

(Acts adopted pursuant to Title VI of the Treaty on European Union)

COUNCIL FRAMEWORK DECISION 2004/68/JHA
of 22 December 2003
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 Article 29, Article 31(1)(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Whereas:

- (1) 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 ⁽³⁾, the conclusions of the Tampere European Council and the Resolution of the European Parliament of 11 April 2000 include or call for legislative action against sexual exploitation of children and child pornography, including common definitions, charges and penalties.
- (2) Council Joint Action 97/154/JHA of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children ⁽⁴⁾ and Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet ⁽⁵⁾ 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.
- (3) The European Parliament, in its Resolution of 30 March 2000 on the Commission Communication on the implementation of measures to combat child sex tourism, 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.
- (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 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.
- (8) 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.
- (9) 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 Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime ⁽⁶⁾ and Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union ⁽⁷⁾.
- (10) 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.

⁽¹⁾ OJ C 62 E, 27.2.2001, p. 327.

⁽²⁾ OJ C 53 E, 28.2.2002, p. 108.

⁽³⁾ OJ C 19, 23.1.1999, p. 1.

⁽⁴⁾ OJ L 63, 4.3.1997, p. 2.

⁽⁵⁾ OJ L 138, 9.6.2000, p. 1.

⁽⁶⁾ OJ L 333, 9.12.1998, p. 1. Joint Action as amended by framework Decision 2001/500/JHA (OJ L 182, 5.7.2001, p. 1).

⁽⁷⁾ OJ L 351, 29.12.1998, p. 1.

- (11) Victims who are children should be questioned according to their age and stage of development for the purpose of investigation and prosecution of offences falling under this framework Decision.
- (12) This framework Decision is without prejudice to the powers of the Community.
- (13) 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 of 29 November 1996 establishing an incentive and exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children ⁽¹⁾, Joint Action 96/748/JHA of 16 December 1996 extending the mandate given to the Europol Drugs Unit ⁽²⁾, Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network ⁽³⁾, Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union ⁽⁴⁾, and Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters ⁽⁵⁾, as well as acts adopted by the European Council and the Council, such as Decision No 276/1999/EC of the European Parliament and of the Council of 25 January 1999 adopting a multiannual Community action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks ⁽⁶⁾, and Decision No 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women ⁽⁷⁾,
- (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or
- (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
- (c) 'computer system' shall mean any device or group of interconnected or related devices, one or more of which, pursuant to a programme, perform 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 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.

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 18 years;
- (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

⁽¹⁾ OJ L 322, 12.12.1996, p. 7.

⁽²⁾ OJ L 342, 31.12.1996, p. 4.

⁽³⁾ OJ L 191, 7.7.1998, p. 4.

⁽⁴⁾ OJ L 105, 27.4.1996, p. 1.

⁽⁵⁾ OJ L 191, 7.7.1998, p. 1.

⁽⁶⁾ OJ L 33, 6.2.1999, p. 1.

⁽⁷⁾ OJ L 34, 9.2.2000, p. 1.

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 children having reached the age of sexual consent are produced and possessed with their consent and solely for their own private use. Even where the existence of consent has been established, it shall not be considered valid, if for example superior age, maturity, position, status, experience or the victim's dependency on the perpetrator has been abused in achieving the consent;
- (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 involves no risk for the dissemination of the material.

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 Article 2 and Article 3(1)(a) and (b), are punishable.

Article 5

Penalties and aggravating circumstances

1. Subject to paragraph 4, each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2, 3 and 4 are punishable by criminal penalties of a maximum of at least between one and three years of imprisonment.
2. Subject to paragraph 4, 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 five and ten 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);

(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 Article 2(b), in both cases as far as they refer to prostitution, where at least one of the following circumstances may apply:

- the victim is a child below the age of sexual consent under national law,
- the offender has deliberately or by recklessness 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/JHA, irrespective of the level of the penalty referred to in that Joint Action;

(c) 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 Article 2(b), in both cases as far as they refer to pornographic performances, Article 2(c)(ii) and (iii), Article 3(1)(a), (b) and (c), where the victim is a child below the age of sexual consent under national law and at least one of the circumstances referred to under the second, third and fourth indent under point (b) of this paragraph may apply.

3. Each Member State shall take the necessary measures to ensure that a natural person, who has been convicted of one of the offences referred to in Articles 2, 3 or 4, may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children.

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

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 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 an offence referred to in Articles 2, 3 and 4.

Article 7

Sanctions on legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(1) 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.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 6(2) is punishable by effective, proportionate and dissuasive sanctions or measures.

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 enable the prosecution, in accordance with national law, of at least the most serious of the offences referred to in Article 2 after the victim has reached the age of majority.

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 2 should be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Council framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings⁽¹⁾.

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 that framework Decision to the family referred therein.

Article 10

Territorial scope

This framework Decision shall apply to Gibraltar.

⁽¹⁾ OJ L 82, 22.3.2001, p. 1.

*Article 11***Repeal of Joint Action 97/154/JHA**

Joint Action 97/154/JHA is hereby repealed.

*Article 12***Implementation**

1. Member States shall take the necessary measures to comply with this framework Decision by 20 January 2006 at the latest.
2. By 20 January 2006 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 20 January 2008 on the basis of a report established using this information and a written report from the

Commission, the Council shall assess the extent to which the Member States have complied with the provisions of this framework Decision.

*Article 13***Entry into force**

This framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels, 22 December 2003.

For the Council

The President

A. MATTEOLI
