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REGULATIONS OF CHILD PORNOGRAPHY – THE IMPACT OF EUROPEAN UNION LEGISLATION ON THE AMENDMENTS TO THE POLISH CRIMINAL CODE

1. INTRODUCTION

The sudden technological development and the spread of electronic devices are the integral features of the 21st century. These conditions lead to the facilitation of production and distribution of pornographic material and thus cause its easy availability. The problem of pornography on the Internet has arisen almost with the moment of its invention and because of the false conviction that the users of the Internet are anonymous it is still an alarming problem¹. It is hard to ascertain whether the consumption of pornography results in an excessive interest in sex or the opposite – the consumption of pornography is one of the effects of a sexual disorder². The problem of child pornography appears to be essential while discussing the issue of pornography itself since it causes controversy both in Poland and other European countries. The reason for the controversy is a conflict between two opposite interests – the good of the child and free market which derives profit from pornographic material³. Child pornography is considered socially harmful due to three main reasons – it can be used by perpetrators to facilitate sexual exploitation of children because it suggests that paedophilia is a common occurrence. Moreover, if it involves the participation of a child it leads to exploitation which can cause serious and long-lasting psychological trauma. Finally, child pornography promotes actions which are considered illegal by the criminal law⁴.

¹ F. Radoniewicz, *Pornografia w Internecie (aspekty wybrane)*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 260.

² M. Budyn-Kulik, *Psychologiczne i społeczne następstwa konsumpcji pornografii*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 192.

³ J. Mierzwińska-Lorencek, *Karnoprawna ochrona dziecka przed wykorzystywaniem seksualnym*, Warszawa 2012, p. 65.

⁴ J. Warylewski, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności*, (in:) A. Wąsek (ed.), *Kodeks karny. Część szczególna. Komentarz do art. 117–221*, Warszawa 2006, p. 958.

Since the 1990s the dynamic process of technological change has entailed new regulations of child pornography which are intended to protect minors in the most effective way. There is a noticeable tendency in Europe to adopt more and more precise tools to prevent children from sexual exploitation⁵. The criminal law in Poland fits into that tendency – it is created on the basis of international law, conventions of the Council of Europe and finally, the European Union law. The purpose of this article is to display the development of regulations of child pornography in the EU and in Poland since 1996. Its aim is also to show that the amendments to the Polish Criminal Code are strictly connected with the changes in the EU law and they reflect the tendency of specifying tools to protect children. This thesis will be supported by comparing the most important EU legal acts after the Green Paper of 1996 and the amendments to the Criminal Code concerning child pornography of 2004 and 2005, 2008 and 2014.

2. THE ESSENCE OF CHILD PORNOGRAPHY

There is no legal definition of “pornographic material” nor “child pornography” in the Polish legal system. M. Filar claims that pornography is such a way of presenting sexual acts that is incompatible with the acceptable behaviour models. That definition surely includes child pornography⁶. The understanding of this expression has been changing over the years as a result of amendments to the Criminal Code from 1997⁷. Those amendments were conditioned by the necessity of meeting international commitments, implementing EU law and reacting to different realities⁸. Nowadays, it is generally assumed that the definition of child pornography includes all of the visual material (photographs, videos or even texts) as well as produced or processed images of a minor involved in a sexual act. It also refers to adults looking and acting like minors who are involved in sexually explicit conduct. Furthermore, the definition includes the display of a minor’s sexual organs themselves⁹. The expression “minor” refers to every person under the age of 18. This wide definition is based especially on the Directive of the European Parliament and of the Council of December 13, 2011 on combating sexual abuse and sexual exploitation of chil-

⁵ K. Kudyba, *Cyberprzestępstwa seksualne na szkodę małoletniego w polskim i amerykańskim porządku prawnym*, Warszawa 2015, p. 41.

⁶ B. Czyż (opr.), *Dzieci w prostytucji i pornografii – wybrane materiały ze Światowego Kongresu Sztokholm 1996*, Helsińska Fundacja Praw Człowieka, Warszawa 1996, p. 20.

⁷ Criminal Code of June 6, 1997 (Journal of Laws of the Republic of Poland from 1997, No. 88, item 553)

⁸ M. Filar, *Nowelizacja kodeksu karnego w zakresie tzw. przestępstw seksualnych*, “Prokuratura i Prawo” 2004, issue 11–12, p. 23.

⁹ J. Warylewski, *Pornografia – próba definicji*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 25.

dren which will be discussed afterwards. However, originally the Polish Criminal Code included a different description of child pornography and a minor itself. The amendments which have changed the meaning of the above-mentioned expressions are worth presenting especially in the context of modifications of the EU law.

3. FIRST ATTEMPTS AT SPECIFYING INSTRUMENTS OF CHILD PROTECTION (AMENDMENTS OF 2004 AND 2005)

One of the first documents released with the aim of effecting the protection of minors in the EU was the Green Paper on the protection of minors and human dignity in audiovisual and information services from 1996. It was published by the European Commission to stimulate discussion on sexual exploitation of minors online at the European level. Its goal was to find a common approach of member states to combating illegal and harmful material on the Internet. The Green Paper divides pornography into *illegal* and *harmful*. Illegal pornography includes child pornography and pornographic material associated with the use of violence. Because of it being a violation of human dignity, it should be forbidden for people of any age. The second type of material, harmful pornography, such as adult erotica, is considered destructive for the development of minors, thus they cannot gain access to such material. However, it should be fully accessible to adults¹⁰. Moreover, the EU invented the first multiannual Community action plan which aimed to protect minors by promoting safer use of the Internet. It was created on January 25, 1999 on the ground of the Directive of the European Parliament and of the Council and lasted till 2004. The Action Plan for a Safer Internet provided measures including promotion of industry self-regulation and content-monitoring schemes. It also presented filtering tools which allowed parents and teachers to select content appropriate for children, and rating systems, for example the platform for Internet content selection (PICS) standard launched by the international World Wide Web consortium with Community support¹¹. The plan was later adopted by decision No. 276/1999/EC. But what played a significant role in protecting minors in this period was the Council decision of May 29, 2000 to combat child pornography on the Internet on the initiative of the Republic of Austria (2000/375/JHA). On the ground of the decision member states were obligated to take necessary measures to encourage Internet users to inform law enforcement authorities of suspected distribution of child pornography on the Internet if they come across such material. Member states committed to ensure the widest

¹⁰ Green Paper on the protection of minors and human dignity in audiovisual and information services, Brussels, October 16, 1996, COM (96) 483 final, p. 4.

¹¹ Decision No. 276/1999/EC of the European Parliament and of the Council of January 25, 1999 (OJ L 33, February 6, 1999), p. 3.

and speediest possible cooperation with each other and with Europol to facilitate an effective investigation and prosecution of offences concerning child pornography as well as to exchange experience and information on that matter¹². The decision obliged member states to regularly verify whether technological developments require, in order to maintain the efficiency of the fight against child pornography on the Internet, changes to criminal procedural law¹³.

M. Filar, while discussing the problem of pornography, claimed that provisions on that matter in Poland are 200 years younger than the European regulations but they have never caused a serious judicial action as in other countries in Europe¹⁴. In 2004 the Polish legislator made the first attempt to prepare an amendment which would reflect the process of creating more effective measures to protect minors from child pornography. On March 18, 2004, the first amendment on pornography after 1997 was included in the Polish Criminal Code. It distinguished two types of pornographic material – softcore and hardcore. The hardcore type, beside material associated with the use of violence or the use of an animal, included child pornography. This issue has been regulated in art. 202 § 3–5, which is shown in the table below.

Art. 202

1997	2004
§ 3. Anyone who produces with the aim of distribution, imports or distributes pornographic material with the participation of a minor <u>under the age of 15</u> or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between three months and five years.	§ 3. Anyone who produces with the aim of distribution, preserves , imports, distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between six months and eight years .
	§ 4. Anyone who preserves, imports, stores or possesses pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between three months and five years.
	§ 5. The court may decide upon forfeiture of means or other items that were intended to be used or were used to commit offences described in § 1–4, even if they were not owned by the offende¹⁵.

¹² B. Kunicka-Michalska, *Przestępstwa przeciwko wolności seksualnej i obyczajności popełnione za pośrednictwem systemu informatycznego*, Wrocław 2004, p. 22.

¹³ Council decision No. 2000/375/JHA of May 29, 2000 to combat child pornography on the Internet (OJ L 138 of June 9, 2000), p. 2.

¹⁴ J. Warylewski, *Przestępstwa seksualne*, Gdańsk 2001, p. 279.

¹⁵ Act on Amending the Criminal Code, the Code of Criminal Procedure and the Petty Offences Code of March 18, 2004 (Journal of Laws from 2004, No. 69, item 626).

As we can observe, in the revised § 3 the legislator for the first time penalised preservation and public display of pornographic material with the participation of a minor. This wider penalisation was the result of meeting international commitments, but its basic purpose was to enhance the protection of minors. However, M. Filar has pointed to a huge inconsistency in the new regulation on how the minor should be defined¹⁶. In § 3 the legislator penalises actions against a minor (by implication – a child under the age of 18) taken only with the aim of distribution while § 4 penalises preservation, import, storage and possession of child pornography without any specific aim but with the participation of a minor under the age of 15. Distribution in this context means making pornographic material commonly available by, for example, copying, publishing, sharing with an unspecified and wide group of people. In the judgment of September 1, 2011, the Supreme Court of Poland held that for assigning criminal liability for distributing child pornography on the Internet it does not matter what precisely the number of users who got familiar with the content was and whether the number can be regarded as significant¹⁷. What matters is that the way of downloading pornographic material and sharing it by using a special program makes it available for an indefinite number of people to acquaint themselves therewith. Showing and sharing such material with a small and clearly specified group of people is not distribution in the light of the Criminal Code¹⁸.

The inconsistency in the new regulation also concerns the relation between art. 202 and art. 200 of the Criminal Code. Article 200 penalises subjecting a minor under 15 years of age to sexual intercourse and making him submit to another sexual act. This leads to a bizarre situation in which having sexual intercourse with a sixteen years old girl is legal while importing such material with the aim of distribution is a crime. The higher age limit complies with the view of the European Commission which indicated that “depictions of persons under the age of eighteen involved in sexually explicit conduct constitute sexual exploitation of children¹⁹”. The Commission remarked that the age of eighteen is in conformity with the Convention of the Rights of the Child and children under that age should be put under special protection even though they may reach the maturity to take an informed decision about involving themselves in sexual activities. The amendment of 2004, although not perfect, started a process of specifying measures to protect minors from child pornography and indicated the need for such regulations.

¹⁶ M. Filar, *Nowelizacja kodeksu karnego...*, p. 29.

¹⁷ Resolution of the Supreme Court of Poland of September 1, 2011, V KK 43/11.

¹⁸ A. Choromańska, D. Mocarska, *Dewiacje i przestępstwa seksualne – klasyfikacja, aspekty prawne*, Szczytno 2009, p. 55

¹⁹ Communication from the Commission to the Council and the European Parliament, Combating trafficking in human beings and combating sexual exploitation of children and child pornography, Brussels, December 21, 2000, COM (2000) 854 final, p. 22.

Just one year later, on July 27, 2005, art. 202 of the Criminal Code was revised again. Changes from 2004 and 2005 can be treated as a whole because the amendment of 2005, called the “anti-paedophilia amendment”, did not penalise any actions different than those from 2004. It was only intended to eliminate flaws of the earlier amendment. The legislator added storing and possessing pornographic material with the participation of a minor with the aim of distribution to § 3. Moreover, § 4 was divided into two paragraphs. The *ratio legis* of this change was to condemn preserving child pornography in a particular way because of the acute immorality of this action. As a result, preserving pornographic material with the participation of a minor under the age of 15 became liable to imprisonment between one and ten years.

Art. 202

2004	2005
§ 3. Anyone who produces with the aim of distribution, preserves, imports, distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between six months and eight years.	§ 3. Anyone who produces with the aim of distribution, preserves, imports, stores or possesses distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between six months and eight years.
§ 4. Anyone who preserves, <u>imports, stores or possesses</u> pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between three months and five years.	§ 4. Anyone who preserves pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between <u>one year and ten years</u> .
	§ 4a. Anyone who imports, stores or possesses pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between three months and five years²⁰.

Article 202 of the Criminal Code lacked penalisation of the act of gaining access to child pornography without possessing it nor importing. In the judgment of September 27, 2012, the Court of Appeals for Wrocław held that the act of entering a site and getting familiar with pornographic material with the participation of a minor is not “importing” in the light of art. 202 § 4a of the Criminal Code²¹.

²⁰ Act on Amending the Criminal Code, the Code of Criminal Procedure and the Executive Criminal Code of July 27, 2005 (Journal of Laws from 2005, No. 163, item 1363).

²¹ Court of Appeals for Wrocław judgment of September 27, 2012, II AKa 171/12, LEX No. 1238629.

4. WIDENING THE SCOPE OF THE DEFINITION OF CHILD PORNOGRAPHY (AMENDMENT OF 2008)

In the opinion of the EU organs, expressed in Decision No. 854/2005/WE²², the Action Plan for a Safer Internet has successfully encouraged a variety of initiatives and thus they decided on further seeking to improve the work already accomplished. The decision introduced a new multiannual action plan called the Safer Internet Plus which lasted from 2005 to 2008. The aim of the plan was to fight against illegal content, tackle unwanted and harmful content, promote a safer environment and raise awareness of the Internet users²³. It included an annex which provided a group of actions that must be held to fulfil provisions of the European Parliament and of the Council. Measures to fight against illegal content include hotlines which pass reports to an Internet Service Provider, the police or a correspondent hotline. Rating systems and quality labels, in combination with filtering technologies, can help enable users to select the content they wish to receive and thus they can be used to tackle unwanted and harmful content. Promoting a safer environment, in the light of the decision, needs a fully functioning system of self-regulation which involves a number of factors: consultation and appropriate representation of the parties concerned, codes of conduct, national bodies facilitating cooperation at the European level and national evaluation of self-regulation frameworks. And finally, the annex included measures to raise awareness of the Internet users such as starting public awareness campaigns and establishing partnerships with government agencies, user organisations, press and media groups²⁴. The next plan, Safer Internet programme, established by Decision No. 1351/2008/EC of the European Parliament and of the Council of December 16, 2008²⁵ for the period 2009–2013, pursued the objectives of “Safer Internet Plus”. It aimed to improve the safety of children on the Internet by increasing the knowledge of the use of new technologies by children and identifying and combating the risks to which they are exposed.

Not only have the legal acts influenced the amendments to the Criminal Code, but they have also been a base for establishing awareness-raising campaigns and organizations. The Polish Safer Internet Centre was launched in 1999 and is run by the Empowering Children Foundation and by the Research and Academic Computer Network (NASK). The Centre organizes educational projects, such

²² Decision No. 854/2005/EC of the European Parliament and of the Council of May 11, 2005 establishing a multiannual Community Programme on promoting safer use of the Internet and new online technologies (OJ L 149 of June 11, 2005), p. 2.

²³ K. Kudyba, *Cyberprzestępstwa seksualne na szkodę małoletniego...*, p. 33.

²⁴ Decision No. 854/2005/EC, Annex 1 (OJ L 149 of June 11, 2005), pp. 5–9.

²⁵ Decision No. 1351/2008/EC of the European Parliament and of the Council of December 16, 2008 establishing a multiannual Community programme on protecting children using the Internet and other communication technologies (OJ L 348 of December 24, 2008).

as *Watch your face – facebook campaign* and media campaigns – *Every move online leaves a trace* and *Keep it fun, keep control*. It also runs conferences and training sessions with the aim of improving the safety of children using the Internet and new technologies²⁶. There has also been established a team called *Dyżurnet.pl*, functioning within the framework of NASK. It responds to anonymous reports about potentially illegal material received from Internet users. They can report one of four types of content: child sexual abuse material, extreme adult content, racism – xenophobia and other illegal content²⁷. *Dyżurnet.pl* also runs campaigns, organizes conferences and trainings. A report from 2015 shows that it is an important initiative because of the fact that during 2015 the number of reports classified as material presenting minors for sexual purposes has increased over twice²⁸.

In connection with the constant development of new information and communication technologies the European Parliament and the Council came up in 2006 with a recommendation on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (2006/952/EC). They concentrated on three basic aspects – considering by the member states of the introduction of measures into their domestic law, promoting actions to enable minors to make responsible use of audiovisual and on-line information services and promoting a responsible attitude on the part of professionals, intermediaries and users of the Internet²⁹. The recommendation laid emphasis on the role of constructive and on-going dialogue between national and European legislators, regulatory authorities, industries, associations, citizens and civil society. None of these goals could be achieved without highlighting education of the society in the subject of safe usage of the Internet. The aim was fulfilled by organizing training for children and their parents as well as national campaigns increasing awareness. The duty of monitoring the progress of completing these tasks was repeated in Directive No. 2007/65/EC of the European Parliament and of the Council on December 11, 2007³⁰. Acts mentioned in subsection 2 considered a minor as a child under the age of 18. Moreover, they penalised three types of child pornography, including

²⁶ See <http://www.saferinternet.pl/en/about/safer-internet-in-poland> (visited September 29, 2016).

²⁷ See <https://dyzurnet.pl/en/formularz.html> (visited September 29, 2016).

²⁸ See <https://dyzurnet.pl/en/aktualnosci/11> (visited September 29, 2016).

²⁹ Recommendation No. 2006/952/EC of the European Parliament and of the Council of December 20, 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (OJ C 87E of April 1, 2010), p. 124.

³⁰ Directive No. 2007/65/EC of the European Parliament and of the Council on December 11, 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332 of December 18, 2007), p. 27.

produced or processed images of a minor involved in a sexual act without the participation of a real child. Material presenting produced and processed images of a minor involved in a sexual act includes the Japanese *hentai manga* and *hentai anime* (cartoon images of paedophiles, sexual perversions and violence), European and American hardcore products as well as simulated imagery with the participation of adults made to look as children³¹.

However, till 2008 the Polish legislator had not penalised virtual child pornography at all. On the ground of the amendment of October 24, 2008, new § 4b was added to the Criminal Code and it finally distinguished virtual child pornography.

Art. 202 § 4b. Anyone who produces, distributes, presents, stores or possesses pornographic material presenting a **produced or processed image of a minor** involved in a sexual act is liable to a fine, restriction of liberty or imprisonment for up to two years³².

This amendment showed that before 2008, occasional views of some experts that expressions such as “minor” or “a minor under the age of 15” should be interpreted widely as including computer animations presenting children, had been wrong. They had been inconsistent with the linguistic interpretation of the law, but most importantly – they had violated the constitutional and criminal principle of *nullum crimen sine lege*³³.

In the opinion of *Dyżurnet.pl*, the amendment of 2008 was really needed and it was an accurate response to the problem of material using images of a minor. It highlights the fact that because of the unstoppable development of computer graphics a virtual image of a minor can precisely resemble a real person³⁴. A different point of view is presented by sociologist L. Nijakowski who finds the amendment of 2008 bizarre and claims that although the regulation reflects the public perception of sexual exploitation of a child, it obviously restrains freedom of expression³⁵. It is hard to agree with that strong of an opinion. Produced images of minors involved in sexual acts may not violate legal interests of a child such as sexual freedom or decency, but they have a secondary effect. Such material confirms the conviction that sexual interest in children is acceptable and it may lead to a rapid growth in paedophilia. That is why the amendment of 2008 serves a great goal and must be treated as a positive change in regulations of child pornography. However, the amendment did not change § 4 of art. 202 which puts under protection children under the age of 15. This deci-

³¹ J. Warylewski, *Rozdział XXV. Przepięstwa przeciwko wolności seksualnej i obyczajności*, (in:) R. A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2015, p. 1307.

³² Act on Amending the Criminal Code and Other Laws of October 24, 2008 (Journal of Laws from 2008, No. 214, item 1344).

³³ J. Warylewski, *Rozdział XXV...*, (in:) R. A. Stefański (ed.), *Kodeks...*, p. 1307.

³⁴ *Raport – 10 lat Dyżurnet.pl*, Warszawa 2015, p. 26.

³⁵ L. M. Nijakowski, *Pornografia – historia, znaczenie, gatunki*, Warszawa 2010, p. 449.

sion led to a violation of international commitments included in such acts as the Convention on Cybercrime which considers a child every person under the age of 18 but allows to lower the age to 16³⁶. This considerable flaw was removed in the next amendment of 2014.

5. STIFFENING SANCTIONS FOR CHILD PORNOGRAPHY (AMENDMENT OF 2014)

One of the most significant EU regulations on the subject of child pornography was the Council Framework Decision No. 2004/68/WSiSW of December 22, 2003 on combating the sexual exploitation of children and child pornography³⁷. On December 13, 2011, it was replaced by the Directive No. 2011/92/EU of the European Parliament and of the Council³⁸. Its aim was to establish minimum standards concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes that could be approved by all of the member states. It also introduced provisions to strengthen the prevention of those crimes and the protection of victims. The directive defines “child pornography” and as a part of the EU legal system it must also be considered in the context of Polish legislation³⁹.

Article 2c defines child pornography as:

- a) material that visually depicts a child engaged in real or simulated sexually explicit conduct;
- b) depiction of the sexual organs of a child for primarily sexual purposes;
- c) material that visually depicts a person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of a person appearing to be a child, for primarily sexual purposes;
- d) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes⁴⁰.

³⁶ A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012, p. 327.

³⁷ Council Framework Decision No. 2004/68/WSiSW of December 22, 2003 on combating the sexual exploitation of children and child pornography (OJ L 13 of January 20, 2004).

³⁸ Directive 2011/92/EU of the European Parliament and of the Council of December 13, 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/WSiSW (OJ L 335 of December 17, 2011).

³⁹ J. Warylewski, *Pornografia...*, p. 25.

⁴⁰ Directive 2011/92/EU (OJ L 335 of December 17, 2011), p. 7.

As earlier acts, the decision considers a child as any person below the age of 18 years.

The result of the Council Framework Decision, which has been replaced by the Directive No. 2011/92/EU, had already appeared in the amendments of Polish Criminal Code. The amendment of 2008 distinguished three basic forms of child pornography highlighted above: depiction of a real minor involved in a sexual act, depiction of an adult made to look as a minor involved in a sexual act and produced or processed image of a minor involved in a sexual act. However, the directive claimed that it should be in the discretion of a member state to decide whether art. 2c would apply to cases involving people appearing to be a child and processed images of a child engaged in sexually explicit conduct. It indicated that actions such as: acquisition and possession, knowingly obtaining access, distribution, dissemination and transmission, offering, supplying or making available as well as production of child pornography should be punishable in member states. It also determined maximum terms of imprisonment for the above-mentioned crimes. It provided minimum sanctions for acquisition, possession and knowingly obtaining access to child pornography (1 year), distribution, dissemination, transmission, offering, supplying and making available (2 years) and production of child pornography (3 years). What is more, the decision stated that also legal persons may be held liable for any of the offences committed as well as inciting or aiding and abetting committing those crimes. As the Polish Criminal Code had already provided in art. 202 § 5, competent authorities were entitled on the ground of the decision to seize and confiscate instrumentalities and proceeds from the offences. It placed member states under an obligation to establish and strengthen policies to prevent sexual exploitation of children including information and awareness-raising campaigns, research and education programmes⁴¹. It also obligated them to provide necessary assistance and support to the victim and their family even without the child's willingness to cooperate.

The last amendment partially implementing the Directive No. 2011/92/UE was introduced to the Polish legal system on April 4, 2014⁴². As a result, it increased penalties for crimes described in art. 202 § 3 of the Criminal Code. It also eliminated the inconsequence in defining the age of a minor – it put under the protection of the criminal law every person under the age of 18. The legislator added § 4c, in which it penalised participating in presenting pornographic material with the participation of a minor. He also added the action of gaining access to such material as liable to imprisonment, behaviour referred to in the Directive No. 2011/92/UE as “knowingly obtaining access”.

⁴¹ K. Kudyba, *Cyberprzestępstwa seksualne na szkodę małoletniego...*, p. 39.

⁴² Act on Amending the Criminal Code and Other Laws April 4, 2014 (Journal of Laws from 2014, item 538).

Art. 202

2008	2014
§ 3. Anyone who produces with the aim of distribution, preserves, imports, stores or possesses distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between <u>six months and eight years</u> .	§ 3. Anyone who produces with the aim of distribution, preserves, imports, stores or possesses distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between two and twelve years .
§ 4. Anyone who preserves pornographic material with the participation of a minor <u>under the age of 15</u> is liable to imprisonment for between one year and ten years.	§ 4. Anyone who preserves pornographic material with the participation of a minor is liable to imprisonment for between one year and ten years.
§ 4a. Anyone who <u>imports</u> , stores or possesses pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between three months and five years.	§ 4a. Anyone who stores, possesses or gains access to pornographic material with the participation of a minor is liable to imprisonment for between three months and five years.
§ 4b.	§ 4b. no changes
	§ 4c. Anyone who, with the aim of sexual satisfaction, participates in presenting pornographic material with the participation of a minor, is liable to restrictions described in 4b⁴³.

As we can notice, the amendment led to increased penalties and widened criminalization. This implementation is considered rather negatively in the criminal law literature in Poland. It is assumed that the amendment led to the final “partition” of art. 202 and provided a casuistic form thereof⁴⁴. A huge flaw is also the inaccuracy of the recent regulation, which leads to a situation in which the prohibited act from 202 § 4a can also be committed by experts and law-enforcement agents who possess and store child pornography to conduct evidence activities and criminal proceedings⁴⁵. Moreover, changes in regulations run counter to the necessary process of decriminalization and depenalization, not only in the context of sex crimes⁴⁶.

Increased penalties is a solution that may only appease the conscience of the legislator, but it will not lead to the elimination or even alleviation of the problem of child pornography. It is necessary to choose a penalty in order to minimize

⁴³ *Ibidem*.

⁴⁴ M. Mozgawa, P. Kozłowska-Kalisz, *Analiza dogmatyczna przestępstw związanych z pornografią (zagadnienia podstawowe)*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 85.

⁴⁵ A. Adamski, *Karnoprawna ochrona dziecka w sieci Internet*, “Prokuratura i Prawo” 2003, No. 9, p. 63.

⁴⁶ J. Warylewski, *Rozdział XXV...*, (in:) R. A. Stefański (ed.), *Kodeks...*, p. 1311.

the risk of committing a similar crime by the convict in the future. According to research, imprisonment itself may not have a positive impact on the personality of the convict⁴⁷. Preventive actions to be effective often shall include isolation, medical treatment and special therapy because without that the risk of committing sex crimes in the future is extremely high. That is why the amendment of 2014 should be considered as disappointing and alarming as it proves that changes of regulations of child pornography go in a fundamentally wrong direction.

6. CONCLUSIONS

Since 1997, the Polish Criminal Code has changed several times and regulations of child pornography are now noticeably different – the impact of the EU law on the amendments is undeniable with regard to defining child pornography as well as in establishing tools to eliminate that problem. The Polish legal system is based on the same values as the EU legislation which leads to cross-fertilization between those two systems. It is a mutual dependency because the effectiveness of EU regulations depends on efficient and comprehensive implementation into legal systems in Poland and in other European countries⁴⁸. However, in the case of child pornography this may not result in a success.

The *ratio legis* of changing Polish criminal law on this matter has been to improve the measures to protect minors from sexual exploitation and to highlight the position of the child as protected by the Constitution. The first amendments of 2004 and 2005 were based mostly on the Council decision of May 29, 2000 (2000/375/JHA) and they proved that the legislator wanted to specify instruments of child protection. It added actions to art. 202 of the Criminal Code such as preserving and publicly displaying pornographic material with the participation of a minor and penalised them. The child's good was initially the main object of protection in art. 202 § 3 and § 4, however that became more complicated after the change in 2008. The second amendment of 2008 resulted from Directive No. 2007/65/EC of the European Parliament and of the Council on December 11, 2007. It widened the definition of child pornography as it included in art. 202 § 4b produced or processed image of a minor involved in a sexual act. This called into question the subject of protection in art. 202 as no exploitation of a real child takes place while breaching the regulation in art. 202 § 4b⁴⁹. The last amendment of 2014 aimed to stiffen sanctions for actions connected with child pornography.

⁴⁷ P. Marcinek, A. Peda, *Terapia sprawców przestępstw seksualnych w warunkach izolacji więziennej*, "Seksuologia Polska" 2009, issue 7(2), p. 60.

⁴⁸ K. Kudyba, *Cyberprzestępstwa seksualne na szkodę małoletniego...*, p. 45.

⁴⁹ M. Filarz (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 1260.

It also increased the age level of children put under protection and equated it to the age of 18. For that reason, the thesis that the child's good is considered the main subject of protection in art. 202 has been corrected. It is assumed that one of two explanations should be taken into consideration – the good of the child is still the subject of protection either because the perpetrator might try to convince a minor that sexual interest in children is acceptable using virtual child pornography, or because as his sexual needs could be awakened by watching such material the perpetrator might search for satisfaction in a real intercourse with a child⁵⁰.

Taking all that into consideration, it must be highlighted that the trend of changes of regulations on child pornography cannot be considered as positive. The casuistic form of provisions makes combating sexual exploitation of children less effective. Because of the number of amendments to the Criminal Code, a comparison of statistics showing the number of crimes before and after the changes is impossible. However, the research of M. Marczewski⁵¹ has shown that between 2006 and 2009 there was a considerable increase in crimes involving pornography, but a relatively small group of perpetrators was prosecuted, which calls into question the effectiveness of the current tendency of regulating child pornography. Also, a report prepared by the Cybercrime Research Centre in 2015 shows that detection of perpetrators and the number of convictions is relatively low. This is a consequence of imperfect regulations, organizational conditions and inappropriate methods in legal proceedings⁵². It is worth indicating that the process of harmonization and Europeanization of the law pertaining to child pornography does not fulfil the goal of protecting children in a more effective way. The term “harmonization” refers to the necessary process of making legislation in European countries similar, with the aim of ensuring cooperation in combating especially dangerous “crimes without borders” such as child pornography. The harmonization has been treated as a stage of Europeanization of law for a long time, but nowadays the perspective of unification seems unlikely to occur⁵³.

However, improving legislation in Poland on that matter is still possible. M. Siwicki claims that the current provisions lack penalisation of the action of “sending” pornographic material as Peer2mail is becoming more popular. It is also a deviation from the standards described in the Convention on Cybercrime⁵⁴. What is more, art. 202 § 4b should be revised again – it is so because deciding whether a virtual child that does not exist might be 18 years old or just 17 years

⁵⁰ *Ibidem*.

⁵¹ M. Marczewski, *Obraz statystyczny przestępstw z art. 202 k.k.*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 165.

⁵² A. Adamski, A. Lach, J. Kosiński, M. Ročławska, S. Bakalarz, *Współpraca w zwalczaniu nielegalnych treści w Internecie – raport z badań*, Toruń 2015, p. 251.

⁵³ A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Girdwoyń, *Prawo karne i wymiar sprawiedliwości państw Unii Europejskiej*, Toruń 2007, p. 431.

⁵⁴ M. Siwicki, *Cyberprzestępczość*, Warszawa 2013, p. 211.

and 6 months old is too subjective and cannot be easily proved. Adding exceptions excluding criminal liability to art. 202 § 4 of the Criminal Code should be considered as well. It could help eliminate problems such as intentional placing of child pornography in the computer of the suspect or possessing pornographic material because of one's profession, which refers to police officers or court experts⁵⁵. However, some find that thesis unjustified and describe it as an overinterpretation⁵⁶. M. Skórzewska-Amberg claims that possessing child pornography by experts and police officers does not cause a situation which leads to an intentional attack on any good of a child and thus it cannot be treated as a crime.

Summary

The aim of this article is to present the development of Polish and EU regulations on child pornography. Four amendments to the Polish Criminal Code, which were passed with the purpose of effecting tools to protect children, are strictly connected with the changes in the EU law – from the Green Paper of 1996 to Directive No. 2011/92/EU of the European Parliament and of the Council. The paper presents the current definition of child pornography, the understanding of which has evolved since the 90s. Changes in the EU law and the Polish regulations can be divided into three stages – first attempts at specifying instruments on child protection, widening the scope of the definition of child pornography and stiffening sanctions for child pornography. Amendments to the Polish Criminal Code reflect the actual tendency to adopt more precise tools to prevent children from sexual exploitation. However, it does not lead to desired effects. Child pornography is a growing problem due to the relentless technological development but current regulations in their casuistic form are not a suitable tool to combat sexual exploitation of children.

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⁵⁵ K. Gienas, *Zjawisko rozpowszechniania pornografii dziecięcej za pośrednictwem Internetu*, "Palestra" 2004, issue 3–4, p. 141.

⁵⁶ M. Skórzewska-Amberg, *Zwalczanie niegodziwego traktowania w celach seksualnych i wykorzystywania seksualnego dzieci oraz pornografii dziecięcej (na tle dyrektywy 2011/92/UE)*, "Państwo i Prawo" 2013, issue 8, p. 58.

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KEYWORDS

child pornography, amendments to the Polish Criminal Code, criminal law of the EU, cooperation in combating child pornography, protecting children's rights

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pornografia dziecięca, nowelizacje kodeksu karnego, unijne prawo karne, współpraca w zwalczaniu pornografii dziecięcej, ochrona praw dziecka