

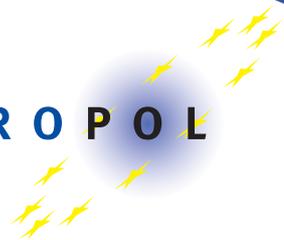
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Child Pornography

Legislation within the European Union

Europol 2005

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Executive Summary

The basic tool that law enforcement needs when combating Child Pornography¹ (CP) through prevention, investigations, prosecutions and co-operation with other parties is efficient legislation that takes into account the international nature of this crime. The European Council has adopted several laws which aim to harmonise CP legislation in the Member States and to improve law enforcement co-operation in criminal procedures. Although some of the EU laws are binding, not all the Member States have applied them to their national legislation.

According to the Council Framework Decision on Combating Trafficking in Human Beings², child pornography is a form of sexual exploitation and it should be penalised as such without making any difference between production, possession and distribution. This is not the case in Latvia where the possession of CP is not considered a crime. In the Czech Republic, possession is considered a crime only if the purpose is to distribute, spread, publicly access, produce, import, transit or export pornographic material. In Slovenia the possession is punishable only if the purpose of dissemination has been proved. The possession and distribution of CP material is also not an offence in Estonia if the depicted child is older than 14 years of age.

The Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography³ aims at achieving a comprehensive and common approach within the MS, not only on CP legislation in general but also on penalties. According to Article 5 of the decision, production, possession and distribution of CP material should be punishable by penalties of at least between one and three years imprisonment and in aggravating circumstances at least between five and ten years. The difference in penalties for child pornography in Member States is notable. The highest possible penalty for possession is in Cyprus (maximum of 10 years) and the lowest is a fine in several MS. The highest penalty for distribution and production is in Italy (maximum of 12 years for production), followed by Belgium and the UK (10 years). The lowest possible penalty is a fine in several MS.

Article 1 of the Framework Decision defines virtual CP as *realistic images of a non-existent child* involved or engaged in sexual conduct. Only a few MS recognise virtual CP in their national law, e.g. in the United Kingdom and Finland virtual child pornography is part of the definition of CP. This implies that possession of virtual child pornography is also referred to as a crime which is not the case in most of the Member States.

The age of a child has been defined in both Framework Decisions as any person below 18 years of age. However, in Austria, Germany and Estonia the age of a depicted child in CP legislation is 14 and in Poland it is 15 years of age.

¹ Instead of using 'child pornography', a more favourable term could be 'child (sexual) abusive images'. The term 'pornography' could infer a degree of consent which is definitely not the case.

² Council Framework Decision 2002/629/JHA OJ L 203/1. The MS should have complied with this Decision before 1 August 2004

³ Council Framework decision 2004/68/JHA, 22 December 2003, which the MS should implement by 20 January 2006

EUROPOL PUBLIC INFORMATION

Table of Contents

1. Introduction	4
2. Elements of the definitions	5
2.1. Child Pornography	5
2.2. Virtual Child Pornography	6
2.3. What is the criminal act	6
2.4. What is the sexual act	7
2.5. The relevance of the age of a child	8
2.6. Locus delicti	8
2.6.1. Council Framework Decision on Execution in the European union order freezing property or evidence	9
2.6.2. Proposal for a Council Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings	10
2.6.3. European Arrest Warrant (Extradition)	11
2.7. The offenders	12
3. Comparison of the relevant legislation in the Member States	14
3.1. The age of a victim and penalties	14
3.2. Accountability of the Internet Service providers, natural and legal persons	17
3.2.1. Council Directive on electronic commerce and the liability of Internet Service providers	17
3.2.2. Convention on Cyber Crime, Council of Europe	20
4. Conclusions	22
5. Recommendations	23

Annex I – Matrix on Child Pornography legislation in EU Member States 2005

Annex II –The legislation on Child Pornography in the Member States

EUROPOL PUBLIC INFORMATION

1. Introduction

This document is an updated version of the Manual on Child Pornography legislation which was published by Europol in March 2001. The summary of the legislation, which is described in the Matrix, can be found in Annex I. The complete wording of the relevant legislation on CP from the Member States can be found in Annex II. The most relevant international legislation is discussed in sections two and three in this document. Section three also points out the main loopholes in legislation on a national level that allow child molesters the possibility to abuse children continuously. The conclusions can be found in section four and the recommendations, based on the contributions, in section five.

The dissemination of CP through the Internet is further increasing due to the nature of non-boundary computer technology. As it does not respect borders, law enforcement authorities are faced with a complex and difficult task to investigate this crime and to reveal child sex offenders, not only in a technical sense but also from the legal point of view. Although 'old fashioned' videos, films and pictures are still collected by child molesters, the main tool in the possession and distribution of the images is the computer and particularly the Internet, which can make children accessible to those who want to abuse them. In line with this, section 2.6. *Locus delicti* mainly focuses on the international aspects of this crime and especially on the international legislation which is relevant for law enforcement in common investigations within the EU.

Methodology

The content of this document is based on the results of responses to a request sent to the Member States to update the legislation and the relevant parts of the previous Manual. In order to avoid giving old information which could cause further confusion and even harm to co-operation and common international investigations, this compilation does not contain legislation from Ireland, Luxembourg and Portugal. If there is a need for updated legislation from these countries, we can only refer to the March 2001 version and Europol recommends using other available official channels to be informed about their actual legislation.

A questionnaire was sent to the 10 new MS (that joined in 1 May 2004). Some of the contributions received were detailed and precise, others inaccurate and covered only the bare minimum.

It should also be noted that the relevant legislation in each country is frequently changing, so this comparison of legislation should be treated as a living document. By this the MS are kindly requested to inform Europol of any kind of changes.

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2. Elements of the Definitions

2.1. Child Pornography

A) United Nations

The United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography defines Child Pornography as follows:

Article 2 (c)

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

This Protocol entered into force on 18 January 2002 and on that date it became a binding instrument for States having ratified it. All the MS have signed it and it has been ratified by Austria, Denmark, Estonia, France, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain⁴.

B) Council Framework decision on combating the sexual exploitation of children and child pornography

This decision defines child pornography as follows:

Article 1

- (a) 'Child' shall mean any person below the age of 18 years;
- (b) 'Child pornography' shall mean pornographic material that visually depicts or represents:
 - (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or
 - (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or
 - (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i).

The most interesting differences between these before mentioned definitions are that the Council Framework decision also includes virtual child pornography and the child means *any person below 18 years*. According to Article 2(a) of the UN Protocol, sexual activities can be real or simulated but the Protocol recognizes only a real child. The Protocol does not define the age of a child as such but it refers to Article 1 of the UN Convention on the Rights of the Child wherein a child is defined as "*Every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.*"

⁴ www.unhchr.ch/html1/menu2/6/crc/treaties/status-opsc.htm (situation in May 2005)

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2.2. Virtual Child Pornography

The creation of pseudo-photographic images causes some problems in criminal procedures. Due to new techniques, it is often difficult to make a difference between a virtual picture and a real picture. This may cause problems to prosecutors and judges in those countries where the possession, production and distribution of virtual CP are not considered criminal offences.

The production of virtual CP is also called morphing: short for “metamorphosing”, a technique that allows a computer to fill in the blanks between dissimilar objects in order to produce a combined image, or to manipulate existing images.

As previously mentioned, the UN Protocol does not recognise virtual child pornography whereas Article 1(b) of the Council Framework Decision on combating the sexual exploitation of children and child pornography defines virtual CP as *realistic images of a non-existent child involved or engaged in the conduct mentioned in (i) above*⁵.

2.3. What is a Criminal Act?

In the case of child pornography, two basic human rights conflict, namely freedom of expression (of the producer) and the right to physical and psychological immunity (of the child). Furthermore, legislation on child pornography aims also to protect the public, and in particular minors, from unsolicited confrontation with (child) pornography. Generally speaking, exercising one's rights has reached its limits when other persons are harmed by it. In many cases, it is clear that the right of the child prevails. However, there are also less obvious cases.

The most evil part of the crime of child pornography is the actual (sexual) abuse of and harm caused to the child. In all Member States, this is considered a crime. The harm caused to the children that are victims of sexual abuse is seen as one of the essential elements in the definition of child pornography. Because the abuse of the child is a *conditio sine qua non*⁶ for the existence of child pornography, all the aspects of a crime must be combated. However, if the abuse of the child was the “only” criminal act in the case of child pornography, it could be included in the crime of child abuse. The making and/or reproduction of pictures of abuse, i.e. the production, possession and distribution of these pictures, could then be seen as aggravating circumstances.⁷ However, in many countries there exists a separate provision on child pornography because it is seen as a serious form of crime with special elements, which make it necessary to approach it as a separate crime.

If the harm done to the child is the main element in the definition, the penalising of virtual child pornography must be excluded. However, the criminal act not only exists for the actual abuse of the child but also for the possession and distribution of the child

⁵ (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child;

⁶ An essential condition or element, an indispensable thing

⁷ Akdeniz, Yaman, The regulation of Pornography and Child Pornography on the internet; http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1997_1/akdeniz/

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pornographic material, which has been made criminal acts in all MS except Latvia Slovenia and Czech Republic⁸.

If the criteria for a criminal act could be "...when sexual abuse of children is encouraged by the possession or distribution of child pornography", then a subjective criteria will be introduced into the definition of child pornography. Furthermore, the criminal act exists in the form of receiving, which means that it is forbidden to profit in any way from a criminal act (in this case the child abuse). However, this theory would not have any effect in the case of virtual child pornography because it cannot be said that the profit is the result of a criminal act (i.e. child abuse). On the other hand, it is thought that by prosecuting the consumer, the financial profit made by the producer of child pornography will vanish and therefore it is justified to prosecute the possessor and distributor as well⁹. Another problem with this is the difference in legislation between the countries. It seems impossible to punish the profiteer when the production itself is not made a criminal act in the country where it is produced¹⁰. Furthermore, the opinion that child pornography is objectionable in itself is another reason to make it a criminal act. However, this last aspect is subjective, which cannot be used as legal grounds for making child pornography a criminal act.

2.4. What is a Sexual Act

In nearly all Member States, some form of sexual behaviour or sexual act with or by the child is necessary before it can be considered child pornography. According to Esposito, pornography includes the representation of any degrading sexual practice for the purposes of pleasure or profit.¹¹ However, it is not easy to determine when something is considered to be a sexual act and when it is not. For example, in the Netherlands, a picture of a man with an erection carrying a baby that was shown in the Attack exhibition during the Holland festival was seized by the Dutch police because it was considered as child pornography. However, the judge had the opposite opinion.

Can a particular posture under certain circumstances be considered a sexual act? Is the sexual stimulating effect from the picture decisive? Who should it have a stimulating effect on? All these questions remain unanswered because there is not one overall concept of what is to be considered a sexual act.

Some pictures can, without doubt, be considered child pornography and some are obviously excluded from this category. However, it is clear that there remains a grey area in which it is difficult to determine whether a picture must be considered child pornography or not. In that case, it is the judge who has to decide. The intention of the suspect is not commonly used to determine whether something can be considered a sexual act or not.

Another influencing factor is the circumstances in which the image is presented. When holiday pictures are collected in a family's photo album, it would not readily be considered as child pornography, which is not the case when these pictures are presented in a newsgroup for child molesters on the Internet. Also, cultural differences have an influence on the concept of child pornography. For example, it can be

⁸ Detailed information can be found in Annex I.

⁹ The majority of the available CP material is home-made. These types of 'producers' do not make a financial profit, they exchange their material on the Internet.

¹⁰ The production is illegal in every EU Member States

¹¹ Esposito, L.C., *Regulating the Internet: The New Battle Against Child Pornography*, in: *Case Western Reserve Journal of International Law*, vol. 30, 1998, p. 542

EUROPOL PUBLIC INFORMATION

considered normal in one country to take a picture of a father playing with his child in the bath, while this would be considered deviant in another country.

In conclusion, it seems that the circumstances determine what should be considered a sexual act. An overall definition cannot be given.

2.5. The Relevance of the Age of the Child

The statutory age for child pornography is not the same in all countries. Furthermore, it is not always possible to prove that the child in the picture is under the given age. In the Dutch penal code, the clause “the person who manifestly has not reached the age of 18” is included in the provision on child pornography, to prevent the prosecutor from the obligation of determining the exact age of the child. It is often difficult to determine the exact age, particularly as many of the images originate from another country, the victim is not a national of the prosecuting country and the victim cannot be traced easily. Most Member States have provisions that mention a specific age but when applying this provision, it is enough that the child is clearly under a certain age. Thus the interpretation of the age is not so strict. Again, a subjective element is introduced in the definition of child pornography. Although the subjective character of this element is a disadvantage, the fact that, as a result, adjudication of the criminal can take place without the presence of the victim may be considered an advantage.

2.6. Locus delicti

Concerning the production of material used on CP websites, the main geographical areas providing child victims are Russia, Ukraine and other former Soviet Union countries, South East Asia and Central and South America where it is very well known that a lack of legislation is facilitating this illegal activity¹². However, it is always possible that child abuse images can be homemade and therefore come from every region of the world. Very recently, ongoing investigations in the EU have revealed that criminal networks are producing child abuse images in South East Asia and East Europe and are disseminating them on the Internet. This information supports what has been previously reported in some Europol Intelligence Bulletins published by Crimes against Persons Unit; sometimes child abuse images are provided by western citizens who participate in “sex tourism” with children and record their illegal sexual intercourse.¹³

It is also important to specify that there are basically two kinds of CP websites: those providing “hard core” material, where children are raped and tortured by their molesters and the content can obviously be produced anywhere (although it predominantly consists of homemade images and movie files), and those offering “soft core” content, consisting of naked children whose photos are normally taken in indoor studios (mainly produced in Russia, Ukraine and regions of the former Soviet Union) or in outdoor settings (mainly produced in Russia, Ukraine, the former Soviet Union regions but also in South America and South East Asia). The business behind this production can be either

¹² U.S. Immigration and Customs Enforcement – News release 28th February 2005: ‘Leaders of Global Internet Child Pornography Operation Please Guilty’; Europol Trafficking in Human Beings Intelligence Bulletin no. 4, August 2004

¹³ E.g. Trafficking in Human Beings Intelligence Bulletin no. 5, October 2004

EUROPOL PUBLIC INFORMATION

a family business, involving a limited number of facilitators in the criminal network, or a business managed by a well structured criminal organization.

As described above, one of the main characteristics of child pornography on the Internet is that borders between countries can be easily crossed without the user realising it. However, to determine which country has jurisdiction to start an investigation and to prosecute the suspect, until now the *locus delicti* has been of decisive importance. In most cases, there is more than one *locus delicti*. When possession, distribution and production of child pornography are considered a crime, it is common practice that these three crimes have taken place in different countries. This international element is the most problematic for law enforcement in this area of crime. An additional problem which may cause difficulties for law enforcement is that, as mentioned before, the possession of CP material is not considered a crime in all MS. In this context it is worth introducing the latest relevant EU legislation and initiatives aimed at harmonising legislation and improving co-operation between MS law enforcement authorities concerning evidence gathering from another MS and extradition of the offender.

2.6.1. Council Framework Decision on Execution in the European Union orders freezing property or evidence¹⁴

The purpose of the Framework Decision is to establish the rules under which a Member State shall recognize and execute in its territory a freezing order issued by a judicial authority of another Member State in the framework of criminal proceedings. E.g. for the purpose of eventual transfer to the issuing State or confiscation. In other words, the Framework Decision aims to prevent the loss of evidence located in the territory of another MS.

Article 3 (1)

This Framework Decision applies to freezing orders issued for the purposes of:

- (a) securing evidence, or
- (b) subsequent confiscation of property.

Article 3 (2)

The following offences, as they are defined by the law of the issuing State, and if they are punishable in the issuing State by a custodial sentence of a maximum period of at least three years shall not be subject to verification of the double criminality¹⁵

(The offences mentioned above are among 32 serious offences listed in Article 3)

- participation in a criminal organisation,
- trafficking in human beings,
- sexual exploitation of children and child pornography.

As far as CP is concerned, a Member State should recognise and execute in its territory a freezing order issued by another MS if an offence is punishable in the issuing State by a custodial sentence of a maximum period of at least three years without the

¹⁴ Council Framework Decision 2003/557/JHA, OJ L 196/45

¹⁵ Double criminality requires that in order to execute criminal proceedings requested by another State the act has to be criminalised also in the executing State.

EUROPOL PUBLIC INFORMATION

requirement of double criminality, i.e. the action does not need to be a crime in the executing state.

The Member States should implement this Framework Decision before 2 August 2005.

2.6.2. Proposal for a Council Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters¹⁶

This proposal for a Council Framework Decision applies the principle of mutual recognition to a European warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. The European Evidence Warrant will result in quicker, more effective judicial co-operation in criminal matters, and will replace the existing mutual assistance regime in this area in line with the conclusions of the Tampere European Council. Minimum safeguards for such co-operation are also introduced.

The proposal focuses on objects, documents or data obtained under procedural law measures such as production orders (in some MS the 'production order' is used to place a third party under an obligation to hand over the evidence if the third party does not cooperate voluntarily) and search and seizure orders and also includes requests for copies of criminal records. It does not address taking statements (in whatever manner) from suspects, defendants, witnesses or victims. Nor does it address procedural investigative measures which involve obtaining evidence in real time, such as the interception of communications and monitoring bank accounts. However, it can be used for the purpose of obtaining objects, documents or data falling within the excluded categories provided that they had already been gathered prior to the issuing of the warrant. In these circumstances, it would be possible to obtain existing records of intercepted communications, surveillance, interviews with suspects, statements from witnesses, data on existing bank accounts and the results of DNA tests.

This proposal for a Framework Decision supplements the Framework Decision on freezing orders by applying the principle of mutual recognition to orders with the specific objective of obtaining objects, documents and data for use in proceedings in criminal matters. The European Evidence Warrant will provide a single, fast and effective mechanism for obtaining evidence and transferring it to the issuing State. It will not be necessary for a prior freezing order to have been issued and it should be available:

- with respect to any criminal offence;
- with respect to acts which are punishable under the national law of the issuing Member State by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.

The grounds for refusing to execute requests will be limited. In particular, dual criminality will not be a ground for refusal except for a transitional period for those Member States that have already made execution of a request for search and seizure dependent on the condition of dual criminality.

¹⁶ COM (2003) 688 final, 2003/0270 (CNS), Brussels 14.11.2003, Explanatory memorandum. (www.europa.eu.int)

EUROPOL PUBLIC INFORMATION

The European Evidence Warrant would be available for use with respect to documents and data held electronically.

The proposal addresses the jurisdictional issue that arises where a business holds computer data about its customers in one Member State on a server located in another Member State. The proposal ensures that the evidence can be obtained from the Member State in which the customer was located without the need to seek the agreement of the Member State in which the server was located. This would enhance the effectiveness of cross-border investigations, e.g. CP investigations, while at the same time providing legal clarity for industry. According to the proposal, neither dual criminality nor custodial sentence will be required.

2.6.3. Council Framework Decision on European Arrest Warrant and the surrender procedures between Member States¹⁷

Another item related to *locus delicti*, is the requirement of double criminality related to extradition. Often, double criminality is a prerequisite for extradition although this requirement has been dropped already in several countries with regards to child pornography. On 11 December 2001, the EU reached a political agreement on a European Arrest Warrant valid for the entire territory of the European Union. Its purpose is to facilitate law enforcement rights across the European Union. The European Arrest Warrant takes the form of a judicial decision handed down by an EU Member State for the apprehension and return by another Member State of a wanted person to be prosecuted or to have a sentence or a detention order against a wanted person carried out. It will replace the traditional extradition procedure. The judiciary of the EU Member States will no longer have to go through the formal extradition procedure in order to forcibly transfer a person from one Member State to another to conduct a criminal prosecution or to execute a custodial sentence or detention order.

The EU Framework decision itself defines the “European Arrest Warrant” as any judicial decision issued by a Member State with a view to the arrest or surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution; executing a custodial sentence; or executing a detention order. The Warrant applies where a final sentence of imprisonment or a detention order has been imposed for a period of at least four months, or for offences punishable by imprisonment or a detention order for a maximum period of at least one year.

Each Member State may refuse to execute a European Arrest Warrant if final judgment has already been passed by a Member State upon the requested person in respect of the same offence; if the offence is covered by an amnesty in the executing Member State; or if the person concerned may not be held criminally responsible by the executing State owing to his age.

For a list of 32 serious offences (the offences are the same as those in the Council Framework Decision on Execution in the European Union orders freezing property or evidence) punishable by deprivation of liberty of at least three years, the surrender of the person does not require the verification of the double criminality of the act. Examples of serious offences subject to the European Arrest Warrant are, among others, sexual exploitation of children, child pornography and participation in a criminal organisation.

¹⁷ Council Framework Decision 2002/584/JHA , OJ L 190/1

EUROPOL PUBLIC INFORMATION

Extradition of own nationals

According to Article 4 of the European Arrest Warrant, the executing judicial authority may refuse to execute the arrest warrant if:

- (6) an arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.

The above paragraph is well in line with the Council Framework Decision on combating the sexual exploitation of children and child pornography.

According to Article 8 (3), a Member State which, under its laws, does not extradite its own nationals, shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 2, 3 and 4 (sexual exploitation of children and child pornography) where it is committed by one of its own nationals outside its territory.

The deadline for implementing this Framework Decision was 31 December 2003.

2.7. The Offenders

¹⁸Paraphilia / paedophilia / child molester

Paraphilias are psychosexual disorders defined for clinical and research purposes.¹⁹ They are defined as recurrent, intense and sexually arousing fantasies, urges, or behaviours that generally involve non-human objects, the suffering or humiliation of oneself or one's partner, or children or other non-consenting persons and that occur over a period of at least six months.

Better known and more common paraphilias include²⁰:

- Exhibitionism (deriving sexual pleasure from being watched and exposing, displaying genitals in public)
- Fetishism (sexual attraction to particular objects)
- Frotteurism (deriving sexual pleasure from rubbing against a non-consenting stranger in public)
- Paedophilia (sexual attraction to prepubescent children)
- Masochism (deriving sexual pleasure from sexual submission)
- Sadism (deriving sexual pleasure from inflicting pain)
- Voyeurism (deriving sexual pleasure/arousal through watching others having sex).

Theoretically, many individuals can and frequently do have more than one kind of paraphilia. Paraphilias are psychosexual disorders and not types of sex crimes.

¹⁸ Child Molesters: Behavioural Analysis, K.V. Lanning, 2001

¹⁹ Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR), American Psychiatric Association, 2000 – see also <http://allpsych.com/disorders/dsm.html>

²⁰ <http://paraphilia.wikiverse.org/>

EUROPOL PUBLIC INFORMATION

They may or may not involve criminal activity. Individuals suffering from one or more of these paraphilias can just engage in fantasy and masturbate, or they can act out their fantasies legally (e.g., with consenting adult partners or objects), or they can act out their fantasies illegally (e.g., with non-consenting partners or underage partners). It is their choice. In addition, not everyone committing a sex offence has a paraphilia. Their behaviour patterns may be criminal, but not fit the specific diagnostic criteria of a paraphilia.

The term paedophile is frequently used by the public, the media, law enforcement and even professionals when talking about child molesters and especially related to child pornography on the Internet. However, paedophilia is not a type of sex crime; it is one type of paraphilia.

The American Psychiatric Association lists several criteria for diagnosis of paedophilia. A person²¹:

- Must be at least 16 years of age
- Must have sexual fantasies or urges or behaviour towards a child of 13 years or younger
- Must have had the sexual fantasies, sexual urges, or behaviours described above for more than six months' duration

Paedophilia starts early in the teenage years and continues through life. How early it starts generally depends on whether the paedophile molests boys or girls. Molesters with paedophilia who sexually abuse boys usually start the earliest. According to the results of the study done by Gene G. Abel and Nora Harlow (The Stop Molestation Book), there is a strong suggestion that early intervention in the lives of molesters developing paedophilia is a powerful preventive measure that will drastically reduce the numbers of child victims.²²

Not all paedophiles are child molesters. A child molester is an individual who sexually molests children. A paedophile might have a sexual preference for children and fantasise about having sex with them, but if he does not act on that preference or those fantasies, he is not a child molester.²³

Not all child molesters are paedophiles. A paedophile is an individual who prefers to have sex with prepubescent children ('preferential type' of a sex offender, if he acts on his preference or fantasies). A person who prefers to have sex with an adult partner may, for any number of reasons, decide to have sex with a child. Such reasons might include simple availability, opportunity, curiosity or a desire to hurt a loved one of the molested child (situational type of a sex offender). The erotic imagery and sexual fantasies of such individuals are not necessarily recurrent, intense and focused on children; therefore, these people are not paedophiles.²⁴

Referring to the above, many child molesters are paedophiles and many paedophiles are child molesters but they are not necessarily one and the same. Often it may be

²¹ Abel & Harlow: The Stop Child Molestation Book, Xlibris 2001. Excerpt available on the Internet: www.stopchildmolestation.org

²² ibid

²³ Child Molesters: Behavioural Analysis, K.V. Lanning, 2001

²⁴ ibid

EUROPOL PUBLIC INFORMATION

unclear whether the term is being applied in its diagnostic form or some other definition. Distinctions between the types of child molesters, however, can have important and valuable implications for the law enforcement investigation of the sexual exploitation of children.²⁵

3. Comparison of the relevant legislation in the Member States

3.1. *The age of the victim and penalties*

The age

The age of the victim in relation to child pornography is not the same in all countries. This might be of relevance when collecting evidence or when double criminality is required, for example in case of extradition. It is not always clear from the legislation what exactly the age in a case of child pornography is. In some cases, the word 'minor' is used. In other cases, the word 'child' and in some cases the age is mentioned in the relevant provision itself. The age of maturity is often different from the age of consent to sexual activity. However the latter can be seen as a *lex specialis* from the legislation on simple majority. Below is an overview giving the age of consent to sexual activity and the age of Child Pornography. When the provision on child pornography refers to a child or a minor, the age of simple majority is taken as the relevant age.

²⁵ *ibid*

EUROPOL PUBLIC INFORMATION

Age of consent to sexual activity		Age in CP legislation	
Austria	14	Austria	14
Belgium	16	Belgium	18
Cyprus	16	Cyprus	18
Czech Republic	15	Czech Republic	18
Denmark	15	Denmark	18
Estonia	14	Estonia	14
Finland	16	Finland	18
France	15	France	18
Germany	14	Germany	14
Greece	18	Greece	18
Hungary	14	Hungary	18
Italy	16	Italy	18
Latvia	16	Latvia	18
Lithuania	14	Lithuania	18
Malta	18	Malta	18
Netherlands	16	Netherlands	18
Poland	15	Poland	15
Slovakia	16	Slovakia	18
Slovenia	15	Slovenia	18
Spain	13	Spain	18
Sweden	15	Sweden	18
United Kingdom	16	United Kingdom	18

The penalties

A comparison of the penalties in the different Member States shows the great variety in the sentences imposed. It may be relevant to know what the sentence is with regards to the special research methods that can be used and with regards to the permissibility of mutual assistance. Therefore, an overview of the penalties is given hereafter. A distinction is made between the possession, production and distribution of child pornography.

EUROPOL PUBLIC INFORMATION

Penalties in the Member States²⁶

	Possession	Production	Distribution
Austria	Max. 2 years ²⁷	Up to 3 years	Up to 3 years
Belgium	1 month to 1 year and fine from 500 up to 5000 €	From 5 years to 10 years and fine from 2.500 up to 50.000 €	From 5 years to 10 years and fine from 2.500 up to 50.000 €
Cyprus	Max.10 years	Max.10 years	Max. 10 years
Czech Republic ²⁸	Fine or forfeiture of thing or max. 1 year	Fine, forfeiture of thing or max. 1 year	Fine, forfeiture of thing or max. 1 year
Denmark	Fine or max. 1 year	Fine or max. 2 years	Fine or max. 2 years
Estonia ²⁹	Pecuniary punishment or up to one year	Pecuniary punishment or up to one year	Pecuniary punishment or up to one year
Finland	Fine or 1 year	Fine or max. 2 years	Fine or max 2 years
France	Fine of 30 000€ and max. 2 years	Fine of 45 000€ and max. 3 years	Fine 75 000 and 5 years
Germany	From 3 months to 5 years	From 3 months to 5 years	From 3 months to 5 years
Greece	At least 1 year and fine from 10.000 up to 100 000€	At least 1 year and fine from 10.000 up to 100.000 €	at least 1 year and fine from 10.000 up to 100.000€
Hungary	Up to 3 years	2-8 years	2-8 years
Italy	Fine minimum 1.500€ and max. 3 years	Fine from 25.000€ up to 250.000€ 6 to 12 years	Fine from 2.500€ up to 50.000€ and 1 to 5 years
Latvia	Not penalised	Fine or max.3 years	Fine or max. 3 years
Lithuania ³⁰	Fine or max. 2 years	Fine or max. 2 years	Fine or max.2 years
Malta	Fine or/and max 6 months	Fine or/and max. 6 months	Fine or/and max. 6 months
Netherlands	Fine or max. 4 years	Fine or max. 4 years	Fine or max 4 years
Poland	From 3 months up to 5 years	From 6 months up to 8 years	From 6 months up to 8 years

²⁶ The penalties in aggravating circumstances are not mentioned here. If needed, please see the Annex II.

²⁷ The possession of images of a child below the age of 14 is punishable with 2 years imprisonment. If a child is older than 14 years of age, the punishment is 1 year. Other exceptions, please see the Annex II.

²⁸ Czech Republic does not have specific legislation for CP. Please see the applicable penalties in the Annex II.

²⁹ The production, possession and distribution are criminalised if the child is under 14 years of age. If the child is between 14 and 18 years of age the production is criminalised but not possession and distribution.

³⁰ The penalties are the same for the possession, production and distribution. However, according to Article 162 of the Criminal Code any person who **uses** a child for the production of pornographic materials shall be punished by fine, arrest or imprisonment for a term max. 4 years.

EUROPOL PUBLIC INFORMATION

	Possession	Production	Distribution
Slovak Republic	Up to one year	From 2 to 12 years ³¹	From 2 to 8 years
Slovenia	6 months up to 5 years	6 months up to 5 years	6 months up to 5 years
Spain	3 months up to 1 year impr. or fine	1 to 8 years impr.	1 to 8 years impr.
Sweden	Fine or max. 2 years	Fine or max. 2 years	Fine or max. 2 years
United Kingdom	Fine max. Level 5 and/or max.5 years	Max. 10 years	Max. 10 years

3.2. Accountability of Internet Service Providers, legal and natural persons

An overview of whether Internet Service Providers (ISP) are liable for acts or whether they are obliged to co-operate with enforcement officers in case of a criminal investigation in relation to child pornography would be helpful to determine whether co-operation from an ISP can be requested in a specific country. Most of the Member States do not have legislation on this subject. Sometimes, formal or informal agreements exist between the ISP and the competent authorities but this cannot be found in the legislation on child pornography in the various Member States. According to legislation, the ISP appears to be liable in most cases, because they might store and/or transmit child pornographic images, often without knowing it.

In this context it is worth introducing two international laws related to ISPs that are binding for the Member States:

3.2.1. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce)³²

According to point 40 and 41 of the preamble of the directive, the disparities in Member States' legislation and case-law concerning the liability of ISPs acting as intermediaries prevent the smooth functioning of the Internal Market, in particular by impairing the development of cross-border services and producing distortions of competition. ISPs have a duty to act, under certain circumstances, with a view to preventing or halting illegal activities. The directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.

The liability of electronic intermediaries, in particular ISPs, is dealt with in Articles 12 to 15 of the directive. The directive distinguishes three types of activities of the ISPs:

³¹ The length of the penalty depends on the age of a child

³² Official Journal 17.7.2000/L178/1 (www.europa.eu.int)

EUROPOL PUBLIC INFORMATION

A. Article 12, Mere conduit.

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider shall not be liable for the information transmitted, on condition that the provider:
 - (a) does not initiate the transmission
 - (b) does not select the receiver of the transmission; and
 - (c) does not select or modify the information contained in the transmission
2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted insofar as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.
3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

B. Article 13, Caching. The more or less automatic temporary storage of data coming from one client, with the ultimate goal to ease the transfer to other clients.

1. Where an Information Society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider shall not be liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:
 - (a) the provider does not modify the information;
 - (b) the provider complies with conditions on access to the information;
 - (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
 - (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
 - (e) The provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.
2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

EUROPOL PUBLIC INFORMATION

C. Article 14, Hosting, storage of information for one client.

1. Where an Information Society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider shall not be liable for the information stored at the request of a recipient of the service, on the condition that;
 - (a) the provider does not have actual knowledge of the illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
 - (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.
3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States to establish procedures governing the removal or disabling of access to information.

Reading these three regimes of liability, it is obvious that the ISPs are protected in a broad way and that criminal liability is not easily recognised. When the conditions in Articles 12 and 13 are fulfilled, liability of the ISPs is excluded. In case of mere conduit in Article 12, all forms of liability for the intermediary are excluded even if the intermediary knows the illegality of the activity or data. These conditions are fulfilled when the ISPs perform their services following normal procedures and take the codes of conduct into account, which have to be established in the future (according to Article 16). In case of hosting (Article 14), the possible liability of the ISPs is the widest. The ISP is not only liable in case the intermediary did not know about the illegal activity or illegal character of the information that is stored on the request of the client, but also in case the intermediary removed the information or blocked access to the information right after he knew of the illegal aspect.

According to point 44, an ISP who deliberately collaborates with one of the recipients of his service, in order to undertake illegal acts, goes beyond the activities of "mere conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.

Article 15 says that the intermediary has no general obligation to monitor the information which they transmit or store.

In paragraph 2 of Article 15 it is stated that:

"Member States may establish obligations for Information Society service providers promptly to inform the competent public authorities of alleged illegal activities or information undertaken by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."

This is a very important provision because it gives the opportunity to oblige the ISPs to co-operate and identify a suspect in case of a criminal investigation. However, this provision should be elaborated in national law. This implies that the different Member States have their own system. Furthermore, it is an optional provision. It is obvious that

EUROPOL PUBLIC INFORMATION

the liability of the ISPs and the obligation to co-operate with the competent authorities are strictly divided.

3.2.2. Council of Europe, Convention on Cyber Crime, Budapest, 23 November 2001³³

The Convention on Cyber Crime, Article 9 on child pornography seeks to strengthen protective measures for children, including their protection against sexual exploitation, by modernising criminal law provisions to more effectively circumscribe the use of computer systems in the commission of sexual offences against children.

In Title 3 Article 9 – Offences related to Child Pornography

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law when committed without right and intentionally the following conduct:
 - a. producing child pornography for the purpose of its distribution through a computer system;
 - b. offering or making available child pornography through a computer system;
 - c. distributing or transmitting child pornography through a computer system;
 - d. producing child pornography through a computer system for oneself or for another person;
 - e. possessing child pornography in a computer system or on computer-data storage medium
2. For the purpose of paragraph 1 above “child pornography” shall include pornographic material that visually depicts:
 - a) a minor engaged in sexually explicit conduct;
 - b) a person appearing to be a minor engaged in sexually explicit conduct;
 - c) realistic images representing a minor engaged in sexually explicit conduct.
3. For the purpose of paragraph 2 above, the term “minor” shall include all persons under 18 years old of age. A party may, however, require a lower age-limit, which shall be not less than 16 years.
- 4 Each party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b and c

Article 9 lists different types of illicit acts related to child pornography which countries are obliged to criminalise if committed "intentionally." Under this standard, a person is not liable unless he has intent to offer, make available, distribute, transmit, produce or possess child pornography. Countries may adopt a more specific standard (as it is stated above in the Council directive), in which case that standard would govern. For example, liability may be imposed if there is "knowledge and control" over the information which is transmitted or stored. It is not sufficient, for example, that a service provider served as a conduit for, or hosted a website or newsroom containing such material, without the required intent under domestic law in the particular case. Moreover, a service provider is not required to monitor conduct to avoid criminal liability.

Article 12, Corporate liability, deals with the liability of legal persons. It is consistent with the current legal trend to recognise corporate liability. It is intended to impose liability on

³³ www.coe.int

EUROPOL PUBLIC INFORMATION

corporations, associations and similar legal persons, for the criminal actions undertaken by a person in a leading position within such legal persons, where undertaken for the benefit of that legal person. Article 12 also contemplates liability where such a leading person fails to supervise or control an employee or an agent of the legal person, where such failure facilitates the commission by that employee or agent of one of the offences established in the Convention. In addition, paragraph two obliges countries to have the ability to impose liability upon a legal person where the crime is committed not by the leading person described in paragraph 1, but by another person acting under the legal person's authority, i.e., one of its employees or agents acting within the scope of their authority. The failure to supervise should be interpreted to include failure to take appropriate and reasonable measures to prevent employees or agents from committing criminal activities on behalf of the legal person. Such appropriate and reasonable measures could be determined by various factors, such as the type of the business, its size, the standards or the established business best practices, etc. This should not be interpreted as requiring a general surveillance regime over employee communications. A service provider does not incur liability by virtue of the fact that a crime was committed on its system by a customer, user or other third person, because the term "acting under its authority" applies exclusively to employees and agents acting within the scope of their authority.

Article 12 – Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a. a power of representation of the legal person;
- b. an authority to take decisions on behalf of the legal person;
- c. an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

3. Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

4. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

All the Member States have signed the Convention and it is ratified by Cyprus, Denmark, Estonia, Greece, Hungary, Lithuania and Slovenia.

EUROPOL PUBLIC INFORMATION

4. Conclusions

This document has focused on the main issues in national and international/EU legislation that law enforcement authorities have to take into account when conducting common investigations within the European Union. The fast and continuous development of specific software and techniques that allow Internet users to hide their identities and/or completely delete evidence contained in storage devices pose a serious threat to successful investigations on child pornography and ultimately to the prosecution of offenders.

Children whose pornographic, abusive pictures have been distributed via the Internet are victims for a lifetime due to the fact that the pictures might circulate forever on the Internet. This form of re-victimisation needs to be combated. Every time a child molester is identified and has been arrested, possible ongoing abuse will be stopped and the abuse of new victims will be avoided. In order to prevent and investigate child pornography effectively, national legislation should provide law enforcement with the possibility to co-operate and exchange information within the EU without the constraints caused by different legislation.

It has to be borne in mind that although the main task of law enforcement authorities is to establish effective measures for identifying child sex offenders who approach children in Internet chat rooms, measures regarding the investigation, prosecution, sentencing and prevention of this type of crime are important as well. Finding the tools to protect children against actual abuse on the Internet is a challenge for ISPs, law enforcement and decision makers on a national and international level. In some countries, ISPs are only obliged to co-operate in criminal investigations. It seems that co-operation, both on an official and an unofficial basis, is minimal in the MS.

EUROPOL PUBLIC INFORMATION

5. Recommendations

Based on the findings of this report, Member States law enforcement and especially decision makers should consider implementing the following proposals which aim to harmonise the legislation and further lessen the constraints for the successful combat of child pornography and to improve the protection of children:

- The MS should, if not already done, consider implementing the following decisions as soon as possible:
 - Council Framework decision on combating the sexual exploitation of children and child pornography
 - Council Framework decision on Execution in the EU orders freezing property or evidence
 - Council Framework decision on European Arrest Warrant and surrender procedures between the MS.

- National legislation on the liability of Internet Service Providers should follow the Council directive on Electronic Commerce and the Liability of Internet Service Providers.

- The MS should, if not already done, take the necessary preparations to implement the coming Council decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters.

Related to the above mentioned international legislation, the following recommendations are made:

- The age of a child should be defined as under 18 years of age.
- The penalties for child molesters should follow at least the standards of EU legislation.
- The production, possession and distribution of child pornography and virtual child pornography should be punishable in every country.
- Data retention should be harmonised on a national and an international level (ISP, common period to be adopted).
- All possible investigative methods should be allowed within the MS.
- The difference in a judicial context between a child molester and a paedophile should be acknowledged within law enforcement in the MS.
- ISPs should co-operate with law enforcement authorities for the identification of designers and administrators of child abuse web sites.