

New Directive

## **EU Criminalizes Erotic Depictions of Adults**

**A new EU-directive on combating child-pornography and sexual exploitation of children provides not only for the blocking of internet-sites but also obliges all 27 member-states to criminalize erotic depictions of adults. Not only pornography is banned but each kind of sexually connotated pictures.**

The EU-Framework Decision on combating child-pornography and sexual exploitation of children (2004/68/JI), passed by the then 15 member-states in 2004, had faced manifold criticism, as the age-limit for „child“-pornography had been set at 18, without differentiating between children and adolescents. Young people over the age of sexual consent and even over the age of marriage were treated on the same footing with 5 year old children. Also pornography with adult performers had been banned if the actors look like under 18.

The criticism, i.e. from sexologists, led to the member-states having been allowed (but not obliged) to make exceptions from the absolute ban in three cases:

1. adult performers,
2. production and possession of virtual (not real) depictions, if there is no danger of dissemination, and
3. production and possession of depictions of young people over the national age of sexual consent, with the consent of the juvenile and for his/her own personal use (for instance within a partnership).

Austria made use of all of these exceptions, Germany of most of them.

The new directive (KOM(2010)94) repeals these three exceptions. The European Commission, in its proposal for the directive, provides no reasons for that.

### **Good deal of standard pornography banned**

As a result a good deal of regular standard pornography is threatened by criminalization, as “it is common that young adults visually cannot be discerned from mature adolescents” (German Constitutional Court BVerfG 06.12.2008, 2 BvR 2369/08; 2 BvR 2380/08). Nearly any performer up to around 25 years of age can be judged to look like 17 ½. Indeed just the impression counts, which the deciding judges have regarding the age of an actor.

In this context a decision by the Austrian Supreme Court dating from March 2010 (OGH 02.03.2010, 14 Os 73/09) raises concerns. With this decision the Supreme Court confirmed a conviction to 7 months imprisonment, without probation, for the

possession of five nude pictures, despite the fact that an expert opinion in the case, provided by a reputed paediatrician, said that one out of ten 18 year olds do look like the young men on the pictures.

It would not be necessary to establish the age of the young men beyond reasonable doubt, the court said; probabilities would suffice. Presumption of innocence and the rule of reasonable doubt would, if there are more than one possible alternatives of fact, not (!) require a criminal court to base its finding on the one which is the most favourable for the defendant. Mere 90% probability of guilt sufficed for the conviction. 10% probability of innocence was not enough. In addition the defendant's application to obtain the proofs of actors' age from the website-operator's files had been rejected.

All this despite the fact that Austrian law requires proof of an age of under 18. What is going to expect us when the Directive will have been implemented and the (mere) impression (of age) by the (majority of) ruling judges will suffice?

German law already now let suffice mere impression of an age of under 18. The German Federal Constitutional Court however in 2008 ruled that, for the safeguard of fundamental rights, only depictions of adults may be criminalized where the actors appear (almost) infantile and give the impression of adolescents so young that they appear almost like children (under 14) (BVerfG 06.12.2008, 2 BvR 2369/08; 2 BvR 2380/08). With the new directive this case-law will however be subjected to control and possible overruling by the Court of Justice of the European Union.

### **Constant suspicion of criminality & threatening arbitrariness**

The new directive also deletes the exception for virtual (not real) depictions. So also a 14 year old will have to be criminalized in each member-state who, in privacy, draws a 17 year old naked beauty. And also a 16 year old who, on her PC, creates a virtual image of a naked peer.

And the exception for consensual acts of juveniles sexually of age is substituted by a new exception so vague and nebulous that it seems useless for effective screening out of cases not requiring criminal law intervention. It requires that partners are "close in age and degree of psychological and physical development or maturity". And even if two partners are found to fulfil these criteria states have to criminalize if the acts are found to involve "any abuse" (Art. 8).

The 19 year old who engages in webcam-sex with a 17 year old, or the 18 year old who takes nude pictures of his 16 year old spouse, all of them are risking prosecution and punishment. They are only spared being labelled as sex offenders, if the law enforcement authorities acknowledge that they are "close in age and degree of psychological and physical development or maturity" and, in addition, do not find "any abuse" being involved. In fact, such sexual activities of young people are put under constant suspicion of criminality and impunity is left to unfettered judicial discretion which easily can tilt into arbitrariness.

## **Not only pornography**

The new directive also deletes the criterion „pornographic“. Member states will have to criminalize depictions of sexual acts (or even of the mere genitals or female breasts) no matter if pornographic or not. Real acts are not required. Simulation of sexual acts of persons under 18 (or of adults looking like under 18) must also be criminalized. The only restriction being that the depictions are „primarily for sexually purposes“, whatever that does mean in concrete. Also mere erotic (non-pornographic) depictions can be judged as „primarily for sexually purposes“.

The U.S. Supreme Court in 2001 turned down such unlimited criminalization and ruled that mere fictitious (virtual) depictions as well as depictions of adults are not to be criminalized (*Ashcroft v. Free Speech Coalition* 16.04.2002). The EU in 2010 introduces such offences.

## **Delight for child-pornographers**

On 7 October 2010 the 27 member-states reached consensus over the respective parts of the directive. Member-states must introduce the new offences within 2 years. Also Germany agreed, despite the fact that the current federal government's coalition agreement emphasized the necessity to differentiate between children and adolescents, and established that “criminal law amendments, which are not prescribed by Union law” will be taken back and that “current plans for even more far-reaching prescriptions by Union law” will be rejected.

Combatting child-pornography is essential and the new directive contains very valuable and important provisions. At the same time however it endangers effective combat of sexual exploitation.

Instead of concentrating all forces on eradicating real child-pornography this kind of exaggerated criminalization heavily interferes with the sexual life of young people (even adults) and their right to sexual self-determination. No 10 year old child abused in pornography benefits if (not even pornographic but just) erotic (even simulated) pictures of 22 year old adults are criminalized because these adults (in the eyes of police, prosecutors and courts) look like 17.

Law enforcement authorities get burdened with more and more useless offences which have nothing to do with child-pornography leaving them less and less resources to go after the real child-pornography.

A delight for child-pornographers.

RA Dr. Helmut GRAUPNER  
Co-Präsident der Österreichischen  
Gesellschaft für Sexualforschung (ÖGS)  
[hg@graupner.at](mailto:hg@graupner.at), [www.graupner.at](http://www.graupner.at), [www.oegs.or.at](http://www.oegs.or.at)