Combating sexual abuse, sexual exploitation of children and child pornography

2010/0064(COD) - 27/10/2011 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 541 to 2, with 31 abstentions, a legislative resolution on the proposal for a directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA.

Parliament adopted its position at first reading adopted under the ordinary legislative procedure. The amendments adopted in plenary are the result of a compromise negotiated between the European Parliament and the Council. They amend the Commission proposal as follows:

Scope: this Directive establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes.

The "**age of sexual consent**" shall mean the age below which, in accordance with national law, it is prohibited to engage in sexual activities with a child.

As regards "pornographic performance", this shall mean the live exhibition aimed at an audience, including by means of information and communication technology.

Offences concerning sexual abuse: causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual activities, even without having to participate, shall be punishable by a maximum term of imprisonment of at least one year.

Engaging in sexual activities with a child, where:

- abuse is made of a recognised position of trust, authority or influence over the child, shall be punishable by a maximum term of imprisonment of at least eight years if the child has not reached the age of sexual consent, and of at least three years of imprisonment, if the child is over that age ; or
- abuse is made of a particularly vulnerable situation of the child, in particular because of a mental or physical disability or a situation of dependence, shall be punishable by a maximum term of imprisonment of at least eight years if the child has not reached the age of sexual consent, and of at least three years of imprisonment if the child is over that age; or
- use is made of coercion, force or threats shall be punishable by a maximum term of imprisonment of at least ten years if the child has not reached the age of sexual consent, and of at least five years of imprisonment if the child is over that age.

Coercing, forcing or threatening a child into sexual activities with a third party shall be punishable by a maximum term of imprisonment of at least ten years if the child has not reached the age of sexual consent, and of at least five years of imprisonment if the child is over that age.

Offences concerning sexual exploitation: Member States shall take the necessary measures to ensure that the intentional conduct is punishable:

- causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes shall be punishable by a maximum term of imprisonment of at least five years if the child has not reached the age of sexual consent and of at least two years if the child is over that age;
- coercing or forcing a child to participate in pornographic performances, or threatening a child for such purposes shall be punishable by a maximum term of imprisonment of at least eight years if the child has not reached the age of sexual consent, and of at least five years if the child is over that age;
- knowingly attending pornographic performances involving the participation of a child shall be punishable by a maximum term of imprisonment of at least two years if the child has not reached the age of sexual consent, and of at least one year if the child is over that age;
- causing or recruiting a child to participate in child prostitution, or profiting from or otherwise exploiting a child for such purposes shall be punishable by a maximum term of imprisonment of at least eight years if the child has not reached the age of sexual consent, and of at least five years of imprisonment if the child is over that age;
- coercing or forcing a child into child prostitution, or threatening a child for such purposes shall be punishable by a maximum term of imprisonment of at least ten years if the child has not reached the age of sexual consent, and of at least five years of imprisonment if the child is over that age;
- engaging in sexual activities with a child, where recourse is made to child prostitution shall be punishable by a maximum term of imprisonment of at least five years if the child has not reached the age of sexual consent, and of at least two years of imprisonment if the child is over that age.

Offences concerning child pornography: production of child pornography shall be punishable by a maximum term of imprisonment of at least three years. It shall be within the discretion of Member States to decide whether punishment shall apply to cases involving child pornography where the person appearing to be a child was in fact 18 years of age or older at the time of depiction.

In addition, Member States shall decide if the punishment shall apply to cases where it is established that pornographic material is produced and possessed by the producer solely for his or her private use in so far as no pornographic material has been used for the purpose of its production and provided that the act involves no risk of dissemination of the material.

Solicitation of children for sexual purposes: Member States shall take the necessary measures to ensure that an attempt through information and communication technology to commit the offences concerning child pornography by an adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child is punishable.

Consensual sexual activities: new measures are introduced which aim to call on the Member States to take the necessary measures to determine under which circumstances it may be considered that certain sexual activities referred to in the Directive may be considered as **consensual sexual activities** in particular sexual activities between peers, who are close in age and degree of psychological and physical development or maturity, insofar as the acts did not involve any abuse. The same goes for a pornographic performance that takes place in the context of a consensual relationship where the child has reached the age of sexual consent or between peers who are close in age and degree of psychological and physical development or maturity, insofar as the acts did not involve any abuse or exploitation and no money or other form of remuneration or consideration is given as payment in exchange for the pornographic performance and for the production and possession of material for private use.

Aggravating circumstances: Members are in favour of more severe sanctions within the EU, especially in cases of abuse committed by a member of the family, a person cohabiting with the child or a person having abused their recognised position of trust or authority; by several people acting together; etc. or that the offence was committed against a **child in a particularly vulnerable situation**, such as a mental or physical disability or a situation of dependence or state of physical or mental incapacity caused by the influence of drugs and alcohol.

Disqualification arising from convictions: in order to avoid the risk of repetition of offences, Member States shall take the necessary measures to ensure that a natural person who has been convicted of any of the offences may be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children.

Employers when recruiting for a post involving direct and regular contact with children are entitled to be informed, of convictions for sexual offences against children entered in the criminal record, or of existing disqualifications.

Seizure and Confiscation: Member States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in the Directive.

Non prosecution or non-application of penalties to the victim: the amended text states that Member States shall, in accordance with the basic principles of their legal systems take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on child victims of sexual abuse and sexual exploitation for their involvement in criminal activities, which they have been compelled to commit.

Jurisdiction and coordination of prosecution: a Member State shall inform the Commission where it decides to establish further jurisdiction over an offence referred to in the Directive committed outside its territory, inter alia where:

- the offence is committed against one of its nationals or a person who is an habitual resident in its territory;
- the offence is committed for the benefit of a legal person established in its territory; or
- the offender is an habitual resident in its territory.

Assistance and support: Member States shall take the necessary measures to ensure that a child is provided with assistance and support as soon as the competent authorities have reasonable grounds indication for believing that the child may have been subject to an offence. Member States shall in particular take the necessary steps to ensure protection for children who report cases of abuse taking place within their family. They shall also take the necessary measures to ensure that assistance and support for a child victim are not made conditional on the child victim's willingness to co-operate in the criminal investigation, prosecution or trial.

Member States shall ensure that child victims have without delay access to legal counselling and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge when the victim does not have sufficient financial resources.

Advertising abuse opportunity and child sex tourism:Member States shall take appropriate measures to prevent or prohibit: (a) the dissemination of material advertising the opportunity to commit any of the offences against children; (b) the organisation for others, whether or not for commercial purposes, of travel arrangements with the purpose of committing any of the offences.

Intervention programmes or measures on a voluntary basis in the course of or after criminal proceedings: Member States shall take the necessary measures to ensure that effective intervention programmes or measures are made available to prevent and minimise the risks of repeated offences of a sexual nature against children. Such programmes or measures shall be accessible at any time during the criminal proceedings, inside and outside prison, in accordance with national law.

Member States shall take the necessary measures to ensure that the following persons may have access to the intervention programmes:

- persons subject to criminal proceedings for any of the offences referred to the Directive, under conditions which are neither detrimental nor contrary to the rights of the defence or to the requirements of a fair and impartial trial, and, in particular in compliance with the principle of the presumption of innocence; and
- persons convicted of any of the offences for similar offences.

Preventive intervention programmes or measures: Member States shall take the necessary measures to ensure that persons who fear that they might commit any of the offences may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of offences being committed. Member States shall take appropriate measures, such as education and training, to discourage and reduce the demand that fosters all forms of sexual exploitation related to exploitation of children.

Measures against websites containing or disseminating child pornography: Member States shall take the necessary measures to ensure the prompt removal of web-pages containing or disseminating child pornography hosted in their territory and to endeavour to obtain the removal of such pages hosted outside of their territory. Member States may take measures to **block access to webpages** containing or disseminating child pornography towards the Internet users in their territory. These measures must be set by transparent procedures and provide adequate safeguards. These safeguards shall also include the possibility of judicial redress.

Transposition: the Directive shall be transposed two years following its entry into force.

Joint statement of the European Parliament and of the Council on solicitation of children for sexual purposes: the European Parliament and the Council make the following statement: having regard to the fact that 'real-life' solicitation of children for sexual purposes (*off-line grooming*) means intentional manipulation of a child under the age of sexual consent by means of speech, writing, audio-visual material or by similar presentations, to meet him or her for the purpose of committing any of the offences referred to in the Directive on combating the sexual abuse and sexual exploitation of children and child pornography and that 'real-life' solicitation of children for sexual purposes is already covered by the national law of Member States in different forms, as attempt, a preparatory offence or a particular form of sexual abuse, the European Parliament and the Council call on the Member States to check carefully **their criminal law definitions as regards the criminalisation of 'real-life' solicitation of children for sexual purposes**, and to improve and correct their criminal law, if necessary, as regards any legal lacunae that might still exists in that regard.