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**ADDENDUM TO INITIATIVE**

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Subject : Initiative of the Kingdom of Belgium with a view to the adoption by the Council of a Framework Decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children

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Delegations will find attached an explanatory note on the initiative of the Kingdom of Belgium with a view to the adoption by the Council of a Framework Decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children.

**Initiative of the Kingdom of Belgium with a view to the adoption by the Council of a Framework Decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children**

**Explanatory note**

**1. Introduction**

The purpose of this Framework Decision is to improve cooperation between Member States of the European Union in the protection of children from sexual abuse, with the particular aim of ensuring effective application of disqualifications linked to criminal convictions for this type of offence.

At present, nothing guarantees that a disqualification handed down in one Member State has any legal effect in the other Member States, even though the convicted person has freedom of movement within the territory of the European Union. A person who has been convicted for paedophile acts in one Member State and is subject in that State to a prohibition on pursuing activities likely to bring that person into contact with children may therefore evade the prohibition by moving to another Member State. This situation is not acceptable, given that it is known that such prohibitions are generally imposed because of the seriousness of the acts committed or to prevent fresh offences being committed by the convicted person. Furthermore, the situation runs counter to the spirit of a European area of freedom, security and justice.

Two types of measures could be considered to remedy these serious shortcomings, namely, measures to ensure either that convictions imposed abroad be taken into account in applying disqualifications and prohibitions imposed by the law of the State on whose territory the person is resident, or the recognition of disqualifications and prohibitions associated with the foreign conviction.

In accordance with the principle of subsidiarity and the conclusions of the Tampere European Council, the option chosen was that of applying the principle of mutual recognition to prohibitions arising from foreign convictions for sexual offences committed against children. This solution is facilitated by the fact that the scope *ratione materiae* is clearly defined and limited to a sector in which the definitions of offences were harmonised by Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography <sup>1</sup>. This Framework Decision also explicitly requires Member States to provide in their national legislation for a sentence of disqualification associated with convictions for such offences.

The aim of this Framework Decision is thus to improve cooperation between Member States of the European Union, in this specific area, by obliging the Member State where the convicted person is resident to recognise prohibitions handed down abroad and to enforce them on its territory. The draft therefore constitutes a specific application of the general principle of mutual recognition of criminal judgments, considered the keystone of judicial cooperation in the European Union by the conclusions of the Tampere European Council in 1999.

Another lacuna in current cooperation concerns the lack of information on previous judicial records at European Union level. To ensure that the principle of mutual recognition of disqualifications and prohibitions is effective, it would appear necessary for information on such records to be circulated within the Member States so that they can be brought to the attention of the competent authorities of the State to which the convicted person moves. Currently, Member States have only a partial view of a person's foreign convictions. Only convictions handed down against their own nationals in another Member State are automatically brought to their attention, under Article 22 of the 1959 European Convention on Mutual Assistance in Criminal Matters <sup>2</sup>. This lack of knowledge is exacerbated by the fact that several Member States do not record such foreign convictions in their national criminal records. In the case of disqualifications and prohibitions associated with such convictions, the situation is all the more problematic, since such measures may not appear in the foreign criminal records.

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<sup>1</sup> OJ L 13, 20.1.2004, p. 44.

<sup>2</sup> Council of Europe, ETS No 30.

To remedy this situation and make the principle of mutual recognition of disqualifications and prohibitions genuinely effective, this Framework Decision provides for a minimum number of obligations regarding information vis-à-vis other Member States of the Union.

One final lacuna identified in cooperation in this area within the European Union is that such cooperation remains for the most part strictly limited to subsequent judicial proceedings and is therefore devoid of any preventive impact. As previously stressed, the very purpose of the disqualification is primarily to prevent the commission of fresh offences. It is thus essential to be able immediately to give legal effect to disqualifications associated with convictions imposed abroad, without waiting for further offences to be committed. In this context, it is not acceptable to restrict consultation of the foreign criminal records to judicial purposes, since a major part of the significance of access to such information is administrative and preventive. There must, on the contrary, be an obligation on a Member State to consult the criminal records of the State of origin in all cases where its own national criminal records are consulted, including where the information taken from the criminal records is required with a view to authorising the pursuit of a given activity, in the context of the scope of the Framework Decision.

This Framework Decision is divided into four parts.

Title I concerns the scope of the Framework Decision.

The purpose of Title II is to improve awareness, in the State of residence of the convicted person, of the existence of prohibitions, where these are a consequence of a criminal conviction handed down in another Member State. The obligations imposed are considered as prerequisites for the recognition of such prohibitions.

Title III describes the procedure for enforcing prohibitions covered by the Framework Decision pursuant to the principle of mutual recognition. This section, which imposes an obligation on all Member States to recognise and enforce on their territories prohibitions of which they are aware, constitutes the main objective of the Framework Decision.

Title IV contains the final provisions.

## **2. Comments on Articles**

### **Article 1: Purpose**

Article 1 defines the scope and objectives of the Framework Decision. This Framework Decision applies to the offences referred to in Articles 2, 3 and 4 of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography<sup>1</sup>. Its aim is to apply the principle of mutual recognition to prohibitions on pursuing certain activities arising from convictions for this type of offence.

Article 1 also contains a clause protecting fundamental rights, inspired by Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States<sup>2</sup> and Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence<sup>3</sup>.

### **Article 2: Definitions**

Article 2 contains the definitions of some essential concepts referred to in the Framework Decision.

The definition of "conviction" draws on that given in the Commission proposal for a Council Decision on the exchange of information extracted from the criminal records<sup>4</sup>.

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<sup>1</sup> OJ L 13, 20.1.2004, p. 44.

<sup>2</sup> OJ L 190, 18.7.2002, p. 1.

<sup>3</sup> OJ L 196, 2.8.2003, p. 45.

<sup>4</sup> COM(2004) 664 final.

The definition of "criminal record" is taken from the same Commission proposal. The criminal record is the national register recording such convictions. Account is taken of the fact that some States may have more than one record.

The definition of "prohibition" takes account of the fact that the nature of the prohibition covered is not harmonised at European Union level and therefore may vary from one Member State to another. The prohibition on exercising certain activities will be covered by this Framework Decision only insofar as it can be directly linked to a criminal conviction. This is the case in particular where the prohibition is imposed by the criminal court judge at the same time as the main conviction or where it follows automatically from it by law. Conversely, it would not be the case for a prohibition whose existence was entirely based on discretionary appraisal by an administrative authority.

The central authority is defined as that which Member States are supposed to appoint under Article 2 of the abovementioned Council Decision on the exchange of information extracted from the criminal records, as proposed by the Commission.

The issuing State is defined as the Member State in which the conviction was handed down.

The enforcing State is defined as the Member State on whose territory the convicted person resides.

### **Article 3: Registration obligation**

Article 3 imposes an obligation on Member States to ensure that the prohibition appears in their criminal records. This obligation applies both where the conviction from which it arises was handed down in the same State and also where the prohibition has been notified to it, automatically or on request, under the applicable international Conventions, principally Articles 13 and 22 of the 1959 European Convention on Mutual Assistance in Criminal Matters.

#### **Article 4: Notification obligation**

Article 4 imposes on the State that handed down the prohibition an obligation to mention it in any excerpt from the criminal record that it passes on to another Member State, automatically or on request, under the applicable international Conventions, principally Articles 13 and 22 of the 1959 European Convention on Mutual Assistance in Criminal Matters.

This obligation to inform applies only to the central authority of the Member State. It does not apply to judicial authorities where they make use of the possibility of directly exchanging information on the criminal record under Article 6(1) of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union <sup>1</sup>.

The central authority is also obliged to mention the duration of the prohibition in the excerpt passed on by it.

#### **Article 5: Obligation to request information**

Article 5 imposes an obligation on the Member State whose criminal records are applied for at national level regarding a person's previous judicial record, to consult the criminal records of the State of which that person is a national. The State of nationality is deemed to be informed, pursuant to Article 22 of the 1959 European Convention on Mutual Assistance, of the existence of any prohibitions and is bound, under Articles 3 and 4 of this Framework Decision, to register them in its own criminal records and include them in any excerpt it provides.

This obligation to consult the criminal records of the State of nationality exists only if an enquiry is made regarding the national criminal record of a Member State in the framework of the application of this Framework Decision, as for example with a view to authorising access to a profession connected with the supervision of children.

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<sup>1</sup> OJ C 197, 12.7.2000, p. 1.

## **Article 6: Recognition and enforcement of the prohibition**

Article 6(1) applies the principle of mutual recognition to prohibitions covered by the Framework Decision.

Paragraph 2 sets a time limit for the recognition and enforcement of the prohibition, which is thirty days as from notification of the prohibition to the competent authority, for the latter to decide on such recognition and enforcement.

## **Article 7: Reasons for non-recognition or non-enforcement**

Article 7 lists the possible obstacles to recognition or enforcement, namely where the penalty is time-limited under the law of the enforcing State, where the conviction was handed down in default of appearance, or through application of the *non bis in idem* principle. These grounds for refusal are inspired by the Framework Decision on the European arrest warrant.

## **Article 8: Enforcement procedures**

Article 8(1) provides that the authority of the enforcing State with competence to decide on recognition and enforcement of the prohibition may not require any formalities other than the reply form provided for in Article 4(2) of the Council Decision on information extracted from the criminal records, as proposed by the Commission.

Paragraph 2 also provides that, if the duration of the prohibition exceeds the maximum laid down by the national law of the enforcing State for the same offence, the duration of the prohibition must be reduced to that maximum. This amounts to compulsory conversion of the foreign prohibition to conform to the law of the enforcing State.



## **Article 9: Appeals**

Article 9(1) imposes on the enforcing State the obligation to ensure that the person concerned has the possibility of a non-suspensive legal remedy against the decision by the competent authority of the enforcing State on the recognition and enforcement of the prohibition.

However, paragraph 2 stipulates that the substantial reasons for handing down the conviction and the sentence may not be challenged before a court in the enforcing State.

## **Article 10: Subsequent changes**

Article 10(1) aims to cover the various instances of subsequent changes that might take place in the State that handed down the conviction and might affect the prohibition linked to that conviction.

Paragraph 2 provides that the central authority of the issuing State must inform the authority of the enforcing State that has competence to decide on the recognition and enforcement of the prohibition, in order for the latter authority to adapt the measures taken in enforcing that prohibition accordingly.

## **Article 11: Implementation**

Article 11 is a standard provision governing implementation of the Framework Decision.

## **Article 12: Entry into force.**

Article 12 stipulates that the Framework Decision shall enter into force on the day of its publication in the Official Journal.

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