



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE
EUROPEAN PARLIAMENT**

**Combating trafficking in human beings and combating the sexual exploitation of
children and child pornography**

Proposal for a

COUNCIL FRAMEWORK DECISION

on combating trafficking in human beings

Proposal for a

COUNCIL FRAMEWORK DECISION

on combating the sexual exploitation of children and child pornography

(presented by the Commission)

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Combating trafficking in human beings and combating the sexual exploitation of children and child pornography; two proposals for framework decisions

1. INTRODUCTION

Trafficking in human beings and the sexual exploitation of children, including child pornography are abhorrent and increasingly worrying phenomena. Trafficking in human beings is not only an episodic phenomenon, affecting a few individuals, but of structural nature with extensive implications on the social, economic and organisational fabric of our societies. The phenomenon is facilitated by globalisation and by modern technologies. Globally, tens of thousands of human beings, especially women and children, are trafficked for exploitative purposes each year. Numerous cases of sexual exploitation of children and child pornography are reported. The Member States of the European Union and the candidate countries are much affected by these scourges to society. A variety of measures, including emphatic legal protection to all individuals, and preventive measures, as well as measures to ensure adequate protection of and assistance to the victims, are required. Measures should address the whole trafficking chain of recruiters, transporters, exploiters and clients. The underlying root causes of trafficking in human beings, such as poverty, including feminisation of poverty, discrimination against women, unemployment and lack of education and access to resources must be addressed in order to establish and maintain a comprehensive policy. In particular, women and children are vulnerable to become victims of trafficking due to inter alia lack of education and professional opportunities. A comprehensive policy therefore needs to include a clear gender perspective.

Against this background, the European Union has been actively engaged since 1996 in developing a comprehensive and multidisciplinary approach towards the prevention of and the fight against trafficking in human beings and the sexual exploitation of children. It should for instance be recalled that the Council, with the active involvement of the Commission and the European Parliament, has set up the STOP¹ incentive and exchange programme and the DAPHNE Programme² to combat violence against women and children. The STOP Programme has in particular developed a multidisciplinary approach in which all relevant actors are involved; in addition to the emphasis on law enforcement co-operation, special importance is attached to non-governmental organisations and their crucial role in a comprehensive and successful approach against trafficking and the sexual exploitation of children. The importance of non-governmental organisations is also underlined by the DAPHNE Programme which is specifically designed to support an approach focusing on the non-governmental organisations and their work to protect and assist women and children who are the victims of violence.

¹ OJ L 322, 12.12.1996

² Decision N° 293/2000/EC of the European Parliament and of the Council of 24.1.2000; OJ L34/1, 9.2.2000

Furthermore, in February 1997, the Council adopted a Joint Action³ concerning action to combat trafficking in human beings and the sexual exploitation of children in which Member States agreed to review their relevant criminal law so as to ensure the criminalisation of certain behaviours and to encourage judicial co-operation. The European Union's initiatives have also contributed substantially to the raising awareness of these phenomena and to action at world wide level as illustrated by the recent, successful, conclusion of the United Nations-protocol on trafficking in human beings supplementing the Convention on Transnational Organised Crime.

At European level further impetus was given by Article 29 of the Amsterdam Treaty, which contains an explicit reference to trafficking in human beings and offences against children. The "Vienna Action Plan"⁴ on the implementation of the Treaty's provisions on an area of freedom, security and justice, consequently also addresses these matters. Furthermore, concrete initiatives in these fields were requested in the conclusions of the Tampere European Council on 15-16 October 1999 (points 23 and 48). The European Council expressed, in particular, its determination on two aspects. First by combating those who engage in trafficking in human beings and economic exploitation of migrants. The Council was invited to adopt by the end of 2000 legislation foreseeing severe sanctions against these serious crimes. Secondly by considering that efforts to agree on common definitions, incriminations and sanctions should, in the first instance, be focused on, inter alia, trafficking in human beings, sexual exploitation of children and high tech crime. Hereafter, the Santa Maria da Feira European Council on 19-20 June 2000 called on the incoming French Presidency and the Commission to take forward urgently the Tampere conclusions in this area.

The Commission, for its part, indicated in the Scoreboard⁵ to review progress on the creation of an area of freedom, security and justice in the European Union, its intention to table proposals by the end of 2000, with a view to the adoption of measures establishing, in particular, common rules relating to the constituent elements of criminal law linked with trafficking in human beings and the sexual exploitation of children, with particular reference to child pornography on the Internet. Such action was also called for by the European Parliament in several resolutions⁶.

Apart from legislative initiatives, the Commission intends to continue a range of actions in the fight against trafficking in human beings and the sexual exploitation of children. The STOP and DAPHNE programmes are central to this policy and, the Commission has recently put forward a proposal for a Council Decision to extend the STOP Programme for a period of two years. This would allow for focused effort involving the candidate countries as well as co-operation with third countries and international organisations to prevent and combat trafficking in human beings and the sexual exploitation of children. In line with previous policy papers⁷, budget lines targeting the candidate countries and third countries will also be used to support actions such as information campaigns to prevent trafficking in human beings and to address the underlying root causes of trafficking. One concrete example of this is the European initiative for Democracy and Human Rights which provides support to non-

³ OJ L 063, 4.3.1997

⁴ OJ C 19, 23.1.1999

⁵ COM (2000) 167 final, 24.3.2000

⁶ E.g. Resolution of 19 May 2000 on the Communication « For further actions in the fight against trafficking in women » (A5-0127/2000) and Legislative Resolution of 11 April 2000 on the initiative of the Republic of Austria with a view to the adoption of a Council Decision to combat child pornography on the Internet (A5-0090/2000)

⁷ COM (96) 567 final of 20.11.1996 and COM (98) 726 final of 9.12.1998

governmental and international organisations working to promote the human rights of women, children and other vulnerable groups in third countries. In the field of child pornography the Action Plan against illegal and harmful content on the Internet⁸ will be applied. In accordance with the Council Recommendation 98/560/EC of 24 September 1998⁹ on the development of the competitiveness of the European audio-visual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, the Commission also examines the measures taken by the Member States, in particular in the area of self regulation to promote the establishment of an environment of confidence in the fight against the distribution of illegal contents as regards human dignity in audio-visual and on-line services.

2. THE PROPOSALS BY THE COMMISSION

Since the issues of trafficking in human beings and the sexual exploitation of children have been high on the political agenda of the European union, progress has been noted in Member States' policies and legislation. However, despite these positive developments the existing discrepancies and divergences make it difficult, in practice, to develop an efficient judicial and law enforcement co-operation in these areas. In preparing the present proposals, the Commission has considered that the main reason why the implementation of the Joint Action of February 1997 failed to achieve its objectives is to be found in the absence of commonly adopted definitions, incriminations and sanctions in the Member States' penal legislation. The aim of the Commission's present proposals on combating trafficking in human beings and the sexual exploitation of children is to remedy this unsatisfactory situation.

As far as the proposal for a Framework Decision on combating trafficking in human beings is concerned, the Commission wishes to underline that the objective is to cover not only offences concerning trafficking in human beings for the purpose of sexual exploitation, but also offences concerning trafficking in human beings for the purpose of labour exploitation. Since it is crucial to address different forms of criminal movements of people that are operated by international criminal organisations, it should also be underlined that the Commission's proposal on trafficking in human beings for exploitative purposes is to be seen as to complement the important initiatives presented by the French Presidency¹⁰ on facilitation of illegal entry, stay and residence.

As regards the Commission's present proposal for a Framework Decision on combating sexual exploitation of children and child pornography, the objective is, in particular, to improve the provisions of the Joint Action of February 1997 by ensuring that there are no safe havens for child sex offenders suspected of having committed an offence in a country other than their own.

Furthermore, the proposal is intended to address, as a matter of urgency, the worrying issue of child pornography on the Internet so as to illustrate the European Union's determination to implement common penal provisions in this field and contribute to provide Internet-users with a safe and crimeless environment.

Finally, the Commission wishes to highlight the fact that, where appropriate, its proposals have taken onboard the work reflected at international level by the United Nations-protocol

⁸ OJ L 33 6.2.1999

⁹ OJ L 270, 7.10.1998

¹⁰ OJ C 253, 4.9.2000, proposals not yet adopted

on trafficking in human beings and by the future Cyber Crime Convention developed within the Council of Europe. The Commission considers that it is important that the European Union should, through swift adoption of the present proposals by the Council, demonstrate clearly its will to take on the fight against these unacceptable violations of human rights and human dignity by providing a common approach on criminal law and a further developed law enforcement and judicial co-operation.

Attached to this Communication are:

- one proposal for a Framework Decision on combating trafficking in human beings,
- one proposal for a Framework Decision on combating sexual exploitation of children and child pornography.

Proposal for a

COUNCIL FRAMEWORK DECISION
on combating trafficking in human beings

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 children¹. 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 trafficking in human beings have developed considerably in number and in substance at the level of the European Union as well as at local, regional and international level in a wider context. That said, the continuing divergence of legal approaches in the Member States clearly demonstrates the need for further action against the menace of trafficking.

Furthermore, Article 29 of the Amsterdam Treaty provides an explicit reference to trafficking in human beings. The Vienna Action Plan² and the Tampere European Council made a clear call for further legislative action against trafficking. Legislative action is also indicated in the Commission's Scoreboard³. At the wider international level, one of the most significant developments has been the United Nations Convention on Transnational Organised Crime with its two supplementing protocols targeting smuggling of migrants and trafficking in persons. The Commission has participated actively in the elaboration of these instruments and important elements of the protocol on trafficking are reflected in this proposal, albeit taken further.

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 and extradition.

In conclusion, the Commission believes that a further response to the issue of trafficking is required at the level of the European Union. Use of a Framework Decision, an instrument introduced by the Amsterdam Treaty, will reinforce a common approach of the European Union in this area and fill gaps in existing legislation. The need for a clear common approach on trafficking 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 trafficking in human beings.

¹ OJ L 063, 4.3.1997

² OJ C 19, 23.1.1999

³ COM (2000) 167 final, 24.3.2000

The proposal also includes provisions on horizontal judicial issues such as jurisdiction and co-operation between Member States. The proposal covers trafficking in human beings for the purposes of labour and sexual exploitation, not including sexual exploitation of children and child pornography which will be covered by a separate proposal. The separation into two Framework Decisions will allow the Council to focus on trafficking in human beings for the purposes of labour as well as sexual exploitation.

2. TRAFFICKING AND SMUGGLING

The Commission is of the view that the division into one United Nations-protocol on trafficking in human beings and one United Nations-protocol on smuggling of migrants highlights the complexity of different forms of criminal movements of people that are operated by international criminal organisations. While smuggling of migrants could be said to constitute a crime against the state and often involves a mutual interest between the smuggler and the smuggled, trafficking in human beings constitute a crime against a person and involves an exploitative purpose.

The Commission is therefore of the view that the French initiatives⁴ on facilitation of unauthorised entry, movement and residence are related to smuggling of migrants. This proposal, on the other hand, relates to trafficking in persons with its characteristics. The Commission's conclusion is that the French initiative on facilitation and this proposal on trafficking complement each other and that they both contribute to a European-wide fight against severe types of criminal activities by international criminal organisations.

3. 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 to a substantial part 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 trafficking in human beings, 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.

4. THE FRAMEWORK DECISION: ARTICLES

Article 1 (Trafficking in human beings for the purpose of labour exploitation)

Article 1 puts on the Member States an obligation to ensure that trafficking in human beings for the purpose of labour exploitation is punishable.

Trafficking is defined in the Article to include the recruitment, transportation, or transfer of a person, including harbouring and subsequent reception of and the exchange of control over him or her for the purpose of exploiting him or her in the production of goods or provision of services. This definition reflects the key elements of one of the parts constituting the definition of trafficking in the United Nations-protocol on trafficking in human beings.

⁴ OJ C 253, 4.9.2000, proposals not yet adopted

Labour exploitation is defined in the Article to be an infringement of labour standards governing working conditions, salaries and health and safety. The reference to labour market regulations is in no way intended to affect the labour market regulations of the Member States. It is intended to establish a benchmark on the basis of existing regulations for what is an acceptable standard on the labour market. It should be underlined that this definition must be viewed upon in conjunction with the definition of trafficking and qualifying elements such as coercion. In addition the offence includes a requirement that the fundamental rights of the person have been and continue to be suppressed, for instance the rights of the Charter of Fundamental Rights proclaimed by the Nice European Council. This requirement includes also the perspective of the victim's fundamental rights and not only the conduct of the perpetrator as in the qualifying elements mentioned below. It also expresses a requirement for a continuing suppression of the fundamental rights of a person.

As regards the elements qualifying trafficking a person for the purpose of labour exploitation as a criminal offence, points (a) and (b) corresponds to the UN-protocol on trafficking. Points (c) and (d), which partly corresponds to the United Nations-protocol, cover forms of taking advantage or exercising pressure when a person is trafficked. The objective is to ensure a comprehensive coverage of criminal conduct. This includes practices such as debt bondage in which a person has no choice but to submit to the pressure. It also includes the abuse of the vulnerability of persons, for instance of persons being mentally or physically disabled or of persons illegally remaining on the territory of a Member State who are often in a situation in which they have no choice or perceive to have no choice, but to submit to the exploitation. These latter elements ensures also that the offence take the specific situation of the victim into account and not only the conduct performed by the trafficker.

The criminal offence described does not include an explicit requirement for the victim to cross a border. The reasoning here is following the Europol Convention and the United Nations-protocol on trafficking, i.e. the context of trafficking in human beings refers generally to international organised crime, but it is not necessary for the victim itself to cross a border. Moreover, the key elements of the offence of trafficking should focus on the exploitative purpose, rather than on the "movement" across a border. If the requirement of a cross-border element would be maintained, there would be a paradox in that a European citizen forced into prostitution and trafficked within its own country, would be less protected than citizens from third countries would. The approach not to include a cross-border requirement also means that the proposal cover "re-trafficking" within the country of destination, which in many cases form an integral part of the trafficking chain/operation.

Article 2 (Trafficking in human beings for the purpose of sexual exploitation)

Article 2 puts on the Member States an obligation to ensure that trafficking in human beings for the purpose of sexual exploitation is punishable. The Article corresponds to the structure and content of Article 1.

Sexual exploitation includes the purposes to exploit a person in prostitution, in pornographic performances or in the production of pornographic material.

Article 3 (Instigation, aiding, abetting and attempt)

Article 3 puts an obligation on Member States to ensure that instigation of, aiding, abetting and attempt to commit trafficking for the purpose of labour exploitation and trafficking for the purpose of sexual exploitation is punishable.

Article 4 (Penalties and aggravating circumstances)

Article 4 concerns penalties and aggravated circumstances. Paragraph 1 indicates that the offences referred to in Articles 1, 2, and 3 shall be punishable by effective, proportionate and dissuasive penalties, including by terms of imprisonment with a maximum penalty that is not less than six years. These penalties are sufficient to include trafficking in human beings within the scope of other instruments already adopted for the purposes of enhancing police and judicial co-operation in the European Union against organised crime such as the 98/699/JHA Joint Action⁵ on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime and the 98/733/JHA Joint Action⁶ on making it a criminal offence to participate in a criminal organisation.

As trafficking in human beings involves very serious criminal conduct, paragraph 2 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 that is not less than ten years. The Commission's proposal to have ten years as a minimum maximum penalty when aggravating circumstances are involved builds on the view that possible penalties for trafficking should reflect the seriousness of the crime and have a strong deterrent effect.

Three circumstances that typically should qualify the trafficking offence as aggravated are listed. These circumstances represent a minimum list, but are without prejudice to additional definitions in the legislation of the Member States. A further explanation of what is meant by these circumstances for the purposes of this Framework Decision is:

- «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 within 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 Union⁷;
- «involves particular ruthlessness» is aimed at targeting the level of force or pressure exercised by the trafficker 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.

Article 5 (Liability of legal persons)

It is necessary also to cover the situation in which legal persons are involved in the trafficking. Article 5 therefore provides provisions for holding a legal person liable for the offences envisaged by Articles 1, 2, and 3, 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 6 on sanctions).

⁵ OJ L 333/1, 9.12.1998

⁶ OJ L 351/1, 29.12.1998

⁷ OJ L 351/1 29.12.1998

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 offence for its benefit. Paragraph 3 indicates that legal proceedings against a legal person do not preclude parallel legal proceedings against a natural person and paragraph 4 defines a legal person for the purpose of this Framework Decision.

Article 6 (Sanctions on legal persons)

Article 6 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 7 (Jurisdiction and prosecution)

The international nature of the trafficking offence 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 criterion 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 the applicability of paragraphs 1(b) and 1(c) to cases where the offence has been committed outside the territory of that Member State.

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 trafficking 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 (Victims)

In the European Union's approach against trafficking in human beings, special importance has been attached to assistance to the victims. In many cases, victims of trafficking have been severely abused by the trafficker. The Commission is therefore of the view that an Article on victims should be included in this Framework Decision. Social assistance for children in order to help them overcome the consequences of such events and enable them to reintegrate, *inter alia*, into the labour market, forms part of the overall policy.

Article 9 (Co-operation between Member States)

The purpose of Article 9 is to take advantage of instruments on international judicial co-operation to which Member States are parties and which should apply to the matters covered in 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 trafficking in human beings. 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-ordinating their action to prosecute effectively. The paragraph also indicates that appropriate use shall be made of existing co-operation mechanisms such as the liaison magistrates⁸ and the European Judicial Network⁹. Paragraph 3 stresses the importance of having appointed points of contact for the purpose of exchanging information. It explicitly indicates that Europol shall 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 trafficking in human beings.

Article 10 (Implementation)

Article 10 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 General Secretariat of the Council and to the Commission the provisions transposing into their national legislation the obligations imposed on them under this Framework Decision. On the basis of a report established on the basis of this information and on a written report from the Commission, the Council will by 30 June 2004 assess the extent to which Member States have taken the necessary measures to comply with this Framework Decision.

Article 11 (Repeal of the Joint Action of February 1997)

Article 11 repeals the Joint Action of February 1997. The Joint Action was to be implemented by 31 December 1999 and on this date the Member States were also to report to Secretariat General of the Council on the proposals they have made with a view for their adoption to fulfil their obligations under the Joint Action. This Framework Decision together with the Framework Decision on sexual exploitation of children and child pornography cover to a large extent the same issues. Although it might follow from general principles of law that the Joint Action is obsolete and no longer have any legal consequences, the Commission is of the view that it is important to clarify that this Framework Decision repeals the Joint Action.

⁸ OJ L 105, 27.4.1996

⁹ OJ L 191/4, 7.7.1998

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.

Proposal for a

COUNCIL FRAMEWORK DECISION

on combating trafficking in human beings

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 justice¹, the Tampere European Council on 15-16 October 1999, the Santa Maria da Feira European Council on 19-20 June 2000, the Commission in the Scoreboard² and the European Parliament in its Resolution of 19 May 2000³ indicate or call for legislative action against trafficking in human beings, 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 children⁴ needs to be followed by further legislative action addressing the divergence of legal approaches in the Member States and contributing to the development of an efficient judicial and law enforcement co-operation against trafficking in human beings;
- (3) Trafficking in human beings constitute serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion;
- (4) The important work performed by international organisations, in particular the UN, must be complemented by that of the European Union;
- (5) It is necessary that the serious criminal offence trafficking in human beings 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;

¹ OJ C 19, 23.1.1999

² COM (2000) 167 final, p. 2.4 Management of migration flows and p. 4.3 Fight against certain forms of crime

³ A5-0127/2000

⁴ OJ L 063, 4.3.1997

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;

- (6) It is necessary to introduce sanctions on perpetrators sufficiently severe to allow for trafficking in human beings to be included within the scope of instruments already adopted for the purpose of combating organised crime such as the 98/699/JHA Joint Action⁵ on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime and the 98/733/JHA Joint Action⁶ on making it a criminal offence to participate in a criminal organisation;
- (7) This Framework Decision should contribute to the fight against and prevention of trafficking in human beings by complementing the instruments adopted by the Council such as the 96/700/JHA Joint Action⁷ establishing an incentive and exchange programme for combating trade in human beings and sexual exploitation of children (STOP), the 96/748/JHA Joint Action⁸ extending the mandate given to the Europol Drugs Unit, the Decision of the Council and the European Parliament 293/2000/EC⁹ on the Daphne programme on preventive measures to fight violence against children, young persons and women, the Joint Action 98/428/JHA¹⁰ on the creation of a European Judicial Network, the Joint Action 96/277/JHA¹¹, concerning a framework for the exchange of liaison magistrates to improve judicial co-operation between the Member States of the European Union and the Joint Action 98/427/JHA¹² on good practice in mutual legal assistance in criminal matters;

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Offences concerning trafficking in human beings for the purpose of labour exploitation

Each Member State shall take the necessary measures to ensure that the recruitment, transportation or transfer of a person, including harbouring and subsequent reception and the exchange of control over him or her is punishable, where the fundamental rights of that person have been and continue to be suppressed for the purpose of exploiting him or her in the production of goods or provision of services in infringement of labour standards governing working conditions, salaries and health and safety, and:

- (a) use is made of coercion, force or threats, including abduction, or
- (b) use is made of deceit or fraud, or

⁵ OJ L 333/1, 9.12.1998
⁶ OJ L 351/1, 29.12.1998
⁷ OJ L 322, 12.12.1996
⁸ OJ L 342 31.12.1996
⁹ OJ L 34 9.2 2000
¹⁰ OJ L 191/4 7.7.1998
¹¹ OJ L 105, 27.4.1996
¹² OJ L 191, 7.7.1998

- (c) there is a misuse of authority, influence or pressure, or
- (d) there is another form of abuse.

Article 2

Offences concerning trafficking in human beings for the purpose of sexual exploitation

Each Member State shall take the necessary measures to ensure that the recruitment, transportation or transfer of a person, including harbouring and subsequent reception and the exchange of control over him or her is punishable, where the purpose is to exploit him or her in prostitution or in pornographic performances or in production of pornographic material, and:

- (a) use is made of coercion, force or threats, including abduction, or
- (b) use is made of deceit or fraud, or
- (c) there is a misuse of authority, influence or pressure, or
- (d) there is another form of abuse.

Article 3

Instigation, aiding, abetting, and attempt

Each Member State shall take the necessary measures to ensure that the instigation of, aiding, abetting or attempt to commit an offence referred to in Articles 1 and 2 is punishable.

Article 4

Penalties and aggravating circumstances

1. Each Member State shall take the necessary measures to ensure that an offence referred to in Articles 1, 2, and 3 is punishable by effective, proportionate and dissuasive penalties, including by terms of imprisonment with a maximum penalty that is not less than six years.
2. Without prejudice to additional definitions in national legislation, each Member State shall take the necessary measures to ensure that an offence referred to in Articles 1, 2, and 3 is punishable by terms of imprisonment with a maximum penalty that is not less than ten years when:
 - it involves particular ruthlessness, or
 - it generates substantial proceeds, or
 - it is committed within the framework of a criminal organisation.

Article 5

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 article 1, 2 and 3, 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 1, 2, and 3 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 1, 2, and 3.
 4. For the purpose 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 6
Sanctions on legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5 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 7
Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over an offence referred to in Articles 1, 2, and 3 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 1, 2, and 3 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.

Article 8
Victims

Each Member State shall ensure that a victim of an offence provided for in this Framework Decision is given adequate legal protection and 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 9
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 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 1, 2, and 3, 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, is 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 pertaining to trafficking in human beings. The General Secretariat shall inform all other Member States about the appointed points of contact.

Article 10
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 law 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 11
Repeal of the 97/154/JHA Joint Action

The Joint Action of 24 February 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 1997 is repealed by 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

Proposal for a

COUNCIL FRAMEWORK DECISION

on combating the sexual exploitation of children and child pornography

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 children¹. 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 Plan² 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 Scoreboard³. On 29 May 2000, the Council adopted a decision⁴ 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

¹ OJ L 063, 4.3.1997

² OJ C 19, 23.1.1999

³ COM (2000) 167 final, 24.3.2000

⁴ 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 interests⁵.

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

⁵ 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 Action⁶ on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime and the 98/733/JHA Joint Action⁷ 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:

⁶ OJ L 333/1, 9.12.1998

⁷ 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 Union⁸.
- “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

⁸ OJ L 351/1 29.12.1998

aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)⁹, 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.

⁹ 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 magistrates¹⁰ and the European Judicial Network¹¹. 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 pornography¹² 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)

¹⁰ OJ L 105, 27.4.1996

¹¹ OJ L 191/4, 7.7.1998

¹² 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.

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 justice¹, the conclusions from the Tampere European Council, the Commission in the Scoreboard², the European Parliament in its Legislative Resolution of 11 April 2000³, 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 children⁴ and the Council Decision to combat child pornography on the Internet⁵ 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 2000⁶ on the Commission Communication on the implementation of measures to combat child sex tourism⁷ 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;

¹ OJ C 19, 23.1.1999

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

³ A5-0090/2000

⁴ OJ L 063, 4.3.1997

⁵ OJ L 138/1, 9.6.2000

⁶ A5-0052/2000

⁷ 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 Action⁸ on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime and the 98/733/JHA Joint Action⁹ 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 Action¹⁰ establishing an incentive and exchange programme for combating trade in human beings and sexual exploitation of children (STOP), the 96/748/JHA Joint Action¹¹ extending the mandate given to the Europol Drugs Unit, the Decision of the Council and the European Parliament 293/2000/EC¹² on the Daphne programme on preventive measures to fight violence against children, young persons and women, the Joint Action 98/428/JHA¹³ on the creation of a European Judicial Network, the Action Plan against illegal and harmful content on the Internet¹⁴; the Joint Action 96/277/JHA¹⁵, concerning a framework for the exchange of liaison magistrates to improve judicial co-operation between the

⁸ OJ L 333/1, 9.12.1998
⁹ OJ L 351/1, 29.12.1998
¹⁰ OJ L 322, 12.12.1996
¹¹ OJ L 342, 31.12.1996
¹² OJ L 34, 9.2.2000
¹³ OJ L 191/4, 7.7.1998
¹⁴ OJ L 33, 6.2.1999
¹⁵ OJ L 105, 27.4.1996

Member States of the European Union and the Joint Action 98/427/JHA¹⁶ 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.

¹⁶ 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