



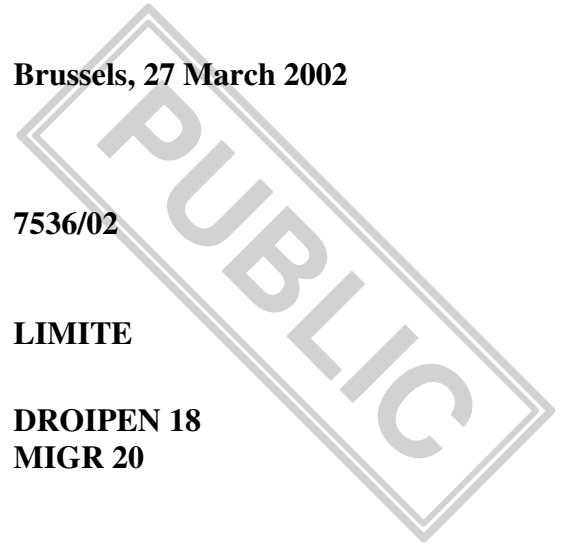
**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 March 2002

7536/02

LIMITE

**DROIPEN 18
MIGR 20**



OUTCOME OF PROCEEDINGS

of : Working Party on substantive criminal law
on : 25 and 26 March 2002

Nos prev. docs : 7268/02 DROIPEN 15 MIGR 18

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

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

I INTRODUCTION

The Working Party on substantive criminal law examined at its meeting on 25 and 26 March 2002 the outstanding questions on the above draft on the basis of documents 6039/02 DROIPEN 5 MIGR 7 and 7268/02 DROIPEN 15 MIGR 18.

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

The European Parliament delivered its opinion on the draft on 12 June 2001¹. At its meeting on 23 and 24 January 2002, the Working Party took note that no delegation thought that the draft should be modified in the light of that opinion.

II OUTSTANDING QUESTIONS

The following questions remain outstanding:

1. General reservations

The draft is subject to parliamentary scrutiny reservations by the Swedish, German, United Kingdom, Netherlands, Danish and Irish delegations.

2. Article 3(2)(b)

Article 3(2)(b) provides that a Member State may exclude from criminal liability conduct relating to child pornography depicting children or persons appearing to be children where, in the case of production and possession, images of persons of the age of sexual consent or older are produced and processed with their agreement and solely for their own private use.

The Italian delegation maintained a reservation on Article 3(2)(b) and thought that this provision should only apply to images of persons of the age of 18 years or older.

¹ See document PE 306.731.

3. Article 3(2)(c)

Article 3(2)(c) provides that a Member State may exclude from criminal liability conduct relating to virtual child pornography 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 child pornography depicting a real person has been used for the purpose of its production.

The Italian delegation maintained its reservation and proposed the following wording of this provision:

"(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 takes place inside a private dwelling in such a way that the danger that the material may be diffused outside the dwelling is excluded."

4. Article 5

At the meeting of the Article 36 Committee on 14 and 15 March 2002, the Presidency presented a paper with draft Council conclusions on the approach to apply regarding approximation of penalties and a revised version of the provisions on penalties in Article 5 of the draft Framework Decision. The Presidency proposed that the draft Council conclusions and the draft Framework Decision should be adopted simultaneously at the same Council meeting. The first application of the Council conclusions would in this way take place at the same time as their adoption.

It was agreed in the Article 36 Committee that the draft Council conclusions would be examined by the JHA Counsellors and that the draft Article 5 would be examined by the Working Party on substantive criminal law. On the basis of the results thereof, the matter would be further examined by the Article 36 Committee.

The JHA Counsellors examined the draft Council conclusions at its meeting on 20 March 2002 on the basis of document 7266/02 DROIPEN 14. The result thereof is set out in document 7266/1/02 DROIPEN 14 REV 1.

The Chairman of the Working Party recalled that the Working Party did not have a mandate for discussing the draft Council conclusions, and that the discussion on the penalty levels in Article 5 of the draft Framework Decision had to take place based on the assumption that the levels set out in DROIPEN 14 REV 1 would apply.

The Working Party examined the text of Article 5 set out in document 7268/02 DROIPEN 15 MIGR 18. Several delegations thought that it would be desirable to simplify the text and focus on harmonisation of penalties in respect of the most serious offences. The Presidency presented in the light of these and other comments a revised text. This text provided for penalties of a maximum of at least 1 year in general. In addition, it provided for penalties of a maximum of at least 10 years in respect of certain offences concerning sexual exploitation of children. For some of these offences, the 10 years level only applied where the offences were committed in one or more specified aggravating circumstances. Some delegations thought that the level of 10 years was too high. Others thought that the level of 1 year was too low in respect of the offences concerning child pornography.

Following the meeting, the Presidency has in the light of the debate established the text of Article 5 set out in Annex I for the purpose of further discussions.

The Presidency underlines that the points of views of different delegations on penalties are very different and therefore very difficult to reconcile. The revised Article 5 could in the view of the Presidency serve as a basis for a fair compromise. The text provides for a 1 year level in general. A level of 5 years would apply to a range of offences, including certain offences concerning child pornography. For some offences, the 5 years level would only apply where the offences are committed in one or more of certain specified aggravating circumstances.

The main outstanding questions on Article 5 are set out in footnotes to the Article in Annex I.

5. Articles 8 and 9

The Austrian delegation proposed the introduction of the following:

Additional provision in Article 8:

“Each Member State shall take the necessary measures to ensure that the time limitation for prosecution of offences according to Article 2 does not start before the victim has reached majority.”

Additional provision in Article 9:

“Each Member State shall take the necessary measures to ensure that victims who are children are interrogated according to their age and stage of development for the purpose of investigation and prosecution of offences falling under this Framework Decision, and that a confrontation with the offender does not take place.”

Some delegations were surprised to see the Austrian proposals as they thought that agreement had been reached on Articles 8 and 9.

A number of delegations showed interest in further examining the proposal on Article 8. Others were against. The Commission thought that a softer, less binding, form of wording might be considered. Following the meeting, the Presidency has elaborated the new Article 8(6) set out in Annex I for further consideration.

Concerning the proposal on Article 9, several delegations thought that an absolute ban against a confrontation between the offender and the victim as long as the victim was still a child was going too far.

The Presidency would consult the Legal Service of the Council on whether there was an appropriate legal basis for adopting a text along the lines proposed. Depending on the outcome thereof, and taking into account the comments made by the delegations, the Presidency may propose a revised text for consideration at the next meeting of the Working Party.

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 ¹, the conclusions of the Tampere European Council, as listed in the Scoreboard ², and the European Parliament in its Legislative Resolution of 11 April 2000 ³, include or call for legislative action against sexual exploitation of children and child pornography, including common definitions, charges and penalties ⁴.

¹ OJ C 19, 23.1.1999, p. 1.

² COM(2000) 167 final, pt. 4.3. Fight against certain forms of crime.

³ A5-0900/2000.

⁴ The wording has on request by the Danish delegation been aligned with that of the first recital of the draft Framework Decision on combating trafficking in human beings (see document 14216/01 DROIPEN 97 MIGR 90).

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. ³

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.

³ At the meeting of the Article 36 Committee on 14 and 15 March 2002, the French delegation lifted its reservation on Article 7(b) on the basis of the introduction of this new recital.

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.
- (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.

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^{1 2}

Penalties and aggravating circumstances

1. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2, 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties of a maximum of at least between 1 and [2][3] years of imprisonment.
2. 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:
 - 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)**;

¹ Text proposed by the Presidency. See also comments under point II.4 of the report.

² General reservations or scrutiny reservations by most delegations. Some delegations (NL/D) were not convinced it was appropriate to simplify the text as proposed. The levels in Article 5 (1 year and 5 years) have not yet been agreed. A number of delegations would prefer to express the level as a range of years rather than a fixed number of years (for example, "at least 5 to 10 years" rather than "at least 5 years").

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 **Articles 2(b), 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 law¹ and at least one of the following circumstances applies^{2 3}:

- The offender has deliberately or by gross negligence⁴ 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.

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.

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

¹ Some delegations (NL/D) were not convinced that the distinction between victims below the age of sexual consent and other victims was appropriate. Other delegations favoured that distinction.

² Any of the aggravating circumstances specified in Article 5(2)(b) apply to any of the offences covered by that provision. The German delegation thought that this was not appropriate

³ The Danish delegation proposed the introduction of a further indent: "- the victim is below the age of 12 years".

⁴ The Finnish delegation favoured the use of the expression "particularly serious harm" in order to bring the text in line with the draft Framework Decision on combating trafficking in human beings.

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.
6. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 2 can be prosecuted after the victim has reached the age of 18 years.¹

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.

¹ Text proposed by the Presidency.

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
Territorial application

This Framework Decision shall apply to Gibraltar.

Article 10a
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.

Article 11
Implementation

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

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

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

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 by the Danish delegation

"Denmark finds the fact that in the EU children below the age of 18 are working as prostitutes unacceptable and Denmark stresses the importance of criminalising this phenomenon. Denmark agrees that in the fight against the prostitution of minors it is not enough to punish the procurers, it is also necessary to punish the clients. Denmark therefore intends to comply with article 2(c)(ii) of the framework decision in accordance with section 223a of the Danish Criminal Code, which criminalises conduct consisting in having sexual intercourse or other sexual relation than intercourse with a person below the age of 18, who fully or partially makes a living through prostitution."

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

"The United Kingdom, Belgium, Germany, Sweden and Ireland 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."

3. 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."