



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 18 May 2009

9892/09

Interinstitutional Files:
2009/0049 (CNS)
2009/0050 (CNS)

LIMITE

DROIPEN 33
MIGR 61
CRIMORG 79

NOTE

of : Presidency

to : Article 36 Committee/COREPER/Council

No. Cion props. : 8150/09 DROIPEN 16 MIGR 36 CRIMORG 50 +REV 1 (en) + 8150/08 ADD 1
+ ADD 1 COR 1 + ADD 2 + ADD 2 COR 2
8151/09 DROIPEN 17 MIGR 37 + ADD 1 + COR 1 + ADD 2 + COR 2

Subject : Proposal for a Council Framework Decision on combating the sexual abuse,
sexual exploitation of children and child-pornography, repealing Framework
Decision 2004/68/JHA
- State of play

Proposal for a Council Framework Decision on preventing and combating
trafficking in human beings, and protecting victims, repealing Framework
Decision 2002/629/JHA
- State of play

**I. STATE OF PLAY OF THE DISCUSSIONS IN THE WORKING PARTY ON BOTH
PROPOSALS**

**A. Proposal for a Council Framework Decision on combating sexual abuse, sexual
exploitation of children and child pornography, repealing Framework Decision 2004/68//JHA**

The Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation
of children and child pornography, repealing Framework Decision 2004/68/JHA, was submitted by
the Commission to the Council on 26 March 2009. ¹

¹ Doc. 8150/09 DROIPEN 16 MIGR 36 CRIMORG 50 +REV 1 (en) + 8150/08 ADD 1 +
ADD 1 COR 1 + ADD 2 +ADD 2 COR 1.

The proposed Framework Decision is based on the recent Council of Europe Convention CETS No. 201 on the protection of children against sexual exploitation and sexual abuse, opened for signature in Lanzarote on 25. 10. 2007 (“Lanzarote Convention”) and on the Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography.

The Working Party on Substantive Criminal Law (DROIPEN) proceeded to the examination at first reading of this Proposal during four of its meetings and succeeded in discussing seventeen Articles. The delegations were invited to send their written observations with respect to the Proposal by 1 June 2009.

A number of delegations (DE, IE, EE, SI, PT, LV, PL, DK and LT), while welcoming the Proposal, lodged general scrutiny reservations in order to be able to examine more in depth the provisions of the proposed instrument. Furthermore, the Proposal is subject to parliamentary scrutiny reservations by EE, IE, SE, UK, FR, NL, DK, and LT.

B. Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA

The Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA¹, was submitted by the Commission to the Council on 26 March 2009.

The proposed Framework Decision is based on Council of Europe Convention CETS No 197 on Action against Trafficking in Human Beings², adopted in 2005 and entered into force on 1 February 2008, and on the Council Framework Decision 2002/629/JHA on Council Framework Decision of 19 July 2002 on combating trafficking in human beings.

¹ COM(2009) 136 final, 8151/09 DROIPEN 17 MIGR 37.

² Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw. 16.5.2005, Council of Europe Treaty Series N. 197.

The Working Party on Substantive Criminal Law (DROIPEN) met on 15-16 April 2009 to have a first exchange of views on the Proposal. In general Member States welcomed the Proposal and the comprehensive and holistic approach taken. The first nine Articles were discussed during this first meeting. Delegations were invited to submit their written observations, including drafting suggestions, to the Proposal by 4 May 2009. On the basis of the discussion during the meeting and the written contributions received so far - from 14 Member States - a new working document with comments and drafting suggestions of Member States inserted in the footnotes will be elaborated and circulated in advance of the next meeting of the Working Group, which will take place on 22 June 2009.

The proposed instrument is subject to Parliamentary scrutiny reservations by DK, EE, FR, IE, LT, NL, SE and UK, and a general scrutiny reservation by LV, LT, SI, DE, IE and PT.

II. ISSUES RAISED DURING THE DISCUSSIONS

From the discussions in the Working Party it arose that in particular following issues are of concern to Member States, which expressed for the most preliminary views:

a) Issues having a cross-cutting character to both Proposals

- The legal basis: the choice of Articles 29, 31 (1) (e) and 34 (2) TEU, was queried by some delegations, who were of the view that, bearing in mind that the Proposal touches upon procedural issues, reference to whole Article 31 (1) TEU or specifically Article 31 (1) (c) TEU should be added to the legal basis chosen by the European Commission.

- The penalties' system¹, in particular the severity of the penalties, which are to be imposed according to the Proposal, the lack of differentiation in the level of penalties according to the types and gravity of the offences and the structure of the corresponding Articles with a need to specify the basic elements of crime on one hand and aggravating circumstances on the other hand. The relevant Articles of the Proposals should follow the Council conclusions on the approach to apply regarding approximation of penalties² adopted on 24-25 April 2002 in order to leave a certain flexibility to Member States and thus maintain the coherence of national penal systems. On the other hand, some delegations supported the approach taken by the Commission.
- Introduction of the so-called “non-punishment clause,” some delegations wanted to insert the formulation referring to the accordance with the *basic principles* of the respective national legal systems and/or inclusion of a “compelling element” inspired by Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings. Some delegations fear of the risk of introducing a general decriminalization provision.
- The question of jurisdiction and in particular the extra-territorial one.³ The provisions on jurisdiction, which are drafted in both Proposals in parallel, were seen problematic to some extent. In particular the element of "habitual residence" was queried in relation to the extension of application of principles of active and passive personality. Moreover, no requirement for double criminality raised number of concerns with view to its practical applicability. On the other hand, some delegations supported the provisions proposed by the Commission in order to effectively combat such phenomenon as sex tourism, especially in the third countries.

¹ Article 7 in the Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child-pornography, repealing Framework Decision 2004/68/JHA and Article 3 in the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA.

² Doc. 9141/02 DROIPEN 33.

³ Article 13 in the Proposal for a Council Framework Decision on combating sexual abuse and exploitation and Article 8 in the Proposal for a Council Framework Decision on preventing and combating Trafficking in Human Beings.

- The question of the protection and assistance to victims¹ which according to the view of some Member States could be better regulated horizontally in a separate legal instrument, in view of the planned revision of the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings.² On the other hand some Member States supported the approach of the Commission, taking into account the specific needs of such victims.

b) Issues pertaining to the Proposal for a Council Framework Decision on combating sexual abuse, sexual exploitation of children and child pornography

- Article 1 on definitions. Several issues were raised and in particular the extension of the scope of the definition of "child pornography" as well as the scope of the "information systems" and "pornographic performance".
- Article 4 on the offences concerning child pornography and in particular points (d) and (e) which do not provide for the reserves to the application of the provision, as included in the relevant Article of Lanzarote Convention³ and are necessary according to the view of some Member States.

¹ Article 14 in the Proposal for a Council Framework Decision on combating sexual abuse and exploitation and Article 9 in the Proposal for a Council Framework Decision on preventing and combating trafficking in Human Beings.

² OJ L 82, 22.3.2001, p.1.

³ Article 30 (3) second indent.

- Article 8 concerning disqualifications arising from convictions raised a number of concerns, in particular with view to complexity of different systems applied in the Member States. Moreover, some delegations also queried its link to risk assessment referred to in Article 16. Furthermore, it was questioned whether there is a need to amend the recently adopted Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States. Finally, the proposed paragraph on mutual recognition of disqualifications in the framework of this instrument was strongly opposed by a number of delegations. In this respect the delegations reminded that the issue of mutual recognition of disqualifications had been discussed in the context of negotiations 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. In general, Member States supported the aim to effectively protect children from travelling pedophiles.
- Article 12 on investigation and prosecution, where the scope of covert operations raised concerns and the corresponding question of the principle of proportionality.
- Article 16 on risk assessment in conjunction with Article 17 on intervention programmes and measures. The scope and structure of both Articles were seen as too complicated and unclear; also the link to Article 8 was questioned. Furthermore, some delegations supposed that those Articles may cause heavy expenditure during their implementation.

c) Issues pertaining to the Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims

- In principle it was supported to align the definition of "trafficking in human beings" with internationally agreed standards, particularly as set out in the Article 4 of the CoE Convention. However, as regards elements going beyond this regulation, especially concerning the drafting of paragraph (3) a number of delegations questioned the wording thereof, particularly with respect to the exact meaning of "begging" and "unlawful activities", which seemed to some delegations to be too broad in relation to the principle of legal certainty.
- Article 9 on "protection of vulnerable victims of trafficking in human beings in criminal proceedings", envisaging specific treatment for victims of trafficking. Some delegations expressed concerns on particular rights provided in this Article, such as for instance the possibility of anonymity of witnesses, provided for in paragraph (4).

III. CONCLUSION

Article 36 Committee is invited to:

- take note of the outcome of the discussions in the Working Party on Substantive Criminal Law; and
- note that the Presidency will inform about the state of play Coreper and JHA Council in June 2009.
