



COMMISSION OF THE EUROPEAN COMMUNITIES

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**REPORT FROM THE COMMISSION**

**Based on Article 12 of the Council Framework Decision of 22 December 2003 on  
combating the sexual exploitation of children and child pornography**

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## **1. INTRODUCTION**

### **1.1. Background**

Under Article 12 (2) of the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (hereafter “the Framework Decision”) the Commission has to provide a written report on the measures taken by the Member States to comply with the Framework Decision.<sup>1</sup>

Paragraph (1) of that Article obliges the Member States to take the necessary measures to comply with the provisions of the Framework Decision by 20 January 2006. According to paragraph (2), Member States should forward to the General Secretariat of the Council and to the Commission by the same day the text of the provisions transposing into their national law the obligations arising from the Framework Decision. On the basis of this information, and a written report by the Commission, the Council should, by the 20 January 2008, have assessed the extent to which Member States have complied with the provisions of this Framework Decision.

The value of this report therefore depends to a large extent on the information received by the Commission from the Member States. By January 2006 only two Member States (Belgium and Austria) had notified the Commission of the measures taken to implement the Framework Decision. The Commission reminded Member States of their obligation to provide the relevant information by means of a letter sent on 8 June 2006. By the end of April 2007, the Commission had received no contributions from three Member States, namely, Greece, Portugal and Malta.

## **2. METHOD AND CRITERIA FOR THE EVALUATION**

### **2.1. Framework Decisions according to Article 34, paragraph (2), point b) of the Treaty on European Union**

This Framework Decision is based on the Treaty of the European Union (TEU), and in particular Article 29, Article 31 (e) and Article 34(2) (b) .

Framework Decisions can best be compared with the legal instrument of a Directive<sup>2</sup>. Both instruments are binding upon Member States as to the result to be achieved, but leave to the national authorities the choice of form and method for implementation. Framework Decisions do not have direct effect however, and the Commission cannot take legal action before the Court of Justice to enforce the transposition of a Framework Decision. Nonetheless, the Court of Justice can rule on any dispute between Member States regarding the interpretation or the application (including the transposition) of the Framework Decision. The possible exercise of this right requires a solid factual basis, which the Commission's Report can help to establish.

### **2.2. Evaluation criteria**

In order to evaluate objectively whether a framework decision has been fully implemented by a Member State, some general criteria have been developed with respect to Directives which should be applied *mutatis mutandis* to Framework Decisions:

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<sup>1</sup> OJ L 13/44 – 20 January 2004.

<sup>2</sup> Article 249 EC Treaty.

1. The form and methods of implementation of the result to be achieved must be chosen in a manner which ensures that the Directive functions effectively with account being taken of its aims<sup>3</sup>;
2. Each Member State is obliged to implement Directives in a manner which satisfies the requirements of clarity and legal certainty, and thus to transpose the provisions of the Directive into national provisions which have binding force<sup>4</sup>;
3. Transposition need not necessarily require enactment in precisely the same words used in a Directive. Thus, for example, appropriate and pre-existing national measures may be sufficient, as long as the full application of the Directive is assured in a sufficiently clear and precise manner<sup>5</sup>;
4. Directives must be implemented within the period prescribed therein.<sup>6</sup>

This report – where possible – based on the criteria outlined above.

### 3. ASSESSMENT

Sexual exploitation of children and child pornography constitute serious violation of human rights. This Framework Decision was intended to complement the existing instruments already adopted by the Council to combat against sexual exploitation of children and child pornography.<sup>7</sup>

The Framework Decision approximates the laws of the Member States in the area of the fight against sexual exploitation of children and child pornography. Therefore, the Framework Decision introduces a common framework of provisions at European level in order to address criminalisation, penalties and other sanctions, aggravating circumstances, jurisdiction, prosecution as well as protection of and assistance to victims. Member States' legal systems can vary greatly, and in many cases legal concepts and expressions cannot always be easily compared to one another.

Though the evaluation can and will refer to each Article of the Framework Decision these cannot necessarily be contemplated in isolation from one another. Partial or non-implementation of an Article or part of an Article will also reflect on linked provisions, which considered independently might seem to comply with the requirements of the Framework Decision. The evaluation shall take account, as far as appropriate, of the general criminal legal background of the Member States.

The information the Commission has received varies considerably, especially in terms of its completeness. Not all Member States have sent the Commission all relevant texts of their implementing provisions. The Commission received no information from Greece, Malta, and

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<sup>3</sup> See relevant case law on the implementation of directives: Case 48/75 Royer [1976 ECR 497 at 518]

<sup>4</sup> See relevant case law on the implementation of directives: Case 239/85 Commission v. Belgium [1986] ECR 3645 at 3659. See also Case 300/81 Commission v. Italy [1983] ECR 449 at 456.

<sup>5</sup> See relevant case law on the implementation of directives for instance Case 29/84 Commission v. Germany [1985] ECR 1661 at 1673.

<sup>6</sup> See substantial case law on the implementation of directives, for example: Case 52/75 Commission v. Italy [1976] ECR 277 at 284, See, generally, the Commission annual reports on monitoring the application of Community law, for instance COM(2001) 309 final.

<sup>7</sup> OJ L 322, 12.12.1996, p. 7; OJ L 342, 31.12.1996, p. 4.; OJ L 191, 7.7.1998, p. 4. OJ L 105, 27.4.1996, p. 1; OJ L 191, 7.7.1998, p. 1; OJ L 33, 6.2.1999, p. 1; OJ L 34, 9.2.2000, p. 1.

Portugal. Gibraltar has not transposed the measures contained in the Framework Decision, but is in the process of introducing legislation to enable it to do so.

### **Article 1: Definition**

Article 1 (a), contains the definitions and meaning of several terms dealt with in the Framework Decision. One major item concerns the definition of the "child", which means any person below the age of 18. The age of eighteen is also in conformity with the UN Convention on the Rights of the Child of 20 November 1989. In fact, one of the main objectives of the Framework Decision is to approximate the level of protection of children from sexual exploitation and child pornography in the Member States' legislation.

A different topic is the age for sexual consent, that varies in Member States' legislation from the age of 13 in Spain to 17 in Ireland (Austria 14, Belgium 16, Czech Republic 15, Denmark 15, Estonia 14, Finland 16, France 15, Germany 16, Hungary 14, Ireland 17, Italy 14, Latvia 16, Lithuania 14, Luxembourg 16, The Netherlands 16, Poland 15, Slovakia 15, Slovenia 15, Spain 13, Sweden 15, UK 16).

The age of sexual consent is relevant to the obligation to criminalize child pornography which is defined in Article 1 (b).

The depiction of children engaged in sexually explicit conduct is normally not allowed when the child is under 18. However, Article 3 allows only in certain specific cases exclusion from criminal liability for child pornography involving children who have reached the age of sexual consent. Therefore the Framework Decision ensures a strong protection of any child below 18 from exploitation in child pornography, and only allows limited exceptions between the age of sexual consent and the age of 18.

In practice the level of protection varies in every Member State according to the different age of sexual consent. However, harmonization of the age of sexual consent, which is connected with other issues like the age for marriage, has not been identified as an objective for the time being.

Article 1 (b) defines child pornography as pornographic material that visually depicts or represents a real child engaged in sexually explicit conduct, or a person appearing to be a child, or realistic images of a non-existing child. 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 which can be converted into a visual image. Many Member States have adopted legislation which is consistent with the definition of child pornography in Article 1(b) of the Framework Decision. Czech Republic, Estonia, Latvia, Lithuania, Luxembourg, Poland, Spain and Sweden do not have a detailed definition of child pornography.

Regarding paragraph (c) (definition of a computer system) the Czech Republic, Lithuania and Poland have not forwarded the relevant documentation to evaluate their implementation properly.

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.

## **Article 2: Offences concerning sexual exploitation of children**

The Council, when it adopted this Framework Decision, was aware of the need to deal with serious criminal offences, such as the sexual exploitation of children and child pornography, by a comprehensive approach in which substantive criminal law including effective, proportionate and dissuasive sanctions, form an integral part together with the widest possible judicial cooperation.

In this regard the Member States forwarded to the Commission a wide range of legal measures applicable to the offender. Legislation in force in Hungary, Finland, Czech Republic, France, Latvia and Slovakia covers all the points listed in Article 2 of the Framework Decision but further details would be useful. As already stated, the Commission works mainly through translated documents, and therefore misunderstandings are possible.

In addition, the Member States' legal systems can vary widely. This is why legal concepts cannot always be compared.

However, a general overview of national legislation shows that the provisions applicable in Member States mostly comply with the requirements of the Framework Decision with respect to the obligation to criminalise the coercing or recruiting a child into prostitution or into participating in pornographic performances, and the engaging in sexual activities with a child when a remuneration is paid, or use is made of coercion, or abuse is made of a recognised position of authority or influence over a child.

## **Article 3: Offences concerning child pornography**

This Article provides for approximation of offences related to child pornography which include production, distribution, dissemination or transmission, acquisition or possession, the supplying or making available of child pornography.

Article 3(2) provides for limited exceptions to the obligation to criminalise, when the person appearing a child is in fact 18 years of age, when child pornography involves realistic images of a non-existing child and it is produced and possessed for private use. In these cases the rationale of the exemption from criminal liability is that no child is involved in the production of pornographic materials.

A further exemption, which has been mentioned above, concerns the cases of production and possession of images of children that have reached the age of sexual consent, when pornographic images are produced or possessed with the consent of the child and solely for private use. However, in this case the consent shall not be considered valid if for example superior age, maturity, position, status, experience or the victim's dependency has been abused in achieving the consent. This provision implies a restriction of the scope of criminalisation of child pornography between the age of sexual consent and the age of 18 years, when the child genuinely consented to the production and private use of pornographic materials.

Whilst national legislation seems to comply with the minimum requirement of criminalisation of child pornography, there is a general lack of information concerning the exceptions under Article 3(2). The Commission only received complete information from Hungary, Lithuania, Italy, Denmark, Germany and Cyprus. Therefore it is not possible to evaluate the real level of protection of children above the age of sexual consent, which is a sensitive issue especially in countries where the age of sexual consent is below 16.

#### **Article 4: Instigation, aiding, abetting and attempt**

In the information provided to the Commission most Member States referred to the general rules on complicity and inchoate offences under their criminal system. The general rules would also be applicable to the crime committed toward minors, namely sexual exploitation and crime related to child pornography.

#### **Article 5: Penalties and aggravating circumstances**

This Article is one of the key provisions of the Framework Decision. Paragraph 1 mainly implies that offences contained in Articles 2, 3 and 4 of the Framework Decision should in all cases be sanctioned with imprisonment of a maximum of at least between one and three years. This provision is intended to ensure a minimum harmonisation in relation to the penalties applicable to the offenders. All Member States seem to comply with the requirements of the Framework Decision. The documentation forwarded to the Commission by Spain, Slovenia Estonia and Luxemburg has not allowed the Commission to establish a clear picture about the legal system implementing the requirements of Article 5(3) of the Framework decision.

#### **Article 6 and 7: Liability and sanctions on legal persons**

The Framework Decision introduces the concept of liability of legal persons in parallel with that of natural persons. Legal persons will be held liable for offences committed for their benefit by any person acting either individually or as part of the organ of the legal person, or, for example by a person who exercises a power of decision. It is not a requirement that the liability of the legal persons be exclusively criminal. Sanctions against legal persons must be "*effective, proportionate and dissuasive*". In any case, as regards the information on national systems submitted to the Commission, the legislation of most Member States provides for the possibility of applying sanctions against legal persons, at least by means of administrative measures. Article 7 (1) of the Framework Decision states that the minimum obligation, as far as sanctions on legal persons are concerned, is the imposition of a criminal or non-criminal fine. As far as administrative or criminal measures are concerned, Articles 6 and 7 appear to have largely been implemented.

#### **Article 8: Jurisdiction and Prosecution**

Article 8 of the Framework Decision sets out the cases in which Member States are obliged to establish jurisdiction over the offences referred to in Articles 2, 3 and 4. The main rule is the territoriality principle, according to which each Member State must establish its jurisdiction over offences committed in whole or in part in its territory. Article 8(3) has been replaced by the Decision on the European Arrest Warrant.<sup>8</sup> Member States are in compliance with the requirement of the Article 8(1)(a) Framework Decision of the territoriality principle.

Article 8(1)(b) establishes the rule of extra-territorial jurisdiction when the offender is one of the national of the country concerned. This provision is particularly important to ensure effective prosecution of the so called sex tourism, which occurs when any act of sexual exploitation of children is committed abroad. In principle, the Member States should guarantee the same level of protection of children regardless whether they are resident in one or another country. Taking into account different legal systems' requirements, Article 8(1)(b)

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<sup>8</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ L 190, 18.7.2002.

allows the Member States to not apply or apply only in specific cases or circumstances the jurisdiction rules when the offence is committed outside the territory. Concerning extra-territorial jurisdiction, however, Member States did not offer sufficient information to evaluate how far they have gone in the implementation of such a rule.

#### **Article 9: Protection of and assistance to victims**

Article 9 regulates three different issues. The first paragraph states that investigation or prosecution of offences covered by the Framework Decision shall not be dependent on the report or accusation made by the victim when territorial jurisdiction rule applies. Generally speaking Member States legislation complies with this obligation.

Paragraph 2 of Article 9 refers to child victims of sexual exploitation, who are considered particularly vulnerable victims for the purpose of the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.<sup>9</sup> Member States' submissions to the Commission are fragmental and incomplete, and do not facilitate an overall analysis. Sweden, Denmark, the Netherlands, Italy, Germany, Slovakia and the UK satisfactorily responded to the Framework Decision requirements. New legislation passed in Cyprus in 2007 contains a comprehensive framework for the recognition, referral to services and protection of victims which fully complies with the requirements of Article 13 of the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings with respect to sexually exploited children.

The third paragraph of Article 9 obliges the Member States to provide for specific protection of and assistance to the victim's family, taking into account Article 4 of the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. Germany, Latvia, Sweden, UK, Austria and Estonia have provided the Commission with information showing that they are in line with the Framework Decision. Other Member States have not provided any information on this item.

#### **4. CONCLUSIONS**

Not all Member States have transmitted all relevant texts of their implementing provisions to the Commission on time. The assessments and conclusions of the Report may thus sometimes be based on incomplete information.

On the basis of the information provided, the requirements set out in the Council Framework Decision have been met by almost all of the Member States, either as a result of pre-existing domestic laws, or through the implementation of new and specific legislation. Generally speaking, Member States legislation ensures a high level of protection of children from sexual exploitation and abuse, and provides for an appropriate level of penalties. Concerning child pornography, the requirement concerning criminalization of production of pornographic materials involving children is generally met, although it is not possible to provide a precise assessment of the range of exemption from criminal liability concerning child pornography involving children between the age of sexual consent and 18 years.

Where the Council Framework Decision has not been given effect in national provisions, the Commission invites the relevant Member States to correct this situation as soon as possible through the introduction of implementing legislation. Nonetheless, as a result of the Council Framework Decision, Member States generally now dispose of specific criminal law

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<sup>9</sup> Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings; OJ L 82, 22.3.2001

provisions incriminating the sexual exploitation of children and child pornography, and provide for effective, proportionate and dissuasive penalties.

As also stated in the report on the implementation of the Framework Decision 2002/629 on combating trafficking in human beings adopted by the Commission on 2 May 2006, it is difficult to provide an exhaustive evaluation in respect of legislation concerning particularly vulnerable victims, due to the limited information received by Member States. A victim-friendly approach in criminal proceedings, as well as a good level of social assistance of victims during and after criminal proceedings is crucial in order to avoid secondary victimisation, and ensure effective prosecution of crimes. Therefore the Commission invites Member States to reconsider carefully their own legislation with a view to strengthening the social protection and ensuring full respect of the rights of child victims.

Taking into account recent developments, in particular in the field of electronic communication technologies, new issues have been raised, for example regarding fraudulent solicitation of children for illicit purposes through the Internet ("grooming"). Simultaneously, new methods aimed at effectively detecting such crimes and identifying child victims through specialised law enforcement units are being developed. In the light of the outcome of these discussions, the Commission may consider the need to update and further strengthen the present Framework Decision regarding child exploitation and related offences, in particular offences committed through electronic communication networks and information systems.