



**COUNCIL OF
THE EUROPEAN UNION**

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12413/02

LIMITE

**DROIPEN 67
MIGR 86**

NOTE

from : Presidency

to : Coreper

No. prev. doc. : 8135/02 DROIPEN 26 MIGR 35 + COR 1

9140/1/02 DROIPEN 32 MIGR 43 REV 1

No. Cion prop. : 5206/01 DROIPEN 2 (COM(2000) 854 final)

Subject : Draft Council Framework Decision on combating the sexual exploitation of children and child pornography

I INTRODUCTION

The Commission submitted a proposal for a Framework Decision on combating the sexual exploitation of children and child pornography on 22 January 2001.¹

The European Parliament delivered its opinion on the proposal on 12 June 2001.²

¹ OJ C 62E, 27.2.2001, p. 327.

² OJ C 53E, 28.2.2002, p. 108.

The Council has examined the above draft Framework decision at several meetings, on the latest occasion at its meeting on 25 and 26 April 2002 on the basis of 8135/02 DROIPEN 26 MIGR 35 + COR 1. The outcome thereof is set out in 9140/1/02 DROIPEN 32 MIGR 43 REV 1.

Coreper examined on that basis the outstanding questions at its meeting on 29 May 2002.

The text resulting from those proceedings is set out in Annex I. Certain declarations for inclusion in the minutes of the Council are set out in Annex II.

The text as amended was subject to the following:

- Parliamentary scrutiny reservations by the Swedish, German, Netherlands, Danish, Irish and Portuguese delegations.
- Reservation by the Italian delegation on Article 3(2)(b).
- Reservation by the Netherlands delegation on Article 5(2)(b) and (c).
- Reservation by the Finnish delegation on the penalty level provided for in Article 5(2)(c) in respect of the offences referred to in Article 3(1)(a), 3(1)(b) and 3(1)(c).

II OUTSTANDING QUESTIONS

A.

Article 3(2)(b) and (c)

At the Council meeting on 6 and 7 December 2001, 14 delegations agreed on Articles 1, 2 and 3, which contain definitions and the conduct relating to sexual exploitation of children and child pornography, which Member States are to criminalize. The Italian delegation, however, upheld a scrutiny reservation in respect of Article 3(2)(b) and (c).

At the Council meeting on 25 and 26 April 2002, the Italian delegation proposed a new wording for Article 3(2)(b).

As a result of discussions at the Council meeting on 25 and 26 April 2002, Article 3(2)(b) and (c) were amended as set out in document 9140/1/02 DROIPEN 32 MIGR 43 REV 1. The Italian delegation upheld its reservation on Article 3(2)(b).

Article 3(2)(c) has been amended as requested by the Italian delegation. However, certain delegations underlined that they could only accept the amended text on the condition that the Italian delegation lifted its reservation on Article 3(2)(b).

On the basis of bilateral contacts between the Presidency and Italy, the Presidency has drafted a new compromise proposal for Article 3(2)(b), taking into account the concerns expressed by Italy:

Article 3(2)(b):

“Referred to in Article 1(b)(i) and (ii) where, in the case of production and possession, images of children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use. Even where the existence of consent has been established, it shall not be considered valid, if superior age, maturity, position, status, experience or the victim’s dependency on the perpetrator has been abused in achieving the consent.”

Explanatory remarks:

The Framework Decision requires Member States to criminalize e.g. the production, distribution, dissemination and possession of child pornography.

With the proposed text to Article 3(2)(b) the Presidency has first of all made it clear that the provision only covers the production and possession and therefore does not cover any kind of distribution or dissemination of child pornography.

Secondly, the reference to the age of sexual consent has been altered in accordance with the original Italian proposal.

Thirdly, the burden of proof as to the consent has been addressed in the compromise proposal.

According to the proposal, it is the person who has produced or possessed the image that has to prove that he has obtained a valid consent. In other words, it will never be the child – the victim – that has to prove that he or she did not give his or her consent.

Thus the compromise proposal makes it clear, that the burden of proof with regard to the existence of a valid consent is on the perpetrator. This follows from the words “even when the existence of consent has been established” in the last sentence.

Fourthly, it follows from the compromise proposal, that even if the consent has been established, it shall not be considered valid if there appears to be an imbalance in the relationship between the two persons involved, for instance because of the age difference.

The intention of the Presidency in this respect has been to ensure that the courts, when the perpetrator e.g. is the child’s teacher, employer or father, naturally assumes that the consent is not valid, unless very strong evidence is presented to prove that the consent was in fact given freely and with full appreciation of the consequences.

It is the opinion of the Presidency that the new draft compromise proposal accommodates the concerns expressed by the Italian delegation by clarifying and narrowing down the exemption with regards to production and possession for private use.

B.

Article 5(2):

As a result of discussions at the Council meeting on 25 and 26 April 2002, Article 5(2) was amended as set out in document 9140/1/02 DROIPEN 32 MIGR 43 REV 1. The text is subject to a scrutiny reservation by the Netherlands delegation. Furthermore the Finish delegation has a scrutiny reservation on the penalty level provided for in Articles 5(2)(c) in respect of the offences referred to in Article 3(1)(a), (b) and (c).

III CONCLUSIONS

Coreper is invited to examine the outstanding questions referred to under point II above.

Proposal for a

COUNCIL FRAMEWORK DECISION
on combating the sexual exploitation of children and child pornography

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 29, 31(e) and 34(2)(b) thereof,

Having regard to the proposal from the Commission,¹

Having regard to the Opinion of the European Parliament,²

Whereas:

The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice ³, the conclusions of the Tampere European Council, as listed in the Scoreboard ⁴, and the European Parliament in its Legislative Resolution of 11 April 2000 ⁵, include or call for legislative action against sexual exploitation of children and child pornography, including common definitions, charges and penalties.

¹ OJ C 62E, 27.2.2001, p. 327.

² OJ C 53E, 28.2.2002, p. 108.

³ OJ C 19, 23.1.1999, p. 1.

⁴ COM(2000) 167 final, pt. 4.3. Fight against certain forms of crime.

⁵ A5-0900/2000.

The Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and the sexual exploitation of children ¹ and the Council Decision to combat child pornography on the Internet ² need to be followed by further legislative action addressing the divergence of legal approaches in the Member States and contributing to the development of efficient judicial and law enforcement cooperation against sexual exploitation of children and child pornography.

The European Parliament, in its Resolution of 30 March 2000 ³ on the Commission Communication on the implementation of measures to combat child sex tourism ⁴, reiterates that child sex tourism is a criminal act closely linked to those of sexual exploitation of children and of child pornography, and requests the Commission to submit to the Council a proposal for a framework decision establishing minimum rules relating to the constituent elements of these criminal acts.

Sexual exploitation of children and child pornography constitute serious violations of human rights and of the fundamental right of a child to a harmonious upbringing and development.

Child pornography, a particularly serious form of sexual exploitation of children, is increasing and spreading through the use of new technologies and the Internet.

The important work performed by international organisations must be complemented by that of the European Union.

It is necessary that serious criminal offences such as the sexual exploitation of children and child pornography be addressed by a comprehensive approach in which the constituent elements of criminal law common to all Member States, including effective, proportionate and dissuasive sanctions, form an integral part together with the widest possible judicial cooperation.

¹ OJ L 63, 4.3.1997, p. 2.

² OJ L 138, 9.6.2000, p. 1.

³ A5-0052/2000.

⁴ COM(1999) 262.

In accordance with the principles of subsidiarity and proportionality, this Framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose.

Penalties must be introduced against the perpetrators of such offences which are sufficiently stringent to bring sexual exploitation of children and child pornography within the scope of instruments already adopted for the purpose of combating organised crime, such as Joint Action 98/699/JHA ¹ on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime and Joint Action 98/733/JHA ² on making it a criminal offence to participate in a criminal organisation.

The specific characteristics of the combat against the sexual exploitation of children must lead Member States to lay down effective, proportionate and dissuasive sanctions in national law. Such sanctions should also be adjusted in line with the activity carried on by legal persons.

Victims who are children should be questioned according to their age and stage of development for the purpose of investigation and prosecution of offences falling under this Framework Decision.

This Framework Decision is without prejudice to the powers of the European Community.

¹ OJ L 333, 9.12.1998, p. 1.

² OJ L 351, 29.12.1998, p. 1.

This Framework Decision should contribute to the fight against sexual exploitation of children and child pornography by complementing the instruments adopted by the Council, such as Joint Action 96/700/JHA ¹ establishing an incentive and exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children (STOP), Joint Action 96/748/JHA ² extending the mandate given to the Europol Drugs Unit, Decision 293/2000/EC of the European Parliament and of the Council ³ on the Daphne programme on preventive measures to fight violence against children, young persons and women, Joint Action 98/428/JHA ⁴ on the creation of a European Judicial Network, the Action Plan on promoting safer use of the Internet by combating illegal and harmful content on global networks ⁵; Joint Action 96/277/JHA ⁶, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union and Joint Action 98/427/JHA on good practice in mutual legal assistance in criminal matters,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definitions

For the purpose of this Framework Decision:

- (a) "*child*" shall mean any person below the age of eighteen years;

¹ OJ L 322, 12.12.1996, p. 7.

² OJ L 342, 31.12.1996, p. 4.

³ OJ L 34, 9.2.2000, p. 1.

⁴ OJ L 191, 7.7.1998, p. 4.

⁵ OJ L 33, 6.2.1999, p. 1.

⁶ OJ L 105, 27.4.1996, p. 1.

- (b) *"child pornography"* shall mean pornographic material that visually depicts or represents:
- (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or
 - (ii) a real person appearing to be a child involved or engaged in the aforementioned conduct; or
 - (iii) realistic images of a non-existent child involved or engaged in the aforementioned conduct;
- (c) *"computer system"* shall mean any device or group of inter-connected or related devices, one or more of which, pursuant to a program, perform automatic processing of data.

Article 2

Offences concerning sexual exploitation of children

Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable:

- (a) coercing a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;
- (b) recruiting a child into prostitution or into participating in pornographic performances;
- (c) engaging in sexual activities with a child, where
 - (i) use is made of coercion, force or threats,
 - (ii) money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities, or
 - (iii) abuse is made of a recognised position of trust, authority or influence over the child.

Article 3
Offences concerning child pornography

1. Each Member State shall take the necessary measures to ensure that the following intentional conduct, whether undertaken by means of a computer system or not, when committed without right is punishable:

- (a) production of child pornography;
- (b) distribution, dissemination or transmission of child pornography;
- (c) supplying or making available child pornography;
- (d) acquisition or possession of child pornography.

2. A Member State may exclude from criminal liability conduct relating to child pornography:

- (a) referred to in Article 1(b)(ii) where a real person appearing to be a child was in fact 18 years of age or older at the time of the depiction;
- (b) referred to in Article 1(b)(i) and (ii) where, in the case of production and possession, images of persons of the age of sexual consent or older are produced and possessed with their agreement and solely for their own private use.¹

¹ The Italian delegation maintained its reservation and proposed the following wording of Article 3(2)(b): "(b) referred to in Article 1(b)(i) (...) where, in the case of production and possession, images of children having reached the age of sexual consent (...) are produced and possessed by them for their own private use."

- (c) referred to in Article 1(b)(iii), where it is established that the pornographic material is produced and possessed by the producer solely for his or her own private use, as far as no pornographic material as referred to in Article 1(b)(i) and (ii) has been used for the purpose of its production, and provided that the act involves no risk for the dissemination of the material.¹

Article 4

Instigation, aiding, abetting and attempt

1. Each Member State shall take the necessary measures to ensure that the instigation of, or aiding or abetting in the commission of an offence referred to in Articles 2 and 3 is punishable.
2. Each Member State shall take the necessary measures to ensure that attempts to commit the conduct referred to in Articles 2 and 3(1)(a) and (b), are punishable.

Article 5

Penalties and aggravating circumstances

1. Subject to paragraph 4, each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2, 3 and 4 are punishable by criminal penalties of a maximum of at least between 1 and 3 years of imprisonment.
2. Subject to paragraph 4, each Member State shall take the necessary measures to ensure that the following offences are punishable with criminal penalties of a maximum of at least between 5 and 10 years of imprisonment:

¹ Article 3(2)(c) was amended on request by the Italian delegation. Certain delegations underlined that they could only accept the amended text on the condition that the Italian delegation lifted its reservation on Article 3(2)(b).

- a) the offences referred to in Article 2(a), consisting in "coercing a child into prostitution or into participating in pornographic performances", and the offences referred to in Article 2(c)(i);
- b) the offences referred to in Article 2(a), consisting in "profiting from or otherwise exploiting a child for such purposes", and the offences referred to in Article 2(b), in both cases as far as they refer to prostitution, where at least one of the following circumstances may apply:¹
- The victim is a child below the age of sexual consent under national law.
 - The offender has deliberately or by recklessness endangered the life of the child.
 - The offences involve serious violence or caused serious harm to the child.
 - The offences are committed within the framework of a criminal organisation within the meaning of Joint Action 98/733/JAI of December 21, 1998 making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, irrespective of the level of the penalty referred to in this text.
- c) the offences referred to in Article 2(a), consisting in "profiting from or otherwise exploiting a child for such purposes", and the offences referred to in Article 2(b), in both cases as far as they refer to pornographic performances, Articles 2(c)(ii), 2(c)(iii), 3(1)(a), 3(1)(b) and 3(1)(c), where the victim is a child below the age of sexual consent under national law and at least one of the circumstances referred to under the second, third and fourth indent under point b) may apply.^{2 3}
3. Each Member State may also consider prohibiting natural persons from exercising, temporarily or permanently, activities related to the supervision of children when they have been convicted for one of the offences referred to in Articles 2, 3 or 4.

¹ The Netherlands delegation maintained its reservation on Article 5(2)(b) and (c) and thought that Article 5(2)(b) should apply to the whole of Article 2(a), consisting in "profiting from or otherwise exploiting a child for such purposes", and of Article 2(b), in both cases concerning both prostitution and pornographic performances, and Articles 2(c)(ii) and (iii).

² See footnote to Article 5(2)(b).

³ Reservation by the Finnish delegation on the penalty level provided for in Article 5(2)(c) in respect of the offences referred to in Article 3(1)(a), 3(1)(b) and 3(1)(c).

4. Each Member State may provide for other sanctions, including non-criminal sanctions or measures, concerning conduct relating to child pornography referred to in Article 1(b)(iii).

Article 6

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for an offence referred to in Articles 2, 3 and 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- (a) a power of representation of the legal person,
- (b) an authority to take decisions on behalf of the legal person, or
- (c) an authority to exercise control within the legal person.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 have rendered possible the commission of an offence referred to in Articles 2, 3 and 4 for the benefit of that legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in an offence referred to in Articles 2, 3 and 4.

4. For the purposes of this Framework Decision, "legal person" shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 7¹
Sanctions on legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order, or
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 8
Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 2, 3 and 4 where:

- (a) the offence is committed in whole or in part within its territory;
- (b) the offender is one of its nationals; or
- (c) the offence is committed for the benefit of a legal person established in the territory of that Member State.

¹ Article 7 has been revised in accordance with the outcome of the JHA Counsellors meeting on 3 June 2002.

2. A Member State may decide that it will not apply, or that it will apply only in specific cases or circumstances, the jurisdiction rules set out in paragraphs 1(b) and 1(c) where the offence is committed outside its territory.
3. A Member State which, under its laws, does not extradite its own nationals shall take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, an offence referred to in Articles 2, 3 and 4 when it is committed by one of its own nationals outside its territory.
4. Member States shall inform the General Secretariat of the Council and the Commission accordingly where they decide to apply paragraph 2, where appropriate with an indication of the specific cases or circumstances in which the decision applies.
5. Each Member State shall ensure that its jurisdiction includes situations where an offence under Article 3 and, insofar as it is relevant, under Article 4, is committed by means of a computer system accessed from its territory, whether or not the computer system is on its territory.
6. Each Member State shall take the necessary measures to enable the prosecution, in accordance with national law, of at least the most serious of the offences referred to in Article 2 after the victim has reached the age of majority.

Article 9

Protection of and assistance to victims

1. Member States shall establish that investigations into or prosecution of offences covered by this Framework Decision shall not be dependent on the report or accusation made by a person subjected to the offence, at least in cases where Article 8(1)(a) applies.

2. Victims of an offence referred to in Article 2 should be considered as particularly vulnerable victims pursuant to Articles 2(2), 8(4) and 14(1) of the Framework Decision on the standing of victims in criminal proceedings.

3. Each Member State shall take all measures possible to ensure appropriate assistance for the victim's family. In particular, each Member State shall, where appropriate and possible, apply Article 4 of the Framework Decision on the standing of victims in criminal proceedings to the family referred to.

Article 9a¹
Territorial scope

This Framework Decision shall apply to Gibraltar.

Article 10
Repeal of Joint Action 97/154/JHA

The Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children is repealed by this Framework Decision.

¹ This Article has been inserted in consultation with the Spanish and United Kingdom delegations.

Article 11
Implementation

1. Member States shall take the necessary measures to comply with this Framework Decision on [...] at the latest ¹.

2. By the same date, the Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national legislation the obligations imposed on them under this Framework Decision. By 30 June 2004 at the latest, on the basis of a report drawn up on the basis of this information and a written report from the Commission, the Council shall assess whether Member States have taken the necessary measures in order to comply with this Framework Decision.

Article 12
Entry into force

This Framework Decision shall enter into force on the day of its publication in the Official Journal of the European Communities

Done at Brussels,

For the Council
The President

¹ Two years after the date of adoption of the instrument.

**Declarations for entry in the minutes of the Council at the adoption of the Framework
Decision on combating the sexual exploitation of children and child pornography.**

1. Declaration on Article 3(2)(c) of the Framework Decision

"The United Kingdom, Belgium, Germany, Sweden, Ireland and Greece condemn all forms of child pornography, see no distinction between real and virtual images of children, and consider it essential to take strong action against both. These States will not therefore apply the discretionary exemption from criminal liability provided for in Article 3(2)(c) of this Framework Decision."

2. Statement by Portugal

"Portugal condemns all forms of sexual exploitation of children and child pornography. Portugal cannot accept the importance of child protection being devalued by assimilation to virtual images. The dignity of the child is irreducible and cannot be called into question. Portugal will therefore provide for harsher sentences for all acts involving children or other human beings than apply in cases of virtual pornography."

3. Declaration by France

"France understands the obligation for the Member States to punish attempt to commit the offences referred to in Article 2(c)(i) and (iii) as an obligation to punish attempt to commit rape as defined in its internal law."

4. Declaration by Denmark

"Denmark condemns child pornography and all forms of sexual exploitation of children and stresses the importance of criminalizing this phenomenon. The Danish criminal code does not contain provisions, which explicitly refer to the term "pornographic performances". The Danish criminal code contains, however, provisions that criminalize coercing, recruiting or inducing a person to indulge in "sexual immorality". Denmark considers the term "sexual immorality" to cover pornographic performances as referred to in the framework decision."

5. Declaration by the German delegation

"The German delegation assumes that the rule laid down in Article 5(1) does not mean that aiding, abetting and attempt, in particular, are to be equated with the offence committed by the principal offender."

6. Declaration on Article 5(2)(c)

"Belgium [and other delegations which want to join the declaration] regrets that the scope of Article 5(2)(c) is limited to cases where the victim is a child below the age of sexual consent, and declares that it will not apply that limitation in its national law."

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