (“Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims”) and Art. 8 para 3 leg.cit. (“States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration”) but first and foremost with the right of a fair hearing laid down in Art. 6 para. 1 ECHR according to which everyone is entitled *inter alia* to a fair and public hearing within a reasonable time.

In Austria, § 9 CCP ensures the necessary acceleration of criminal proceedings (in particular in matters of detention). To temporarily wait and stop prosecution for a certain time could interfere with this principle. In this context, it should be noted that the organisational arrangements for the hearing of a witness take a certain time anyway and therefore also allows for taking necessary supportive measures.

**ad para. 102.b. of the draft:**

It should be pointed out that the establishment of such one-stop-shops may require the involvement of a large number of different actors and the practical implementation of this recommendation could, therefore, probably lead to serious difficulties in a majority of the Member States.

For the sake of completeness, the following **typing errors** are mentioned:

„in **para. 68** of the draft: „Article 3.1(c) OPSC obliges S**t**ate Parties…“

„in the second line of para. 88: „committed i**n** (instead of “is”) another country“.