

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

(2001/C 62 E/25)

COM(2000) 854 final/2 — 2001/0025(CNS)

*(Submitted by the Commission on 22 January 2001)*

THE COUNCIL OF THE EUROPEAN UNION,

framework decision establishing minimum rules relating to the constituent elements of these criminal acts.

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

(4) 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.

Having regard to the proposal of the Commission,

Having regard to the opinion of the European Parliament,

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

Whereas:

(1) 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.

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

(2) The Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and the sexual exploitation of children <sup>(4)</sup> and the Council Decision to combat child pornography on the Internet <sup>(5)</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 cooperation against sexual exploitation of children and child pornography.

(7) 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 cooperation; 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.

(3) The European Parliament in its resolution of 30 March 2000 <sup>(6)</sup> on the Commission Communication on the implementation of measures to combat child sex tourism <sup>(7)</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

(8) 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>(8)</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>(9)</sup> on making it a criminal offence to participate in a criminal organisation.

<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> A5-0090/2000.

<sup>(4)</sup> OJ L 63, 4.3.1997.

<sup>(5)</sup> OJ L 138, 9.6.2000, p. 1.

<sup>(6)</sup> A5-0052/2000.

<sup>(7)</sup> COM(1999) 262.

<sup>(9)</sup> This Framework Decision is without prejudice to the powers of the European Community.

<sup>(8)</sup> OJ L 333, 9.12.1998, p. 1.

<sup>(9)</sup> OJ L 351, 29.12.1998, p. 1.

(10) 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>(1)</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>(2)</sup> extending the mandate given to the Europol Drugs Unit, the Decision of the Council and the European Parliament 293/2000/EC <sup>(3)</sup> on the Daphne programme on preventive measures to fight violence against children, young persons and women, the Joint Action 98/428/JHA <sup>(4)</sup> on the creation of a European Judicial Network, the Action Plan against illegal and harmful content on the Internet <sup>(5)</sup>; the Joint Action 96/277/JHA <sup>(6)</sup>, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union and the Joint Action 98/427/JHA <sup>(7)</sup> on good practice in mutual legal assistance in criminal matters,

- (a) coercing, exploiting, inducing, profiting from or otherwise facilitating the prostitution of a child;
- (b) engaging a child in sexual conduct, where:
  - (i) use is made of inducement or coercion, violence or threats, or
  - (ii) money, other items of economic value or other forms of remuneration, is given to a child in exchange for sexual services, or
  - (iii) use is made of authority or influence over the child's vulnerability.

### 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, 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 and possession of child pornography.

2. Each Member State shall also take the necessary measures to ensure, without prejudice to definitions otherwise provided for in this Framework Decision, that the conduct referred to in paragraph 1 is punishable when involving pornographic material that visually represents a child engaged in sexually explicit conduct, unless it is established that the person representing a child was over the age of eighteen years at the time of the depiction.

### 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.

HAS ADOPTED THIS FRAMEWORK DECISION:

### Article 1

#### Definitions

For the purposes 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 a child engaged in sexually explicit conduct;
- (c) 'computer system' shall mean any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs 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 conduct is punishable:

- <sup>(1)</sup> OJ L 322, 12.12.1996.
- <sup>(2)</sup> OJ L 342, 31.12.1996.
- <sup>(3)</sup> OJ L 34, 9.2.2000.
- <sup>(4)</sup> OJ L 191, 7.7.1998, p. 1.
- <sup>(5)</sup> OJ L 33, 6.2.1999.
- <sup>(6)</sup> OJ L 105, 27.4.1996.
- <sup>(7)</sup> OJ L 191, 7.7.1998.

*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 State's 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
- 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 State's 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 State's 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***Liability of legal persons**

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for offences 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 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 offences referred to in Articles 2, 3, and 4.

*Article 7***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***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.
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. For the purpose of establishing jurisdiction over an offence referred to in Article 3, the offence shall be considered to be committed in whole or in part within its territory where the offence is committed by means of a computer system accessed from its territory, whether or not the computer system itself is on its territory.

*Article 9***Victims**

Each Member State shall ensure that a victim of an offence provided for in this Framework Decision is given the adequate legal protection and the standing in judicial proceedings. In particular Member State's shall ensure that criminal investigations and judicial proceedings do not cause any additional damage for a victim.

*Article 10***Cooperation between Member States**

1. In accordance with the applicable conventions, multi-lateral or bilateral agreements or arrangements, Member States shall afford each other mutual assistance to the widest extent possible in respect of judicial proceedings relating to the offences provided for in this Framework Decision.
2. Where several Member States have jurisdiction over of the offences envisaged by this Framework Decision, those States shall consult one another with a view to coordinating their action in order to prosecute effectively. Appropriate use shall be made of existing cooperation mechanisms, such as the liaison magistrates and the European Judicial Network.
3. For the purpose of exchange of information relating to the offences referred to in Articles 2, 3, and 4, and in accordance with data protection rules, Member States shall establish operational points of contact or make use of existing cooperation mechanisms. In particular, Member States shall ensure that Europol, within the limits of its mandate, and the communicated points of contact under the Council Decision to combat child pornography are fully involved.
4. Each Member State shall inform the General Secretariat of the Council and the Commission of its appointed point of contact for the purpose of exchanging information relating sexual exploitation of children and child pornography. The General Secretariat shall inform all other Member States about the appointed points of contact.

*Article 11***Implementation**

1. Member States shall take the necessary measures to comply with this Framework Decision on 31 December 2002 at the latest.
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*.