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REPORT

on the initiative of the Republic of Austria with a view to adopting a Council Decision to combat child pornography on the Internet
(10317/1999 – C5-0318/1999 – 1999/0822(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Timothy Kirkhope

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend the common position
- *** Assent procedure
majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend the common position
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Abbreviations for committees

- I. AFET Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy
- II. BUDG Committee on Budgets
- III. CONT Committee on Budgetary Control
- IV. LIBE Committee on Citizens' Freedoms and Rights, Justice and Home Affairs
- V. ECON Committee on Economic and Monetary Affairs
- VI. JURI Committee on Legal Affairs and the Internal Market
- VII. INDU Committee on Industry, External Trade, Research and Energy
- VIII. EMPL Committee on Employment and Social Affairs
- IX. ENVI Committee on the Environment, Public Health and Consumer Policy
- X. AGRI Committee on Agriculture and Rural Development
- XI. PECH Committee on Fisheries
- XII. REGI Committee on Regional Policy, Transport and Tourism
- XIII. CULT Committee on Culture, Youth, Education, the Media and Sport
- XIV. DEVE Committee on Development and Cooperation
- XV. AFCO Committee on Constitutional Affairs
- XVI. FEMM Committee on Women's Rights and Equal Opportunities
- XVII. PETI Committee on Petitions

CONTENTS

	Page
PROCEDURAL PAGE	4
LEGISLATIVE PROPOSAL	5
DRAFT LEGISLATIVE RESOLUTION	19
EXPLANATORY STATEMENT	20
OPINION OF THE COMMITTEE ON CULTURE, YOUTH, EDUCATION, THE MEDIA AND SPORT	24
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET	38

PROCEDURAL PAGE

By letter of 7 December 1999 the Council consulted the European Parliament pursuant to Article 39(1) of the EU Treaty on the initiative of the Republic of Austria with a view to adopting a Council Decision to combat child pornography on the Internet (10317/1999 - 1999/0822 (CNS)).

At the sitting of 13 December 1999 the President of Parliament announced that she had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and to the Committee on Culture, Youth, Education, the Media and Sport and the Committee on Legal Affairs and the Internal Market for their opinions (C5-0318/1999).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs appointed Timothy Kirkhope rapporteur at its meeting of 17 January 2000.

It considered the draft decision and draft report at its meetings of 27 January, 24 February and 22 March 2000.

At the last meeting it adopted the draft legislative resolution by 27 votes to none, with one abstention.

The following were present for the vote: Graham R. Watson, chairman; Robert J.E. Evans, vice-chairman; Timothy Kirkhope, rapporteur; Mary Elizabeth Banotti, Christian von Boetticher, Kathalijne Maria Buitenweg (for Patsy Sörensen), Michael Cashman, Charlotte Cederschiöld, Ozan Ceyhun, Carlos Coelho, Giuseppe Di Lello Finuoli, Carlo Fatuzzo (for Rocco Buttiglione (Rule 153(2))), Pernille Frahm, Othmar Karas (for Gérard M. J. Deprez (Rule 153(2))), Margot Kessler, Ewa Klamt, Jean Lambert (for Alima Boumediene-Thiery), Baroness Sarah Ludford, Hartmut Nassauer, Arie M. Oostlander (for Thierry Cornillet), Elena Ornella Paciotti, Hubert Pirker, Martine Roure (for Joke Swiebel), Gerhard Schmid, Ingo Schmitt (for Daniel J. Hannan), Martin Schulz, Gianni Vattimo and Jan-Kees Wiebenga.

The opinions of the Committee on Culture, Youth, Education, the Media and Sport and of the Committee on Legal Affairs and the Internal Market are attached.

The report was tabled on 28 March 2000.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Initiative of the Republic of Austria with a view to adopting a Council Decision to combat child pornography on the Internet (10317/1999 – C5-0318/1999 – 1999/0822(CNS))

The proposal is amended as follows:

Text proposed by the Austrian initiative ¹

Amendments by Parliament

(Amendment 1)

Title

Initiative of the Republic of Austria with a view to adopting a Council Decision to combat child pornography on the Internet

Initiative of the Republic of Austria with a view to adopting a Council framework Decision to combat child pornography on the Internet

Justification:

Although the wording of the initiative is in many respects not binding, the text intrinsically seeks the approximation of the laws and regulations of the Member States, for which Article 34(2)(b) of the EU Treaty prescribes the form of a framework decision.

(Amendment 2)

First citation

HAVING REGARD to the Treaty on European Union, and in particular Article 34(2)(c) thereof,

HAVING REGARD to the Treaty on European Union, and in particular Article 34(2)(b) thereof.,

Justification:

Article 34(2) (c) TEU, which excludes “any approximation of the laws and regulations of the Member States”, while Article 34(2) (b) allows the Council to “adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States”. As the Decision would lead to approximation of the laws and regulations of the Member States, Article 34(2) (b) TEU must be chosen as the legal basis.

¹ OJ C 362, 16.12.1999, p.8.

(Amendment 3)

Fourth citation

TAKING ACCOUNT OF the resolution adopted by the European Parliament on 19 September 1996 on minors who are victims of violence,

TAKING ACCOUNT OF the resolutions adopted by the European Parliament on:

- 19 September 1996 on minors who are victims of violence¹,

- 12 December 1996 on protection of minors²,

- 24 April 1997 on the Commission communication on illegal and harmful content on the Internet³,

- 6 November 1997 on the Commission communication on combating child sex tourism and the aide-memoire on the European Union's contribution to reinforcing the prevention of the sexual abuse and exploitation of children⁴,

¹ OJ C 320, 28.10.1996, p. 190

² OJ C 20, 20.1.1997, p. 170

³ OJ C 150, 19.5.1997, p. 38

⁴ OJ C 358, 24.11.1997, p. 37

Justification:

The need to know the action taken by the European Parliament in this area.

(Amendment 4)

Sixth citation

BEARING IN MIND the European Convention on Human Rights, and in particular Article 10(2) thereof,

BEARING IN MIND the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950, and in particular Articles 2, 3 and 10(2) thereof,

Justification:

Use of exact wording of international legal tools, comprehensive protection of children's rights.

(Amendment 5)
Sixth citation a (new)

RECALLING the European Convention on the Exercise of Children's Rights, adopted in Strasbourg on 25 January 1996, and more precisely Articles 1, 6, 7, 8, 9, 10, 11, 12, and 15,

Justification:

Comprehensive reference to international legal tools, stresses the responsibilities and duties of the different bodies to combat exploitation of children.

(Amendment 6)
Sixth citation b (new)

HAVING REGARD TO the Universal Declaration of Human Rights, adopted by the UN General Assembly in its resolution 217 A (III) on 10 December 1948 in Paris, and more precisely Articles 2, 3, 7, 25, and 26,

Justification:

Comprehensive reference to international legal tools, stresses the responsibilities and duties of the different bodies to combat exploitation of children.

(Amendment 7)
Seventh citation

RECALLING Article 34 of the Convention on the Rights of the Child of 20 November 1989,

RECALLING the United Nations Convention on the Rights of the Child, adopted by the UN General Assembly Resolution 44/25 of 20 November 1989, and in particular its preamble and Articles 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 18, 19, 20, 27, 28, 32, 33, 34, 35, 36, and 39,

Justification:

Comprehensive reference to international legal tools, stresses the responsibilities and duties of the different bodies to combat exploitation of children.

(Amendment 8)
Seventh citation a (new)

BEARING IN MIND the Joint Action of 29 November 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing an incentive and exchange programme for persons responsible for combating trade in human beings and the sexual exploitation of children¹,

¹ OJ L 322, 12.12.1996, p. 7

Justification:

The need to know the measures already taken by the Council in this area.

(Amendment 9)
Seventh citation b (new)

HAVING REGARD TO the Carneby report of the G7 States, issued on 17 October 1997, and the outcome of the Unesco 'Info-Ethics' conference, held from 1 to 3 October 1998 for the purpose of laying down the minimum international regulation required to guard against child pornography on the Internet,

Justification:

The steps already taken by the Council in this field need to be mentioned.

(Amendment 10)
Third recital

CONVINCED that a high value must be placed on the physical and emotional integrity of children and the protection of victims of sexual crimes,

CONVINCED that respect for the physical and emotional integrity of children and the protection of victims of sexual crimes are of fundamental importance and must lie at

the heart of the Union's concerns,

Justification:

Improved wording.

(Amendment 11)

Article -1(1) (new)

Each Member State shall take the necessary measures to ensure that the production, sale and distribution or other forms of trafficking in child pornography material and the possession of such material is punishable by effective, proportionate and dissuasive penalties. Participation in and attempts to commit these offences, with the exception of possession, shall also be punishable.

Justification:

This is already laid down in the Joint Action of 24.2.1997 concerning action to combat trafficking in human beings and sexual exploitation of children. It should be repeated here as the text is amplified below.

(Amendment 12)
Article -1(2) (new)

Possession shall be punishable only where it is the result of an intentional or deliberate act or, if it is not, where possession is deliberately retained. Acquiring and possessing child pornography material for the purpose of passing it on to the law enforcement authorities or corresponding contact points shall not be an offence.

Justification:

Joint action 97/154/JHA provides that any possession of child pornography material shall be a punishable offence. This goes too far. The wrongful element required for a punishable offence is present only where possession is knowingly or deliberately obtained or deliberately retained. Anyone inadvertently coming into possession of child pornography material while surfing the Internet or by receiving unsolicited e-mail cannot have thereby committed a punishable offence.

(Amendment 13)
Article -1(3) (new)

For the purposes of this framework Decision, child pornography is visual material giving the impression that a sexual act is being performed on a child or that a child is performing a sexual act on itself, on another person or on an animal. Evidence that the person depicted is not a child or that the act did not actually take place is no defence. The production of child pornography material shall be an offence even when it does not give the impression that the person depicted is a child, although that person actually is a child.

Justification:

The term child pornography material has not been standardised and a definition is therefore urgently required. Comprehensive protection under criminal law will be provided only if the pornographic representation not only of children but also of persons who have the

appearance of children and virtual pornographic material are included. The last two categories tend to trivialise crime against children thus misleading potential customers as to the deviance of their paedophile inclinations and facilitating child abuse

(Amendment 14)
Article -1(4) (new)

4. For the purposes of this framework Decision, the term 'children' shall mean persons younger than 16 years of age. Member States shall be free to set a higher age limit.

Member States shall endeavour to engage in constructive dialogue in order to agree on a common definition of the age below which a human being is considered to be a child with the objective of ensuring comprehensive protection for children by trying to fix such age at 18 years old.

Justification

The age-limit must coincide with the age limit of 16 applying to sexual exploitation.

(Amendment 15)
Article 1(1)

1. In order to intensify measures to prevent and combat the production, processing, distribution and possession of child pornography material and to promote the effective investigation and prosecution of offences in this area, Member States will take the necessary measures to encourage Internet users to inform law enforcement authorities, either directly or indirectly, on suspected distribution of child pornography material on the Internet, if they come across such material. Internet users shall be made aware of ways to make contact with law enforcement authorities or entities which have privileged links with law enforcement authorities, to enable such authorities to fulfil their task of preventing and combating child pornography on the

1. Within the framework of Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks and in order to intensify measures to prevent and combat the production, processing, distribution and possession of child pornography material and to promote the effective investigation and prosecution of offences in this area, Member States will take the necessary measures to encourage Internet users to inform law enforcement authorities, either directly or indirectly, on suspected distribution of child pornography material on the Internet, if they come across such

Internet.

material. Internet users shall be made aware of ways to make contact with law enforcement authorities or entities which have privileged links with law enforcement authorities, to enable such authorities to fulfil their task of preventing and combating child pornography on the Internet.

Justification:

The measures set out in this article are already set out in Decision No 276/1999/EC of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, which has the budget necessary for their implementation.

(Amendment 16)
Article 1(1a) (new)

Member States shall adopt the legislative measures required to permit their crime prevention authorities, without prejudice to fundamental rights and in compliance with the data protection Directive, 95/46/EC, to search the Internet systematically for child pornography material.

Justification:

All Member States should have a legal basis for the scanning of the Internet for child pornography material.

(Amendment 17)
Article 1(2)

Where necessary, and taking account of the administrative structure of each Member State, measures for the promotion of effective investigation and prosecution of offences in this area could be the setting up of specialised units within law enforcement authorities with the necessary expertise and resources to be able to deal swiftly with information on suspected production, processing, distribution and possession of child pornography.

Member States shall, for the promotion of effective investigation and prosecution of offences in this area, set up specialised units within law enforcement authorities with the necessary expertise and resources to be able to carry out their own investigations and to initiate enquiries and deal swiftly with information on suspected production, processing, distribution and possession of child pornography.

Justification:

As special skills are required to combat child pornography on the Internet, it is essential to set up specialised units

(Amendment 18)
Article 1(3)

3. Member States shall ensure that the law enforcement authorities act swiftly when they have received information on suspected production, processing, distribution and possession of child pornography material.

3. Member States shall ensure that the law enforcement authorities act swiftly when they have received information on suspected production, processing, distribution and possession of child pornography material. Law enforcement authorities may defer taking action if and as long as tactically necessary, for instance with a view to getting at those behind the criminal operations, or at networks (child pornography rings).

Justification

For tactical reasons, it may be necessary for law enforcement authorities to defer taking action, with a view to getting at those behind criminal operations or at networks.

(Amendment 19)

Article 2(1)

Member States shall ensure the widest possible cooperation to facilitate an effective investigation and prosecution of offences concerning child pornography on the Internet in accordance with existing arrangements and agreements.

Member States shall ensure the widest and speediest possible cooperation to facilitate an effective investigation and prosecution of offences concerning child pornography on the Internet in accordance with existing arrangements and agreements.

Justification:

Child pornography on the Internet can be effectively combated only at international level. Cooperation therefore needs to be as speedy as possible.

(Amendment 20)

Article 2(2)

To ensure a timely and effective response to these offences, Member States will communicate already established points of contact, which are set up on a 24-hour basis and consist of knowledgeable personnel, as well as the specialised units, which are mentioned in Article 1(2) and which can be used for exchange of information and for further contacts between Member States. Points of contact, which Member States have already set up for other duties can be used for these purposes. Equally, existing channels for communication, such as Europol and Interpol shall be used.

To ensure a timely and effective response to these offences, Member States will establish points of contact, which are set up on a 24-hour basis and consist of knowledgeable personnel and communicate them and the specialised units which are mentioned in Article 1(2) and which can be used for exchange of information and for further contacts between Member States to each other. Points of contact which Member States have already set up for other duties can be used for these purposes. Equally, existing channels for communicate, such as Europol and Interpol shall be used.

Justification:

Contact points operated round the clock by qualified staff are essential as immediate expert action is most important in the case of Internet crimes.

(Amendment 21)
Article 2(5a) (new)

Member States shall establish registers of persons convicted of the distribution of child pornography and the sexual abuse of children. The information in these registers shall be accessible to all Member States and Europol.

Justification:

These registers will facilitate the tracing of repeat offenders. In the light of Europol's mandate and with a view to international cooperation all other Member States and Europol should be given access to these registers.

(Amendment 22)
Article 2(5b) (new)

Member States shall seek to involve the candidate countries as soon as possible in action to combat child pornography.

Justification:

With a view to effective action against child pornography it would be desirable to involve the candidate countries in the campaign at this stage rather than wait for their accession.

(Amendment 23)
Article 3, introduction

Member States shall engage in constructive dialogue with industry and examine appropriate measures, of a voluntary or a legally binding nature, to eliminate child pornography on the Internet. In particular, Member States shall exchange experiences on the effectiveness of any measures they have taken to eliminate child pornography on the Internet. In this context, they shall examine the following measures, which would place Internet providers under a duty:

Member States shall engage in constructive dialogue with industry and adopt appropriate measures, both of a voluntary and of a legally binding nature, to eliminate child pornography on the Internet. In particular, Member States shall exchange experiences on the effectiveness of any measures they have taken to eliminate child pornography on the Internet. In this context, they shall adopt the following measures, which, within the framework of Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on

promoting safer use of the Internet by combating illegal and harmful content on global networks will place Internet providers under a duty:

Justification:

It does not make sense for a Decision to include wording which has a non-binding effect.

(Amendment 24)

Article 3(-a) (new)

(-a) ensure that the identity of persons who obtain an electronic mail (e-mail) address can be established.

Justification:

The possibility of sending anonymous e-mails which even the authorities cannot trace back to their senders makes prosecution impossible.

(Amendment 25)

Article 3(c)

(c) in accordance with the Council Resolution of 17 January 1995 on the lawful interception of telecommunications to retain traffic-related data, where applicable and technically feasible – in particular for criminal prosecution purposes in cases of suspected sexual abuse of children, production, processing and distribution of child pornography – for such time as may be specified under the applicable national law, to allow the data to be made available for inspection by the criminal prosecution authorities in accordance with the applicable rules of procedure:

(c) in accordance with the Council Resolution of 17 January 1995 on the lawful interception of telecommunications to retain traffic-related data, where technically feasible – in particular for criminal prosecution purposes in cases of suspected sexual abuse of children, production, processing and distribution of child pornography – for such time as may be specified under the applicable national law, which shall not, however, be less than three months, to allow the data to be made available for inspection by the criminal prosecution authorities in accordance with the applicable rules of procedure:

Justification:

It does not make sense for a Decision to include wording which has a non-binding effect.

(Amendment 26)

Article 4

Member States shall regularly verify whether technological developments require, in order to maintain the efficiency of the fight against child pornography on the Internet, changes to criminal procedural law, while respecting the fundamental principles thereof and, where necessary, shall make appropriate proposals to their competent authorities to that end.

Member States shall regularly verify whether technological developments require, in order to maintain the efficiency of the fight against child pornography on the Internet, changes to criminal procedural law, while respecting the fundamental principles thereof and, where necessary, shall make appropriate proposals to their competent authorities to that end. Offences committed in third countries should be punishable in accordance with national law.

Justification:

The need to establish international criminal proceedings

(Amendment 27)

Article 6(1)

The Council shall examine the extent to which Member States have fulfilled their obligations pursuant to Joint Action 97/154/JHA and the extent to which the measures proposed in this Decision have proved effective.

By 1 July 2000 the Council shall examine the extent to which Member States have fulfilled their obligations pursuant to Joint Action 97/154/JHA and this framework Decision and the extent to which the measures proposed in this framework Decision (Article 3) have proved effective.

Justification:

There is little point in requiring a review without a deadline. The fact that the Council has not met the deadline set in Joint Action 97/154/JHA on action to combat trafficking in human beings and sexual exploitation of children does not change matters. For efficiency it would be reasonable to combine the examination of the implementation of the framework Decision with that of the implementation of Joint Action 97/154/JHA.

(Amendment 28)

Article 6(2)

The examination referred to in paragraph 1 may be carried out under Joint Action 97/827/JHA adopted by the Council on 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime, subject to the following:

- (a) evaluation teams shall consist of two experts;
- (b) on-the-spot evaluation shall be made so as to avoid cumbersome procedures.

The examination referred to in paragraph 1 shall be carried out under Joint Action 97/827/JHA adopted by the Council on 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime, subject to the following:

- (a) evaluation teams shall consist of two experts;
- (b) on-the-spot evaluation shall be made so as to avoid cumbersome procedures.
- (c) the Council Presidency shall annually inform Parliament of the conclusions of the MDW and of all recommendations formulated by the Council.

Justification:

Parliament, as the representative of the peoples of Europe, has to be kept informed of the national measures taken to combat child pornography and of any shortcomings in this respect. The Council Presidency should therefore inform Parliament of its recommendations to individual Member States and of the conclusions of the multidisciplinary working party on organised crime (MDW).

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the initiative of the Republic of Austria with a view to adopting a Council decision to combat child pornography on the Internet (10317/1999 – C5-0318/1999 – 1999/0822(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative of the Republic of Austria (10317/1999²),
 - having been consulted by the Council pursuant to Article 39(1) of the EU Treaty (C5-0318/1999),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinions of the Committee on Culture, Youth, Education, the Media and Sport and the Committee on Legal Affairs and the Internal Market (A5-0090/2000),
1. Approves the initiative of the Republic of Austria as thus amended;
 2. Calls on the Council to alter the draft decision accordingly;
 3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 4. Asks to be consulted again if the Council intends to amend the draft decision substantially;
 5. Instructs its President to forward its position to the Council and Commission.

² OJ C 232, 16.12.1999, p.8.

EXPLANATORY STATEMENT

Introduction

By its nature the Internet offers completely new possibilities for dissemination of child pornography. It can be distributed via the Internet free of charge and in unlimited quantity. News groups and bulk mails make information on it generally and rapidly available. The problems which faced traditional forms of marketing have disappeared; there is no need to seek secure and suitable advertising media, freight routes and charges are eliminated, as is the risk of carriage across borders. Moreover, on-line links at the workplace and in the home are becoming more and more common so that optimum use can be made of potential demand. The supply of child pornography is correspondingly varied. There is a clear need for action. Combating it is difficult as technical development is so rapid. Moreover, Internet transactions cannot easily be regulated, as the services can be offered from anywhere in the world and their origins are hard to detect. Nowhere can suppliers act with such flexibility as on the Internet. The action to combat child pornography must therefore take place at supranational level. Joint action by the Member States within the EU framework is therefore vital.

Content of the draft decision

This draft decision is designed to facilitate the detection and prosecution of offences involving child pornography on the Internet and to stem the distribution of child pornography on the Internet.

It is a practically verbatim repetition of the draft joint action to combat child pornography on the Internet³ on which Parliament had already delivered a favourable opinion⁴ but which with the entry into force of the Treaty of Amsterdam could not be adopted by the Council.

The main points in the draft decision are as follows:

- the Member States shall take steps to encourage Internet users to inform law enforcement authorities if they come across child pornography material;
- for the purposes of the efficient investigation and prosecution of offences the establishment of specialised units is to be considered, which, like the points of contact manned round the clock by qualified staff, would be notified by the Member States to each other;
- the Member States should ensure rapid action by the law enforcement authorities;
- the Member States shall ensure the widest possible cooperation in respect of both law enforcement and technological developments to combat child pornography on the Internet, and shall promote such developments;
- the Member States shall regularly clarify whether technological developments require changes to criminal procedural law;
- Europol, within the limits of its mandate, is to be kept informed of suspected cases of child pornography;
- as already laid down in the joint action concerning action to combat trafficking in human

³ 10850/5/98 – C4-0674/98/0917 (CNS)

⁴ A4-0141/99

beings and the sexual exploitation of children (97/154/JHA)⁵, the Council is required to examine the extent to which Member States have fulfilled their obligations, and the extent to which the measures proposed in the decision have proved effective.

Assessment of the draft decision

The Austrian initiative to reintroduce the draft joint action to combat pornography on the Internet⁶ is welcome. The fact that joint action is needed here is not in question, but the procedure adopted is unsatisfactory on several grounds.

The first is the choice of instrument. Pursuant to Article 34(2)(c) of the TEU, the decision is the appropriate form for any purpose other than the approximation of laws and regulations. Although the individual provisions are not very specific and in places are even not binding and hence constitute no more than a suggestion, the subject involves an albeit cautious, approximation of laws and regulations of the Member States. However, Article 34(2)(b) of the TEU expressly provides the instrument of the framework decision for this purpose, and it should therefore be the choice in this case. (Amendment 1).

Further grounds for criticism lie in the fact that the actual offence of child pornography is not specified in any detail. The joint action of 24 February 1997 on action to combat trafficking in human beings and sexual exploitation of children (97/154/JHA) set minimum standards for the offence of child pornography. The Member States have to make sure that the 'exploitative use of children in pornographic performances and materials, including the production, sale and distribution or other forms of trafficking in such materials' and participation in or attempt to commit them, with the exception of possession, are 'punishable by effective, proportionate and dissuasive criminal penalties'. This description of the offence should be included in this draft decision (Amendment 2) and, taking the use of the Internet for that purpose into account, the implementing measures required should also be incorporated (Amendments 3-5).

Joint Action 97/154/JHA does not describe the actual offence of child pornography in any detail. However, any effective Community-level cooperation will require a standard description; a common definition is therefore essential. If children are to be given comprehensive protection against pornographic performances, they on the one hand have to be protected as the direct victims, while any performance must also be prosecuted if it conveys the appearance of child pornography. Such material trivialises crimes against children, deceives potential clients over the deviance of their paedophile tendencies and thus encourages the abuse of children. Effective protection of children against pornography under the criminal law can be guaranteed only if this offence covers not only the production of pornographic performances using children but also pornographic depictions of other persons giving the impression of being children and virtual pornographic material (involving montage or computer generation) (Amendment 4). Even if it can be proved that the performers were not children or that the pornography was produced by virtual means, this should be no defence. As regards the marketing of child pornography material via the Internet, it also seems particularly important to clarify the offence of possession. Joint Action 97/154/JHA

⁵ OJ L 63 4.3.1997, p. 2-6

⁶ 10850/5/98 – C4-0674/98/0917 (CNS)

makes any possession an offence. This is going too far. Any person inadvertently coming into possession of child pornography while Internet surfing or by receiving unsolicited e-mails cannot have committed an offence at that stage, even if somebody considers this possible and accepts it, the weakest form of intention. The culpability required if an offence is to take place can only exist if possession was acquired consciously or even deliberately, or is deliberately retained (Amendment 3).

It is also important to set an age limit. There can be no doubt that 16-year-olds need protection. Although it is always difficult to set an age limit, perceptions of the appearance of a 16-year-old person should be relatively uniform. This age limit seems relatively well suited for the assessment of whether a person is older or younger. Nevertheless, the Member States should be able to set a higher age limit (Amendment 5).

Apart from this failure to define the offence, the draft is also unsatisfactory in that many of its provisions are vague or non-binding. Parliament criticised this aspect when consulted on the Joint Action, as expressed in the amendments adopted on 13.4.1999. It considered it essential to set up specialised units within the law enforcement authorities and contact points manned around the clock by qualified staff. Effective action against child pornography on the Internet requires facilities for immediate and expert action. It is not enough simply to suggest such measures; the Member States must be obliged to take them. The Austrian initiative does not unfortunately take account of this. Parliament's amendments to this effect must be retabled (Amendments 7 and 9).

Parliament's amendment setting up national legal bases for the systematic scanning of the Internet has also been ignored. The draft is obviously concentrating on cases where the law enforcement authorities wish to react to offences that have already come to light. If effective action is to be taken against child pornography on the Internet the authorities cannot confine themselves to reacting to individual cases. They will have to make an active effort to track down offences. The Member States must therefore be required to establish a legal basis allowing the law enforcement authorities, subject to fundamental rights and the provisions of the data protection Directive, to scan the Internet for child pornography material (Amendment 6).

One essential and positive aspect of the text is the encouragement of international cooperation, which is the precondition for effective action against child pornography on the Internet. As the Internet ignores national boundaries, those tracking down Internet crime must also be able to cross them. Cooperation therefore has to be as rapid and direct as possible (Amendment 8). It should moreover not be confined to the Member States but extended as soon as possible to the candidate countries. In some of them organised crime is already very active in child pornography and other forms of the commercial abuse of children. If this is to be effectively countered, cooperation needs to begin as soon as possible and cannot wait for accession (Amendment 11). Cooperation with Europol is also important in this respect. The joint action on 16.12.1996⁷ in conjunction with the Council Decision of 3.12.1998⁸ extended Europol's mandate for the exchange and analysis of information and knowledge to the exploitation of minors and hence also to the production, sale or distribution of child-

⁷ OJ L 342, 31.12.1996, p.4.

⁸ OJ C 26, 30.1.1998, p. 21.

pornography material. This Decision rightly provides for Europol, within the limits of its mandate, to be informed of suspected cases of child pornography. To improve the flow of information it would appear desirable for the Member States to keep registers in standard form listing all persons convicted of child pornography or other forms of child abuse, accessible to all Member States and Europol (Amendment 10). Comprehensiveness would seem better served by establishing national registers rather than a central register at Europol headquarters which would depend on information forwarded by the Member States.

It seems reasonable for an examination of the implementation of this Decision to be combined with a review of Joint Action 1997/154/JHA (on action to combat trafficking in human beings and sexual exploitation of children). The Council should however be set a specific deadline or doing so (Amendment 12). The fact that the Council has not met the deadline set in Joint Action 97/154/JHA for its assessment does not change matters.

The provision that this examination may be carried out under the Joint Action of 5 December 1997 establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime (97/827/JHA)⁹ also seems fundamentally correct. As the Member States have already agreed on the mechanism, it should be used. Any change here is necessary only to stipulate that the Council Presidency annually inform Parliament of the conclusions of the multidisciplinary working party provided for in the joint action and of all recommendations formulated by the Council (Amendment 13). Parliament as the representative of the peoples of the Europe has to be kept fully informed of the national measures to combat child pornography and of any shortcomings therein.

The draft decision is otherwise to be welcomed and therefore deserves Parliament's approval subject to its amendments.

⁹ OJ L 344, 15.12.1997.

29 February 2000

Opinion of the Committee on Culture, Youth, Education, the Media and Sport

for the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the initiative of the Republic of Austria with a view to adopting a Council decision to combat child pornography on the Internet (10317/1999 – C5-0318/1999 – 1999/0822 (CNS))

Draftsman: Christa Prets

PROCEDURE

The Committee on Culture, Youth, Education, the Media and Sport appointed Mrs Prets draftsman at its meeting of 27 January 2000.

It considered the draft opinion at its meetings of 22 and 28/29 February 2000.

At the latter meeting it adopted the amendments below unanimously.

The following took part in the vote: Graça Moura, acting chairman; Iivari, vice-chairman; Prets, draftsman; Alyssandrakis, (for Alavanos), Andreasen, Aparicio Sánchez, Arvidsson (for Gargani), Gutiérrez-Cortines (for Ridruejo), Hieronymi, de La Perrière, Lynne (for Formentini), Manisco, Martens, Okking, O'Toole, Pack, Perry, Ries (for Mennea), Sanders-Ten Holte, Van Brempt, Vander Taelen and Zabell.

AMENDMENTS

The Committee on Culture, Youth, Education, the Media and Sport calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Council¹⁰

Amendments by Parliament

(Amendment 1)
First citation

HAVING REGARD TO the Treaty on European Union, and in particular Article 34(2)(c) thereof,

HAVING REGARD TO the Treaty on European Union, and in particular Article 34(2)(b) thereof,

Justification:

The legal basis for the initiative is Article 34(2)(c) of the EU Treaty, which is not intended for the purpose of 'approximation of the laws and regulations of the Member States'. Under certain individual provisions of the initiative, however, the Member States would have to approximate their laws and regulations. Article 34(2)(b) stipulates expressly that such approximation must be effected by means of framework decisions.

(Amendment 2)
Fourth citation

TAKING ACCOUNT OF the Resolution adopted by the European Parliament on 19 September 1996 on minors who are victims of violence,

TAKING ACCOUNT OF the Resolutions adopted by the European Parliament on:

- 19 September 1996 on minors who are victims of violence¹,

- 12 December 1996 on protection of minors²,

- 24 April 1997 on the Commission communication on illegal and harmful content on the Internet³,

- 6 November 1997 on the Commission

¹⁰ OJ C 362, 16.12.1999, p. 8.

communication on combating child sex tourism and the aide-memoire on the European Union's contribution to reinforcing the prevention of the sexual abuse and exploitation of children⁴,

¹ OJ C 320, 28.10.1996, p. 190

² OJ C 20, 20.1.1997, p. 170

³ OJ C 150, 19.5.1997, p. 38

⁴ OJ C 358, 24.11.1997, p. 37

Justification:

The need to know the action taken by the European Parliament in this area.

(Amendment 3)

Sixth citation

BEARING IN MIND the European Convention on Human Rights, and in particular Article 10(2) thereof,

BEARING IN MIND the European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4 November 1950, and in particular Articles 2, 3 and 10(2) thereof,

Justification:

Use of exact wording of international legal tools, comprehensive protection of children's rights.

(Amendment 4)

Sixth citation a (new)

RECALLING the European Convention on the Exercise of Children's Rights, adopted in Strasbourg on 25 January 1996, and more precisely Articles 1, 6, 7, 8, 9, 10, 11, 12, and 15,

Justification:

Comprehensive reference to international legal tools, stresses the responsibilities and duties of the different bodies to combat children's exploitation.

(Amendment 5)

Sixth citation b (new)

HAVING REGARD TO the Universal Declaration of Human Rights, adopted by the UN General Assembly in its resolution 217 A (III) on 10 December 1948 in Paris, and more precisely Articles 2, 3, 7, 25, and 26.

Justification:

Comprehensive reference to international legal tools, stresses the responsibilities and duties of the different bodies to combat children's exploitation.

(Amendment 6)
Seventh citation

RECALLING Article 34 of the Convention on the Rights of the Child of 20 November 1989,

RECALLING the United Nations Convention on the Rights of the Child, adopted by the UN General Assembly Resolution 44/25 of 20 November 1989, and in particular its preamble and Articles 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, 18, 19, 20, 27, 28, 32, 33, 34, 35, 36, and 39,

Justification:

Comprehensive reference to international legal tools, stresses the responsibilities and duties of the different bodies to combat children's exploitation.

(Amendment 7)
Seventh citation a (new)

BEARING IN MIND the Joint Action of 29 November 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing an incentive and exchange programme for persons responsible for combating trade in human beings and the sexual exploitation of children¹,

¹ OJ L 322, 12.12.1996, p. 7

Justification:

The need to know the measures already taken by the Council in this area.

(Amendment 8)
Seventh citation b (new)

BEARING IN MIND the Joint Action of 29 November 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the creation and maintenance of a directory of specialised competences, skills and expertise in the fight against international organised crime¹,

¹ OJ L 342, 31.12.1996, p. 2

Justification:

See preceding justification.

(Amendment 9)

Seventh citation c (new)

BEARING IN MIND the Council decision of 16 December 1996 to extend the mandate of the Europol Drugs Unit to include the area of combating trafficking in human beings²,

² OJ L 342, 31.12.1996, p. 4

Justification:

See preceding justification.

(Amendment 10)

Seventh citation d (new)

HAVING REGARD TO the Carneby report of the G7 States, issued on 17 October 1997, and the outcome of the Unesco 'Info-Ethics' conference, held from 1 to 3 October 1998 for the purpose of laying down the minimum international regulation required to guard against child pornography on the Internet,

Justification:

The steps already taken by the Council in this field need to be mentioned.

(Amendment 11)

Third recital

CONVINCED that a high value must be placed on the physical and emotional integrity of children and the protection of victims of sexual crimes,

CONVINCED that respect for the physical and emotional integrity of children and the protection of victims of sexual crimes are of fundamental importance and must lie at the heart of the Union's concerns,

Justification:

Improved wording.

(Amendment 12)

Third recital a (new)

AWARE that the Internet constitutes a case apart inasmuch as it is a world-wide medium without go-betweens or frontiers,

Justification:

The specific nature of the Internet

Article 1(2)

(Amendment 13)

Article 1(2) (new)

2. Where necessary, and taking account of the administrative structure of each Member State, measures for the promotion of effective investigation and prosecution of offences in this area could be the setting up of specialised units within law enforcement with the necessary expertise and resources to be able to deal swiftly with information on suspected production, processing, distribution and possession of child pornography.

2. Where necessary, and taking account of the administrative structure of each Member State, measures for the promotion of effective investigation and prosecution of offences in this area could be the setting up of specialised units within law enforcement with the necessary expertise and resources - including high-performance software permitting pornographic images of children circulated on the network to be automatically disabled - to be able to monitor, verify and deal swiftly with information on suspected production, processing, distribution and possession of child pornography, so as to identify and deter authors and providers.

Justification:

The need for high-performance software capable of combating effectively child pornography circulating on the network.

(Amendment 14)
Article 1(3)

3. Member States shall ensure that the law enforcement authorities act swiftly when they have received information on suspected production, processing, distribution and possession of child pornography material.

3. Member States shall ensure that the law enforcement authorities act swiftly when they have received information on suspected production, processing, distribution and possession of child pornography material. In this context it is necessary to actively assess the information gathered at Community level and to create a joint database in order to ensure that law enforcement authorities are fully informed of paedophile activities, especially when it is suspected that activities are transcending national frontiers.

Justification:

Cooperation between Member States is essential if cross-border crime is to be tackled effectively.

(Amendment 15)
Article 1(3a) (new)

3a. For the purposes of this framework Decision children shall be persons under 18 years of age, in accordance with Article 1 of the UN Convention on the Rights of the Child.

Justification:

Definition as stated by the United Nations Convention on the Rights of the Child, adopted by the UN General Assembly Resolution 44/25 of 20 November 1989, and more precisely Article 1.

Definition as stated by the European Convention on the Exercise of Children's Rights, adopted in Strasbourg on 25 January 1996, and more precisely Article 1.1.

(Amendment 16)

Article 2(1)

1. Member States shall ensure the widest possible cooperation to facilitate an effective investigation and prosecution of offences concerning child pornography on the Internet in accordance with existing arrangements and agreements.

1. Member States shall ensure the widest possible cooperation to facilitate an effective investigation and prosecution of offences concerning child pornography on the Internet in accordance with existing regulations and agreements.

Justification:

Better wording.

(Amendment 17)

Article 3(d)

(d) to set up their own control systems for combating the production, processing, distribution and possession of child pornography.

(d) to set up their own control systems with the aid of codes of conduct, filtering systems, etc, in collaboration with voluntary bodies such as Internet Watch, for combating the production, processing, distribution and possession of child pornography.

Justification:

The need to make use of specialist organisations

(Amendment 18)

Article 4

Member States shall regularly verify whether technological developments require, in order to maintain the efficiency of the fight against child pornography on the Internet, changes to criminal procedural law, while respecting the fundamental principles thereof and, where necessary, shall make appropriate proposals to their competent authorities to that end.

Member States shall regularly verify whether technological developments require, in order to maintain the efficiency of the fight against child pornography on the Internet, changes to criminal procedural law, while respecting the fundamental principles thereof and, where necessary, shall make appropriate proposals to their competent authorities to that end. Offences committed in third countries should be punishable in accordance with national law.

Justification:

The need to establish international criminal proceedings

(Amendment 19)

Article 5

Member States, in contact with the industry, shall cooperate by sharing their experiences and encouraging, if possible, the production of filters and other technical means to prevent and detect the distribution of child pornography material.

Member States, in contact with the industry, shall cooperate by sharing their experiences and encouraging, if possible, the production of filters and other technical means to prevent and detect the distribution of child pornography material.

In addition, Member States shall strengthen cooperation in this area with third countries, in particular applicants for accession, international organisations, in particular the Council of Europe and the United Nations, and specialist NGOs.

Justification:

The need to strengthen cooperation with the candidate countries and with the international organisations concerned.

EXPLANATORY STATEMENT

1. BACKGROUND

The World Congress on the commercial sexual exploitation of children held in Stockholm from 27 to 31 August 1996 and the recent UNESCO Conference, which took place in Paris on 18 and 19 January 1999, denounced the proliferation of images and text involving child pornography on the Internet.

The network has become the new rendezvous of paedophiles, a place where they can obtain addresses, arrange meetings and watch porn films in which the 'actors' - and victims - are children.

Access to illegal material of this kind was initially mainly via 'newsgroups', informal discussion groups bringing together personal contributions (in the form of text, pictures, etc), which could be read by anyone. Some Internet resources can also be used by paedophiles in order to make contact with minors and arrange meetings. The first control measures taken led to a reduction in the number of such newsgroups. However, pornographic images of children continue to be circulated on the network, particularly via email and with the use of passwords, which makes effective monitoring impossible.

Some of these pornographic images are even animated or generated by synthesis (virtual pornography). While the former deal with living beings, the latter ultimately encourage child prostitution.

The Internet is a medium the structure of which makes it difficult to control. It is highly fluid, knows no frontiers and involves complete freedom of expression.

In this context, several questions arise:

- how can we ensure that existing bans on the production, processing, distribution and possession of child pornography transmitted via the Internet are enforced?
- how, in particular, is the liability of the various operators and parties involved (issuers, users and Internet access providers) to be determined and how are offenders to be identified and prosecuted?
- how are minors to be protected against obtaining access via this network to illegal material which could have a seriously harmful effect on their physical and psychological development?
- how can other forms of abuse, such as the harassment or seduction of minors, via these networks and services be prevented?

2. THE RESPONSE OF THE COMMUNITY INSTITUTIONS

(a) The Commission

In its aide-memoire of 25 September 1996 on the European Union's contribution to reinforcing the prevention of the sexual abuse and exploitation of children, the Commission announced four initiatives, in the light of the decisions taken in Stockholm:

- Green Paper on the protection of minors and human dignity in audiovisual and information services¹¹,
- Communication on illegal and harmful content on the Internet¹²,
- Communication on trafficking in women for the purpose of sexual exploitation¹³,
- Communication on combating child sex tourism¹⁴.

These initiatives, which were favourably received, were followed by European Parliament and Council Decision No 276/1999/EC of 25 January 1999 for a multiannual Community action plan on promoting safe use of the Internet¹⁵.

(b) The Council

In response to an initiative from Belgium, the Council adopted two joint actions on 29 November 1996 on the basis of Article K.3 of the Treaty on European Union:

- Joint Action establishing an incentive and exchange programme for persons responsible for combating trade in human beings and the sexual exploitation of children¹⁶,
- Joint Action concerning the creation and maintenance of a directory of specialised competences, skills and expertise in the fight against international organised crime¹⁷,

In response to an initiative from the Republic of Ireland, another joint action was adopted by the Council on 16 December 1996, extending the mandate given to the Europol Drugs Unit to include trafficking in human beings¹⁸.

¹¹ COM(96)0483

¹² COM(96)0487

¹³ COM(96)0567

¹⁴ COM(96)0547

¹⁵ OJ L 33, 6.2.1999

¹⁶ OJ L 322, 12.12.1996, p. 7

¹⁷ OJ L 342, 31.12.1996, p. 2

¹⁸ OJ L 342, 31.12.1996, p. 4

On 24 January 1997 the Council adopted another joint action on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children¹⁹.

(c) The European Parliament

In its resolution of 19 September 1996 on minors who are victims of violence²⁰, Parliament called on the European Union to review the effectiveness of its action to protect children and to implement, at Union level, the action programme agreed at the Stockholm Congress.

On 12 December 1996 Parliament adopted two other resolutions concerning the protection of minors²¹ and the adoption of minors²².

Furthermore, Parliament has supported all of the above-mentioned Commission initiatives, in the following resolutions of:

- 24 April 1997 on the Commission communication on illegal and harmful content on the Internet²³,
- 6 November 1997 on the Commission communication on combating child sex tourism and the aide-memoire on the European Union's contribution to reinforcing the prevention of the sexual abuse and exploitation of children²⁴,
- 13 May 1998 on the proposal for a Council Recommendation concerning the protection of minors and human dignity in audiovisual and information services²⁵,
- 2 July 1998 and 17 November 1998 on the Commission proposal for a Council Decision adopting a multiannual Community action plan on promoting safe use of the Internet²⁶.

The latter proposal was adopted in European Parliament and Council Decision No 276/1999/EC of 25 January 1999²⁷.

¹⁹ OJ L 63, 4.3.1997, p. 2

²⁰ OJ C 320, 28.10.1996, p. 190

²¹ OJ C 20, 20.1.1997, p. 170

²² OJ C 20, 20.1.1997, p. 178

²³ OJ C 150, 19.5.1997, p. 38

²⁴ OJ C 358, 24.11.1997, p. 37

²⁵ OJ C 167, 1.6.1998, p. 128

²⁶ OJ C 226, 20.7.1998, p. 33 and minutes of 17.11.1998

²⁷ OJ L 33, 6.2.1999, p. 1

3. THE DRAFT JOINT ACTION

The initiative of the Republic of Austria with a view to adopting a Council decision to combat child pornography on the Internet replaces (owing to the entry into force of the Treaty of Amsterdam) the draft joint action which was presented in November 1998; it is virtually identical to the latter. In this way, the Member States are to be required to take measures to combat child pornography on the Internet.

Regrettably, this joint action does not encourage the Member States to harmonise certain concepts in their criminal legislation (in particular, the age up to which an individual may be deemed to be a child with regard to sexual exploitation) and to define as criminal offences:

- (a) paedophile acts,
- (b) child pornography,
- (c) the sexual exploitation of children,
- (d) failure to inform the judicial authorities of paedophile acts or child abuse, or serious indications of such acts or abuse, of which a person may have become aware, as failure to assist a person in danger,

or to provide for comparable penalties in their respective criminal legislation.

Furthermore, the Member States should, under their respective legislation, prohibit incitement to paedophile acts and child pornography whatever the means of communication used. Any offence committed on their territory by the issuer, the user or the provider, whether via electronic mail, newsgroups or web sites, would this be subject to criminal proceedings.

A joint action to strengthen judicial cooperation in the face of crimes committed against children would be welcome.

In order to combat child pornography on the Internet, it will also be necessary for:

- the network's professionals to adopt a code of good conduct;
- effective filtering systems, such as PICS (Platform for Internet Content Selection) to be implemented;
- special telephone hotlines to be set up to for reporting any messages of an illegal nature encountered on the Internet.

Given that the Internet is a world-wide phenomenon, the Member States should strengthen cooperation to combat child pornography with third countries, in particular applicants for accession (which, in some cases, are existing or potential sources of the commercial sexual exploitation of children), as well as with international organisations, including the Council of Europe and the United Nations, and specialist NGOs.

Since the entry into force of the Treaty of Amsterdam, the European Union has had Community instruments (Articles 29 to 42 of the Treaty of Amsterdam) at its disposal for combating child pornography on the Internet.

Although the Austrian initiative is purely declaratory in nature, a substantial increase in the effectiveness of action to combat this form of criminality can meanwhile be discerned.

On the one hand, public awareness has increased, and on the other hand, there has also been more training of law enforcement officials, an opening up towards industry and enhanced cooperation with providers.

To conclude, we would stress the fact that the existence of child pornography on the Internet is not merely the result of perversion on the part of certain individuals but above all the consequence of the extreme poverty suffered by large numbers of children. The widening of economic disparities, the rapid growth of mass tourism, breakthroughs in new technologies, the increasingly pervasive influence of the market and the temptations which it presents to everyone, including the very poorest in society, favour the development of the commercial sexual exploitation of children.

With regard to child pornography on the Internet, we have already discussed ways of remedying the problem. However, it should not be forgotten that, in addition to taking technical, legal, penal and police measures, there is a need to combat poverty, ignorance and prejudice, improving the image which some societies have of their children as well as the self-image of children in those societies. Victims must be helped and reintegrated into society, as no modern society will preserve its dignity if it is incapable of protecting its children against these extremely serious crimes.

22 February 2000

Opinion of the Committee on Legal Affairs and the Internal Market

For the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

on the initiative of the Republic of Austria with a view to adopting a Council Decision to combat child pornography on the Internet (10317/1999 – C5-0318/99 – 1999/0822(CNS))

Draftsman: Charlotte Cederschiöld

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Charlotte Cederschiöld draftsman at its meeting of 11 January 2000.

It considered the draft opinion at its meetings of 1 and 21 February 2000.

At the last meeting it adopted the amendments below unanimously.

The following were present for the vote: Willi Rothley; acting chairman; Rainer Wieland, second vice-chairman; Charlotte Cederschiöld, draftsman; Maria Berger, Jean-Maurice Dehousse, Janelly Fourtou, Marie-Françoise Garaud, Evelyne Gebhardt, Gerhard Hager, Malcolm Harbour, Heidi Anneli Hautala, The Lord Inglewood, Ioannis Koukiadis, Kurt Lechner, Donald Neil MacCormick, Véronique Mathieu, Hans-Peter Mayer, Manuel Medina Ortega, Claude Moraes, Astrid Thors, Feleknas Uca, Diana Paulette Wallis, Joachim Wuermeling and Stefano Zappalà.

BACKGROUND/GENERAL COMMENTS

INTRODUCTION

The World Congress on the commercial sexual exploitation of children held in Stockholm from 27 to 31 August 1996 and the UNESCO Conference, which took place in Paris on 18 and 19 January 1999, denounced the proliferation of images and text involving child pornography on the Internet.

In 1996, the European Commission approved:

- a Green Paper on the protection of minors and human dignity in audiovisual and

information services²⁸, followed by a proposal for a Council Recommendation concerning the protection of minors and human dignity in audiovisual and information services,

- a Communication on illegal and harmful content on the Internet²⁹, which gives policy options for immediate action to fight against harmful and illegal content on the Internet, and
- a Communication on combating child sex tourism³⁰.

The European Commission documents followed the resolution adopted by the Telecommunications Council of Ministers on September 27, 1996, on preventing the dissemination of illegal content on the Internet, especially child pornography.

The Communication and the Green Paper were followed by the Report of the European Commission Working Party on illegal and harmful content on the Internet in early November 1996. According to the Working Party Report a self-regulatory system should include a Code of Conduct for the ISPs, a hot-line for complaints from the public, an independent self-regulatory body, including representatives of industry and users, to advise on whether or not a breach of the Code of Conduct has occurred.

The European Parliament adopted many resolutions on the protection of children: a resolution on a European Charter of Children's Rights of 21 September 1992, a resolution on minors who are victims of violence of 19 September 1996³¹, a resolution on measures to protect minors in the European Union of 12 December 1996³² and resolutions of 24 October 1997, 13 May 1998, 2 July 1998, and 17 November 1998³³.

In its resolution of 19 September 1996 on minors who are victims of violence, Parliament called on the European Union to review the effectiveness of its action to protect children and to implement, at Union level, the action programme agreed at the Stockholm Congress.

Furthermore, the Parliament supported all of the above-mentioned Commission initiatives (resolutions of, respectively, 13 May 1998, 24 April 1997 and 6 November 1997).

These initiatives were followed by a proposal for a multiannual Community action plan on promoting safe use of the Internet³⁴. This action plan, on which Parliament gave a favourable opinion on 2 July 1998 and 17 November 1998³⁵, was adopted by the Council on 25 January 1999³⁶.

²⁸ COM(96)0483

²⁹ COM(96)0487

³⁰ COM(96)0547

³¹ OJ C 320, 28.10.1996, p. 190

³² Legal Affairs Committee initiative report A4-0393/96, Rapporteur Mrs Zimmermann

³³ Reports A4-0227/97, A4-0153/98, A-40234/98, and A4-0377/98, respectively

³⁴ COM(1997)0582, OJ C 48, 13.2.1998, p., 8

³⁵ A4-0234/1998 and A4-0377/1998

³⁶ Decision No 276/1999/EC of the European Parliament and of the Council of 25 January

Another initiative was the joint action establishing an incentive and exchange programme for persons responsible for combating trade in human beings and the sexual exploitation of children³⁷ which the Council adopted on 29 November 1996 pursuant to Article K.3 of the Treaty on European Union, in response to an initiative from Belgium.

DRAFT JOINT ACTION OF NOVEMBER 1998

On 20 November 1998 the Council adopted a draft joint action pursuant to Article K.3 of the Treaty on European Union, to combat child pornography on the Internet³⁸.

The Parliament approved the draft joint action on 13 April 1999, with amendments³⁹.

THE INITIATIVE OF THE REPUBLIC OF AUSTRIA

The initiative of the Republic of Austria with a view to adopting a Council Decision to combat child pornography on the Internet replaces (because of the entry into force of the Treaty of Amsterdam) and is almost identical with the draft joint action presented in November 1998 as it intends to oblige the Member States to adopt measures aimed at combating child pornography on the Internet by

- encouraging Internet users to inform the authorities on suspected distribution of child pornography material on the Internet,
- proposing the setting up of specialised units in the Member States,
- facilitating cooperation between Member States' authorities as well as between Internet users and law enforcement authorities,
- placing Internet providers under a duty (instead of simply prompting them as set out by the draft joint action) to take measures in order to stop distribution of child pornography material and to advise the authorities,
- placing Internet providers under a duty to set up their own control systems to prevent and detect the distribution of child pornography material,
- encouraging the production of filters and other technical means to prevent and detect the distribution of child pornography material, and
- evaluating the effectiveness of certain measures.

1999, OJ L 33, 6.2.1999, p. 1

³⁷ OJ L 322, 12.12.1996, p. 7

³⁸ (10850/5/98 - C4-0674/98 - 98/0917(CNS)).

³⁹ A4-0141/99

LEGAL BASIS

The proposal is based on Article 34(2)(c) TEU which excludes “any approximation of the laws and regulations of the Member States”.

In contrast, Article 34(2)(b) allows the Council to “adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States”.

The current proposal stipulates, *inter alia*, that

- the Member States shall *examine* the measures which would impose a number of obligations on Internet providers (Article 3), and
- the Member States shall verify whether their criminal procedural law should be changed (Article 4).

These provisions would lead to approximation of the laws and regulations of the Member States.

Article 34(2)(b) TEU would therefore be a more appropriate basis for the proposal.

COMMENTS ON THE TEXT OF THE INITIATIVE

As for the draft joint action, one might regret the lack of commitments set out in the proposed text, the wording used being extremely timid.

This initiative is nevertheless welcome as combating child pornography represents an absolute necessity. There can be no understanding of the special problem of child pornography until there is understanding of the special way in which child pornography is child abuse. According to specialists, the increased demand for child pornography directly translates into an increased number of sexually abused children. The production of child pornography is itself an act of child molestation or sexual abuse⁴⁰.

Some points are nevertheless of issue:

EUROPOL

Europol is not competent for cases of child pornography. It would then be necessary to provide Europol with this competence through an amendment to the Europol convention. This was also highlighted by Mr Crowley in his opinion on the draft joint action.

INTERNET PROVIDERS

The current wording of Article 3(d) aims at requiring the Internet providers to “set up their own control systems for combating the production, processing, distribution and possession of

⁴⁰ Akdeniz Y 'The Regulation of Pornography and Child Pornography on the Internet', [1997 \(1\) The Journal of Information, Law and Technology \(JILT\)](#).
<http://elj.warwick.ac.uk/jilt/internet/97_1akdz/>

child pornography material”.

Article 3 of European Parliament and Council Decision N° 276/1999/CE of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks⁴¹ requires industry self-regulation on this matter.

The Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity⁴² also recommended 'voluntary national frameworks', 'self-regulation', promotion of 'technological developments', 'codes of conduct', etc.

In the meantime, Article 15(1) of the proposal for a Directive of the European Parliament and of the Council on certain legal aspects of Information Society services, in particular electronic commerce, in the internal market, approved at first reading by the European Parliament⁴³, provides that the Member States shall not impose a general obligation on providers, when providing the services such as mere conduit, caching and hosting to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

Article 3(d) as currently drafted imposes a general obligation to monitor which contradicts the instruments that have been chosen under former regulations either actual or currently proposed.

PRE-EXISTING LEGAL CONTEXT

The Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children⁴⁴, provides an exhaustive set of rules as to how sexual exploitation of children ought to be fought but is not worded in very binding terms and, therefore, did not lead to many concrete results.

We can also recall the Resolution of 17 January 1995 on the lawful interception of telecommunications⁴⁵ and the already mentioned Recommendation 98/560/EC of 24 September 1998.

We have mentioned the European Parliament and Council Decision adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks adopted on 25 January 1999⁴⁶, which provides EUR 25 million over four years for the following objectives:

⁴¹ OJ L 33, 6.2.1999, p.1.

⁴² Celex 398x0560

⁴³ A4-0248/1999, OJ C 279, 1. 10 1999, p. 8

⁴⁴ Celex 497x0154

⁴⁵ Celex 496y1104(01)

⁴⁶ Decision 276/1999/EC, OJ L 33, 6.2.1999, p.1.

- promotion of industry self-regulation
- encouraging filtering tools and rating systems
- increasing awareness among users
- assessment of legal implications
- international cooperation

Furthermore, we recommend some actions set out by the current initiative to be implemented within the framework of the multiannual Community action plan, which has the necessary budget to proceed with such implementation.

DEFINITION OF CHILD PORNOGRAPHY MATERIAL

The proposal does not contain any definition of child pornography material. Such definition should be introduced, as the Member States must agree on the type of material that they must work together to combat. The question of the definition of the age of a child, as Amendment 7 of the European Parliament requested to be introduced in the draft joint action, is more problematic. The European Parliament determined such age as 15 years old, while some Member States' legislation considers 16 years old as being the limit. Member States should try to adopt a common definition.

The civil liberties committee agreed on the age of 16 in the last parliamentary term. The age agreed on ought to be as high as possible, as a higher age better protects the children. The age of 18 is probably a realistic age to agree on as this is the age used by the UN to define a child.

Pseudo-photographs are created by the use of computers only and without any physical harm to children. Such pseudo-photographs must be included in the definition, as in the 1978 UK Protection of Children Act as amended 84 (4) of the Criminal Justice and Public Order Act 1994.

Pseudo-photographs are technically photographs, but they are created by computer software such as MS Paintbrush by using more than one picture.

Specialists believe that the creators or possessors of pseudo-photographs will end up abusing children. Furthermore, inclusion of pseudo-photographs eliminates a loophole giving rise to future problems in the prosecution of such cases because it may be very difficult to separate a pseudo-photograph from a real photograph⁴⁷.

⁴⁷ See Akdeniz Y 'The Regulation of Pornography and Child Pornography on the Internet', [1997 \(1\) The Journal of Information, Law and Technology \(JILT\)](http://elj.warwick.ac.uk/jilt/internet/97_1akdz/).
<http://elj.warwick.ac.uk/jilt/internet/97_1akdz/>

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Council⁴⁸

Amendments by Parliament

(Amendment 1)
First citation

Having regard to the Treaty on European Union, and in particular Article 34(2)(c) thereof,

Having regard to the Treaty on European Union, and in particular Article 34(2)(b) thereof.

Justification:

Article 34(2) (c) TEU. Such Article 32 (2) excludes “any approximation of the laws and regulations of the Member States”, while Article 34(2) (b) allows the Council to “adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States”. As the Decision would lead to approximation of the laws and regulations of the Member States, Article 34(2) (b) TEU must be chosen as the legal basis.

(Amendment 2)
Article 1(1) (new)

1. Each Member State shall ensure that effective measures are taken in order to prevent child pornography on the Internet and to protect the users against such material through the use of technical measures of protection, provision for rehabilitation of offenders and support to victims and through ensuring that the production, processing, supplying and distribution in connection with the Internet and the possession, via the Internet, of child pornography material and abetting or inciting such behaviour is subject to effective, appropriate and deterrent

⁴⁸ OJ C 362, 16.12.1999, p. 8

penalties under criminal law.

(Amendment 3)
Article 1(2) (new)

2. For the purposes of this Decision, 'child pornography material' means any material in which children are used as performers for its production and which shows sexual acts on or with children, whatever the support of such material, such as photographs, pseudo-photographs, videos, drawings, etc.

Justification:

A definition of child pornography material is needed as the Member States must agree on the type of material that they must combat jointly.

(Amendment 4)
Article 1(1)

1. In order to intensify measures to prevent and combat the production, processing, distribution and possession of child pornography material and to promote the effective investigation and prosecution of offences in this area, Member States will take the necessary measures to encourage Internet users to inform law enforcement authorities, either directly or indirectly, on suspected distribution of child pornography material on the Internet, if they come across such material. Internet users shall be made aware of ways to make contact with law enforcement authorities or entities which have privileged links with law enforcement authorities, to enable such authorities to fulfil their task of preventing and combating child pornography on the

1. Within the framework of Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks and in order to intensify measures to prevent and combat the production, processing, distribution and possession of child pornography material and to promote the effective investigation and prosecution of offences in this area, Member States will take the necessary measures to encourage Internet users to inform law enforcement authorities, either directly or indirectly, on suspected distribution of child pornography material on the Internet, if they come across such

Internet.

material. Internet users shall be made aware of ways to make contact with law enforcement authorities or entities which have privileged links with law enforcement authorities, to enable such authorities to fulfil their task of preventing and combating child pornography on the Internet.

Justification:

The measures set out in this article are already set out in the Decision No 276/1999/EC of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks, which has the budget necessary for their implementation.

(Amendment 5)
Article 1(2)

2. Where necessary, and taking account of the administrative structure of each Member State, measures for the promotion of effective investigation and prosecution of offences in this area could be the setting up of specialised units within law enforcement authorities with the necessary expertise and resources to be able to deal swiftly with information on suspected production, processing, distribution and possession of child pornography

2. To promote effective investigation and prosecution of offences in this area, the Member States shall set up specialised units within law enforcement authorities with the necessary expertise and resources to be able to investigate and deal swiftly with information on suspected production, processing, distribution and possession of child pornography.

Justification:

Should the Union adopt a decision on combating child pornography on the Internet, strict commitments must be given instead of vague and timid declarations.

(Amendment 6)
Article 1(4) (new)

4. Member States shall endeavour to engage in constructive dialogue in order to agree on a common definition of the age below which a human being is considered to be a child with the objective of ensuring comprehensive protection for children by trying to fix such age at 18 years old.

(Amendment 7)
Article 3, introduction

Member States shall engage in constructive dialogue with industry and examine appropriate measures, of a voluntary or a legally binding nature, to eliminate child pornography on the Internet. In particular, Member States shall exchange experiences on the effectiveness of any measures they have taken to eliminate child pornography on the Internet. In this context, they shall examine the following measures, which would place Internet providers under a duty:

Member States shall engage in constructive dialogue with industry and take appropriate measures, of a voluntary or a legally binding nature, to eliminate child pornography on the Internet. In particular, Member States shall exchange experiences on the effectiveness of any measures they have taken to eliminate child pornography on the Internet. In this context, they shall take the following measures prompting Internet providers, within the framework of Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks:

Justification:

The pre-existing legal framework encourages the self-regulation approach with ISPs and the Decision No 276/1999/EC of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks has received the budget necessary for the promotion of such an option.

(Amendment 8)

Article 6(1)

1. The Council shall examine the extent to which Member States have fulfilled their obligations pursuant to Joint Action 97/154/JHA and the extent to which the measures proposed in this Decision have proved effective.

1. The Council shall examine the extent to which Member States have fulfilled their obligations pursuant to Joint Action 97/154/JHA and the extent to which the measures set out in this Decision have proved effective.

Justification:

As we request the Decision to be more binding than the proposed text, the wording of Article 6(1) must be adapted accordingly.