



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 13 July 2001 (18.07)  
(OR. fr)**

**10854/01**

**LIMITE**

**DROIPEN 68  
MIGR 61**

**NOTE**

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from :	Presidency
to :	Article 36 Committee
Nos prev. docs	5206/01 DROIPEN 2 + COR 1, 10458/01DROIPEN 59 MIGR 58
No Cion prop:	COM (2000) 854 final
Subject:	Proposal for a Council Framework Decision on combating the sexual exploitation of children and child pornography

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At its meeting on 9 and 10 July 2001, the Working Party on Substantive Criminal Law continued examining the abovementioned draft Framework Decision on the basis of 5206/01 DROIPEN 2 (COM (2000) 854 final) + COR 1 and 10458/01 DROIPEN 59 MIGR 58.

The outcome of the discussions is outlined in the Annex hereto. Amendments to the text of DROIPEN 59 are underlined. Delegations' comments are set out in the footnotes.

To prepare the ground for the future discussions of the Working Party on Substantive Criminal Law, the Presidency would like to have the views of the Article 36 Committee on the following questions.

1. Do Member States agree with the definition of child pornography as contained in Article 1(b) of the draft framework Decision in Annex I?  
Do Member States consider that the words "realistic images" can be interpreted in such a way that Member States are not obliged to criminalise drawings, comic strips or other similar material representing children engaged in sexually explicit conduct where no real children are involved?
2. Do Member States consider that the conduct referred to in Article 2(a), when restricted to pornographic performances and where the child is not coerced into it or exposed to violence, should always be penalised?
3. Do Member States consider that exceptions may be made with regard to making the production of child pornography a criminal offence when it can be shown that:
  - (a) production is not for distribution;
  - (b) the persons represented are over 18 years of age but appear to be children;
  - (c) virtual images of children are used?
4. Do Member States consider possession of child pornographic material to be a criminal offence in all circumstances or do they feel that exceptions may be made?
5. Do Member States agree to adopt a system of penalties based on the system adopted in the Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence and in the draft Framework Decision on combating trafficking in human beings?

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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,

Having regard to the Opinion of the European Parliament,

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 <sup>1</sup>, the conclusions of the Tampere European Council, the Commission in the Scoreboard <sup>2</sup>, and 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, charges and penalties.

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

<sup>2</sup> COM (2000) 167 final, pt. 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 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 <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, 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; 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 63, 4.3.1997, p. 2.

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

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

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

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 <sup>1</sup> on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime and Joint Action 98/733/JHA <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 Joint Action 96/700/JHA <sup>3</sup> establishing an incentive and exchange programme for combating trade in human beings and sexual exploitation of children (STOP), Joint Action 96/748/JHA <sup>4</sup> extending the mandate given to the Europol Drugs Unit, Decision 293/2000/EC of the European Parliament and of the Council <sup>5</sup> on the Daphne programme on preventive measures to fight violence against children, young persons and women, 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>; Joint Action 96/277/JHA <sup>8</sup>, 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: <sup>9</sup>

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

<sup>2</sup> OJ L 351, 29.12.1998, p. 1.

<sup>3</sup> OJ L 322, 12.12.1996, p. 7.

<sup>4</sup> OJ L 342, 31.12.1996, p. 4.

<sup>5</sup> OJ L 34, 9.2.2000, p. 1.

<sup>6</sup> OJ L 191/4, 7.7.1998, p. 4.

<sup>7</sup> OJ L 33, 6.2.1999, p. 9.

<sup>8</sup> OJ L 105, 27.4.1996, p. 1.

<sup>9</sup> Parliamentary scrutiny reservations by D and UK, which are also examining the question of the instrument's territorial application.

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, including lascivious exhibition of the genitals or the pubic area of a child. This shall include realistic images of a child, whether the child is real or not, and images of a real person appearing to be a child <sup>1</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) (...)

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:

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<sup>1</sup> This amendment, supported by a large majority of delegations, should meet the concerns of DK and FIN. DK had entered a reservation on the ground that the definition should not cover drawings and similar material where no real child has been abused. For similar reasons FIN proposed referring to "realistic images of a person appearing to be a child".

- (a) coercing a child into prostitution or into participating in pornographic performances, making proposals to that effect, profiting from or otherwise exploiting a child for such purposes;<sup>1 2</sup>
- (b) 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 order to induce the child to engage in sexual activities<sup>3</sup>, 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<sup>4</sup>;
- (b) distribution, dissemination or transmission of child pornography;
- (c) offering or otherwise making child pornography available;
- (d) acquisition or possession of child pornography<sup>5</sup>.

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<sup>1</sup> P suggested including in Article 2(a) the conditions listed in Article 2(b). This proposal was not supported by the other delegations.

<sup>2</sup> FIN/DK maintained their reservation. FIN wanted to separate pornographic performances from prostitution and to exclude proposals made to the child to take part in a pornographic performance. The text would read as follows: "coercing a child into prostitution, making proposals to that effect, profiting from or otherwise exploiting a child for such purposes or coercing a child into participating in pornographic performances, profiting from or otherwise exploiting a child for such purposes". NL/S felt that this would be a step backward.

<sup>3</sup> Scrutiny reservation by DK.

<sup>4</sup> F/DK/FIN/D entered reservations on this Article and would like to add: "for distribution". Several delegations (IRL/NL/P/B/E/COM) were against because it would be difficult to prove.

<sup>5</sup> DK entered a scrutiny reservation.

2. A Member State may exclude from criminal liability situations where: <sup>1</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>2</sup>
- (b) in the case of production (...) <sup>3</sup> 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. <sup>4</sup>

#### Article 4

#### Instigation, aiding, abetting and attempt <sup>5</sup>

- 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 attempts to commit the conduct referred to in Articles 2 and 3(1)(a) to (c) are punishable.

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<sup>1</sup> DK and I had scrutiny reservations on paragraph 2. I wanted to be able to exclude cases where it can be proved that the images involved are virtual images for personal use.

<sup>2</sup> Reservations by B/NL and D, which contended that appearance of being a minor was sufficient grounds for proceedings to be brought. F/S/FIN/IRL and UK disagreed.

<sup>3</sup> The word "acquisition" as deleted but EL/A and FIN wanted it included.

<sup>4</sup> F said that it could agree to this text if the words "for distribution" were added to Article 3(1)(a) or if a paragraph 2 (c) were added to cover cases where it is established that production was not for purposes of distribution. DK/FIN/D supported this proposal although several delegations were against it.

<sup>5</sup> Scrutiny reservation by D on attempt.

## Article 5

### Penalties and aggravating circumstances <sup>1</sup>

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 <sup>2</sup>,
  - it involves particular ruthlessness, or

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<sup>1</sup> Reservation by D on a two-pronged approach and on the reference to Article 4.  
Reservation by FIN which wanted imposition of the maximum penalty restricted to the most serious forms of crime and to organised crime.  
General reservation by A on this Article .  
Reservation by DK which was opposed to the proposed approximation of penalties and referred to Denmark's proposals in 10853/01 DROIPEN 67.  
UK/F/S/P said that this Article should be examined without waiting for the results of the general review of the harmonisation of penalties.  
Most delegations agreed that the text should be simplified on the basis of the corresponding provisions of texts on trafficking in human beings and on prevention of the facilitation of unauthorised entry and residence. Aggravating circumstances also came in for criticism, particularly the words "particular ruthlessness" and "substantial proceeds".

<sup>2</sup> S suggested the words "it involves young children".

- 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,<sup>1</sup> 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<sup>2</sup>,
- it involves depictions of a child being exposed to violence or force,
- 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.

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<sup>1</sup> S suggested the words "it involves a young child".

<sup>2</sup> S suggested the words "it involves a young child".

## 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 has 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 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 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;
- (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.

## 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.

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.

#### 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 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 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 10

##### Cooperation between Member States

(deleted)

## Article 10a

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

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

## Article 11

### 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. 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

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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.

<sup>2</sup> Two years after the date of adoption of the instrument.