ADOLESCENTS & YOUNG ADULTS ARE NO CHILDREN

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Declaration by German speaking sexological associations on the pending EU-Childpornography-Directive

Proposed 2001 by the EU Commission, the European Council in 2004 passed the „Framework Decision on Combating Child Pornography and Sexual Exploitation of children (2004/68/JI). Based on the Lisbon EU Treaty, in force since 1st January 2010, the EU Commission proposed to replace it by a directive with the same title, but toughened in several aspects (COM 2010-94). The 27 justice ministers have already approved. Only the EU parliament can – and should! – object.

The new EU-directive not only provides for the blocking of internet-sites but also obliges all 27 member-states to criminalise erotic depictions of adults. Not only pornography is banned but any kind of sexually connotated pictures, making no exception for arts or science. Movies like "The Tin Drum" or common coming-of-age movies, even the new Harry-Potter movie, could be criminalised. Even mere private possession of such films will be sanctioned and everybody will be obliged to report such "crimes". These absurd measures endanger effective combat of real child-pornography.

Within 2 years after the Directive taking effect all member states must have implemented the new offences. Also the German Minister of Justice has approved, even though Germany's current coalition had agreed to the necessity of differentiating between children and youths.

The Commission initiative is based upon the claim that the former Framework Decision proved insufficient: some of the member states allegedly did not follow suit, new kinds of abuse by information technology were inadequately considered, lacks of transnational law enforcement and prevention.

Action on the level of the EU is to be welcomed. But a directive providing for nothing but toughening criminal law without addressing the socio-psychological causes is an example of senseless symbolic policy. Even more than the Framework Decision before the Directive will have unintended and counter-productive side-effects. Here are the reasons:

1. Politics by Symbols & Populism

Art. 24 of the EU-Charter of Fundamental Rights obliges all member states to guarantuee the protection of children. Legislation in force in the member-states as well as the requirements established by conventions elaborated in the framework of the Council of Europe and the United Nations are totally sufficient in this respect. EU-legislation should secure unionwide coordinated implementation of these requirements. What is vital in all member-states is effective law enforcement which may indeed vary significantly, depending on the practice of social authorities, institutions of youth protection, police and justice systems. The quality

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of those systems in turn depends entirely on equipment, personnel, training etc. – which parameters cannot be influenced directly by the EU. Only substantial and adequately complex measures in the framework of specific national social structures and legal cultures can be promising. Strict normative equalisation of 27 nations only leads to cultural distortions and informal resistance. Contrary to what its recital no. 5 claims, the Directive does not provide for a „comprehensive concept" but rather violates fundamental principles of Union law, namely subsidiarity, commensurateness and proportionality. Toughening criminal law on the books instead of addressing the worsening socio-economic situation and other social conditions of child abuse: this is politics by symbols and mere populism. If passed, the Directive will violate fundamental legislative and criminal law principles including the supreme constitutional principles of commensurateness and proportionality.

2. False Assumptions

It appears symptomatic that in drafting the Directive the EU-Commission explicitly waived expert knowledge. Their empirical assumptions are accordingly vague and partially wrong. These assumptions form no apt and legitimate basis for such drastic reductions of civil liberties and for the elimination of specific national/cultural scopes of discretion and leeways. In fact the Directive represents a latent totalitarian strategy of criminalisation in dubio contra libertate: „When in doubt decide against freedom"! It is empirically wrong to allege that child abuse will statistically increase. This assumption ignores criminological knowledge that such increase results entirely from increased social attention and increased readiness to report. Certainly vain is the assumption that in this area an increase in punishment threats – as suggested in recital no. 6 – would lead to deterrence of perpetrators.

3. Toughened Criminal Offences

The problems involved with the Framework Decision will substantially increase with the Directive. One main problem lies in the definition of "child" as imported from the UN Convention on the Rights of the Child – which in turn was largely influenced by the USA. Eighteen as the age of "protection" had been severely criticised by experts already back in 2004: Adolescents of seventeen are treated on the same footing as five year old children. Due to such criticism, especially from sexology, the Framework Decision of 2004 finally provided for three exemptions, three ways for member states to opt out from absolute criminalisation: adult actors, production and possession of fictitious (not real) depictions, if there is no danger of dissemination, and production and possession of depictions of youths above the national age of sexual consent (e.g. age 14 in Germany and Austria) with the consent of the juvenile and for his/her own personal use (for instance within a partnership). Germany and Austria made use of these exceptions. The draft Directive completely repeals them, and provides no reasons for this. In future a fourteen year old youth who, in his privacy, sketches a seventeen year old beauty must be subjected to criminal punishment in all 27 member-states, just as much as a sixteen year old generating a virtual image of a naked peer on her PC.

The new wording of the exception for consensual acts of youths sexually of age (Art. 8) is so vague that it is simply useless for effective filtering out of cases not requiring criminal law intervention. The clause requires that partners are "close in age and degree of psychological and physical development or maturity". The counter-exception of „any involved abuse" makes this exception practically obsolete. A nineteen year old young woman practising

webcam sex with a seventeen year old youth or an eighteen year old man photographing his 16 year old wife in a curt bikini on a beach could now be punished, if - despite clear consent – law enforcement construes an inequality in "psychological and physical development or maturity". In fact the sexual life of young people will be subjected to constant suspicion of criminality. Judicial discretion is granted to an extremely wide extent, and it will very likely be influenced by changeable moral standards. Rather than providing legal certainty the Directive paves the way for moralising arbitrariness.

One can accept that commercial and public production, distribution and making available of depictions of sexual acts are even criminalised when adolescents sexually of age (over the national age of consent) are involved and the depicted acts therefore are basically legal (Art. 2 lit.. a). Intrusion however into the privacy of consensual intimate relations and the criminalisation of private possession of such depictions (even of adults) violates fundamental rights. Above all, the definition of „pornography" (Art. 2 lit. b) is much too vague and needs to be legally specified. According to the definition provided by the Directive „any material that visually depicts a child engaged in real or simulated sexually explicit conduct" or „any depiction of the sexual organs of a child for primarily sexual purposes" calls for punishment. The leeway for arbitrary interpretation of these terms is too large, i.e. when punishability is now extended to „any person appearing to be a child" or even „realistic images". So even depictions of adults and works of art or comics will have to be criminalised. And the basic criminal law principles of intentionality and in dubio pro reo have been dropped.

Also the section on "Sexual Exploitation" (Art. 4) appears subject to arbitrary interpretation by the police and the justice systems, thus violating the universal constitutional principle of certainty in criminal law. This applies, above all, to the frequently used term „causing a child".

Absurdly even a fourteen year old youth could be prosecuted for "seducing" or depicting an almost eighteen year old "child". Movies with such "children" simulating sex scenes will also have to be criminalised: the Directive does not allow for exceptions for science or art. Many films, novels or paintings will become serious criminal offences. All 27 member-states will have to criminalise popular coming-of-age movies like "Eskimo Limon" or "American Pie" as well as works of art like the world famous movie "The Tin Drum" which was the first German movie receiving the Oscar. Even the new Harry-Potter-movie will be made criminal as it features a nude scene involving simulated sex. Member states must not only prosecute producers, distributers and sellers of such movies; even mere private possession has to be punished with a maximum sentence of at least 2 years. „The Tin drum" in fact had once been banned in Northern America (the role model for this new EU-legislation) for displaying under-age sexuality. Even in the USA however the Supreme Court in 2002 turned down such unlimited criminalisation and ruled that mere fictitious (virtual) depictions as well as depictions of adults are not to be criminalized (Ashcroft v. Free Speech Coalition 16.04.2002). The EU in 2010 introduces such offences.

4. Toughened Criminal Procedure Law

Additional disproportionate restriction of civil rights goes along with toughening legislation of criminal procedure. In future anybody is by threat of punishment obliged to report any of the "crimes" proscribed by the Directive (Art. 15) with no exceptions for relatives or certain professions. Even a mere suspicion has to be reported. Every person convicted under the new

offences will be registered in many member states as a sex offender and his/her registration automatically forwarded to the proper police authority when he/she relocates, and he/she will have to be banned from any regular contact with persons under 18 all over the Union. For that end data exchange between member-states will be facilitated (Art. 14).

So whoever has the movie „The Tin drum", „American Pie", „Eskimo Limon", the new Harry-Potter or similar movies in his/her closet has to be reported by anyone (even the parents, the spouse, children, therapist, lawyer, priest) who (reasonably) presumes this. The convict will lose custody over and contact with his/her children and will be banned from regular contact with any person under 18 be it in private or in public.

5. Promotion of Real Child Pornography

The need for combatting real child pornography is of great importance and the new directive contains many valuable and important provisions. Instead of concentrating all forces on eradicating real child-pornography this kind of exaggerated criminalization heavily interferes with the sexual life of young people (even adults) and their right to sexual self-determination. Law enforcement agencies are increasingly flooded with useless criminalisation of acts which have nothing to do with child pornography, wasting resources instead of concentrating them on real child pornography.

The Directive's kind of centralisation and focussing on the law on the books endangers effective measures against real child pornography in a counter-productive way. Without implementation of concrete and substantial measures of support and protection in society, neighbourhoods and families criminal law as such only creates an illusion of protection.

The criteria for criminalisation also have to be balanced against constitutional rights and basic principles of criminal law: threatening and enforcing punishment constitute the most extreme form of state interference with human rights. Therefore the use of criminal law has to be very scrupulous and restrictive. Criminal law must not be abused for protecting the morality of certain groups. Instead it must always be the ultimate means to protect citizens from substantial violations of their human rights. And the legislature must always look for effective solutions outside criminalisation. Sexual self-determination and physical as well as mental integrity can only successfully be protected by the criminal law if beforehand society provides socialisation and family structures that allow for a capacity to bring up children properly and to control oneself. Only good and substantial social policy can minimise the risk of sexual perpetration.

Once again we must observe how on the level of the EU political action takes place according to the principle "The end justifies any means". The fragile balance of criminalisation and protection of human rights has to some degree been distorted by EU-measures in the realm of vaguely defined organised and sexual crimes. Like many other measures this one has largely been motivated by and based on UN-conventions. These have, in turn, been strongly influenced by the specific morality and an extremely repressive crime policy of the USA. This is moral colonisation.

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[1] http://www.dgfs.info
[2] http://www.dgg-ev-bonn.de
[3] http://www.dgsmt.de
[4] http://www.sexualwissenschaft.org
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[6] http://www.oegs.or.at

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