

## **Prevention of Child Pornography Bill**

### **Proposals of Council of European Union on Combating Sexual Exploitation of Children and Child Pornography**

At the 6<sup>th</sup> Bills Committee meeting on 17 October 2002, Members requested the Administration to provide information on the directives issued by the European Union on prevention of child pornography. Attached please find the following relevant documents available on the Internet.

- (1) Proposal for a Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography (copy at Annex A)

Website:

[http://europa.eu.int/eur-lex/en/com/pdf/2000/en\\_500PC0854\\_01.pdf](http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0854_01.pdf)

The Council of the European Union proposed the attached Framework Decision on combating sexual exploitation of children in 2000. Its main purpose is to prevent and fight against child pornography. In Article 1 of the Framework Decision, a child is defined as, in accordance with the Convention of Rights of the Child, any person below the age of 18 years. The Council, pending parliamentary scrutiny reservations by Member States, reached a political agreement on the Framework Decision in the Council meeting on Justice, Home Affairs and Civil Protection held in mid October 2002.

The following main points from the Framework Decision's Explanatory Memorandum are noteworthy-

- (a) Article 1

Even though a person under 18 years of age may lawfully engage in sexual conduct, it does not mean that the person may be sexually exploited through the visual depiction of such sexually explicit conduct.

- (b) Article 3

Europe does ensure that where a court is convinced that an [pornographic] image appears to be that of a child, it is criminalized, even though the actual age is unknown.

- (2) Convention on Cybercrime ETS no.: 185 (copy of relevant extract at Annex B)

Website:

<http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=185>

Besides the European Union's proposed Framework Decision, Article 9 of the Convention on Cybercrime is also a useful reference. The Convention is a Treaty open for signature by member states of the Council of Europe and non-member states. As listed on the Website, 30 European countries have already signed the Treaty. In Article 9, the term 'minor' includes all persons under 18 years of age. A lower age-limit may, however, be adopted which shall not be less than 16 years. "Child Pornography" is defined to include pornographic material that visually depicts:

- a) a minor engaged in sexually explicit conduct;
- b) a person appearing to be a minor engaged in sexually explicit conduct;
- c) realistic images representing a minor engaged in sexually explicit conduct.

Security Bureau  
November 2002

Proposal for a

**COUNCIL FRAMEWORK DECISION**

**on combating the sexual exploitation of children and child pornography**

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:

- (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;
- (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 co-operation against sexual exploitation of children and child pornography;
- (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 framework decision establishing minimum rules relating to the constituent elements of these criminal acts;

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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> A5-0090/2000

<sup>4</sup> OJ L 063, 4.3.1997

<sup>5</sup> OJ L 138/1, 9.6.2000

<sup>6</sup> A5-0052/2000

<sup>7</sup> COM (99) 262

- (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;
- (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;
- (6) The important work performed by international organisations must be complemented by that of the European Union;
- (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 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;
- (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;
- (9) This Framework Decision is without prejudice to the powers of the European Community;
- (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>10</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>11</sup> extending the mandate given to the Europol Drugs Unit, the Decision of the Council and the European Parliament 293/2000/EC<sup>12</sup> on the Daphne programme on preventive measures to fight violence against children, young persons and women, the Joint Action 98/428/JHA<sup>13</sup> on the creation of a European Judicial Network, the Action Plan against illegal and harmful content on the Internet<sup>14</sup>; the Joint Action 96/277/JHA<sup>15</sup>, concerning a framework for the exchange of liaison magistrates to improve judicial co-operation between the

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<sup>8</sup> OJ L 333/1, 9.12.1998

<sup>9</sup> OJ L 351/1, 29.12.1998

<sup>10</sup> OJ L 322, 12.12.1996

<sup>11</sup> OJ L 342, 31.12.1996

<sup>12</sup> OJ L 34, 9.2.2000

<sup>13</sup> OJ L 191/4, 7.7.1998

<sup>14</sup> OJ L 33, 6.2.1999

<sup>15</sup> OJ L 105, 27.4.1996

Member States of the European Union and the Joint Action 98/427/JHA<sup>16</sup> on good practice in mutual legal assistance in criminal matters;

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 inter-connected 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:

- (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.

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<sup>16</sup> OJ L 191, 7.7.1998

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.

#### *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
  - 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*  
*Liability of legal persons*

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for an 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 States' shall ensure that criminal investigations and judicial proceedings do not cause any additional damage for a victim.

*Article 10*  
*Co-operation between Member States*

1. In accordance with the applicable conventions, multilateral 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 co-ordinating their action in order to prosecute effectively. Appropriate use shall be made of existing co-operation 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 co-operation 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*.

Done at Brussels,

*For the Council*  
*The President*

## EXPLANATORY MEMORANDUM

### 1. INTRODUCTION

On 24 February 1997 the Council adopted a Joint Action concerning action to combat trafficking in human beings and the sexual exploitation of children<sup>1</sup>. The Joint Action covers a wide range of topics such as definitions (without prejudice to more specific definitions in the Member States' legislation), jurisdiction, criminal procedure, assistance to victims and police and judicial co-operation. Through the Joint Action, the Member States undertook to review their existing laws with a view to providing that trafficking in human beings and the sexual exploitation of children were criminal offences.

Since the adoption of the Joint Action in 1997, actions and initiatives against sexual exploitation of children and child pornography have developed considerably in number and in substance at the level of the European Union as well as at local, regional level and international level in a wider context. Sexual exploitation of children and child pornography has given rise to increased concern and the need to address diverging legal approaches in the Member States by further action is clearly demonstrated.

Furthermore, Article 29 of the Amsterdam Treaty provides an explicit reference to offences against children. The Vienna Action Plan<sup>2</sup> and the Tampere European Council made a clear call for further legislative action against sexual exploitation of children. Legislative action is also indicated in the Commission's Scoreboard<sup>3</sup>. On 29 May 2000, the Council adopted a decision<sup>4</sup> to combat child pornography on the Internet.

Two examples of the development at the wider international level are the United Nations Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography and the future Cyber Crime Convention developed within the Council of Europe addressing, inter alia, child pornography in the context of computer systems. The Commission has participated actively in the elaboration of the latter instrument and important elements of the future Convention on child pornography in computer systems are reflected in this proposal, albeit this proposal also covers forms of child pornography other than those in connection with computer systems.

Furthermore, the specific character of an area of freedom, security and justice to be created within the European Union should enable the Member States to develop a Framework Decision in which certain aspects of criminal law and judicial co-operation are taken further than has been possible through instruments available before the entry into force of the Amsterdam Treaty and instruments developed at a wider international level. A Framework Decision should, for instance, address more precisely issues such as criminalisation, penalties and other sanctions, aggravating circumstances, jurisdiction, including provisions on extraterritorial jurisdiction, and extradition.

In conclusion, the Commission believes that a further response to the issue of sexual exploitation of children and child pornography is required at the level of the European Union. Use of a Framework Decision, an instrument introduced by the Amsterdam Treaty, will

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

<sup>2</sup> OJ C 19, 23.1.1999

<sup>3</sup> COM (2000) 167 final, 24.3.2000

<sup>4</sup> OJ L 138/1, 9.6.2000

reinforce a common approach of the European Union in these areas and fill gaps in existing legislation. The need for a clear common approach on sexual exploitation of children and child pornography should also be viewed against the background of the future enlargement of the European Union.

The Commission has therefore, as announced in the Scoreboard, decided to put forward a proposal for a Framework Decision on the approximation of the criminal laws of the Member States, including penalties, concerning sexual exploitation of children and child pornography. The proposal also includes provisions on horizontal judicial issues such as jurisdiction and co-operation between Member States. The proposal covers sexual exploitation of children and child pornography. It does not include trafficking in human beings for exploitative purposes that will be covered by a separate proposal. The separation into two Framework Decisions will allow the Council to focus on sexual exploitation of children and child pornography.

## **2. LEGAL BASIS**

This proposal for a Framework Decision concerns approximation of the laws and regulations of the Member States in the area of police and judicial co-operation in criminal matters. It also concerns “minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organised crime”. The legal basis indicated in the preamble of the proposal is therefore Articles 29 with an explicit reference to offences against children, 31(e) and 34(2)(b) of the Treaty on European Union. The proposal will not entail financial implications for the budget of the European Communities.

## **3. THE FRAMEWORK DECISION: ARTICLES**

### **Article 1 (Definitions)**

Article 1 contains definitions of terms used in the Framework Decision. Points (a), (b), and (c) contain core definitions for the purposes of the Framework Decision. Point (a) defines «*child* », point (b) defines «*child pornography* » and point (c) «*computer system* ».

The definition of «*child* » regards any person below the age of eighteen years as being a child for the purposes of this Framework Decision. As far as this age is concerned with child pornography, the Commission is of the view that depictions of persons under the age of eighteen involved in sexually explicit conduct constitute sexual exploitation of children. Even though children under the age of eighteen have reached the maturity to take an informed decision about involving themselves in sexual activities, this should therefore not include depictions of such activities. The age of eighteen is also in conformity with the Convention of the Rights of the Child.

Point (b) covers pornographic material depicting a child engaged in sexually explicit conduct. The term visual depiction should be construed so as to include undeveloped film and videotape, and data stored on computer disk or by electronic means that are capable of conversion into a visual image. As specifically regards sexually explicit conduct involving a child, it should be understood to include at least:

- a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal intercourse;
- b) bestiality;

- c) masturbation;
- d) sadistic or masochistic abuse; or
- e) lascivious exhibition of the genitals or the pubic area.

Point (d) defines « *legal person* ». The definition of legal person is taken from the second Protocol to the Convention on the protection of the European Communities' financial interests<sup>5</sup>.

## **Article 2 (Offences concerning sexual exploitation of children)**

Article 2 puts an obligation on the Member States to ensure that sexual exploitation of children is punishable. Point (a) indicates that various forms of exploiting a child in prostitution are punishable. Point (b) indicates that the engagement of a child in sexual conduct is punishable when qualified by the circumstances indicated in points (i) to (iii). Sexual conduct shall for the purposes of this Framework decision be construed to include the conduct referred to under Article 1 on sexually explicit conduct as regards child pornography.

## **Article 3 (Offences concerning child pornography)**

Article 3 puts an obligation on the Member States to ensure that various forms of intentional acts concerned with child pornography is punishable. Paragraph 1(a) covers the production of child pornography, paragraph 1(b) the distribution, dissemination and transmission of child pornography, paragraph 1(c) the offering or otherwise the making available of child pornography, and paragraph 1(d), finally, acquisition or possession of child pornography.

The « action verbs » in points (a) to (d) correspond not only to the future Cyber Crime Convention, but also to elements found in the criminal laws of the Member States. The Commission's intention has been, as fully as possible, to cover the behaviours typically constituting the criminal offence child pornography.

Paragraph 1 of the Article includes that Member States shall ensure that the offences listed shall be punishable also when the conduct, in part or in whole, includes the use of a computer system.

Paragraph 2 covers two specific types of child pornographic material that visually represents a child involved in sexually explicit conduct. First, where a person appears to be a child, and, secondly, images that include depictions that are altered or even generated entirely by for instance a computer, i.e. simulated or fabricated. Paragraph 2 thus covers pornographic material where there is no « actual » sexual exploitation behind the depiction. The interest to protect is therefore different from the child pornography referred to in paragraph 1; while paragraph 1 seeks to protect children from sexual abuse, paragraph 2 seeks to protect children from being used as sexual objects and to prevent pseudo child pornographic depictions to become more widespread with a potential to underpin sexual exploitation of children.

Paragraph 2 requires Member States to take the measures necessary to ensure that acts concerned with pornographic material that visually represents a child involved in sexually explicit conduct is punishable. These measures shall be without prejudice to the definitions otherwise provided for in this Framework Decision. However, as specifically regards the

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<sup>5</sup> OJ C 221, 19.7.1997

situation where the representation involves a person appearing to be a child, i.e. not a fabricated depiction, but a depiction of a real person, Member States shall exempt from the scope of criminalisation the cases where it can be established that the image is in fact of a person aged 18 or over. This ensures that, as a minimum in all Member States, where a court is convinced that an image appears to be of a child, but the actual age is unknown, this remains criminalised.

#### **Article 4 (Instigation, aiding, abetting and attempt)**

Article 4 (1) put an obligation on Member States to ensure that instigation of, aiding or abetting the sexual exploitation of children and child pornography are punishable.

Paragraph 2 of Article 4 specifically concerns attempt. It puts an obligation on Member States to ensure that attempt to commit sexual exploitation of children, production, distribution, dissemination, transmission, offering or otherwise making available child pornography are punishable. Paragraph 2 does not include attempt to commit intentional acquisition and possession of child pornographic material.

#### **Article 5 (Penalties and aggravating circumstances)**

Article 5 concern penalties and aggravating circumstances. Paragraph 1 indicates that the offences referred to in Articles 2, 3, and 4 shall be punishable by effective, proportionate and dissuasive penalties including by terms of imprisonment that is not less than four years. As regards intentional acquisition and possession it is specifically indicated that the maximum penalty shall not be less than one year. These penalties are sufficient to include sexual exploitation of children and child pornography within the scope of other instruments already adopted for the purposes of enhancing police and judicial co-operation in the European Union such as the 98/699/JHA Joint Action<sup>6</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>7</sup> on making it a criminal offence to participate in a criminal organisation.

As sexual exploitation of children and child pornography are very serious criminal offences, paragraph 2 to 4 sets out that Member States shall ensure that when aggravating circumstances apply, the offences shall be punishable by terms of imprisonment with a maximum penalty of not less than eight years. The Commission's proposal to have eight years as a minimum maximum penalty builds on the view that possible penalties for sexual exploitation of children and child pornography should reflect the seriousness of the crime and have a strong deterrent effect.

Aggravating circumstances that typically should qualify child prostitution, sexual exploitation of children and child pornography as aggravated offences are listed. These circumstances represent a minimum list, but are without prejudice to additional definition in the legislation of the Member States. A further explanation of what is meant by these circumstances for the purpose of this Framework Decision is:

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<sup>6</sup> OJ L 333/1, 9.12.1998

<sup>7</sup> OJ L 351/1, 29.12.1998

- “involves a child below the age of ten years” or in the case of child pornography “...depictions of a child below the age of ten years” should provide emphatic legal protection for very young children and emphasise the seriousness of sexual exploitation of very young children in terms of possible penalties;
- “involves particular ruthlessness” is aimed at targeting the level of force or pressure exercised and the level of disregard of the health and integrity of the victim, physical as well as mental; the more serious force, pressure or disregard, the more severe the offence;
- “generates substantial proceeds” could, where applicable, be construed in analogy with aggravated “pimping” offences and should at least include the enrichment of the perpetrator of the criminal activities;
- “is committed in the framework of a criminal organisation should be construed in accordance with Article 1 of the 98/733/JHA Joint Action on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union<sup>8</sup>.
- “involves depictions of a child being exposed to violence or force” is aimed at targeting depictions involving elements of violence or force that indicates that the child is being hurt or expressing a strong anxiety; the more serious violence or force, the more serious the offence.

Paragraph 5 of Article 5 requires Member States to consider prohibiting natural persons from exercising, temporarily or permanently, activities involving supervision of children when they have been convicted for one of the criminal offences provided for in this Framework Decision.

### **Article 6 (Liability of legal persons)**

It is necessary also to cover the situation in which legal persons are involved in sexual exploitation of children and child pornography. Article 6 therefore provides provisions for holding a legal person liable for the offences envisaged by Articles 2, 3, and 4, committed for their benefit by any person, acting either individually or as a part of the organ of the legal person. The term liability should be construed so as to include either criminal or civil liability (see also Article 7 on sanctions).

In addition, paragraph 2 provides that a legal person can also be held liable when the lack of supervision or control by a person in a position to exercise control, has rendered possible the commission of the offences for its benefit. Paragraph 3 indicates that legal proceedings against a legal person do not preclude parallel legal proceedings against a natural person.

As specifically regards the criminal offence child pornography by means of a computer system, Article 6 is important in connection with liability of information society service providers. Article 6 does not affect the provisions of Directive 2000/31/EC on certain legal

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<sup>8</sup> OJ L 351/1 29.12.1998

aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)<sup>9</sup>, which deal with the liability of intermediary service providers. Articles 12 to 14 of this Directive define the conditions under which intermediary service providers are not to be held liable for mere conduit, caching and hosting activities and Article 15 specifies that Member States shall not impose on such intermediary service providers a general obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

The purpose of this Framework Decision is to ensure that service providers are liable when they commit child pornography offences for the benefit of the service provider. Similarly, liability applies where lack of supervision has rendered possible the commission of child pornography offences by a person under the authority of the service provider and where the offence was committed for the benefit of the service provider.

### **Article 7 (Sanctions on legal persons)**

Article 7 sets out a requirement for sanctions on legal persons. It requires effective, proportionate and dissuasive sanctions, where the minimum obligation is to impose criminal or non-criminal fines. Other sanctions that typically could apply to legal persons are also indicated.

### **Article 8 (Jurisdiction and prosecution)**

The international nature of the criminal offences sexual exploitation of children and child pornography implies that an efficient legal response requires procedural provisions on jurisdiction and on extradition which are as clear and as far reaching as national legal systems will allow in order to guard against persons evading prosecution.

Paragraph 1 establishes a series of criteria conferring jurisdiction on national enforcement and judicial authorities to prosecute and examine cases involving the offences referred to in this Framework Decision. A Member State shall establish its jurisdiction in three situations:

- (a) where the offence is committed in whole or in part on its territory, irrespective of the status or the nationality of the person involved (territoriality principle), or
- (b) where the offender is a national (active personality principle). The criteria of the status as a national means that jurisdiction can be established regardless of the *lex locus delicti*. It is up to Member States to prosecute for offences committed abroad. This is particularly important for Member States which do not extradite their own nationals, or
- (c) where the offence is committed for the benefit of a legal person established in the territory of that Member State.

However, as not all Member States' legal traditions recognise extraterritorial jurisdiction for all types of criminal offences, Member States may, subject to the obligation under paragraph 1, limit their jurisdiction to the first of these three situations. In addition, if they do not do so, they can still make provisions to limit the applicability of paragraphs 1(b) and 1 (c) to cases where the offence has been committed outside the territory of that Member State.

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<sup>9</sup> OJ L 178, 17.7.2000, p. 1



Paragraph 3 takes account of the fact that some Member States do not extradite their nationals and seeks to ensure that persons suspected of having committed sexual exploitation of children or child pornography offences do not evade prosecution because extradition is refused in principle on the grounds that they are nationals of that state.

A Member State which does not extradite its own nationals must, in accordance with paragraph 3, take the necessary measures to establish its jurisdiction over and to prosecute, where appropriate, the offences concerned when committed by its own nationals outside its territory. Paragraph 4 says that Member States shall inform the General Secretariat and the Commission where they decide to apply paragraph 2.

Article 8(5) is intended to ensure that Member States have jurisdiction over offences committed by accessing a computer system in a third country from their own Member State, e.g. storing or making available child pornography on/from a server in a third country.

### **Article 9 (Victims)**

In the European Union's approach against sexual exploitation of children and child pornography, special importance has been attached to the protection of and the assistance to the victims. The Commission is therefore of the view that an Article on victims should be included in the proposal for this Framework Decision. Social assistance for victims in order to help them overcome the consequences of such events and enable them to reintegrate into their normal course of life, forms part of the overall policy.

### **Article 10 (Co-operation between Member States)**

The purpose of Article 10 is to take advantage of instruments on international judicial co-operation to which Member States are parties and which should apply to this Framework Decision. For instance, arrangements on mutual legal assistance and extradition are contained in a number of bilateral and multilateral agreements as well as conventions of the European Union. An additional purpose with this Article is to facilitate the exchange of information.

Paragraph 1 requires Member States to afford each other mutual assistance to the widest extent possible in judicial proceedings on sexual exploitation of children and child pornography. For the situation where a positive conflict of jurisdiction occurs, paragraph 2 establishes that Member States shall consult one another with a view to co-ordinate their action to prosecute effectively. The paragraph also indicates that appropriate use shall be made of existing co-operation mechanisms such as the liaison magistrates<sup>10</sup> and the European Judicial Network<sup>11</sup>. Paragraph 3 stresses the importance of having appointed points of contact for the purpose of exchanging information. It explicitly indicates that Europol and the communicated points of contact under the Council Decision to combat child pornography<sup>12</sup> should be properly involved. Paragraph 4 provides for the circulation of information on which points of contacts have been appointed for the purpose of exchanging information pertaining to sexual exploitation of children and child pornography.

### **Article 11 (Implementation)**

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<sup>10</sup> OJ L 105, 27.4.1996

<sup>11</sup> OJ L 191/4, 7.7.1998

<sup>12</sup> OJ L 138/1, 9.6.2000

Article 11 concerns the implementation and follow-up of this Framework Decision. It establishes that the Member States shall take the necessary measures to comply with this Framework Decision not later than 31 December 2002. It also establishes that the Member States shall, by the same date, transmit to the Secretariat General of the Council and to the Commission the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report established on the basis of this information and a written report from the Commission, the Council will by 30 June 2004 assess the extent to which the Member States have taken the necessary measures to comply with this Framework Decision.

**Article 12 (Entry into force)**

Article 12 indicates that this Framework Decision will enter into force on the day of its publication in the Official Journal of the European Communities.

## **Extract of ETS 185 Convention on Cybercrime, 23.XI.2001**

### *Title 3 – Content-related offences*

#### **Article 9 – Offences related to child pornography**

- 1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:
  - a producing child pornography for the purpose of its distribution through a computer system;
  - b offering or making available child pornography through a computer system;
  - c distributing or transmitting child pornography through a computer system;
  - d procuring child pornography through a computer system for oneself or for another person;
  - e possessing child pornography in a computer system or on a computer-data storage medium.
- 2 For the purpose of paragraph 1 above, the term “child pornography” shall include pornographic material that visually depicts:
  - a a minor engaged in sexually explicit conduct;
  - b a person appearing to be a minor engaged in sexually explicit conduct;
  - c realistic images representing a minor engaged in sexually explicit conduct.
- 3 For the purpose of paragraph 2 above, the term “minor” shall

include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years.

- 4 Each Party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b. and c.