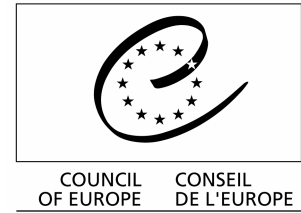


Web site: www.coe.int/cybercrime



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THE CYBERCRIME CONVENTION COMMITTEE (T-CY)

“CYBERCRIME” PROVISIONS IN THE COUNCIL OF EUROPE CONVENTION ON THE PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION AND SEXUAL ABUSE

Secretariat Memorandum
prepared by
the Directorate General of Human Rights and Legal Affairs (DG-HL)

1. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS 201 – hereafter “the Convention”) was adopted by the Committee of Ministers in July 2007 and opened for signature on the occasion of the 28th Conference of European Ministers of Justice in Lanzarote on 25 October 2007.

2. Cybercrime is a major concern in the field of sexual exploitation and abuse of children. According to UNICEF, approximately two million children are used in the “sex industry” each year. There are more than one million images of around ten to twenty thousand sexually abused children posted on the Internet. Of these, only a few hundred have so far been identified.

3. The Convention contains numerous references to “the use of information and communication technologies” as well as two specific provisions criminalising sexual offences against children committed through such means.

4. The Preamble highlights the worrying dimensions of sexual exploitation and abuse of children at both national and international levels, in particular as regards the increased use by both children and perpetrators of information and communication technologies, and recalls the Convention on Cybercrime.

5. Article 6 of the Convention provides for education for children at primary and secondary level on the risks of sexual exploitation and sexual abuse with particular attention to those involving the use of new information and communication technologies.

6. Article 20 defines the criminal offences concerning child pornography. It is mainly inspired from Article 9 of the Convention on Cybercrime, Article 3 of the Council of the European Union Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography, and Article 2 of the Option Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. However, unlike Article 9 of the Cybercrime Convention, there is no restriction to offences committed through the use of a computer system.

7. In addition to criminalising producing, offering or making available, distributing or transmitting, procuring for oneself or for another person, and possessing child pornography, a further element has been added, that of “knowingly obtaining access, through information and communication technologies, to child pornography”. This is intended specifically to target persons who view child abuse images on line by accessing child pornography sites but without downloading the material, and who cannot therefore be caught under the offences of “procuring” or “possession”. To be criminally liable the person must both *intend* to enter a site where child pornography is available and *know* that such images can be found there. The intentional nature of the offence, as well as the required knowledge, may be deduced from the fact that the person repeatedly accessed the same site or that access to the site was achieved through payment. A reservation possibility is provided with respect to this provision.

8. The Convention also differs from the Cybercrime Convention in the definition of “child pornography”. Article 9 of the Cybercrime Convention sets out three separate defining elements - the involvement of a child in sexually explicit conduct, the involvement of a person appearing to be a child engaged in sexually explicit conduct, and finally realistic images representing a child engaged in sexually explicit conduct. The drafters of the Convention preferred a definition more in line with the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography but restricting the material to *visual depictions*: “any material that visually depicts a child engaged in real or simulated sexually explicit conduct”.

9. The definition is further expanded in the Convention by the addition of “or any depiction of a child’s sexual organs for primarily sexual purposes”, which permits a broader category of representations to be included as constituting child pornography. There need not be any sexually explicit conduct represented; the mere image of a child’s sexual organs is sufficient as long as the purpose is primarily sexual.

10. Article 20 of the Convention does not allow Parties to lower the age-limit in respect of child pornography to below 18 years, as does Article 9, paragraph 3 of the Cybercrime Convention.

11. The Convention allows Parties the right not to criminalise the production and possession of images which consist entirely of simulated representations or realistic images of a child who does not exist in reality, such as, for example, cartoon images. Nevertheless, the explanatory memorandum warns “when making such a reservation, States Parties should be aware of the rapid developments in technology, which allow producing of extremely life-like images of child pornography where in reality no child was involved and should avoid covering such productions by their reservation.”

12. The Convention also allows Parties to reserve the right not to criminalise the production and possession of pornographic material involving children who have reached the legal age set in domestic law for engaging in sexual activities where the images are produced and possessed by them with their consent and solely for their own private use.

13. Article 23 incriminates the solicitation of children for sexual purposes, commonly known as “grooming” and reflects the recent but increasingly worrying phenomenon of children being sexually harmed in meetings with adults whom they had initially encountered in cyberspace, specifically in Internet chat rooms or game sites. The offence involves the proposal of an adult to meet a child through information and communication technologies for the purpose of engaging in sexual activities with the child who is below the legal age for sexual activities (as specified in domestic law) or for the purpose of producing child pornography.

14. The offence can only be committed “through the use of information and communication technologies”. In view of the particular danger inherent in the use of such technologies due to the difficulty of monitoring them the negotiators wished to focus the provision exclusively on the most dangerous method of grooming children which is through the Internet and by using mobile phones to which even very young children increasingly now have access.

15. Article 30 on principles related to investigation, prosecution and procedural law urges Parties to develop techniques for examining material containing pornographic images of children made available through the use of information and communication technologies in order to make it easier to identify victims.

