

# The 17-year-old Child

## An Absurdity of the Late 20<sup>th</sup> Century

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No language in the world ever used the term “child” for persons beyond their early teens. It was the Convention on the Rights of the Child of 1989 which first did away with the distinction between children and adolescents and labelled all minors under 18 “child”.

The European Commission took this concept over into the criminal law area when it proposed an EU-Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography in December 2000. This framework-decision will oblige all the member states of the European Union to create certain sexual offences which would go far beyond what is known in that area in any European state today.

The proposal defines as “child” each person up to its 18<sup>th</sup> birthday. It does not differentiate in any way between various age groups, i.e. it does not distinguish between children on the one hand and adolescents on the other. The proposal treats a 17 1/2 year old young man in the same way as a 5 year old child.

This implementation of the same criteria for sexual protection and abuse to a five-year-old child and a 17-year-old adolescent leads to absurd and dangerous consequences.

The Commission in its proposal did not set a minimum age limit for consensual sexual activity, despite the fact that all the EU member states as well as all of the other European and non-European countries have determined such age limits, which limits, as we heard this morning, are nowhere set under 12 years of age and, in most cases at 14 or 15. According to the proposed framework decision, members will be obliged to outlaw sexual activity with children only in the context of pornography, prostitution, violence and inducement. The draft does not cover sexual activity with a child outside the area of pornography and prostitution

and committed without violence and without inducing the child. This deficiency in protection appears inconceivable, in that it would leave it open to the EU member states to even decriminalize paedophilia, to the extent that no inducement or violence and no involvement into pornography or prostitution of the child takes place.

The draft also merely requires the member states “...to *consider* prohibiting natural persons from exercising...activities involving supervision of children when they have been convicted for one of the criminal offences provided for...” (Art. 5 par. 5). That this is not an *absolute requirement* is perplexing, indeed. As is the fact that only *private* – and not *public* – bodies can be held responsible for their offences (Art. 1 lit. d, Art. 6 & 7).

These insufficient and half-hearted measures proposed for the protection of children stand in striking opposition to the near draconian limitations prescribed for the sex lives of adolescents. Both being the result of the same mistake: the equation of children with adolescents.

The Commission defines as “child”-pornography all visual depictions of explicit sexual conduct which (directly or indirectly) involves a person under 18. Explicit sexual conduct thereby includes even “lascivious exhibition” not only of the genitals but also of the mere pubic area. This phrase, as the whole definition of “child”-pornography, has been literally taken over from § 2256 of the U.S.-Federal Criminal Code. How extensive these phrases are can be inferred from the development in the U.S.. In 1994 the Congress in reaction to a Supreme Court case expressly declared that in enacting this provision it was and is the intent of Congress that “the scope of ‘exhibition of the genitals or pubic area’ is not limited to nude exhibitions or exhibitions in which outlines of those areas were discernible through clothing, and that for videotapes falling under this law it is not afforded that the genitals or the pubic area are visible in the tapes and that the minors pose or act lasciviously. So the phrase now taken over into European law covers all kinds of allegedly erotic depictions of persons under 18, even if the young man or woman on the picture is fully clothed.

According to the Commission’s proposal also fictitious depictions are covered, as for instance comic strips, drawings and paintings, even if totally unrealistic. In addition it shall not be necessary to establish the true age of the actors; it shall suffice that for the viewer they appear to be under 18. Given the very diverse views in estimating age and considered that according

to this wide variety nearly every person of 18, 19 or in its early twenties can be judged to be possibly under 18, a good deal of standard pornography and standard erotic material will face prosecution under this provision.

The Commission's proposal aims not only to a massive extension of sexual offences in the area of pornography. It obliges member states also to criminalize sexual contacts with persons under 18 not just against money or other items of economic value but also in exchange for "other (non-economic) forms of remuneration", whatever that might be. In addition even "inducement" of young man and women under 18 to sexual acts should become a criminal offence. The Commission gives no reason whatsoever for this proposed criminalization of sexual contacts of adolescents which are not initiated by themselves but by their partners.

The proposal also contains no exception for juveniles, so even adolescents themselves can be perpetrators of these offences. And the penalties suggested by the Commission are draconian: the maximum penalty must be at least four years incarceration, with no differentiation between juvenile and adult offenders. So as victims adolescents are treated as children, and as offenders they are treated as adults.

According to the proposal of the Commission in all the member states of the European Union a 15-year-old would be liable to up to four years incarceration (at the minimum) for making a picture of his girl-friend of same age in tight bikinis exposing (not the genitals but) the "pubic area" and posing erotically (or in the words of the law: "lasciviously"). The same is true for a 14-year-old who, in private, draws a young beauty naked and in "lascivious" poses. As well it is for 17-year-olds, who exchange intimate pictures of themselves, or watch each other via live cams on the internet "lasciviously" exposing their "pubic area" (or even their genitals), not to mention watching each other during sexual activity (so called "webcam-sex"). Also adolescents asking other adolescents for sex would face prosecution, as they "induce" a "child" into sex. That would be the more so if they offer any reward for being accepted.

The European Parliament welcomed the proposal by a vast majority of 446 against 16 votes; and it even called for extensions as for instance the criminalization of "negligent" production of "child"-pornography and the criminalization of audiovisual, textual or written material advocating sexual contacts with persons under 18.

Among experts the proposal however caused widespread criticism. In particular the World Association for Sexology (WAS), the Austrian and all three German sexological associations as well as the International and the German Lesbian and Gay Association expressed their opposition to such a wide-ranging criminalization of juvenile sexuality. The German Society for Sex Research even spoke of “moral colonialism” as the definition of “child”-pornography has been literally taken over from § 2256 of the U.S.-Federal Criminal Code.

The associations called for respect of adolescents’ sexual autonomy by lowering the age limit of 18 and, above all, to differentiate between children and adolescents. They asked for a complete deletion of the offence of “inducement” of a person under 18 into sex and the deletion of the offence of sexual contact against “non-economic” remuneration. In addition they asked to bear in mind that giving a reward is not necessarily prostitution, for what reason Denmark felt bound to formally declare that it will apply the provision for contacts with prostitutes only. The associations suggested to consider also that criminal investigations whether a reward has been causative for an intimate contact or not would do more harm than good to the juveniles involved. Finally even in the case of real youth-prostitution criminalization would remarkably impair social-work with young prostitutes, which turned out as the only effective mean of support and relief for them.

These concerns, also raised by some member-states, to some extent have been taken into account during the deliberations in the EU-Council, which finally decides on the frame-work-decision. The offence of “inducement” of under 18-year-olds into sexual contacts and the reference to non-economic forms of remuneration have been deleted. And the offence of sexual contact against remuneration has been changed so that the remuneration or consideration has to be given as payment in order to induce a ‘child’ (that is a person under 18) to engage in sexual activity. This wording seems to exclude from the offence cases where the juvenile initiates the contact or readily agrees to a respective offer; also this wording however could also be interpreted in the opposite direction. In any way the latest published version of the text, for reasons not known, returned back to the wording “remuneration or consideration given as payment in exchange for the ‘child’ engaging in sexual activities”, which wording again covers all cases of sex against remuneration.

As regards pornography certain exceptions have been established, which the member-states can, but need not, apply.

While under the Commission's proposal it was always possible to avoid punishment by proving that the person depicted in fact was over 18 at the time the picture was taken, the Council changed that to a mere option for the member-states. They can also establish that the mere impression that a person on a picture looks like a person under 18 suffices for conviction, and that a younger look and impression alone constitutes the offence. Several member-states have already declared that they will follow this way and not make use of the exception. That despite the fact that the U.S.-Supreme Court in a recent judgment held that the criminalization of fictitious or virtual (child-)pornography violates fundamental rights. As the definition of "child"-pornography has been taken over from the U.S.-Federal Criminal Code one might have expected that such a judgment of fundamental importance by the Supreme Court would matter. It did not.

Another exception the Council introduced is that the member-states can (but again need not) exclude from criminal liability the production and possession of images of persons of the age of sexual consent or older with their agreement and solely for their own private use. This exception turns out as far too narrow. It does exempt from criminal liability just production and possession which is solely for the use of the adolescent depicted. So it seems highly questionable whether other persons than mere photographers and depositaries without any interest in the images on their own could benefit from this exception. So for instance the 15-year-old who possesses a "lascivious" picture of his girl-friend for joint (!) use with her; or an (even also himself adolescent) "Webcamsex-Partner" of a juvenile on whose computer the image of his juvenile partner is displayed primarily for his use, and only secondarily for the use of the juvenile partner who sends the picture mainly in exchange to see the other one himself over the cam. In all these cases the image is possessed or produced not solely (!) for the use of the depicted person. Definitely outside of the scope of the exception is an adolescent who hands over or even just shows a "lascivious" picture of him- or herself to another person, a 15 or 16-year-old doing so is liable to harsh sentences for producing, making accessible and distributing "child"-pornography. Also outside of the scope of the exception is a couple of two 17-year-olds exchanging intimate pictures of themselves, let alone if they show it to third persons. Italy still resists even this extremely narrow exception.

The third exception regards fictitious or virtual images. The Council (different than the Commission) restricted the scope of the frame-work-decision to fictitious images, which are

“realistic”, and stipulated that the member-states could (but again need not) exclude from liability production and possession for the own private use of the producer. Also here the judgment of the U.S.-Supreme Court had no, or just a minor, impact. The 14-year-old mentioned before, may now (if his member-state allows for that exception) draw the naked young beauty in “lascivious poses”, but he becomes liable to prosecution and harsh sentences for making accessible “child”-pornography if he shows this drawing to a friend.

All this seems absurd. As it seems absurd to treat 17-year-olds as “children” and to criminalize a person for acquiring or possessing an erotic (“lascivious”) picture of a 17 1/2 year old fully developed young man or of a 17 1/2 year old fully developed young woman.

To make it utmost clear. The fight against sexual exploitation of children is extremely important. In this respect the upcoming frame-work-decision is to be welcomed. As shown at the beginning, it even dos not go far enough in this area. The decision however goes very far beyond combating child-pornography and child-prostitution and infringes deeply into people’s sex lives. Insofar it has to be criticized and rejected.

Initially six member-states raised concerns regarding the indiscriminate age-limit of 18 years. It is difficult to understand why they gave in.