



PERMANENT MISSION OF PORTUGAL
GENEVA

DH - 490 /2004

Geneva, October 20, 2004

Dear Sir,

With reference to your letter G/RO 214 (69-14), dated July 30, 2004, concerning the Commission on Human Rights resolution 2004/48 on "Rights of the Child" requesting you to present a report to the Commission at its sixty-first session, I have the honour to send herewith the contribution of the Government of Portugal, in which relevant information on the question of child pornography on the Internet is provided.

Please accept, dear Sir, the assurances of my highest consideration.

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Permanent Representative of Portugal

Mr. Juan Miguel Petit
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Questionnaire presented by the CHR Special Rapporteur on the sale of children, child prostitution and child pornography pursuant to CHR resolution 2004/48

1. Information on existing legislation on child pornography on the Internet.

a) Legislation on the definition of child pornography

Portuguese legislation presently in force does not explicitly define child pornography. Article 172 (3) of the Portuguese Criminal Code (sexual abuse of children) establishes that

"3 - Whoever:

[...]

b) Acts over a minor of 14 years, through obscene conversation or pornographic writing, show or object;

c) Uses a minor of 14 years in a pornographic photo, film or recording; or

d) Exhibits or assigns, at any title or by whatever means, the materials referred to in the previous sub-paragraph,

shall be punished with imprisonment of up to 3 years.

e) Holds materials referred to in subparagraph c) with the purpose of exhibiting or assigning them;

shall be punished with imprisonment of up to 3 years.

4 - Whoever practices the acts described in subparagraphs a), b), c) and d) of the previous paragraph with the intent of profit shall be punished with imprisonment from 6 months to 5 years.

However, an amendment to the Criminal Code has been approved by the Council of Ministers on June 2004 and is now due to be discussed by Parliament. The Criminal Code, as amended, shall criminalize the conduct of whoever uses a child (therefore, any person below 18 years of age) in a photography, film, recording or any other pornographic material, including those in computerized data files, with 6 months to 5 years of imprisonment.

b) Legislation on producing, offering, distributing, transmitting, procuring and possessing child pornography through or in a computer system

The revised version of the Portuguese Criminal Code, when adopted, shall include a new Article 250-A (Child pornography), establishing that:

"1 - Whoever:

a) Produces, distributes, imports, exports, diffuses, exhibits or assigns, at any title or by whatever means, photography, film or recording of a pornographic character representing a minor, regardless of its support;

b) Possesses materials foreseen in the previous sub-paragraph with the purpose to distribute, import, export, diffuse, exhibit or assign them,

shall be punished with 6 months to 5 years of imprisonment.

2 – Whoever commits the acts described in the previous paragraph using simulated or manipulated pornographic material of a non-existing minor shall be punished with up to two years of imprisonment.

3 – Whoever commits the acts described in paragraph 1 with the intent of profit shall be punished with imprisonment of 1 to 8 years.

4 – Whoever commits the acts described in paragraph 1 with the intent of profit, using simulated or manipulated pornographic material of a non-existing minor, shall be punished with up to 3 years of imprisonment.

5 – Whoever acquires or possesses the materials foreseen in paragraph 1, subparagraph a), and paragraph 2, shall be punished with up to 1 year of imprisonment or a fine.

6 – The attempt is punishable”.

c) Information on the age of consent to sexual activity vis-à-vis the age used in child pornography legislation

The age of consent to sexual activity is presently 14 years (article 172 of the Criminal Code). Sexual intercourse with children aged 14-16 years can also be punished in case the agent acts “abusing [the child’s] inexperience”. As seen above, articles regarding child pornography presently in force cover children below 14 years of age only. However, the new amendments to the Criminal Code are intended to encompass all children, thus all persons below 18 years of age.

d) Legislation on Internet Service Providers in relation to child pornography on the Internet and other forms of sexual exploitation of children through the Internet

The Criminal Code (see above) applies to all private individuals. The Act on CyberCrime (Act 109/91, of 17 August) provides for the criminal liability of corporate persons (not excluding the criminal liability of agents), which are subject to the penalties of warning, fine and dissolution (as well as to the accessory penalties of loss of assets, bail for proper conduct, temporary prohibition of exercising certain activities or occupations, temporary or permanent closure of facilities and publicity of condemnation decision) in case they commit any of the acts qualified as crimes of computing falsehood, damage in relation to computing data or programmes, computer sabotage, illegitimate access, illegitimate interception or illegitimate reproduction of protected programme.

On 12 August 2003, the Action Plan for Information Society was adopted, through Council of Ministers resolution 107/2003. One of the axes around which this Action Plan develops is “Combating Illegal and Harmful Contents”, within which was foreseen the transposition into the Portuguese legal order of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”). This Directive sets forth the conditions for exempting internet service providers of liability in relation to possibly illicit contents of the messages they diffuse; establishes the legal framework on the liability of intermediary service providers for the association of contents (eg. search engines and

hiperlinks), introduces a scheme of previous conflict settlement, under the competence of supervisory entities (definitive settlement can only be made through courts), adopts the "opt-in" regime concerning non requested commercial communications (spamming), and gives supervisory entities the power to prosecute misdemeanours and impose the respective fines, eventually associated with accessory penalties.

2. Information on the implementation of child pornography legislation on the Internet. This might include:

a) Relevant jurisprudence

A judgement passed in 2003 by the Lisbon Court of Appeal has decided that, "not having been determined, by technical scientific expertise, whether the minors whose photos the Defendant has diffused in a website he created were below the age of 14, the acquittal of the Defendant shall be maintained, in accordance with the principle *in dubio pro reo*".

In June 2002, another judgment issued by the Lisbon Court of Appeal has determined that "[...] sexual acts with children below the age of 14, depicting acts of sexual intercourse, anal sex or oral sex, are acts of pornography. Photos depicting minors in such practices are pornographic for the purposes of Article 172 (3) (a) of the Criminal Code".

b) Competent law enforcement agencies

The Judiciary Police is the competent body to investigate crimes related to child pornography. Its Central Department of International Cooperation coordinates the Portuguese National Europol Unit, body whose purpose is to improve the efficiency of and cooperation among the competent services of EU Member States on the prevention of and combat to organised crime inter alia in the area of child pornography.

- *How are they resourced in terms of technological equipment and technical expertise of staff?*

In 1995, a special brigade was established, within the judiciary police, to investigate computer crimes. In September 1998, this brigade was replaced by the Section for the Investigation of Computer and Telecommunication Crimes, composed by two investigation brigades. Law imposes that investigators admitted to these brigades have the adequate computer skills.

- *Are they trained on information technology and children's rights?*

A previously referred, investigators admitted to the Section for the Investigation of Computer and Telecommunication Crimes must have the adequate computer skills. Information technologies are part of the initial training of police officers, which also comprises a human rights seminar (as well as criminal law modules). Within the life-long training of police officers, there are courses of computer crimes (gathering and

preservation of evidence), investigation of sexual abuse of children and trafficking of human beings.

The Superior Institute of Judiciary Police and Criminal Sciences regularly organises training actions on a number of topics: in 2003, a conference was devoted to criminal investigation and human rights and a seminar to policing and human rights. In 2005, Portugal shall organise, in partnership with the European Police College (CEPOL) a 5-day course on child pornography on the Internet.

3. Information on initiatives to prevent and combat child pornography on the Internet and other forms of sexual exploitation of children via Internet, such as sex tourism and trafficking. This might include:

a) Institutional and policy measures (e.g. establishment of a task force on child protection on the Internet, adoption of an action plan, etc.)

At the EU level, a Safer Internet Action Plan is being implemented since 1999, aiming at the promotion of safety when using the Internet through the combat to illegal or harmful contents available on-line. At the Portuguese national level, four projects have been implemented within this Action Plan, two in the area of awareness-raising and two in the area of developing filtering and classifying contents.

In the area of awareness-raising, a Institute of Higher Education participated in project Educaunet, within which two educational actions at schools and one study on the risks of using the Internet have been undertaken. EDIDECO – Editors for the Defence of Consumers has participated in project CISA – Consumer Internet Safety Awareness; a comparative test on content filtering systems has been elaborated and published.

In the area of technology, AXON – Institute for Advanced Normative Information, has participated in project Euforbia, with the purpose of developing a new generation of content filtering systems tailored to cultural, religious and politic diversity.

The Ministry of Education has participated in project E-UNCLE, with the purpose to develop an European environment of collaboration adequate to the diverse national education policies and approaches to the question of Internet safety.

b) Measures to protect children:

- *When using the Internet (e.g. online chat)*
- *When identified as victims of abuses within a context of child pornography*

See above and reply to question 3 e).

c) Initiatives undertaken by or in collaboration with the private sector, in particular with Internet Service Providers, chat-providers, banks and card billing companies (e.g. hotlines, codes of conduct)

See below.

d) Initiatives undertaken by or in collaboration with NGOs, civil society and consumers' associations

Some NGOs develop an important work on the protection of children, inter alia against child pornography in the Internet. Some NGOs provide programmes which parents can download in order to deny children's access to harmful websites.

APAV (Portuguese Association of Victim Support) has developed the CORE Handbook – On Children Victims of Sexual Violence, with the support of the European Commission (Programme STOP II) aiming at training professionals that deal with children victims of sexual violence; this handbook puts a special emphasis on the prevention of sexual abuse and trafficking in children for the purpose of sexual exploitation. This NGO expects to undertake specific training actions on this field.

e) Information on the coordination among different actors at the national and international levels

The European Union has, for some time, been adopting several measures aimed at combating the sexual exploitation of children. On 24. February 1997, the Council adopted Joint action 97/154/JHA to combat trafficking in human beings and sexual exploitation of children (amended by Council Outline Decision 2002/629/JHA of 19 July 2002 concerning trafficking in human beings). The objective of this joint action is to establish common rules for action to combat trafficking in human beings and sexual exploitation of children in order to contribute to the fight against certain forms of unauthorised immigration and to improve judicial cooperation in criminal matters. On September 1996, the mandate of Europol was extended to include therein trafficking in human beings.

On 1996, Joint action 96/700/JHA has established an incentive and exchange programme (STOP) for persons responsible for combating trade in human beings and sexual exploitation of children, on disappearances of minors and on the use of telecommunications facilities for the purposes of trade in human beings and the sexual exploitation of children. Programme STOP addresses judges, public prosecutors, police departments, civil servants, public services concerned with immigration and border controls and with social and tax legislation, the prevention of or combat to such phenomena and assisting the victims or dealing with the perpetrators, and provides for measures in the fields of training, exchange programmes and training courses, the holding of multidisciplinary meetings and seminars, studies and research, and dissemination of information. The second phase of this programme (STOP II) has been launched on 2001, aiming at developing, implementing and evaluating a European policy in this field, encouraging networking, the dissemination of information and the improvement of scientific and technical research, facilitating participation by countries that have applied to join the European Union in the projects that are developed, and encouraging cooperation with non-Union countries and the relevant international organisations.

By Decision No 293/2000/EC, of 24 January 2000, the European Parliament and the Council adopted a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women. This programme represented very much a beginning of cooperative action by European non-governmental organisations (NGOs) and voluntary organisations in the

fight against violence towards children, young people and women. In many cases, they provide services which public authorities lack the ability or the power to provide. A mid-term evaluation report from the Commission to the European Parliament and the Council on the Daphne Programme has been submitted on January 2002.

On the other hand, through Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999, was adopted a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks. This Plan of Action (originally scheduled for the period 1999-2002, but extended until 31 December 2004) aims to:

- encourage industry and users to develop and use effective self-regulation systems;
- provide the initial impetus by supporting demonstrations and promoting the application of technical solutions;
- alert and inform parents and teachers, particularly through parent-teacher associations;
- encourage cooperation and the exchange of experience and best practice;
- promote coordination throughout Europe and between the various parties involved;
- ensure that the approaches adopted in Europe are compatible with those adopted elsewhere.

It falls into four sections:

- establishing a safe environment through a network of "hotlines" and by encouraging self-regulation and codes of conduct;
- developing filtering tools and rating mechanisms to make it easier to identify content;
- encouraging awareness campaigns at all levels to inform parents and all people dealing with children (teachers, social workers etc.) on the best way to protect minors against exposure to content that could be harmful to their development, so as to ensure their well-being;
- conducting support activities to assess legal implications, provide coordination with similar international initiatives and assess the impact of Community measures.

The Commission, responsible for the implementation of this action plan, undertakes the following activities:

- promoting industry self-regulation and content-monitoring schemes (especially dealing with content such as child pornography, racism and anti-semitism);
- encouraging industry to provide filtering tools and rating mechanisms which allow parents or teachers to select content appropriate for children in their care while allowing adults to decide what legal content they wish to access and which takes account of linguistic and cultural diversity;
- increasing awareness of services provided by industry among users, in particular parents, teachers and children, so that they can better understand and take advantage of the opportunities of the Internet;
- activities such as assessment of legal implications;
- activities fostering international cooperation.

Given the need to adopt specific measures to combat child pornography in the Internet (in view of the proportions assumed by this type of crime), on 29 May 2000 the Council adopted a decision to combat child pornography on the Internet. In accordance with this decision, EU Member States will take measures to:

- encourage Internet users to inform law enforcement authorities if they suspect that child pornography material is being distributed on the Internet;
- ensure that offences are investigated and punished, by setting up specialised units within the law enforcement authorities, for example;
- ensure that the law enforcement authorities react rapidly when they receive information on alleged cases of the production, processing, distribution and possession of child pornography.

Furthermore, Member States are also regularly to verify whether, in the light of technological developments, their criminal law procedures should be amended with a view to combat child pornography on the Internet.

In order to facilitate cooperation between the Member States, a list of 24-hour national contact points and specialised units will be disseminated. Europol will have to be informed of suspected cases of child pornography and meetings will be held between the national specialised services.

The Member States are to investigate all measures which could help to eliminate child pornography on the Internet and are to exchange information on best practice. They will also examine the possibility of placing Internet providers under an obligation to: advise the competent authorities of child pornography material which is distributed through them, withdraw such material from circulation, retain such material in order to make it available to the authorities, and set up their own control systems. In partnership with industry, Member States will encourage the production of filters and other technical means to prevent the distribution and facilitate the detection of such material.

The Council will organise visits to assess to what extent the Member States comply with the obligations arising from the Council Decision. Depending on the results of these assessments, it will examine the need to adopt additional measures.