

Child Cyberpornography in EU Countries: The Ways of Protecting Children's Integrity

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Abstract

European countries have made significant progress in strengthening their legal frameworks and policies to prevent and combat child cyberpornography. However, effective prevention and combat efforts require a comprehensive and coordinated approach that involves sharing information and intelligence across borders, cooperating in investigations and prosecutions, and providing support to victims and their families. The research will be conducted using a mixed-methods approach, including both quantitative and qualitative data collection and analysis. The paper, examines the legal measures taken by European countries to prevent and combat child cyberpornography. It analyzes the legal frameworks and policies in different European countries, the challenges faced in implementing and enforcing these legal measures, and the effectiveness of these measures in combatting child cyberpornography. The effectiveness of measures such as age verification, content moderation, and reporting mechanisms will be analyzed to determine their impact on preventing child cyberpornography. Artificial intelligence (AI) technology is also becoming increasingly important in preventing and combatting cyberpornography involving children. From the other side, interstate cooperation can also play a critical role in promoting international education and awareness-raising efforts to prevent child cyberpornography.

Keywords: child, protect, cyber pornography, sexual abuse, artificial intelligence

JEL Classification: K14, K33

1. Introduction

Child cyberpornography is a global issue that has significant negative impacts on the psychological and emotional development of children. The expansion of the Internet has led to an explosion in the market for childpornography, making it easier to create, access, and distribute these images of abuse.³ Children who are exposed to cyberpornography may experience emotional distress, anxiety, depression, and PTSD. They may also develop unhealthy sexual attitudes and behaviors, including hypersexual behavior, which can lead to further exploitation. Potential offenders are able to gain enhanced access to victims and to child sexual abuse material through the use of ICTs, which increase their pool of potential victims, offer the opportunity of creating false identities, and facilitate the transmission of harmful content to children. Human traffickers may also recruit new victims, including children, and market child sex tourism through the use of ICTs.⁴ International law increasingly recognizes that children deserve special protection. A number of international legal instruments require that States take measures to protect children from abuse and exploitation, as well as to engage in international cooperation in the investigation and prosecution of child abuse and exploitation crimes. Tools and mechanisms for international cooperation include mutual legal assistance treaties, direct law enforcement cooperation, multi-agency partnerships, forums for information-sharing and informal direct law enforcement cooperation. Significant challenges nevertheless still exist in achieving effective international cooperation regarding online investigations and electronic evidence in criminal matters. Specific tools can be employed for detection and investigate.⁵ However, EU states vary considerably in approaches to addressing forms of child abuse and exploitation. While many states criminalize acts such as production of child sexual abuse

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³ UNODC, The National Strategy for Child Exploitation Prevention and Interdiction, 2010.

⁴ UNODC, Study on the Effects of New Information Technologies on the Abuse and Exploitation of Children, New York, 2015.

⁵ Ibid, p. 13.

material, they may differ with respect to elements of the crime and definitions of “child”. Some countries have enacted laws that are specific to the commission of child exploitation offences using ICTs, while other States rely on general criminal laws against abuse and exploitation.⁶

2. The definition of child cyberpornography and challenges to the law

The United Nation Convention on the Rights of the Child (CRC) and its Optional Protocol on Sale of Children, Child Prostitution and Child Pornography (OPCR), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), the Council of Europe Convention on Cybercrime and the newly established European Directive 2011/92/EU on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (the Directive) are the major legal documents used as a basis for examining the above questions.

The United Nations Convention on the rights of the Child is a legally binding document and according to its signatories children should be protected from “all forms of sexual exploitation and sexual abuse,” where child pornography is also included.⁷ However, it is noticed the absence of additional clarification on terminology that may mislead the states’ legislative power to adopt the law accordingly. In that sense, the Committee of the Rights of the Child sees the scope of the framework of article 19 of the CRC to be further elaborated and to find its relevance in the Optional protocol on sale of Children, Child Prostitution and Child Pornography. It also calls for respect, protection and closer cooperation between states and non-governmental organizations in the battle for children’s “dignity, physical and psychological integrity and to equal protection”⁸

In 2002, entered into force, Optional Protocol of the Convention on the rights of the child and now is a binding document and a guiding line for member states to adapt their legislations on child pornography issues accordingly.⁹ The protocol gives a definition of the crime as “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”¹⁰. In that train of thoughts it should be specified that materials having medical, scientific or artistic application do not constitute a crime.¹¹ The legal documents hardly touch upon the issue of technologically created images where no real child has been involved.¹² The question which arises here is whether and to what extent the images, where no real child is involved, should be considered child pornography and prosecuted. The challenge for the law in such situations is whether the material is a static picture with the participation of a real child, pseudo-photograph, or manipulated picture taken from a movie. The development of information and communication technologies have considerably changed the perception that photographs are the only form of visual depiction. Computer generated images, which include drawings, cartoons and paintings, differ from the so called pseudo (or morphed) images. However, the Cybercrime Convention is considered a global guideline for cybercrimes and gives a strong framework for prosecuting such offences. Section IX advises member states on how to modernize their criminal law by adding provisions that cover use of computer systems for disseminating illegal content. The Council of Europe’s Convention on Cybercrime aims at protecting children when they appear in depicted images representing a “minor engaged in sexually explicit conduct” by not clarifying any additional options. The Convention was opened to worldwide membership and non-member States can thus ratify. According to the explanatory report, however, a ‘sexually explicit

⁶ Ibid, p 13.

⁷ Convention on the Rights of the Child, art. 34, par. c).

⁸ General Comment 13 (2011), paragraph 2.

⁹ UNICEF, http://www.unicef.org/crc/index_30204.html, consulted on 1.02.2023.

¹⁰ Optional Protocol, art. 2, c).

¹¹ Alisdair Gillespie, Legal definitions of child pornography, *Journal of Sexual Aggression: An international, interdisciplinary forum for research, theory and practice*, Volume 16, Issue 1, 2010, p. 24.

¹² Marie Eneman, Alisdair A. Gillespie and Bernd Carsten Stahl, *Criminalizing Fantasies: the Regulation of Virtual Child Pornography*, Em Proceedings of the 17th European Conference on Information Systems. Gotemburgo, Suécia: Departamento de Tecnologia de Informação Aplicada da Universidade de Gotemburgo, 2009, available at <http://www.cse.dmu.ac.uk> 2009, consulted on 1.02.2023.

conduct' includes "at least real or simulated among other things sexual intercourse, between minors, or between an adult and a minor, of the same or opposite sex" which transferred into a picture, video or other material clearly points to child pornography.¹³ The distribution of child pornography is forbidden under article 9(1(a)) of the Convention. It implies that pedophiles share online their fantasies, practices and thus will encourage the support and development of criminal networks for exploitation of children. Additionally, art. 9(1(b)) outlaws the act of "offering" of child pornography. According to the Council of Europe explanatory report, "offering" is defined as the use of pornographic websites or just providing the materials through the online networks. Criminalizing this act has the aim to hamper the dissemination of the content. The "transmission" of child pornography is almost the same but here the offender sends the content from one personal computer to another through sophisticated server allowing the personal exchange of information (peer-to-peer networks). According to Williams, the Cybercrime Convention "makes the activity a crime without even defining it"¹⁴. She also refers to the explanatory report by clarifying the weak points in the convention to be seen as act of omission. The reason behind this is the core principle of the convention – bring harmonization of the member states' law in the sphere of cybercrimes for smoother and more effective cooperation among law enforcement agencies against child sexual exploitation and abuse. She expressly emphasizes that "without defining crime, it is not possible to ensure co-operation". The pornographic materials as referred to in article 9(2) entail obscene and "inconsistent with the public morals or similarly corrupt" materials.¹⁵ Along with the United Nations Optional Protocol which only expresses its concerns about the easier invention and proliferation of child pornography through the Internet, the Cybercrime Convention explicitly governs the Internet space as a place of exchange, storage and dissemination of illegal content with children. However, both documents introduce the importance of mutual assistance and cooperation in the fight against child pornography offenders¹⁶ but still are observed and criticized for their vagueness and missing definitions. In this context, it is very important to understand, what will constitute "child pornography"?

In 2007 in Lanzarote, Spain, the Council of Europe adopted the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention, 2007). Here child pornography is defined as: *....any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes*.¹⁷ As Yvonne Jewkes has implied in her Handbook of Internet Crime, the document is restricted to the visual representation but does not require an involvement of a real child to be proved which means that fictitious images also fall under the scope of the Convention. The Convention allows member states to decide whether to criminalize them or not. What is also important to mention here is that the Lanzarote Convention does not explicitly criminalize the possession or production of child pornography by children who have reached the age of consent only when the materials are for their own use and with their consent. However, it urges state parties to criminalize the following activities under the national legislations: production of child pornography; making child pornography available; distribution and transmission; procuring child pornography for personal use or others'; possession; knowingly accessing child pornography through communication technologies.¹⁸ While, Cyber is a prefix for "forming words relating to electronic communication networks and virtual reality" (Reader's Digest 1998). This is the meaning attached to "cyber-" in this paper. Various authors such as Ahn, Bivona and DiScala¹⁹ refer to the ubiquitous nature of the internet. Internet access can be gained not only through computers (websites, blogs, discussion forums, chat rooms,

¹³ Convention on Cybercrime Explanatory Report, point 100, ETS No. 185.

¹⁴ Katherine S. Williams, Child Pornography Law: Does it Protect Children?, *Journal of Social Welfare and Family Law*, Volume 26, Issue 3, 2004, p. 254.

¹⁵ Convention on Cybercrime, point 142.

¹⁶ Optional Protocol on Sale of Children, Child Prostitution and Child Pornography article 10; Convention of Cybercrime, articles 25-27.

¹⁷ Lanzarote Convention article 20(2).

¹⁸ Ibid., article 20.

¹⁹ June Ahn, Lauren K. Bivona, Jeffrey Discale, *Social media access in K-12 schools: Intractable policy controversies in an evolving world*, Proceedings of the ASIST Annual Meeting, 2011, available at <https://nyuscholars.nyu.edu/en/publications/social-media-access-in-k-12-schools-intractable-policy-controversies>, consulted on 1.02.2023.

instant MMS messaging or text messages and social network sites such as Facebook, Mxit, Twitter, MySpace, and LinkedIn) but also through mobile technology, video game consoles or other electronic devices. “Cyber” in the term “child cyber pornography” refers to child pornography produced, distributed or accessed through the internet. However, it is essential to remember, that, there is a difference between “child cyberpornography” as a crime and as a form of sexual misconduct. Child cyberpornography as a crime and as a form of sexual misconduct is independent yet interrelated because one transgression can constitute both misconduct and a crime.

3. The object of the crime ‘child cyberpornography’ in EU countries

The Council of Europe Convention on Cybercrime, signed in Budapest (2001) and entered into force in 2004, has the aim to support and guide states to establish a corresponding national legislation and to facilitate the cooperation among them in the fight against cybercrimes where the online dissemination of child abusive images is also covered. According to article 9(c) of the Convention 18 years is the age under which a person is considered a child. The contracting parties are given the right to make reservations about the age by deciding whether to lower it to 16 (but not less) if necessary.²⁰ For instance, such a reservation has been declared by Switzerland which lowers the age thresholds for child pornography materials to 16 years. The Lanzarote Convention, on the other hand, defines a child as any person under the age of 18 years and does not allow reservations to be made. For instance, such a reservation has been declared by Switzerland which lowers the age thresholds for child pornography materials to 16 years. The Lanzarote Convention, on the other hand, defines a child as any person under the age of 18 years and does not allow reservations to be made. The recently adopted Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography (European Directive), replacing Council Framework Decision 2004/68/JHA, also gives the age of 18 years to be the age of majority. But it clarifies and allows member states to decide on a national level what the age of engagement of a child in sexual activities should be.²¹

As Gillespie reflects in his work *Legal definitions of child pornography* (2010), the lack of correspondence in the different national legislations, both in the age of sexual consent and the illegal age of a child appearing in abusive materials, may be a serious obstacle for the law enforcement to combat child pornography and the ambiguity in the legislation should be reduced to a minimum.²² He constructs his argument on the citation of Jenkins²³ who states that the law, courts and law enforcement agencies cannot treat a seven - year old and seventeen - year old children equally just because many people nowadays have already experienced sexual intercourse consensually before turning 18. Even though most of the European member states and those of Council of Europe have harmonized the illegal age of a child appearing in pornographic materials to be under 18, the age of sexual consent still varies considerably within the European Union. For instance, in Spain the age of sexual consent is 13 years; Hungary – 14; Czech Republic – 15; Belgium - 16.²⁴ Gillespie states that this disparity is a result of the strong opposition of the countries to acknowledge the necessity that the age of representation of sexual abuse should be different from the age of sexual consent. Unfortunately, such distinctions would encourage offenders to travel to countries where the age threshold is lower and thus escape prosecution for committing a crime as would be considered in their own countries. The difficulty in the interpretation as well as in the application of the already established laws with regards to the former remark (treating differently sexual consent and abuse) can also be sensed in cases of adolescents who personally make and possess child pornography or take photographs of their peers. Lanzarote Convention refers to this issue by allowing member states to decide whether to apply the law on children who consensually have taken or possess pornographic

²⁰ Council of Europe Convention on Cybercrime (2001), article 9, paragraph 3.

²¹ European Directive 2011/92/EU, article 2 (a)(b).

²² Alisdair Gillespie, *op. cit.*, 2010, p. 25.

²³ Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet*, New York University Press, New York, 2001, p. 175.

²⁴ The document is available online at <https://rm.coe.int/168030419a>, consulted on 1.02.2023.

material of other minors. The latest European Directive also gives a wide margin of appreciation to the member states when it comes to deciding whether to raise that problem in their national laws. Cultural, religious and social differences in the development of member states are seen as the major obstacle for the legislator to incorporate the clause in the Directive.²⁵ Reaching an international or at least regional (European) agreement on a certain age, both of sexual consent and appearance in pornographic materials, is an extremely controversial topic and should not be left unresolved for two reasons.

Firstly, the illegal content may lead to further criminal offences. For example, the possession of such materials may lead to further bullying or illegal dissemination of pictures, videos, or creation of other materials in the cyber space and would inevitably result in further exploitation and victimization of the depicted individuals. Secondly, the difference in the age threshold may cause a huge difficulty in cases that require double criminality (a crime committed abroad should also be a crime in the offender's home country as a requirement the offender to face prosecution in their home country) and would result in prevention of a criminal to face prosecution. An additional point needs to be made on the difficulty for establishing what the actual age of a child appearing in pornographic material is. Neither the European, nor the International experts on child pornography have found an effective and uncompromised mechanism for finding the real age of children appearing in photographs or movies. Such obstacles can seriously hinder investigation proceedings as well as court decisions. Judges often ask for a forensic and medical opinion of what age the child appearing in visual pornographic material is, the law also implies that the object should be an individual under the age of 18, or at least to look like a child. However in the period from 2002 to 2007 the European Union funded a project aiming to prove that there is a link between the age of a child appearing in pornographic images and its facial metric proportions. The pilot study used over 2000 images of 353 female and 20 male German, Italian and Lithuanian children from ages respectively "89 6-year old, 99 10-year olds, 85 14-year old and 100 18-year old".²⁶ The study used the method of comparison of different indices of the children's facial proportions taken both from pictures and real children. Even though the facial measurements for forensic purposes of children appearing in pornographic images have not been studied until recently, the pilot study shows some positive results. For instance, many facial indices from frontal and lateral photographs of children were satisfactorily correlated to the same parameters of living children. Another positive result of the study was that some photo indices of child's face were narrowly linked with age.²⁷

4. Mechanisms for international cooperation: succesful case "Operation Avalanche"

The 2013 Cybercrime Study noted that use of traditional cooperation predominates for obtaining extra-territorial evidence in cybercrime cases.²⁸ Formal international cooperation mechanisms such as mutual legal assistance—the process whereby States formally request judicial assistance from another State in criminal investigations—may often similarly be used in transnational investigations of ICT-facilitated abuse and exploitation. At the same time, however, the importance of victim identification and protection, as well as the need for timely information sharing has resulted in the development of effective cooperation mechanisms at the operational law enforcement, as well as strategic levels. With regard to volatile computer data and at-risk children, both of which require immediate action by law enforcement, police often need to attain information or assistance faster than they could via formal channels, such as mutual legal assistance. Informal direct communication between police officers can provide a valuable supplement to formal procedures. While waiting for official responses to information requests, police can advise each other on how to follow up time-

²⁵ EU Directive 2011/92/EU, point 20

²⁶ Christina Cattaneo, Zuzana Obertova, Melanie Ratnayake, et al., Can facial proportions taken from images be of use for ageing in cases of suspected child pornography? A pilot Study, *International Journal of Legal Medicine*, 2012 Jan;126(1), p 139–144.

²⁷ Mihaela Astinova, *The Crime of Child Pornography: European Legislative and Police Cooperation Initiatives*, Tilburg, 2013, p. 143.

²⁸ UNODC, *World Drug Report*. Pp. 197, 2013.

sensitive leads. They may also be able to inform each other about cultural norms and local practices, which may facilitate cross-border investigations.²⁹

Particularly with regard to child sexual abuse material, international law enforcement operations have been instrumental in increasing arrests and convictions and bringing awareness of the crime. One of the first such operations, Operation Avalanche as it was called in the United States, was initiated in 1999 and was set up to examine the 35,000 names registered to a pornography web-portal database. The United States Federal Bureau of Investigation shared the details of subscribers from overseas with law enforcement agencies in the relevant countries and operations were initiated in Canada, Germany, Ireland, Switzerland and the United Kingdom. In total, 59 countries were involved in this investigation. This type of cooperation has been replicated successfully many times since and does not generally involve sustained coordination or action, or requests for legal assistance through formal or informal channels. Sustained joint operations as well as mutual legal assistance procedures are types of international cooperation that are frequently more complicated and time consuming to implement.

The Cybercrime Study reported that, while many countries engage in informal cooperation in cybercrime cases, the range of investigative actions that can be provided through such channels varies considerably, as well as the existence of clear policies on its use. One major problem in the context of informal cooperation is the fact that many countries prohibit the use of evidence obtained through such informal channels in the context of judicial proceedings. Nevertheless, “24/7” networks in particular hold a considerable potential for streamlining informal cooperation and facilitating formal cooperation; however, they still tend to be used infrequently in the investigation and prosecution of transnational cybercrime. The Cybercrime Study also concluded that, globally, divergences in the scope of cooperation provisions contained in multilateral and bilateral instruments, a lack of response time obligation, multiple informal law enforcement networks and variance in cooperation safeguards represent significant challenges to effective international cooperation regarding electronic evidence in criminal matters.³⁰ At the strategic level, the formation of multi-agency partnerships has emerged as a common practice for combating technology-facilitated crimes against children. Groups such as the Virtual Global Task Force (VGT), the Financial Coalition against Child Pornography (FCACP), and the International Association of Internet Hotlines (INHOPE) bring together different agencies from multiple countries to work on specific child exploitation issues. Such initiatives aim to harness the ideas and resources of multiple entities, resulting in more robust policy and programme initiatives.³¹ Forums for information-sharing and joint problem-solving are also examples of commonly adopted practices for combating online child abuse and exploitation. Working groups sponsored by private entities, individual States, and regional and international coalitions constitute important opportunities for detailed technical information exchange. The INTERPOL Specialist Group on Crimes Against Children, for example, brings together global experts to share best practices. Individuals involved benefit from opportunities for developing informal relationships that may facilitate fast and easy cross-border cooperation in the future.³²

5. Conclusions

The fact that in the recent years the crime has reached enormous dimensions, not only in Europe but worldwide, proves once again that children are at great risk.³³ In a legislative aspect, European Union introduced the Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, which is in conformity with its predecessors - OPCRC, Lanzarote Convention and Cybercrime Convention. On the one hand, the Directive, as a

²⁹ Ibid, p 208-215, 2013.

³⁰ Ibid, p 197-215, 2013.

³¹ The document is available at <http://www.inhope.org/gns/Internetconcerns/overview-of-the-problem/illegal-content.aspx>, consulted on 1.02.2023.

³² <http://www.interpol.int/Crime-areas/Crimes-againstchildren/Crimes-against-children>, consulted on 1.02.2023.

³³ Mihaela Astinova, *op. cit.*, p. 147.

dominant legal instrument in the post-Lisbon period, is expected to improve considerably and harmonize the national laws on the crime of child pornography among the 27 European member states. Definitions of terms and offences, respectively their penal framework, were expected to be consciously and correctly implemented among the member states by the end of 2013. On the other hand, the countries failed to implement the Directive on time. However, with the improvement of the legislation, a visible step forwards is expected to be made in the sphere of police cooperation. Enhanced joint operations between national police authorities and European Police Office should seriously pursue child pornography offenders and reduce the production and dissemination practices. Since Europol has been made a major Law enforcement agency having analytical and information exchange responsibilities, conducting of the joint operation should be easier and more effective. However, despite the existence of solid states' duties and obligations under the current conventions, protocols and directive, challenges for the law and its enforcement authorities to safeguard children appropriately are still present. Disparities in the definitions of child pornography, what the most legally adequate age at which a child appeared in sexually abusive material should be; further clarification of the relation to the age of sexual consent, as well as which content is considered abusive and constitute crime, impose difficulties in the whole process of protection of the best interest of children. However, it has been observed that positive results have been achieved not only on an European legislative level by the adoption of the newly established EU Directive, but also on the practical arena with the enhanced cooperation and close collaboration between law enforcement agencies and national police authorities. Their work additionally needs to be supported by adequate legislative accuracy and harmonization of child pornography law among countries. On the other hand, it should be noted that it is impossible to prosecute everyone who has seen or tried to obtain child pornography materials. The harmonization in the legislation among the 27 European member states will also result in easier child pornography case resolution, assistance of victims and better availability and exchange of information and best practices. Law enforcement agencies should prioritize their efforts and focus more on the most severe offenders, those who constantly produce, supply the chain and gravely abuse and exploit children's lives because, after all, the prevention of the crime against children is important, not the number of the images confiscated. Adequate training of specialized units against child pornography offences, superior technical equipment and strong cooperation with agencies and jurisdictions all over the world need to be established for the protection of the best interest of children. Many child pornography materials uploaded on the Internet cannot be accessed through a normal search engine due to the hidden channels and offenders' protective software mechanisms. Thus, specially trained people to search hidden channels and websites are absolutely crucial. Additionally, strong regulation on the servers allowing users to send data with hidden identification should be established. In this train of thought, Internet Service Providers (ISP) should play a significant role in the assistance of law enforcement agencies. ISP need to be internationally obligated to constantly report child pornography websites and to take the initiative in blocking of the illegal content. Since child pornography materials have often been produced and disseminated for commercial purposes, payment with credit cards for illegal products should be strictly regulated and controlled as well. Public awareness campaigns should produce materials and tips for people. They should focus on parents to highlight the dangers and how to avoid them – using search filters on their personal computers or being more vigilant with the websites their children visit.

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