Combating sexual abuse, sexual exploitation of children and child pornography

2010/0064(COD) - 29/03/2010 - Legislative proposal

PURPOSE: to recast Framework Decision 2004/68/JHA on the sexual abuse, sexual exploitation of children and child pornography by including new provisions aimed at making it more effective.

PROPOSED ACT: Directive of European Parliament and of the Council.

BACKGROUND: with regard to child victims, the main cause of this phenomenon is vulnerability resulting from a variety of factors. Insufficient response by law enforcement mechanisms contributes to the prevalence of these phenomena, and the difficulties are exacerbated because certain forms of offences transcend national borders. Victims are reluctant to report abuse, variations in national criminal law and procedure may give rise to differences in investigation and prosecution, and convicted offenders may continue to be dangerous after serving their sentences. Developments in information technology have made these problems more acute by making it easier to produce and distribute child sexual abuse images while offering offenders anonymity and spreading responsibility across jurisdictions. Ease of travel and income differences fuel so-called child sex tourism, resulting often in child sex offenders committing offences abroad with impunity.

National legislation covers some of these problems, to varying degrees. However, it is **not strong or consistent enough to provide a vigorous social response to this disturbing phenomenon**. The recent Council of Europe Convention CETS No. 201 on the Protection of Children against Sexual Exploitation and Sexual Abuse ("the COE Convention") arguably constitutes the highest international standard for protecting children against sexual abuse and exploitation to date. However, not all Member States have yet acceded to this Convention.

At EU level, Council Framework Decision 2004/68/JHA, introduces a minimum of approximation of Member States' legislation to criminalise the most serious forms of child sexual abuse and exploitation, to extend domestic jurisdiction, and to provide for a minimum of assistance to victims. Although the requirements have generally been put into implementation, the Framework Decision has a number of shortcomings. It approximates legislation only on a limited number of offences, does not address new forms of abuse and exploitation using information technology, does not remove obstacles to prosecuting offences outside national territory, does not meet all the specific needs of child victims, and does not contain adequate measures to prevent offences. It is therefore necessary to recast this text in order to respond to the needs of these new challenges.

It should be noted that this proposal would replace existing legislation in place since 2004, and builds on a proposal made on 25/03/2009. After the entry into force of the Lisbon Treaty, this proposal has to be reshaped. This will allow the Commission to verify that EU law is correctly translated into national rules and take those countries that are not complying to Court.

IMPACT ASSESSMENT: the Commission considered several options:

- ***option 1***: **no new EU action**;
- ***option 2***: **complement existing legislation with non-legislative measures**: Framework Decision 2004/68/JHA, would not be amended. Instead, non-legislative measures could be put in place to support coordinated implementation of national legislation. This would include exchanging information and experience in prosecution, protection or prevention, awareness raising, cooperation

with private sector and encouragement of self regulation, or the setting up of mechanisms for data collection;

- ***option 3***: **new legislation on prosecuting offenders, protecting victims, and preventing offences**: a new legislative act would be adopted, incorporating the existing Framework Decision, certain provisions of the COE Convention, and additional elements not contained in either of these. It would cover prosecution of offenders, protection of the victims, and prevention of the phenomenon;
- ***option 4***: **new comprehensive legislation**: the existing provisions of Framework Decision 2004/68 /JHA would be supplemented by EU action to amend substantive criminal law and procedure, protect victims, and prevent offences as under option 3, plus the non-legislative measures identified under option 2 to improve the implementation of national legislation.

Following the analysis of the economic impact, social impacts, and impacts on fundamental rights, options 3 and 4 represent the best approach to the problems and achieve the objectives of the proposal. The preferred option would be **option 4**, followed by option 3.

LEGAL BASIS: Articles 82 (2) and 83 (1) of the Treaty on the Functioning of the EU. Given the cross-border dimension, EU action is required as the objective of effectively protecting children cannot be sufficiently achieved by Member States, either at central level or at regional or local level.

CONTENT: the proposal will both repeal and incorporate Framework Decision 2004/68/JHA to include the following new elements:

- **substantive criminal law**: serious forms of child sexual abuse and exploitation currently not covered by EU legislation would be criminalised. This includes, for instance, the organisation of travel arrangements with the purpose of committing sexual abuse, something particularly relevant, but not exclusively, in the context of child sex tourism. The definition of child pornography is amended to approximate it to the COE Convention and the Optional Protocol to the Convention on the Rights of the Child. Special consideration is given to offences against children in a particularly vulnerable situation. In particular, the level of criminal penalties should be increased so that they are proportionate, effective and dissuasive. To determine the degree of seriousness and attach penalties proportionate to it, consideration is given to different factors which may intervene in very different sorts of offences, like the degree of harm to the victim, the level of culpability of the offender and the level of risk posed to society. Accordingly, a number of relations between offences can be established. In general terms, **activities involving sexual contact are more serious than those which do not**; the presence of exploitation makes the offence more serious than its absence; coercion, force or threats are more serious than abuse of a position of power of the offender or weakness of the victim, which in turn is more serious than free consent of the victim. Prostitution, which involves sexual activities and money, is more serious than pornographic performances, which may or may not include them; recruiting to prostitution or similar is more serious than mere causing, as it involves active seeking of children as commodities. On child pornography, production, usually involving recruiting and sexual contact with the child, is more serious than other offences like distribution or offering, which in turn are more serious than possession or access. As a result of combining these different criteria, distinction is thus made between five different groups of offences, depending on their degree of seriousness, leading to accordingly different levels of penalties for the basic crimes;
- **new criminal offences in the IT environment**: new forms of sexual abuse and exploitation facilitated by the use of IT would be criminalised. This includes **on-line pornographic performances**, or **knowingly obtaining access to child pornography**, to cover cases where viewing child pornography from websites without downloading or storing the images does not amount to "possession of" or "procuring" child pornography. Also the new offence of "**grooming**" is incorporated closely following the wording agreed in the COE Convention.
- **criminal investigation and initiation of criminal proceedings**: a number of provisions would be introduced to assist with investigating offences and bringing charges. A mechanism to coordinate

prosecution in cases of multiple jurisdictions is included, but may be superseded once the proposal for a Framework Decision on conflict of jurisdiction in criminal proceedings is adopted;

- **prosecution of offences committed abroad**: rules on jurisdiction would be amended to ensure that child sexual abusers or exploiters from the EU, both nationals and habitual residents, face prosecution even if they commit their crimes **outside the EU**, via so-called sex tourism;
- **protection of victims**: new provisions will be included to ensure that victims have easy access to legal remedies and do not suffer from participating in criminal proceedings. They cover assistance and support to victims, and protection of victims specifically in criminal investigations and proceedings;
- **prevention of offences**: amendments would be introduced to help prevent child sexual abuse and exploitation offences, through a number of actions concentrating on previous offenders to prevent recidivism, and to **restrict access to child pornography on the internet**. The aim of restricting such access is to reduce the circulation of child pornography by making it more difficult to use the publicly-accessible Web. It is not a substitute for action to remove the content at the source or to prosecute offenders;
- **other protective measures not contained in the COE Convention**: the proposal includes elements not contained in the COE Convention, notably: (i) ensuring implementation across the EU of prohibitions from activities with children imposed on offenders; (ii) blocking access to child pornography on the internet; (iii) criminalising coercing a child into sexual relations with a third party and child sexual abuse online; (iv) a non-punishment clause for child victims. It also goes beyond the obligations imposed by the COE Convention regarding the level of **penalties**, free legal counselling for child victims and repression of activities encouraging abuse and child sex tourism. Moreover, incorporating provisions from the Convention into EU law will facilitate faster adoption of national measures compared to national procedures for ratification, and ensure better monitoring of implementation.

Territorial scope: the adoption of the proposal will be addressed to the Member States. The application of the resulting Directive to the United Kingdom, Ireland and Denmark will be determined in accordance with the provisions of Protocols (No 21) and (No 22) annexed to the Treaty on the functioning of the European Union.

BUDGETARY IMPLICATION: the proposal has no implication for the Community budget.