



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 2 July 2001**

**10458/01**

**LIMITE**

**DROIPEN 59  
MIGR 58**

**OUTCOME OF PROCEEDINGS**

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of : Working Party on Substantive Criminal Law

on : 11 June 2001

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No. prev. doc. : 5206/01 DROIPEN 2 (COM (2000) 854 final)  
8112/01 DROIPEN 35 MIGR 36

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Subject : Proposal for a Council Framework Decision on combating the sexual exploitation  
of children and child pornography

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During its meeting on 11 June 2001, the Working Party continued examining the above mentioned draft Framework Decision on the basis of document 5206/01 DROIPEN 2 (COM (2000) 854 final), document 8112/01 DROIPEN 35 MIGR 36, and certain proposals made by the delegations in the course of the meeting. The question of the level of the penalties (Article 5) was not examined.

It has been recalled that during its meeting of 3 and 4 May 2001 the Article 36 Committee had taken note of the progress achieved in the Working Party on Substantive Criminal Law and confirmed that a child should be understood as any person below 18 years.

In the light of the discussions the Presidency has established the text set out in the Annex. Amendments to the text as compared with DROIPEN 35 are underlined. The comments made by the delegations are set out in footnotes to the text.

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 of the Commission;

Having regard to the opinion of the European Parliament;

Whereas:

The Action Plan of the Council and the Commission on how to best implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice <sup>1</sup>, the conclusions from the Tampere European Council, the Commission in the Scoreboard <sup>2</sup>, the European Parliament in its Legislative Resolution of 11 April 2000<sup>3</sup> include or call for legislative action against sexual exploitation of children and child pornography, including common definitions, incriminations and sanctions;

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<sup>1</sup> OJ C 19, 23.1.1999.

<sup>2</sup> COM (2000) 167 final, p. 4.3 Fight against certain forms of crime.

<sup>3</sup> A5-0900/2000.

The Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and the sexual exploitation of children <sup>1</sup> and the Council Decision to combat child pornography on the Internet <sup>2</sup> need to be followed by further legislative action addressing the divergence of legal approaches in the Member States and contributing to a further development of an efficient judicial and law enforcement co-operation against sexual exploitation of children and child pornography;

The European Parliament in its resolution of 30 March 2000 <sup>3</sup> on the Commission Communication on the implementation of measures to combat child sex tourism <sup>4</sup> reiterates that child sex tourism is a criminal act closely linked to those of sexual exploitation of children and of child pornography, requiring 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 the serious criminal offences sexual exploitation of children and child pornography be addressed by a comprehensive approach in which 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 co-operation; 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;

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<sup>1</sup> OJ L 063, 4.3.1997.

<sup>2</sup> OJ L 138/1, 9.6.2000.

<sup>3</sup> A5-0052/2000.

<sup>4</sup> COM (99) 262.

It is necessary to introduce sanctions on perpetrators sufficiently severe to allow for sexual exploitation of children and child pornography to be included within the scope of instruments already adopted for the purpose of combating organised crime such as the 98/699/JHA Joint Action <sup>1</sup> on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime and the 98/733/JHA Joint Action <sup>2</sup> on making it a criminal offence to participate in a criminal organisation;

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

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 the 96/700/JHA Joint Action <sup>3</sup> establishing an incentive and exchange programme for combating trade in human beings and sexual exploitation of children (STOP), the 96/748/JHA Joint Action <sup>4</sup> extending the mandate given to the Europol Drugs Unit, the Decision of the Council and the European Parliament 293/2000/EC <sup>5</sup> on the Daphne programme on preventive measures to fight violence against children, young persons and women, the Joint Action 98/428/JHA <sup>6</sup> on the creation of a European Judicial Network, the Action Plan against illegal and harmful content on the Internet <sup>7</sup>; the Joint Action 96/277/JHA <sup>8</sup>, concerning a framework for the exchange of liaison magistrates to improve judicial co-operation between the Member States of the European Union and the Joint Action 98/427/JHA on good practice in mutual legal assistance in criminal matters;

HAS ADOPTED THIS FRAMEWORK DECISION:

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<sup>1</sup> OJ L 333/1, 9.12.1998.  
<sup>2</sup> OJ L 351/1, 29.12.1998.  
<sup>3</sup> OJ L 322, 12.12.1996.  
<sup>4</sup> OJ L 342, 31.12.1996.  
<sup>5</sup> OJ L 34, 9.2.2000.  
<sup>6</sup> OJ L 191/4, 7.7.1998.  
<sup>7</sup> OJ L 33, 6.2.1999.  
<sup>8</sup> OJ L 105, 27.4.1996.

*Article 1*  
*Definitions*

For the purpose of this Framework Decision:

- (a) "*Child*" shall mean any person below the age of eighteen years;
- (b) "*Child pornography*" shall mean pornographic material that visually depicts or represents a child involved or engaged in a sexually explicit conduct <sup>1</sup>, including lascivious exhibition of the genitals or the pubic area of a child <sup>2</sup>. This shall include realistic images of a child, whether the child is real or not, and images of a person appearing to be a child <sup>3</sup>;
- (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;
- (d) "*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 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, (...) offering, or profiting from or otherwise exploiting <sup>4</sup>(...) a child in prostitution or in pornographic performances;

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<sup>1</sup> GR has called for the introduction of definitions of "pornographic material" and "sexually explicit conduct".

<sup>2</sup> B.F would like to replace "..., including lascivious exhibition of the genitals or the pubic area of a child" by "...or position".

<sup>3</sup> DK has entered a reservation regarding this sentence and thought that the definition should not cover drawings and similar material where no real child has been abused.

<sup>4</sup> B and GR would prefer the word "using".

- (b) engaging (...) in sexual activities with a child , where
- (i) use is made of coercion, force or threat, or
  - (ii) money or other forms of remuneration or consideration, is given as payment in order to obtain the sexual activities from the child, or
  - (iii) abuse is made of a recognised position of trust, authority or influence over the child <sup>1</sup>

*Article 3<sup>2</sup>*

*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, or
- (b) distribution, dissemination or transmission of child pornography, or
- (c) offering or otherwise making child pornography available, or
- (d) acquisition or possession of child pornography<sup>3</sup>

2. A Member State may exclude from criminal liability situations where : <sup>4</sup>

- (a) It is established that the person appearing to be a child was in fact over the age of 18 years at the time of the depiction, or <sup>5</sup>

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<sup>1</sup> B was against using the word "recognised".

<sup>2</sup> F, DK, FIN, entered reservations against this Article, and would like to add : « for the purpose of its distribution ».

<sup>3</sup> DK entered a scrutiny reservation and asked for the possibility to exclude this behaviour from criminal liability.

<sup>4</sup> DK and Italy had scrutiny reservations on paragraph 2.

<sup>5</sup> Reservation from B, NL and P on this paragraph.

(b) in the case of situations of production, [acquisition] and possession, all those involved are over the age of sexual consent, and they have consented to the production, and where the images are only intended for and being used for the involved persons own use.<sup>1</sup>

#### *Article 4*

##### *Instigation, aiding, abetting and attempt*

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

#### *Article 5*

##### *Penalties and aggravating circumstances*

1. Each Member State shall take the necessary measures to ensure that an offence referred to in Articles 2, 3(1)(a) to (c) and Article 4 is punishable by effective, proportionate and dissuasive penalties, including by terms of imprisonment with a maximum penalty that is not less than four years and, as regards an offence referred to in Article 3(1)(d) not less than one year.
2. Without prejudice to additional definitions in the Member States' legislation, each Member State shall take the necessary measures to ensure that an offence referred to in Articles 2(a) and 4 in that respect is punishable by terms of imprisonment with a maximum penalty that is not less than eight years when:
  - it involves a child below the age of ten years, or

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<sup>1</sup> UK proposed a simplified text as follows : « in the case of production [acquisition] and possession images of persons over the age of sexual consent are produced and possessed with their agreement and solely for their own private use ».

- it involves particular ruthlessness, or
- it generates substantial proceeds, or
- it is committed within the framework of a criminal organisation.

3. Without prejudice to additional definitions in the Member States' legislation, each Member State shall take the necessary measures to ensure that an offence referred to in Articles 2(b) and 4 in that respect is punishable by terms of imprisonment with a maximum penalty that is not less than eight years when:

- it involves a child below the age of ten years, or
- it involves particular ruthlessness.

4. Without prejudice to additional definitions in the Member States' legislation, each Member State shall take the necessary measures to ensure that an offence referred to in Articles 3(1)(a) to (c) and 4 in that respect is punishable by terms of imprisonment with a maximum penalty that is not less than eight years when:

- it involves depictions of a child below the age of ten years, or
- it involves depictions of a child being exposed to violence or force, or
- it generates substantial proceeds, or
- it is committed within the framework of a criminal organisation.

5. Each Member State shall also consider prohibiting natural persons from exercising, temporarily or permanently, activities related to the supervision of children where they have been convicted of an offence referred to in Articles 2, 3, or 4.



*Article 6<sup>1</sup>*  
*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, or
- (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 made 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 purpose 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.

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<sup>1</sup> The Member States have agreed that the text should be aligned with the corresponding provision of the 1997 Second Protocol to the 1995 Convention on the protection of the European Communities' financial interests, and the text of the draft Framework Decision on combating trafficking in human beings (document 8599/1/01 DROIPEN 43 MIGR 41).

*Article 7<sup>1</sup>*

*Sanctions on legal persons*

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6 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, or
- (b) temporary or permanent disqualification from the practice of commercial activities, or
- (c) placing under judicial supervision, or
- (d) a judicial winding-up order, or
- (e) temporary or permanent closure of establishments which have been used for committing the offence.

*Article 8<sup>2</sup>*

*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; or
- (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.

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<sup>1</sup> The Member States have agreed that the text should be aligned with the corresponding provision of the 1997 Second Protocol to the 1995 Convention on the protection of the European Communities' financial interests, and the text of the draft Framework Decision on combating trafficking in human beings (document 8599/1/01 DROIPEN 43 MIGR 41)

<sup>2</sup> The Member States have agreed that the text of paragraphs 1-4 should be in line with the corresponding paragraphs of Article 6 of the draft Framework decision on combating trafficking in human beings (document 85991/1/01 DROIPEN 43 MIGR 41)

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) as far as 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 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 is committed by means of a computer system accessed from its territory whether or not the computer system is on its territory.<sup>1</sup>

### *Article 9<sup>2</sup>*

#### *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.

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<sup>1</sup> F would prefer inserting this indent after Article 8. 1 a). It will be decided later on whether this paragraph also should include offences under Article 4.

<sup>2</sup> The text has been adjusted to the corresponding provision of the draft Framework Decision on combating trafficking in human beings (document 8599/1/01 DROIPEN 43 MIGR 41).

2. Victims of an offence referred to in Article 1 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 the measures possible to ensure appropriate assistance for his or her 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 10*

*Co-operation between Member States*

(deleted)

*Article 10 a*

Repeal of the 97/ 154/JHA Joint Action <sup>1</sup>

The Joint Action of 24 February 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 1997 is repealed by this Framework Decision

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<sup>1</sup> It was agreed that the Joint Action should be totally repealed. The Legal Service will consider the exact wording of this Article.

*Article 11<sup>1</sup>*  
*Implementation*

1. Member States shall take the necessary measures to comply with this Framework Decision on [...] at the latest <sup>2</sup>.
  
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. The Council will, by 30 June 2004 at the latest, on the basis of a report established on the basis of this information and a written report transmitted by the Commission, assess the extent to which 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

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<sup>1</sup> The text has been aligned with the corresponding provision of the draft Framework Decision on combating trafficking in human beings (document 8599/1/01 DROIPEN 43 MIGR 41).

<sup>2</sup> The date to be inserted should be the date of two years after the date of adoption of the instrument.