Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography

Working Document

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This very ambitious proposal for a Directive aims at creating, for the first time, a European legal framework with the objective of preventing and prosecuting offences against children with regard to paedophilia and sexual exploitation of children.

In the current proposal, new definitions of offences are introduced, related in particular to new threats deriving from the development of technological means and the "wide spreading" social networks. For the first time children will be protected at European level against grooming and a comprehensive framework against viewing of internet pages with paedophile pornographic content will be created. This in line with was requested by the European Parliament with its Resolution of 2009.

Moreover, Member States will have strict legal obligations to punish crimes against children committed abroad by own nationals or residents. This is a big step in the fight against sexual tourism in Europe and abroad.

The current proposal is a step forward, and I hope at the end of the procedure we will be able to go even further than what was agreed in the Lanzarote Convention of 2007 as well as the Council's JHA decision of 2004. We have the responsibility and we need to be ambitious to ensure an adequate protection to our children.

I am very keen on finding an agreed solution within the Parliament to start negotiations as soon as possible with the other EU institutions, with a strong Parliamentary position. We know that some topics will be controversial: blocking, freedom of expression, definition of children, age of sexual consent, jurisdiction and disqualification measures. But I believe that we are called to make every possible effort to grant a safer environment to our children and stop their exploitation.

As you know, this is one of the first cases in which a legal basis, Article 82(2) and 83(1) TFEU, will apply. In fact Parliament will have the power of full co-decision unless MS will decide to stop the legislative procedure. This would suggest that we, as Parliament, should aim for a very ambitious but realistic proposal respecting MS prerogatives as well as taking into account differences in national laws, culture and sensitivities. We need to avoid that we, as Parliament, are deprived of the chance of participating in the creation of this keystone for children protection.

I am sure that we will make an important contribution to strengthening the prevention and the protection of victims.

More in detail, I will now sum up the most sensitive points of the draft directive which we should try to solve as early as possible in order to find a common and shared Parliamentary position.

Definition of child, child pornography and the problems of the age of sexual consent

The UN Convention on the Rights of the Child, the Lanzarote Convention, and the JHA Decision of 2004 give the following definition of child: "any person below the age of 18 years". This is why I would propose to stick to the Commission proposal.

Nevertheless, considering the differences in national legislations between the age of majority and possible derogations for the consent of sexual activities, I would propose adding a new definition in Article 2 of "age of sexual consent". Starting from the wording of Lanzarote Convention I would suggest: "*age under which a child has not reached the legal age for sexual activities according to the relevant provisions of national laws".*

Concerning the definition of "child pornography" in Article 2, I noted that according to many comments, it should be replaced by the "child abuse images" or "child abuse material". Even if the current definition is contained in the Lanzarote Convention, I would tend to agree with this suggestion considering that the description contained in Article 2 lists pornographic material rather than practices.

Even more important, as a matter of principle, we are called to decide in Article 2 on a very delicate issue. Can we consider as included in child pornography also material containing simulated representation of sexually explicit conducts? To be clearer: should we consider child pornography material some comics, pictures,

books or films (e.g. Lolita) if they refer to sexual activities with children, and which are produced without real images of existing children and are produced for private use and are not susceptible to further dissemination? Should we ban all these materials? Or set a limit? Or should we leave it up to each MS to decide if it will fall into this Directive or not?

At the same time, what about material depicting children having the age of sexual consent according to national laws but being below the age of 18? And what if the person who is 18 is older but looks like a child?

On this I am really eager to listen to your comments taking into account that the Lanzarote Convention provides for a derogation to MS who can decide not to consider this material as falling into the qualification of child pornography.

Offences and penalties:

The directive lays down minimum penalties at national level for 22 types of offences to be implemented by MS parliaments. Therefore, we should be vigilant and make sure that none of our decisions could prevent MS from taking stricter measures in defence of our children.

The Commission proposal, in accordance with the already existing regime following the Framework Decision 2004/68/JHA, takes the approach of leveraging the minimum level of maximum penalties. Of course MS are always allowed to raise maximum penalties above this level and ensure higher sanctions for the offences.

On the contrary, it should be noted that the Directive does not lay down a mandatory minimum level of minimum penalties. This choice will allow MS to have very different levels of minimum sanctions. If you want I am ready to discuss also this with you.

This being said, I welcome the fact that for the first time forcing a child to witness sexual abuse will be punished considering the negative effects on the child's psychology. Moreover, considering the fact that a great number of abuses against children are committed within the family, I agree on the proposal for higher sanctions in cases of abuse of a recognized position of trust, authority or influence over the child.

At the same time, I welcome the provision regarding the vulnerable situation of children, notably because of a mental or physical disability or a situation of dependence.

On Article 4, offences concerning sexual exploitation, I consider that the level of sanctions is particularly low, considering the fact that we are talking about an intentional exploitation of sexual abuses against children which is unquestionably an abhorrent type of wrongdoing. In particular, causing a child to participate in pornographic performances, and profiting from or otherwise exploiting a child participating in pornographic performances should have in my opinion a higher level of punishment than only two years. I consider it as well necessary to punish intentional attendants of pornographic performances with exemplary sanctions.

Article 5 refers to the whole range of activities which go from the simple access to child-pornography sites to the downloading and further dissemination of child pornography material also through peer to peer exchange of data.

Article 6 incorporates the elements of grooming as an offence following European Parliament Recommendation of 3 February 2009 on combating sexual exploitation of children and child pornography.

I warmly welcome the proposal to sanction this offence independently from the commission of the abuse on the child as well as from the effective taking place of the meeting. In particular, the intentional proposal followed by material acts leading to such a meeting will be sanctioned by a maximum term of imprisonment of at least two years. Nevertheless, I consider that since potential offenders are increasingly using grooming, especially through social networks, using more of them at the same time to multiply their contacts and potential victims. I intend to introduce and I hope you will sustain this proposal, a new specific aggravating circumstance under Article 9 for the cases in which the same kind of criminal behaviour, as grooming, is committed habitually at the same time against a plurality of potential victims. This new provision means that it will be possible to raise the sanction for cases in which the potential offender uses social networks regularly and in a widespread way to contact the highest number possible of children.

Consensual sexual activities

Concerning the exemption introduced in Article 8, I believe that with the actual wording, a sexual act between children of the age of 10 might be allowed if the requirements listed in the article are met. I consider this as going too far.

I am aware that some member states have set very different levels of age for sexual consent between peers. For this reason, I am considering referring to national legislation on the subject.

Moreover, a very important point concerns minors which in some cases can also be offenders against their peers. The commission proposal provides a derogation from criminal responsibility for minors for all the offences listed in Article 5 related to child pornography. Nevertheless, considering several cases that have occurred in many MS, I believe that there is an urgent need to protect child victims and to sanction offenders even if they are minors of the same age. Of course with sanctions tailored on minors but those acts cannot remain unpunished. For example if a child records a sexual act with a peer and disseminates the video, or even worse, sells it to schoolmates, friends or also to adult person, I believe that this act should be sanctioned with the appropriate measures related to his age.

Therefore, I will introduce a specific reference for cases listed in Article 5(4) and 5(5) requiring MS to take necessary measures considering the age of the offenders and according to national law to punish those offences. Those sanctions would not have to be necessarily of criminal law. Nevertheless it would be important to have clear and dissuasive sanctions in order to make children realize the gravity of such actions.

As mentioned above in Article 6, concerning aggravating circumstance I would intend to punish with higher sanctions the habitual offender of grooming who commits the crime against many victims to multiply his possibilities of success.

In addition, it should be also considered that we could introduce, as aggravating circumstance, the commission of those offences (listed from Articles 3 to 7) in view of an economic revenue.

Disqualifications arising from convictions

This article reflects a very sensitive issue. It will prevent persons who have been convicted for offences against children from exercising activities involving regular contacts with children.

In this field Article 10 ensures that MS will enter in the criminal records this kind of disqualification measure which will be available on request of other EU Member State authorities.

This exchange of information concerning criminal records has been regulated through the Council Framework Decision 2009/315/JHA on the organization and content of the exchange of information extracted from criminal records between Member States. Nevertheless, the current proposal allows derogation to this

decision to ensure that data on disqualification are transmitted on request. Moreover it should be remembered that, on the same subject, the Commission announced in the Stockholm Action Plan a legislative proposal on mutual recognition of disqualification to be expected in 2013. The coordination of those acts will hopefully be solved during negotiations.

Apart from this, what I would find necessary in this article would be to insert what was requested by the Lanzarote Convention (Article 5(3)). In particular MS should require a regular preliminary screening of candidates to those organized and recognized professions whose exercise implies regular contacts with children to verify the absence of pending disqualification measures.

Liability and sanctions on legal persons

On this, by fully supporting the idea of liability of legal persons, I would add, as a sanction, the immediate confiscation of any child pornography material and of the proven revenues of the commission of the offences.

Investigation and Prosecution:

Firstly I would like to stress that the entire investigation should be conducted bearing in mind the best interest and the protection of the rights of the child victim.

Moreover, I would propose that MS should facilitate and strengthen cooperation with national banks and major credit card companies to allow tracking internet-based payments of child exploitation.

Jurisdiction and coordination of prosecution:

About the constituent elements of jurisdiction, I welcome the fact that Article 16 includes the possibility of sanctioning offences also if not committed in the territory of the MS, provided that the offender or the victim has the nationality or has habitual residence in the territory of the MS concerned.

It should be noted that exclusively for the cases in which the criterion relates to the victim or the place of establishment of the legal person, paragraph 3 provides for an opt out possibility for MS to exclude its own jurisdiction.

Since Article 16(1)(b) as well as 16(4) ensure, among others, the liability of offenders in the context of so-called "sex tourism", I would propose adding an explicit reference to sex tourism into the recitals of the Directive stressing the need

that MS should put in place measures to enhance voluntary cooperation between civil society, NGOs, travel agencies to fight against that practice.

Moreover I would insert a definition of sex tourism into Article 2, which would be useful to insert a further aggravating circumstance in Article 9 referring to the offences from Articles 3 to 7 if committed in the context of sex tourism.

A possible definition could be: the practice which consists in travelling outside the country of nationality or habitual residence for the purpose of sexual exploitation of children.

Blocking and removal of websites containing child pornography:

In my opinion a web page containing child-pornography material should be immediately obscured by any means. Concerning the big discussion between removal or blocking, I think that these instruments should be complementary and should be chosen for the main purpose of protecting the interest of the child. In particular I consider that the removal of child pornographic content at the source would be the most preferable solution provided that it would be easy to implement and would take a shorter time.

Nevertheless, I believe that exclusively for cases in which the removal at source would be complicated, for example if the providers of the web pages are located in third countries where there is no cooperation agreement in this field with the EU, I believe that in order to safeguard the rights of the depicted child and to stop further dissemination of this material we would need also the possibility of blocking the access by users. We have to bear in mind that our priority is to eliminate these images for public access as quick as possible.

It would be necessary to ensure that the blocking would be limited only to child pornography material and that the providers would be promptly informed about their rights to appeal against the decision.
In any case I would like to recall that according to the judgment of the ECHR *"Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others" (…) "Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives"* (case of K.U. v. Finland, Application no 2872/02).

In conclusion I believe that children deserve the maximum of protection against exploitation and I invite colleagues to participate in the very challenging task of providing Europe with a new instrument for the defence of children.