Combating the sexual exploitation of children and child pornography: criminal offences, penalties and sanctions. Framework decision

2001/0025(CNS) - 16/11/2007 - Follow-up document

In accordance with provisions set out in the Council Framework Decision on combating the sexual exploitation of children and child pornography, the Commission is required to prepare a report on measures taken by the Member States to comply with the Decision. The value of the report, therefore, depends to a large extent on the information forwarded to the Commission by the Member States. By January 2006 only two Member States namely Belgium and Austria had notified the Commission of measures taken. By the end of April 2007, the Commission had received no contribution from Greece, Portugal and Malta.

Assessment: the sexual exploitation of children and child pornography constitutes a serious violation of human rights and the Decision was adopted in order to complement existing Community instruments and to approximated the laws of the Member States on this matter. The Decision introduces a set of common provisions in order to address criminalisation, penalties and other sanctions, aggravating circumstances, jurisdiction, prosecution as well as protection of, and assistance to, victims. The legal systems of the Member States can vary greatly and in many cases legal concepts and expressions cannot always be easily compared to one another. The information received by the Commission varies considerably, especially in terms of its completeness. Not all of the Member States forwarded the relevant texts. Below, is a summary of the Commission's findings on the information it did receive:

Definitions: in most cases the report finds that the definitions have been correctly implemented and no areas of major concern have arisen. In the case of "child pornography" most of the Member States have adopted legislation which is consistent with that set out in the Framework Decision. The Czech Republic, Estonia, Latvia, Lithuania, Luxembourg, Poland, Spain and Sweden do not have a detailed definition of child pornography. Concerning the definition "Computer system" the Czech Republic, Lithuania and Poland have not forwarded the relevant documentation to evaluate their implementation properly.

Offences concerning the sexual exploitation of children: the report points out that Member States' legal systems vary widely making comparisons not always easy. Also, the Commission works mainly through translated documents and misunderstandings are therefore always possible. However, a general overview of national legislation shows that the provisions applicable in Member States mostly comply with the requirements of the Framework Decision with respect to the sexual exploitation of children.

Offences concerning child pornography: the report finds that whilst national legislation seems to comply with the minimum requirement of criminalisation of child pornography, there is nevertheless a general lack of information concerning permitted exceptions. The Commission only received complete information from Hungary, Lithuania, Italy, Denmark, Germany and Cyprus. As a result is has not been possible to evaluate the real level of protection of children above the age of sexual consent, which is a sensitive issue especially in countries where the age of sexual consent is below 16.

Instigating, aiding, abetting and attempt: the information received by the Commission referred to the general rules on complicity and inchoate offences under their criminal system. The general rules would also apply to the crime committed towards minors, namely sexual exploitation and crime related to child pornography.

Penalties and aggravating circumstances: this is one of the Decision's key provisions. Offences, as identified in the Decision, should in all cases be sanctioned with imprisonment of a maximum of at least between one and three years. This provision is intended to ensure a minimum harmonisation in relation to the penalties applicable to the offenders. All Member States seem to comply with the requirements of the Decision. However, documentation forwarded to the Commission by Spain, Slovenia, Estonia and Luxembourg has not enabled the Commission to establish a clear picture regarding the legal system implementing the requirements of the Decision.

Liability and sanctions on legal persons: legal persons will be held liable for offences committed for their benefit by any person acting either individually or as part of the organ of the legal person, or, for example, by a person who exercises a power of decision. As regards information on national systems submitted to the Commission, the legislation of most Member States provides for the possibility of applying sanctions against legal persons, at least by means of administrative measures.

Jurisdiction and prosecution: the Member States are obliged to establish jurisdiction over the offences set out in the Decision. The main rule being the territoriality principle, according to which each Member State must establish its jurisdiction over offences committed in whole or in part in its territory. (One of the provisions has since been replaced with the European Arrest Warrant). These requirements are of particular importance in order to ensure the effective prosecution of sex tourism. In principle, therefore, the Member States should guarantee the same level of protection of children regardless of whether they are resident in one or another country. Concerning extra-territorial jurisdiction, the Member States did not offer sufficient information to evaluate how far they have gone in the implementation of such a rule.

Protection of and assistance to victims: generally speaking, the Member States complied with the rule that states investigating or prosecuting offences covered by the Framework Decision will not be dependent on the report or accusation made by the victim when the territorial jurisdiction rules applies. On the matter of child victims who are considered particularly vulnerable, Member States' replies were fragmented and incomplete. An overall analysis of this requirement was therefore not possible. On a final point, Germany, Latvia, Sweden, the UK, Austria and Estonia provided the Commission with information showing that they apply the rules to provide specific protection of and assistance to the victim's family.

Conclusions: on the basis of information received, the report concludes that requirements set out in the Decision have been met by most, though not all, of the Member States – either as a result of pre-existing domestic laws or through the implementation of new and specific legislation. Generally speaking, Member States' legislation ensures a high level of protection for children and provides for an appropriate level of penalties. In cases where the Decision has not been implemented into national provisions, the Commission invites the relevant Member States to correct the situation as soon as possible through the introduction of implementing legislation.

The report also finds that new issues have been raised since the rise in electronic communications. This includes, for example, fraudulent solicitation of children for illicit purposes through the internet. At the same time, new methods aimed at effectively detecting such crimes and of identifying child victims through specialised law enforcement units are being developed. The Commission may consider the need to update and further strengthen the present Framework Decision regarding child exploitation and related offences – in particular offences committed through electronic communication networks and information systems.