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REPORT

on the initiative by the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children

(14207/2004 – C6-0244/2004 – 2004/0818(CNS))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Bogusław Sonik

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the initiative by the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children (14207/2004 – C6-0244/2004 – 2004/0818(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the initiative by the Kingdom of Belgium (14207/2004)¹,
 - having regard to Article 34(2)(b) and Article 31(1)(a) of the EU Treaty,
 - having regard to Article 39(1) of the EU Treaty, pursuant to which the Council consulted Parliament (C6-0244/2004),
 - having regard to the opinion of the Committee on Legal Affairs on the proposed legal basis,
 - having regard to Rules 93, 51, 41(4) and 35 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Legal Affairs (A6-0068/2006),
1. Approves the initiative by the Kingdom of Belgium as amended;
 2. Calls on the Council to amend the text accordingly;
 3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
 4. Calls on the Council to consult Parliament again if it intends to amend the initiative by the Kingdom of Belgium substantially;

 5. Calls for a parallel provision to be enacted on the basis of Article 65(a) of the EC Treaty given the clear intersection between issues linked to judicial cooperation in criminal and in civil matters,
 6. Instructs its President to forward its position to the Council and Commission, the government and Parliament of the Kingdom of Belgium and the governments and parliaments of the other Member States.

Text proposed by the Kingdom of Belgium

Amendments by Parliament

¹ Not yet published in OJ.

Amendment
Citation 1

having regard to the Treaty on European Union, and in particular **Article 31(a)** and Article 34(2)(b) thereof,

having regard to the Treaty on European Union, and in particular **Article 31(1)(a) and (c)** and Article 34(2)(b) thereof,

Justification

As the objective of the instrument is twofold: to improve access to information on prohibitions (in particular through compulsory registration of prohibitions in the criminal record) and to make it compulsory to enforce them.

Giving the fact that the criminal law varies in the Member States of the EU it is necessary to ensure a certain level of compatibility in rules applicable to criminal convictions.

Amendment 2
Recital 5

(5) Combating the sexual exploitation of children and child pornography, and in particular combating risks of recidivism in this context, should be a priority for the Union. In this particular area Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography established, in accordance with the principle of subsidiarity, a minimum common EU approach to these criminal offences, in particular as regards the type of penalty and prohibition that should be provided for by national legislation. The principle of mutual recognition should be applicable to temporary or permanent prohibition from exercising professional activities related to the supervision of children, which is expressly provided for by the Framework Decision, where that prohibition is consequent upon a criminal conviction for one of the offences connected to the sexual exploitation of children and child pornography.

(5) Given that, within the same Member State and across the European Union, the range of possible prohibitions arising from criminal convictions is broad and the nature and methods of applying those sanctions can vary considerably, priority should be given to sectors where a common basis already exists between the Member States. Combating the sexual exploitation of children and child pornography, and in particular combating risks of recidivism in this context, should be a priority for the Union. In this particular area Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography established, in accordance with the principle of subsidiarity, a minimum common EU approach to these criminal offences, in particular as regards the type of penalty and prohibition that should be provided for by national legislation. The principle of mutual recognition should be applicable *inter alia* to temporary or permanent prohibition from exercising professional activities related to the supervision of children, which is expressly provided for by the Framework Decision, where that prohibition is consequent upon

a criminal conviction for one of the offences connected to the sexual exploitation of children and child pornography.

Justification

The Member State willingness to co-operate is necessary for any strengthened co-operation in the area of criminal matters. Existing common basis is a fundamental element for any further co-operation.

Limitation of mutual recognition only to prohibition from exercising responsibilities related to the supervision of children is not advisable. Such limitation has not been imposed by Council Framework Decision of 22 December 2003 establishing only a minimum common EU approach to defined types of criminal offences simultaneously allowing decisions concerning instruments other than those mentioned in article 5(3) of this decision (see also Framework Decision article 5(4) of 22 December 2003). It is advisable to extend the scope of recognition and enforcement of prohibitions to include prohibitions from exercising professional activities in any character in public or private institutions related to the supervision of children. For more information on prohibitions, see article 2 (c) definition of "prohibition".

Amendment 3
Article 2, point (c)

(c) "prohibition" shall mean a temporary or permanent ban on exercising professional activities related to the supervision of children, referred to in Article 5(3) of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, arising from a conviction for an offence under Article 1(1);

(c) "prohibition" shall mean a temporary or permanent ban on exercising professional activities related to the supervision of children, referred to in Article 5(3) of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, **and on exercising activities other than the supervision of children within a public or private institution that supervises or works with children**, arising from a conviction for an offence under Article (1);

Justification

It is very important that also those prohibitions related to jobs, other activities or business activities within institutions which supervise children or work with them should be passed on to eliminate situations where for instance a person convicted for paedophilia in one country could have regular contact with children as part of their professional responsibilities other than supervision of children in such an institution in another country.

Amendment 4
Article 2, point (d)

(d) "central authority" shall mean the authority appointed under *Article 2* of the Council Decision of [...] on the exchange of information extracted from the criminal record;

(d) "central authority" shall mean the authority appointed under *Article 1* of the Council Decision of [...] on the exchange of information extracted from the criminal record;

Amendment 5
Article 3, paragraph -1

-1. Where the applicable international instruments on mutual legal assistance in criminal matters so allow, prohibitions imposed by third countries shall be registered in the criminal record.

Justification

Considering the seriousness of the offence in relation to which the prohibition has been issued, it is advisable to provide European Union citizens with a higher level of safety by obliging the Member States to register in criminal records also prohibitions issued in countries which are not Member States if it should be permitted by applicable international instruments, such as the European Convention on Mutual Assistance in Criminal Matters of 1959¹

Amendment 6
Article 3

Member States shall take the necessary steps to ensure that any prohibition is registered in the criminal record.

2. Member States shall take the necessary steps to ensure that any prohibition, ***including any prohibition imposed by other Member States***, is registered in the criminal record.

Justification

Prohibitions on which the present framework decision will apply are limited and laid down in Article 2(c). The obligation to register in the criminal record also those prohibitions which have been passed on by other States should be expressly provided for in the Framework Decision.

Amendment 7
Article 4, paragraph 1

1. When the issuing State passes on criminal record information to another Member State under the applicable international rules on mutual legal

1. When the issuing State passes on criminal record information to another Member State under the applicable international rules on mutual legal

^{1 1} There may be difficulties with passing this amendment as it exceeds beyond the scope of the basis for the decision (It is based on article 31(1)(a) and (c) European Union Treaty).

assistance in criminal matters, it shall mention the prohibition in the excerpt from the criminal record.

assistance in criminal matters, **and in accordance with Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record¹**, it shall mention the prohibition **among the information provided for** in the excerpt from the criminal record.

¹ OJ L 322, 9.12.2005, p. 33.

Justification

The information given by the issuing Member State has not to be necessarily limited on prohibitions but may contain also additional information concerning criminal history of the offender.

The recently adopted Council Decision on the exchange of information from criminal record supplements regulations of the Convention of 1959 by providing details on time-limitations related to passing on information about the prohibition on request of the enforcing State.

Amendment 8 Article 5

Where application is made in the framework of this Framework Decision for the criminal records of a Member State, in accordance with national law, with a view to obtaining information on a national of another Member State, an application shall always be made to the central authority of the Member State of which the person concerned is a national.

Where application is made in the framework of this Framework Decision for the criminal records of a Member State, in accordance with national law, with a view to obtaining information on a national of, **or on a person residing in**, another Member State, **including where there are no criminal proceedings before a court against any such persons**, an application shall always be made to the central authority of the Member State of which the person concerned is a national **or is a resident**.

Justification

The provision of Article 5 of the proposed Framework Decision leaves a lacuna in respect of non-EU nationals who may, nevertheless, be living within the EU.

Keeping in mind the accepted practice of applying the European Convention on Mutual Assistance in Criminal Matters (particularly in view of reservations expressed for article 13 of this Convention), it is crucial to state expressly in this framework decision that application for criminal record should also be considered if no criminal proceedings have been brought against the person concerned before any court. However, even such a proposal may not exceed beyond the frames of the decision. For instance applying when information from the

criminal record is required to obtain a permit to exercise certain activities related to the supervision of children.

Amendment 9
Article 5, paragraph 1 a (new)

1a. Where application is made in the framework of this Framework Decision for the criminal records of a Member State, in accordance with national law, with a view to obtaining information on a national of more than one State, such an application shall always be made to the central authority of each Member State of which the person concerned is a national.

Justification

Persons who are nationals of two or more states should be subject to explicit regulations. This proposal is particularly important since it is not known how the information circulates between states of which the person concerned is a national, since regulation of Article 22 European Convention of 1959 exempts the State in whose territory the person concerned was convicted from notifying other States about the conviction if the convicted person is a national of the convicting country. This situation is also not improved by the recently adopted Council Decision on the exchange of information from criminal record.

Amendment 10
Article 7, heading

Reasons for non-recognition ***or*** non-enforcement

Reasons for non-recognition, non-enforcement ***or adaptation of the prohibition***

Justification

A member State has also a possibility to adapt declared prohibition.

Amendment 11
Article 7, point (c a) (new)

(ca) the offence at the origin of the prohibition is covered by an amnesty in the enforcing State.

Justification

Bearing in mind respect for amnesty given in another Member State. (Application of the "ne bis in idem" principle).

Amendment 12
Article 7, paragraph 1 a (new)

1a. If the duration of the prohibition exceeds the maximum provided for by the law of the enforcing State for the same offence, the duration of the enforced prohibition shall be reduced to that maximum.

Justification

*Considering sovereignty of a Member State in criminal matters it is necessary to respect the rules of execution of offences in different Member States.
Should this paragraph be adopted, the previous paragraph should be regarded as paragraph 1.*

Amendment 13
Article 8, paragraph 1

1. To enforce a prohibition, the competent authority of the issuing State shall not require any formalities other than form **B**, referred to in **Article 4(2)** of the Council Decision of [...] on the exchange of information extracted from the criminal record.

1. To enforce a prohibition, the competent authority of the issuing State shall not require any formalities other than **the** form referred to in **Article 3(2)** of the Council Decision of [...] on the exchange of information extracted from the criminal record.

Amendment 14
Article 8, paragraph 2

2. If the duration of the prohibition exceeds the maximum provided for by the law of the enforcing State for the same offence, the duration of the enforced prohibition shall be reduced to that maximum.

deleted

Justification

This case is already foreseen in Article 7, second indent.

Amendment 15
Article 9, paragraph 1

1. Each Member State shall put in place the necessary arrangements to ensure that the convicted person has a *suspensive* legal remedy against the recognition and enforcement of a prohibition pursuant to Article 6. The action shall be brought before a court in the enforcing State in accordance with the national law of that State.

1. Each Member State shall put in place the necessary arrangements to ensure that the convicted person has a *non-suspensive* legal remedy against the recognition and enforcement of a prohibition pursuant to Article 6. The action shall be brought before a court in the enforcing State in accordance with the national law of that State.

Justification

The amendment relates to the new wording of this provision in the draft report. That justification argues that suspensive remedies are necessary to ensure the effectiveness of the prohibition and prevent children from remaining unprotected if prohibitions are not recognised. In fact, the effects of such a measure would be the opposite to those intended. It is not the prohibition which is suspended but recognition thereof, which means that if it did not take effect, there would be no prohibition in the country ad quem. It is therefore proposed that the original wording of this article, according to which the procedure concerned should be non-suspensive in relation to the (automatic) recognition of a prohibition, should be maintained.

30.11.2005

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

for the Committee on Civil Liberties, Justice and Home Affairs

on the initiative of the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children (14207/2004– C6-0244/2004 – 2004/0818(CNS))

Draftsman: Aloyzas Sakalas

PA_Leg

CONCLUSION

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Kingdom of Belgium¹

Amendments by Parliament

Amendment 1
Article 6, paragraph 2 a (new)

2a. This deadline of 30 days may be extended if the information provided by the issuing State is insufficient or if form B referred to in Article 4, paragraph 2, of Council Decision of..... on the exchanges of information drawn from police records is incomplete.

Justification

The 30-day deadline at the expiry of which the competent authority of the enforcing State must give its decision must be extended if additional information has to be gathered from the issuing State or if form B is incomplete.

Amendment 2
Article 7, point (c a) (new)

(ca) where the person subject to the prohibition has undergone rehabilitation,

¹ Not yet published in OJ.

been amnestied or pardoned in the issuing State.

Justification

The competent authorities of the enforcing State must refuse to recognise or enforce a prohibition if the sentenced person has undergone rehabilitation or been amnestied or pardoned in the issuing State.

Amendment 3
Article 8, paragraph 2 a (new)

2a. If the prohibition covers one or more professional activities not designated as such by the legislation of the enforcing State, the competent authorities of the enforcing State for the purpose of Article 6, paragraph 1, shall assess the means of enforcing the prohibition.

Justification

It is a matter for the competent authorities of the enforcing State to assess the means of enforcing a prohibition covering professional activities which are not designated as such by the legislation of the enforcing State.

PROCEDURE

Title	Initiative of the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children
References	14207/2004 – C6-0244/2004 – 2004/0818(CNS)
Committee responsible	LIBE
Opinion by Date announced in plenary	JURI 10.1.2005
Enhanced cooperation – date announced in plenary	
Drafts(wo)man Date appointed	Aloyzas Sakalas 20.1.2005
Previous drafts(wo)man	
Discussed in committee	21.11.2005
Date adopted	21.11.2005
Result of final vote	+: 15 –: 0 0: 0
Members present for the final vote	Maria Berger, Bert Doorn, Giuseppe Gargani, Piia-Noora Kauppi, Kurt Lechner, Klaus-Heiner Lehne, Aloyzas Sakalas, Rainer Wieland, Nicola Zingaretti, Tadeusz Zwiefka
Substitute(s) present for the final vote	Nicole Fontaine, Othmar Karas, Arlene McCarthy, Marie Panayotopoulos-Cassiotou, Michel Rocard
Substitute(s) under Rule 178(2) present for the final vote	
Comments (available in one language only)	

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON LEGAL BASIS

Mr Jean-Marie Cavada
Chairman
Committee on Civil Liberties, Justice and Home Affairs
BRUSSELS

Subject: Legal basis of the Initiative of the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children (14207/2004 – C6-0244/2004 – 2004/0818(CNS))¹

Dear Chairman,

By letter of 6 October 2005 you asked the Committee on Legal Affairs pursuant to Rule 35(2) to consider whether the legal basis of the above Commission proposal was valid and appropriate.

The Committee considered the above question at its meeting of 22 November 2005.

General

Whereas the present legal basis is Article 31(1)(a)² and Article 34(2)(b) of the EU Treaty, the rapporteur of the Civil Liberties Committee, Mr Sonik, considers that adding a reference to Article 31(c) so as to make the legal basis Article 31(1)(a) and (c) and Article 34(2)(b) will "improve access to information on prohibitions (through compulsory registration of prohibitions in the criminal record) and make it compulsory to enforce them".

Legal basis

All Community acts must be founded upon a legal basis laid down in the Treaty (or in another legal act which they are intended to implement). The legal basis defines the Community's competence *ratione materiae* and specifies how that competence is to be exercised, namely the legislative instrument(s) which may be used and the decision-making procedure.

According to the Court of Justice the choice of legal basis is not a subjective one, but "must be based on objective factors which are amenable to judicial review"³, such as the aim and

¹ Not yet published in the OJ.

² There is a typographical error in the initiative: Article 31(a) should read Article 31(1)(a).

³ Case 45/86, *Commission v. Council* [1987] ECR 1439, para. 5.

content of the measure in question¹. Furthermore, the decisive factor should be the main object of a measure.²

According to the case-law of the Court of Justice, a general Treaty article constitutes a sufficient legal basis even though the measure in question also seeks, in a subordinate manner, to attain an aim sought by a specific Treaty article³.

However, where a measure has several contemporaneous objectives which are indissolubly linked with each other without one being secondary and indirect in respect to the others, the measure must be based on the various relevant Treaty provisions⁴ unless this is impossible on account of the mutual incompatibility of the decision-making procedures laid down by the provisions⁵.

The relevant provisions of the EU Treaty

Article 31

1. Common action on judicial cooperation in criminal matters shall include:

(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions;

(b) ...

(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;

....

Article 34

1. ...

2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:

(a)

(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and

¹ Case C-300/89, *Commission v. Council* [1991] ECR I-287, para. 10.

² Case C-377/98, *Netherlands v. European Parliament and Council* [2001] ECR I-7079, para. 27.

³ Case C-377/98 *Netherlands v. European Parliament and Council* [2001] ECR I-7079, paras 27-28; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paras 93-94.

⁴ Case 165/87 *Commission v. Council* [1988] ECR 5545, para. 11.

⁵ See, e.g., Case C-300/89 *Commission v. Council* [1991] ECR I-2867, paras 17-21 (*Titanium dioxide case*), Case C-388/01 *Commission v. Council* [2004] ECR I-4829, para. 58 and Case C-491/01 *British American Tobacco* [2002] ECR I-11453, paras 103-111.

methods. They shall not entail direct effect;

....

Aim and content of the proposed framework decision

According to the explanatory note to the initiative of the Kingdom of Belgium, the purpose of the proposed framework decision is to improve cooperation between Member States in the protection of children from sexual abuse, with the particular aim of ensuring effective application of disqualifications linked to criminal convictions for this type of offence.

At present, nothing guarantees that a disqualification handed down in one Member State has any legal effect in the other Member States, even though the convicted person has freedom of movement within the territory of the European Union. A person who has been convicted for paedophile acts in one Member State and is subject in that State to a prohibition on pursuing activities likely to bring that person into contact with children may therefore evade the prohibition by moving to another Member State.

The proposed framework decision would apply the principle of mutual recognition to prohibitions arising from foreign convictions for sexual offences committed against children. In Belgium's view, this solution is facilitated by the fact that the scope *ratione materiae* is clearly defined and limited to a sector in which the definitions of offences were harmonised by Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography¹. It may be noted that the legal basis for that framework decision is Article 29, Article 31(1)(c) and Article 34(2)(b) of the EU Treaty.

The framework decision would also require Member States to provide in their national legislation for a sentence of disqualification associated with convictions for such offences.

The aim is therefore to improve cooperation between Member States by obliging the Member State where the convicted person is resident to recognise prohibitions handed down abroad and to enforce them on its territory.

In order to ensure that the principle of mutual recognition of disqualifications and prohibitions is effective, the proposed instrument would allow information on criminal records to be circulated among the Member States so that they can be brought to the attention of the competent authorities of the State to which the convicted person moves. Currently, Member States have only a partial view of a person's foreign convictions. Only convictions handed down against their own nationals in another Member State are automatically brought to their attention, under Article 22 of the 1959 European Convention on Mutual Assistance in Criminal Matters². This lack of knowledge is exacerbated by the fact that several Member States do not record such foreign convictions in their national criminal records. In the case of disqualifications and prohibitions associated with such convictions, the situation is all the more problematic, since such measures may not appear in the foreign criminal records.

To remedy this situation and make the principle of mutual recognition of disqualifications and prohibitions genuinely effective, the proposed framework decision provides for a minimum number of obligations regarding information vis-à-vis other Member States of the Union.

¹ OJ L 13, 20.1.2004, p. 44.

² Council of Europe, ETS No 30.

One final lacuna identified in cooperation in this area within the European Union is that such cooperation remains for the most part strictly limited to subsequent judicial proceedings and is therefore devoid of any preventive impact. Indeed, the very purpose of the disqualification is primarily to prevent the commission of fresh offences. It is thus essential to be able immediately to give legal effect to disqualifications associated with convictions imposed abroad, without waiting for further offences to be committed. In this context, it is not acceptable to restrict consultation of the foreign criminal records to judicial purposes, since a major part of the significance of access to such information is administrative and preventive. There must, on the contrary, be an obligation on a Member State to consult the criminal records of the State of origin in all cases where its own national criminal records are consulted, including where the information taken from the criminal records is required with a view to authorising the pursuit of a given activity, in the context of the scope of the Framework Decision.

The proposed substantive provisions

Accordingly, **Article 1** sets out the purpose of the framework decision, *viz.* to establish the rules under which a Member State shall recognise and enforce in its territory prohibitions arising from convictions covered in Articles 2, 3 and 4 of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography¹.

Article 2 sets out a series of definitions.

Article 3 makes it obligatory for any prohibition (temporary or permanent ban on exercising professional activities related to the supervision of children arising from an offence within the meaning of Articles 2, 3 and 4 of Council Framework Decision 2004/68/JHA) to be registered in the offender's criminal record.

Article 4 provides that when the Member State in which the person concerned was convicted passes on criminal record information to another Member State under the applicable international rules on mutual legal assistance in criminal matters, it has to mention the prohibition (and its duration) in the excerpt from the criminal record.

Article 5 provides that information about criminal records has to be obtained from the relevant national central authority.

¹ Broadly, these offences are:

- coercing a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;
- recruiting a child into prostitution or into participating in pornographic performances;
- 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.
- production of child pornography;
- distribution, dissemination or transmission of child pornography;
- supplying or making available child pornography;
- acquisition or possession of child pornography;
- instigating, aiding, abetting and attempts in relation to those offences.

Article 6 deals with the recognition and enforcement of prohibitions in the following terms:

"1. The competent authorities of the enforcing State shall recognise any prohibition, without any formalities being required, and shall enforce it, unless the competent authorities decide to invoke one of the grounds for non-recognition or non-enforcement provided for in Article 7.
2. When an enforcing State is informed of the existence of a prohibition, it shall forward that information to the competent authority for the purposes of applying paragraph 1. The competent authority shall issue its decision within thirty days of such information being forwarded."

Article 7 deals with reasons for non-recognition or non-enforcement as follows:

"The competent authorities in the enforcing State may refuse to recognise and enforce a prohibition only if:

- (a) the penalty is time-limited under the law of the enforcing State, where the offences concerned are subject to the jurisdiction of that State under its own criminal law;
- (b) the conviction was handed down in default of appearance and the person concerned was not summoned in person nor otherwise informed of the date and location of the hearing that led to the conviction handed down in default of appearance;
- (c) a conviction was handed down on the person concerned for the same offences in the enforcing State."

Article 8 provides that to enforce a prohibition, the competent authority of the issuing State is not to require any formalities other than the relevant form on the exchange of information extracted from the criminal record.

Article 9 provides that Member States have to put in place the necessary arrangements to ensure that the convicted person has a non-suspensive legal remedy against the recognition and enforcement of a prohibition and that the substantial reasons for handing down the conviction and the sentence cannot be challenged before a court in the enforcing State.

Article 10 deals with subsequent measures affecting prohibitions, including review, pardon, amnesty, rehabilitation and erasure.

Articles 10 and 11 deal with implementation and entry into force, respectively.

The appropriate legal basis

The Civil Liberties Committee has asked whether it would not be appropriate to add (as their rapporteur is proposing in the first amendment in his draft report) point (c) of Article 31(1) of the EU Treaty, in addition to point (a) of that provision and Article 34(2)(b).

The grounds given in the draft report for adding this extra provision are as follows:

"As the objective of the instrument is twofold: to improve access to information on prohibitions (in particular through compulsory registration of prohibitions in the criminal record) and to make it compulsory to enforce them.

Giving the fact that the criminal law varies in the Member States of the EU it is necessary to

ensure a certain level of compatibility in rules applicable to criminal convictions."

As will be recalled, point (c) of Article 31(1) reads as follows:

[Common action on judicial cooperation in criminal matters shall include]

"(c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;"

Therefore the question to be answered is whether the proposed framework decision goes beyond *"facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions"*, as provided for in point (a) of Article 31(1).

Given that no procedural implications are involved, this is the only question to be answered.

In view simply of the purpose of the framework decision as set out in Article 1 - *"Its purpose is to establish the rules under which a Member State shall recognise and enforce in its territory prohibitions arising from convictions for such offences."* - recourse to point (c) of Article 31(1) would seem desirable if only *ex abundanti cautela*.

However, it is plain from further examination of the provisions of the proposed framework decision that some of them do seek to ensure compatibility in rules applicable in the Member States within the meaning of point (c) of Article 31(1).

Indeed, Article 3 requires Member States to *"take the necessary steps to ensure that any prohibition is registered in the criminal record"*. In this respect, the explanatory note to the Belgian initiative could not put it in any plainer terms: *"The framework decision would also require Member States to provide in their national legislation for a sentence of disqualification associated with convictions for such offences."*

In addition, Article 6 requires Member States to *"recognise any prohibition, without any formalities being required, and ... enforce it"*. Then again, Article 7 sets out a limited list of circumstances in which national competent authorities may refuse to recognise and enforce a prohibition. Article 8, for its part, makes enforcement of a provision conditional only upon presentation of a particular form. Lastly, Article 9 requires Member States to *"put in place the necessary arrangements to ensure that the convicted person has a non-suspensive legal remedy"*.

All those provisions go beyond facilitating and accelerating cooperation between competent national authorities within the meaning of point (a) of Article 31(1) of the EU Treaty.

They are in fact likely to necessitate changes in at least the law of criminal procedure in the Member States. As a result, they may be considered to be designed to ensure compatibility in rules applicable in the Member States within the meaning of point (c) of Article 31(1) of the EC Treaty.

At its meeting of 22 November 2005 the Committee on Legal Affairs accordingly decided,

unanimously¹, to recommend that the legal basis for the proposed framework decision should be not only Article 31(1)(a) and Article 34(2)(b) of the EU Treaty, but also Article 31(1)(c).

Yours sincerely,

Giuseppe Gargani

¹ The following were present for the vote Giuseppe Gargani (chairman), Rainer Wieland (vice-chairman), Antonio López-Istúriz White (draftsman), Maria Berger, Bert Doorn, Nicole Fontaine, Othmar Karas, Piia-Noora Kauppi, Kurt Lechner, Klaus-Heiner Lehne, Arlene McCarthy, Marie Panayotopoulos-Cassiotou, Michel Rocard, Aloyzas Sakalas, Nicola Zingaretti and Tadeusz Zwiefka.

PROCEDURE

Title	Initiative by the Kingdom of Belgium with a view to the adoption by the Council of a framework decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children			
References	14207/2004 – C6-0244/2004 – 2004/0818(CNS)			
Date of consulting Parliament	9.12.2004			
Committee responsible Date announced in plenary	LIBE 10.1.2005			
Committee(s) asked for opinion(s) Date announced in plenary	JURI 10.1.2005			
Not delivering opinion(s) Date of decision				
Enhanced cooperation Date announced in plenary				
Rapporteur(s) Date appointed	Bogusław Sonik 18.1.2005			
Previous rapporteur(s)				
Simplified procedure – date of decision Date of decision				
Legal basis disputed Date of JURI opinion	LIBE 30.11.2005	JURI 22.11.2005		
Financial endowment amended Date of BUDG opinion	/			
Parliament to consult European Economic and Social Committee – date decided in plenary				
Parliament to consult Committee of the Regions – date decided in plenary				
Discussed in committee	21.6.2005	13.9.2005	23.1.2006	13.3.2006
Date adopted	13.3.2006			
Result of final vote	+ : 42 – : 0 0 : 0			
Members present for the final vote	Alexander Nuno Alvaro, Roberta Angelilli, Alfredo Antoniozzi, Edit Bauer, Johannes Blokland, Mihael Brejc, Michael Cashman, Giusto Catania, Jean-Marie Cavada, Charlotte Cederschiöld, García Consuegra, Fausto Correia, Agustín Díaz de Mera, Rosa Díez González, Kinga Gál, Patrick Gaubert, Elly de Groen-Kouwenhoven, Lilli Gruber, Adeline Hazan, Ewa Klamt, Stavros Lambrinidis, Henrik Lax, Sarah Ludford, Edith Mastenbroek, Jaime Mayor Oreja, Hartmut Nassauer, Martine Roure, Inger Segelström, Antonio Tajani, Ioannis Varvitsiotis, Stefano Zappalà, Tatjana Ždanoka			
Substitute(s) present for the final vote	Frederika Brepoels, Panayiotis Demetriou, Bill Newton Dunn, Antonio Masip Hidalgo, Sophia in 't Veld, Jeanine Hennis-Plasschaert, Hubert Pirker, Herbert Reul, Marie-Line Reynaud, Boguslaw Sonik, Johannes Voggenhuber, Rainer Wieland			
Substitute(s) under Rule 178(2) present for the final vote				
Date tabled	21.3.2006			