

# Proactive Undercover Policing and Sexual Crimes against Children on the Internet

*Original article*

## Proactive Undercover Policing and Sexual Crimes against Children on the Internet

Trine Thygesen Vendius\*

**Abstract:** The Internet has made it easier for child sex offenders to get into direct contact with their victims, including the exchanging and distributing of “child pornography”. On a European level, child sexual exploitation is one of the three main priorities of EC3, Europol's Cybercrime Centre. Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children further prescribes that the EU Member States shall ensure that sexual offences against children are effectively investigated. However, when it comes to investigative measures such as undercover policing, national police forces are bound by national rules. This article concludes that undercover policing is a necessary investigative tool in order to detect and infiltrate the networks of these sexual offenders. Departing from a legal dogmatic method this article first examines relevant EU legal instruments. It then takes a comparative approach describing national differences in investigating sexual offences against children. Finally, it discusses whether common rules in the area are foreseeable within the existing frameworks of European law.

**Keywords:** Cybercrime – Securitisation – Child Pornography – Undercover Policing – Europol – Interpol

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## Introduction

The emergence of the Internet has had a revolutionary impact on the way we interact and communicate with each other. The development towards an increasingly interconnected world has, at the same time, also resulted in innovations within criminal networks. Here, one tends to see that criminals use the Internet to commit traditional forms of crimes, such as online fraud and the distribution of indecent images of children, as well as new forms of crimes such as attacks against critical infrastructure and information systems (Cloud, 2010:10-12). Criminals increasingly operate across borders in transnational, organised networks using innovations in technology (Brady, 2008:103). The Internet, on the other hand, also offers innovations for the police, as digital footprints can be used as evidence for criminal acts. Furthermore, as in the case of criminal networks, national police forces increasingly cooperate across borders. This is mainly done on a bilateral basis but also within the framework of Europol, the European Police Office, and Interpol, the world's largest international police organisation assembling 190 Member States.

In recent years, according to Save the Children Denmark, there has been an increase in what is often being referred to as “child pornography” (indecent images of children) as a result of the growing use of social media platforms.<sup>[1]</sup> Still, however, it is difficult to give a precise indication of the extent of the problem due to differences in national definitions of different child abuse and exploitation offences (Europol, 2012).

Nevertheless, fighting child pornography on the Internet has become a top priority under the auspices of Europol as well as in various legal EU instruments aimed at combating this particular crime on an equal footing as other serious and organised crimes.

This article seeks to explore how child sexual exploitation on the Internet has moved to the EU security agenda as one of the three main priorities of Europol's Cybercrime Centre, EC3. This step is also in accordance with directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children (hereafter referred to as directive 2011/93/EU) which further prescribes, that the EU Member States shall ensure the effective investigation of these crimes. In this respect, this article will elaborate on the challenges for national police forces when it comes to the more operational aspects related to policing on the ground. What are the respective Member States' police forces allowed to do in order to fulfil this overall objective of the EU? Are common investigative rules foreseeable within the existing EU legal framework?

The fact that sexual crimes against children on the Internet have moved to the European security agenda as a matter of high politics can be seen as a result of the growing securitisation of this particular crime being articulated as cybercrime.

As argued by Buzan et al. (1993), security issues are made security issues by acts of securitisation (Buzan et al. 1993: 204). In this respect, the EC3, Europol's cybercrime centre has been established as a part of the “EU Internal Security Strategy in Action” in order to tackle cybercrime

including sexual offences against children on the Internet. Thus, the EC3 is to deal with the following priorities: Cyber-attacks, credit card fraud and online child exploitation (European Commission, 2012) and on 11 January 2013, the EC3 became operational.

The EC3 offers both operational and analytical support to the Member States' investigations in the area of cybercrime as well as technical and digital support. In addition, the EC3 also cooperates with a variety of different partners dealing with cybercrime, such as the different European agencies (for instance Eurojust, EU's Judicial Cooperation Unit), the private sector (for instance the banking industry), research communities and a number of civil society organisations. This phenomenon has also been labelled a "triangular diplomacy between states, companies and the inter-state system in the global regulation of the Internet" (Bigo et. al., 2012).

Similar to Europol, Interpol has also set up a cybercrime centre, Interpol Global Complex for Innovation (IGCI). The IGCI is situated in Singapore and became operational in 2015 (INTERPOL World, 2014). As stated by both Europol's cybercrime centre, EC3, and Interpol's cybercrime innovation centre, IGCI, these two will be working closely together due to the borderless nature of cybercrime. On September 25, 2013, Europol and Interpol held their first common cybercrime conference with the aim to enhance international police cooperation in the field of cybercrime (Europol-Interpol, 2013).

However, as pointed out by a specialist from Interpol, this move can also be seen as a result of the growing competition between the various security agencies:

For years it has been a priority for Interpol to fight these crimes. But we did not have the necessary directives nor the financing or the support on a high political level. Now it has become fashionable on a European level.<sup>[1]</sup>

This statement is also in line with Bigo (1996) who claims that the securitisation of an issue can be seen as the result of power struggles between different security agents (Bigo, 1996: 49). However, as argued by an Interpol specialist<sup>[2]</sup>, the enhanced focus on an EU level could also result in increased synergy between the two— Europol and Interpol. Furthermore, as stated by a former Danish Europol liaison officer<sup>[3]</sup>, the growing focus on sexual crimes against children on the European security agenda could eventually put pressure on national governments to prioritise the investigation and prevention of these offences. As stated by Wæver (1995), security is a specific way to frame an issue as having absolute priority:

Security is a practice, a specific way to frame an issue. Security discourse is characterized by dramatizing an issue as having absolute priority. Something is presented as an existential threat: if we do not tackle this, everything else will be irrelevant [...] And by labelling this a security issue, the actor has claimed the right to handle it with extra-ordinary means, to break the normal political rules of the game (Wæver, 1995: 227).

This security discourse, however, must derive from power holders/state representatives who define when a given problem should become a security issue. In this respect, the EU can be seen as a securitising actor (Carrapico, 2014). However, despite the securitisation of sexual crimes against children, including increased international cooperation, the possibility to form Joint Investigation Teams (JITS), and despite a number of successful operations targeting online child sex abuse networks, fighting sexual crimes against children on the Internet still has a long way to go. As illustrated by operations like for instance “Operation Golf” (2010), “Operation Rescue” (2011), “Operation Icarus” (2011), “Operation Atlantic” (2012), “Operation Atelier” (2012) and “Operation Archimedes”<sup>[1]</sup>, these have mainly been targeted the distribution of “child pornography” and not the offenders and offences behind these indecent images, the latter being up to the EU Member States’ police forces as Europol has no executive powers. A Danish police chief explains:

The EU has provided us with both operational and technical support and also the coordination of operations. But this has not been followed up with international rules on the use of special investigative measures.<sup>[2]</sup>

Thus, national police forces are left in a legal vacuum on the EU level when it comes to actual investigations and the use of special investigative measures as there are no common rules regulating how far police forces can go. In the following section the various EU legal instruments regarding sexual crimes against children will be elaborated further.

## **Online Sexual Crimes against Children – EU Legal Instruments**

Initially, it should be noted, as stated by Interpol, that most law enforcement agencies working with child sexual abuse material believe it is time to stop the use of the misleading term “child pornography” when describing images of sexual abuse of children<sup>[1]</sup>. As Interpol further points out, child abuse images are documented evidence of a crime in progress—a child being sexually abused. This statement is also in line with Edwards (2000), who defines the term “child pornography” as “[...] a record of the systematic rape, abuse and torture of children on film and photograph and other electronic means” (Edwards, 2000:1).

Yet the term “child pornography” repeatedly appears in various legal instruments such as directive 2011/93/EU. This directive is aimed to harmonise criminal offences related to sexual abuse committed against children, the sexual exploitation of children, and “child pornography”. Furthermore, the directive lays down provisions for the minimum of sanctions and provisions aimed at combating child pornography online and sex tourism, including provisions to prevent paedophiles convicted of an offence from exercising professional activities involving regular contact with children.

In the Convention on Cybercrime (the so-called “Budapest Convention” from 2001) aimed at the

protection of society against cybercrime, offences related to “child pornography” are included in article 9. Also, the so-called Stockholm program<sup>[2]</sup> mentions the rights of the child as a priority in an “open and secure Europe serving and protecting citizens as a priority” in accordance with the “EU Internal Security Strategy in Action: Five steps towards a more secure Europe” (from 2010).

According to directive 2011/93/EU, the EU Member States shall ensure that effective investigative tools, such as those used in organised crime or other serious crime cases are available for investigating sexual offences against children.

In other words, with this directive the EU Member States have committed themselves to investigating sexual offences against children with the same investigative tools as those used in the combat against organised crime or other serious crime cases. Such typical “organised and serious crimes” could for instance be terrorism or illegal drug crimes on a large scale.

Furthermore, according to the directive, the Member States shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child (Article 30). The rights of the child are also mentioned in the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, article 30 (the so-called “Lanzarote Convention” from 2007).

However, despite the aim of effectively combating sexual crimes against children on the Internet as repeated in these legal EU instruments, these crimes are still subject to hesitation when it comes to the empowerment of the police to act more proactively in the field. As stated by Kelly et al. (1995):

Most of the international documents [...] outline approaches to response in only the vaguest of terms, which most concerned with child protection would agree with. Once discussion moves beyond the generalised level, however, substantial obstacles and problems emerge. (Kelly et al., 1995: 67).

## **Proactive Undercover Policing in Cases of Child Pornography**

So far, Europol has been successful in coordinating a number of actions aimed at targeting online child sex abuse file-sharing networks with help from various member States’ police forces. One of the most spectacular operations was “Operation Icarus” from December 2011 involving law enforcement agencies from 26 European countries. “Operation Icarus” led to the identification of 269 suspects and the arrest of 112 suspects, spread across 22 different countries. The operation was targeting those offenders sharing the most extreme forms of video material, which included babies and toddlers being sexually abused and raped (Europol, 2011). In this respect, studies have shown that a significant proportion of those involved in the circulation and consumption of such images may also be involved in committing contact abuse against minors (Yar, 2013:485).

However, "Operation Icarus" was not aimed at infiltrating the paedophile environments where the actual offences behind these pictures (child abuse material) were committed. This is due to the fact that an agency like Europol has no operational powers in the sense that it cannot make use of surveillance, infiltration or engage with suspects nor "control the crime" using an undercover agent. Thus, when it comes to for instance the infiltration of paedophile networks across borders, where the actual crimes behind "child pornography" are committed, this is left to the national police forces to deal with. In "Operation Icarus", all the evidence in the operation was collected by a Danish police officer who then sent it as packages to the police forces of respective Member States involved in the operation. Europol's role was mainly to coordinate the operation, which was described as "the latest major success in over 10 years of Europol" (Europol, 2011).

As mentioned, the concrete investigation of these crimes is up to the national police forces of the Member States. In this respect, if the actual crimes (rape, sexual assaults etc.) behind the child abuse material were to be revealed, this would imply a more proactive approach allowing for the respective national police forces to be more active. For instance, by allowing the police officers to pose as either offenders or victims on the internet (sting operations) in order to detect these crimes and eventually prevent the offences from being committed.

This approach—proactive policing—is contrary to the traditional reactive approach, where the police are responding to a crime that has already been committed. Thus

A reactive investigation concerns an investigation for the purpose of clarifying a committed crime where a reasonable suspicion that a crime has been committed is present, whereas a proactive investigation refers to criminal investigative activities before there is a reasonable suspicion that a crime has been committed (Hirsch Ballin, 2012:80-81).

So far, according to the Danish national police, the response to offences against children has been merely reactive<sup>[1]</sup>. At a seminar held in Copenhagen during the Danish EU presidency in 2012 aimed at exploring best practice in the investigation of online sexual offences against children, a great number of representatives from the police all over the world participated. The seminar concluded that,

[...] proactive measures of investigations, i.e. undercover agents etc., were considered to be valuable tools of investigation when dealing with cases of sexual exploitation of children on the internet and child pornography (Seminar conclusions, 2012).

In other words, a proactive approach, including the use of undercover tactics, was regarded as crucial when investigating online sexual offences against children. As pointed out by specialists in the field, this method is especially valuable when trying to infiltrate paedophile circles where abuse is actually taking place.<sup>10</sup> Such practice of undercover policing, however, implies that the police are allowed to undertake a more active role. In this respect, as pointed out by Joh (2009):

Covert policing necessarily involves deception, which in turn often leads to participation in activity that appears to be criminal. In undercover operations, the police have introduced drugs into prison, undertaken assignments from Latin American drug cartels to launder money, established fencing businesses that paid cash for stolen goods and for “referrals,” printed counterfeit bills, and committed perjury, to cite a few examples (Joh, 2009:156).

However, as Joh also points out, this practice of *authorised criminality* raises a number of concerns:

This practice of *authorised criminality* is secret, unaccountable, and in conflict with some of the basic premises of democratic policing (Joh, 2009:157).

The practice of undercover operations thus is closely linked to the discussion on secrecy and accountability. However, considering that more and more crimes are moving to the Internet for instance drug related crimes and sexual crimes against children, the methods used by police agents such as conversations and purchases are evidenced in the log files. As argued by a former Danish investigator dealing with sexual crimes against children on the Internet, undercover policing in an online world is therefore transparent to a judge:

When acting undercover on the Internet all conversations are documented in the log files. So I don't see any problem related to secrecy or accountability.<sup>[1]</sup>

In addition to the above considerations, also questions of ethics and morality seems to be at stake when it comes to the use of undercover policing in cases involving sexual crimes against children. Thus, a report on the use of undercover policing submitted to the Dutch government in 2010 concluded that with respect to child pornography

Moral and societal acceptability can also apply as an objection; 'the government should not be involved' in such crimes, not even through an undercover agent (Kruisbergen *et al.*, 2010: 287).

This could indicate, that sexual crimes against children is still a sensitive issue and therefore, subject to further hesitation, when it comes to dealing with this offence on equal terms with other serious and organised crimes such as for instance terrorism or drugs. This is for instance the case in Denmark.

According to a Danish Europol liaison officer, most national police forces lack the necessary investigative tools when dealing with offences against children compared to other serious organised crimes:

This is not a matter of “disgusting pictures” on the internet. This is a matter of life and death. Babies are being raped on demand and even killed. How come we have the necessary investigative tools when it comes to terror and drugs but not when it comes to investigating

## offences against children?<sup>12</sup>

In this respect, offences related to terrorism and drugs have long been framed as organised crime, where the growing securitisation of these crimes has been imported into the EU from the USA and international fora (Carrapico, 2014: 610). This has resulted in more powers for the police in order to detect and prevent these offences in a number of European countries. Especially after the 9/11 events and the war on terror declared by former US President Bush in 2001, followed by the terror bombings in Madrid and London. Thus in Denmark the possibility of secret searches was introduced in 2002. As for drug related crimes, these have long been framed as a societal problem. In Denmark drug related crimes have been closely linked to the problem with the so-called biker gang crimes as biker groups are considered to be the core of organised crime in Denmark (Cornils and Greve, 2004: 853).

Thus, with the introduction of the so-called "Biker Law" in 1996, which was later amended in 2003 the Danish police were given increased powers in terms of infiltration, controlled deliveries including test purchases and monitoring. The focus on drugs related crimes can be seen in a broader context such as the war on drugs initiated by former US president Nixon in 1984. On a European scale, one can observe the creation of EDU (the European Drugs Unit) in 1994, the forerunner of Europol. Seen in this context—the war on terrorism and the war on drugs—there is probably no prospect of an imminent war on paedophiles in the near future in terms of increased powers to the police in the field. In this respect it has been argued, that sexual offences against children known as “child pornography” are merely considered to be harmful to the general morality in society. Thus

[...] there appears to be an acceptance of the possibility that the availability of child pornography is harmful to society because it has a corrupting effect upon the general morality (Ost, 2002: 437).

But how far can the police go, when investigating these offences more proactively? The following section will elaborate this question further comparing the powers of the police in Belgium, the Netherlands, the UK and Denmark.

## **What Are the Powers of the Police in Other EU Member States?**

When comparing different legal systems the functional method seems to be the most appropriate in this study, as this method focuses on legal responses to certain problems. This is contrary to the dogmatic method that is merely focused on rules as they appear within different legal systems. (De Coninck, 2010: 322-323). Thus, the starting point is here the societal problem which has resulted in a given legal regulation.

In Belgium, a number of cases where children were sexually abused and even killed have called for

more powers for the police to investigate these offences more proactively. This was the case with the Marc Dutroux case in the mid 1990's, which caused great media attention worldwide. Six girls aged eight to 19 were kidnapped tortured and sexually abused. Among these, four girls were killed. A number of errors in the Dutroux investigation resulted in severe criticism from the public with the country's justice system.

In a spectacular case from 2008, a Belgium police officer working undercover on the Internet came in contact with two family fathers in France, who planned to kidnap, rape, torture and murder a seven year old girl. The Belgian police officer met the two men in person, who were subsequently arrested and prosecuted in France.

Both men were sentenced to 10 years of prison for “association de malfaiteurs en vue de préparation de crimes” (conspiracy and attempt)<sup>[1]</sup>.

In this case, the Belgian police officer was acting as a participating offender. Here, Belgian regulation further allows for a Belgian undercover officer to exchange indecent pictures as part of the investigation. This is a very controversial investigative step, but as a Belgium police officer explained:

Regulation in Belgium allows us to commit offences. This means that an undercover agent can exchange child pornography. Not all countries allow that. Surviving on a website without doing anything or exchanging material doesn't last long.<sup>[2]</sup>

Also in the Netherlands, this controversial investigative step is allowed. Thus the Dutch police are allowed to work undercover and to commit criminal acts, which include the exchange of indecent pictures if necessary for the infiltration of paedophile networks. Such practices are regulated in the Dutch “Wet Bijzonderer Opsporingsbevoegdheden” (BOB, Law on Special Investigative Methods). This law was introduced in the 80's after some extreme police actions, where the Dutch police were committing crimes (buying/selling drugs). However, beside the general prohibition on entrapment, the crime has to be connected to an organised group, which can be hard to prove beforehand<sup>[3]</sup>.

In this respect a case from 2010, “The Amsterdam sex crimes”, has been highlighted by a number of investigators working with sexual crimes against children<sup>16</sup>. The case sent shock waves through the Dutch society, and was part of a larger group of cases, originating from a US police investigation on the Internet of paedophile networks. One of the identified offenders was Robert Mikelsons, who was sentenced to 19 years of imprisonment for having sexually abused 67 children aged 0-4 years under the auspices of his private day care centre.

Similarly, the UK had a case originating from an FBI investigation on paedophile networks. This led to “Operation Ore” in 1999-2002, the UK's biggest computer crime investigation, leading to 7,250 suspects identified, 4,283 homes searched, 3,744 arrests, 1,848 charged, 1,451 convictions, 493

cautioned and 140 children removed from suspected dangerous situations. In the UK, the rules on undercover investigation are regulated in the "Regulation of Investigatory Powers Act 2000 (RIPA)". A trained undercover police officer can create a false profile on the Internet in order to catch online offenders. This investigative step is allowed as long as the officer does not incite or procure the commission of a crime. In this respect, an agent provocateur has been defined in *R. v Mealey and Sheridan* (1974) as a person who "entices another to commit an express breach of the law which he would not otherwise have committed and then he proceeds or informs against him in respect of such offence"<sup>[1]</sup>.

Recently it has been decided, that the British police are allowed to send indecent images as part of the investigation. As stated by a former Covert Internet Investigator within the Metropolitan Police Child Abuse Investigation Command:

Covert officers can commit crimes however this has to be sanctioned by an Assistant Commissioner 9th up the ladder of seniority. This includes the sending of indecent images if necessary. However whilst covert officers involved in drugs may be involved in crime, those involved in online covert policing targeting sex offenders have only very rarely sent images. It has been discussed and is possible but most senior officers would say no to the sending of images on the grounds of further victimisation rather than being illegal.<sup>[2]</sup>

In Denmark such a controversial step—the sending of indecent images as part of the investigation—is not allowed for the police. Initially, it can be stated that the Danish rules on special investigation techniques are set out in the chapter on interrogation and special investigative steps in the Administration of Justice Act (737 of 25.6.2014 "Retsplejeloven"). These rules prescribe, that the crime must have a maximum penalty of minimum 6 years. This is the case with terrorism and serious drug crimes, but is not the case with "child pornography". Excepted here are aggravating circumstances such as if the child's life is at risk or serious violence is causing the child serious harm, or if the dissemination of pictures is of a more systematic or organised character. This leaves Danish police investigators with a problem, as this can be hard to prove beforehand.

Furthermore, it is not clear how the Danish police should act when investigating cases of "child pornography" proactively, as the internal guidelines in the field only deal with the proactive investigation of grooming cases (where the police can act as victims, thereby not taking part in a crime). These internal guidelines were carried out after a Danish tabloid newspaper (*Ekstra Bladet*) had a journalist working undercover for more than a year posing on the Internet as a 13-year-old girl. The case led to several arrests, where one of the convicted was a 73-year-old man.

So far, the internal guidelines in cases of sexual offences against children only deal with grooming cases. Here the described procedure for the police does not fall within the rules on covert investigation (agent rules), as the role of the police in these cases working under false identity as

victims is merely passive. The problem occurs when the Danish police are investigating cases of "child pornography". However, it is not clear how far the police can go. As a Danish police investigator in the area notes, the police are operating in a grey zone, as the police can act as a minor but not as an offender.

We can act as minors. That is grooming. But we cannot act as offenders. I work in the middle. I take over accounts from arrested sexual predators and I monitor via their profiles to uncover their networks and identify new abuse series. <sup>[1]</sup>

Furthermore, as a senior legal advisor in the Danish National Police notes, a trained Danish police officer is excluded from acting as a credible offender in order to infiltrate the paedophile circles where the offences are being committed.

It's a trade situation. And here we cannot appear as credible offenders in order to expose those who are behind the pictures distributed. <sup>[2]</sup>

In order to act undercover, Danish police investigators are forced to initiate their investigation based on the assumption that the case is involving sexual intercourse with a minor, which has a maximum penalty of 8 years. Otherwise, they cannot act undercover as the rules on undercover policing prescribe that the investigated crime must have a penalty of minimum 6 years. As argued by a former Danish investigator working with sexual crimes against children on the Internet, the rules on undercover operations ought to include the section on child pornography in the penal code (152 of 18.2.2015 "Straffeloven") enabling the police to initiate their investigation based on the correct suspect grounds. <sup>[3]</sup>

This also includes the possibility to share abusive material in order to infiltrate the closed circles where the actual abuse initially occurs. According to a Danish investigator, the police are currently trying to get permission to do that. <sup>[4]</sup>

## **Challenges related to Sexual Offences against Children**

In addition to the above mentioned challenges related to covert policing in the area of sexual offences against children, a number of additional questions can be raised when dealing with this type of crime.

First, the question related to more surveillance. Here there seems to be an alleged conflict between the rights of the child and other fundamental rights such as the freedom of expression and the right to privacy, when considering more cyber patrolling on the Internet. In this respect it could be argued that minors ought to be safe to express themselves freely on the Internet without being monitored by child offenders.

Secondly, the question related to the technological challenges when investigating these offences. These are for instance the rapid development in technology, e.g. various anonymisation services/the dark net (TOR) and hidden servers (Silk Road), the lack of global validation of IP addresses and cloud services, not to mention the slow reaction within public authorities and different national agendas/priorities. The question here is how to deal with a situation where the current legislation is not adapted to reality..

Thirdly, the question of prioritising the investigation of such offences, as limited resources, lack of technological expertise, a tendency to target “low hanging fruit” and an occupational culture resistant to new challenges seem to be the impediments to policing successfully online abuse of children (Jewkes, 2010: 13). As pointed out by O'Donnell and Millner (2007):

The intensity with which a country polices internet child pornography offences depends on the priority given to the problem by the government, competing demands on law enforcement and the extent to which Internet access is easy available (O'Donnell and Millner, 2007: 159).

Finally, as emphasized by Kardasz (2013), these crimes are psychologically hard to deal with:

Crimes against children are the most reviled types of investigations for law enforcement officers. While respectful of the need to bring offenders to justice many officers say, “I could never work those kinds of crimes.” The true facts about the sexual victimisation of minors are so psychologically distressing that few can emotionally tolerate being deeply involved in the investigations (Kardasz, 2013).

Danish police officers, including those working as Europol liaison officers as well as Interpol specialists in the field, call for international rules providing for the police to respond more actively when investigating sexual crimes against children<sup>[4]</sup>.

So far only four countries have introduced a provision on grooming in accordance with the 2011 EU Directive on combating the sexual abuse, sexual exploitation of children and child pornography (the United Kingdom, the Netherlands, Sweden, and Norway). And only a few countries, as shown in the previous section, allow for the exchange of indecent pictures as part of the investigation. It is therefore obvious to imagine a situation, where a police officer in one country, for instance Denmark, would ask a colleague in another country to pursue an investigation, because the legislation in that country allows for the police to act in a more proactive manner. Such an example could be Belgium, where the police as mentioned are allowed be more active on the Internet including the possibility to exchange abusive material in order to catch the most dangerous offenders. However, this practice of *forum shopping* would eventually be regarded as unlawful undercover policing by a Danish court. Enhanced harmonisation here could seem to be the answer in order to address such practices.

In this respect, a question that arises is whether common rules in the area (covert investigation) are

foreseeable within the current EU legal framework. This question will be elaborated in the following section.

## **Where to Find the Legal Basis for Common EU Rules for Undercover Policing?**

According to the Treaty of Lisbon Article 87 of the Treaty on the Functioning of the European Union (TFEU) the EU can establish measures for the purpose of police cooperation in relation to the prevention, detection and investigation of criminal offences concerning “common investigative techniques in relation to the detection of serious forms of organised crime”. This article is a slightly modified version of article 30 the Treaty on European Union (TEU) in the previous Treaty of Amsterdam. Curiously enough, this particular article has not been subject to much interest in academic literature, nor is it clear what this article entails when going through European soft law.

However, a communication from the European Commission dating back to 2004 and dealing with police and customs cooperation in the European Union (section 2.1.5.1. Investigative techniques) mentions that:

Article 30.1(d) of the TEU stipulates that common action in the field of police co-operation shall include “the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.” [...] However, although common guidelines have been developed in the framework of Europol, for example on the use of informants or on controlled deliveries, these are but guidelines and are not necessarily applied in all Member States. Until now, there is no generally agreed interpretation of article 30.1 (d) TEU at the EU level (European Commission, 2004).

Thus, there seems to be no agreed understanding of the wording of “particular investigative techniques”, and as pointed out above, the guidelines in the area are so far primarily directed towards the use of informants or controlled deliveries. As for the use of undercover agents as a particular investigative technique, the question remains unanswered.

However, according to the Stockholm Program—An open and secure Europe serving and protecting citizens, which sets out the European Union’s priorities for the area of justice, freedom and security for the period 2010-14, the European Commission is invited by the European Council to:

[...] examine how operational police cooperation could be stepped up, for example as regards incompatibility of communication systems and other equipment, use of undercover agents, and, where necessary, draw operational conclusions to that end.

In this respect, the recently approved European Investigation Order (EIO) (Directive 2014/41/EU),

which replaces the European Evidence Warrant (EEW), has been adopted in accordance with the aim of the Stockholm Program for the setting up of a comprehensive system for obtaining evidence in cases with a crossborder dimension, based on the principle of mutual recognition. In this context article 29 of the EIO on covert investigations, states that:

An EIO may be issued for the purpose of requesting the executing State to assist the issuing State in the conduct of investigations into crime by officers acting under covert or false identity (“covert investigations”).

However, as article 29 further states:

Covert investigations shall take place in accordance with the national law and procedures of the Member State on the territory of which the covert investigation takes place.

In other words, undercover policing remains a strictly national affair that shall take place in accordance with national law. Thus despite the growing harmonisation of criminal law and criminal procedure on a European level undercover policing is still a very sensitive issue. In this context, contrary to the US, most European countries remain reluctant to use of undercover policing mostly due to historical reasons, e.g. political surveillance and cooperation with fascism (Joh, 2009, Ross, 2008). However, in view of the growing international cooperation and interdependence among the different countries, undercover policing should no longer be regarded as an isolated act, depending on the different national legal frameworks. Thus, as stated by Ross (2004), this investigative measure

[...] spills over national borders and thus raises questions about the globalisation of investigative techniques, the viability of transplanted law enforcement methods, the harmonisation of legal regimes, and the influence of supranational legal actors such as the ECtHR. (Ross, 2004: 267).

Meaning that the European Court of Human Rights (ECHR) is to determine how far the police can go in order to achieve an appropriate balance between police powers and individual liberty, including fundamental human rights such as the right to a fair trial in civil and criminal cases as prescribed in article 6 in the European Convention on Human Rights.

## Conclusion

In this article, I have tried to address some problems relating to the proactive investigation of sexual offences against children on the Internet from a *policing on the ground* perspective taking into account how these offences have gained more and more focus at an EU level. This is for instance the case with the setting up of EC3, Europol’s new cybercrime centre, where one of the main priorities is the fight against sexual crimes against children on the Internet. Thus, this type of

crime has become a top priority at EU level in terms of high politics by labelling it cybercrime.

As mentioned, however, it is still up to the respective Member State's police forces to investigate these crimes. Still, there are no common rules for the use of investigative steps such as undercover policing as this is a very sensitive issue. As argued in the article, it is necessary to provide national police forces with the necessary powers to effectively investigate sexual offences against children on an equal foot with other organised and serious crimes. Not least in an era of growing globalisation, where the Internet has been called "the schoolyard of the 21st century".

In this respect I have identified three EU member countries where the police are allowed to work as offenders in order to infiltrate the paedophile circles where the abuses behind these pictures is taking place. These countries (Belgium, the Netherlands, and the UK) further allow for the police to share abusive material as part of their undercover investigation. This controversial step is not allowed for instance in Denmark.

Research on harmonisation in this area is still necessary. As shown in this article sexual offences against children are still subject to a general reluctance despite the aim of effectively combating these crimes (like organised and serious crime) and despite the overall wish to take into account the rights of the children as prescribed in the various EU legal instruments in the field.

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