Combating sexual abuse, sexual exploitation of children and child pornography

2010/0064(COD) - 13/12/2011 - Final act

PURPOSE: to recast Framework Decision 2004/68/JHA on the sexual abuse, sexual exploitation of children and child pornography

LEGISLATIVE ACT: Directive 2011/92/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

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. This is why a new Directive has been adopted to recast the 2004 text and integrate new provisions to protect children more effectively.

CONTENT: this Directive, adopted following an agreement reached at first reading with the European Parliament, seeks to establish 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.

Principles: the directive will harmonise around twenty relevant criminal offences, at the same time setting high level of penalties. The new rules include provisions to fight against **online child pornography and sex tourism**. They also aim to prevent convicted paedophiles moving to another EU member state from exercising **professional activities** involving regular contacts with children. The directive introduces measures to protect the child victim during investigations and legal proceedings.

Definitions: the Directive lays down a certain number of definitions including that of a “child”, which means any person below the age of 18 years, and “age of sexual consent” or the age below which, in

accordance with national law, it is prohibited to engage in sexual activities with a child. “Child pornography” is also defined and includes, among other things, “realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes” and “any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct”.

Offences: the directive penalises the following offences across the EU and sets lower thresholds for their maximum penalties as compared to previous rules from 2004:

a) sexual abuse of children: Maximum penalties range from at least one year imprisonment for causing a child to witness sexual activities to at least ten years for coercing a child into sexual actions. Moreover, 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.

It is also stipulated that 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.

b) 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 5 years if the child has not reached the age of sexual consent and of at least 2 years of imprisonment 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 8 years if the child has not reached the age of sexual consent, and of at least 5 years of imprisonment 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 2 years if the child has not reached the age of sexual consent, and of at least 1 year of imprisonment 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 8 years if the child has not reached the age of sexual consent, and of at least 5 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 10 years if the child has not reached the age of sexual consent, and of at least 5 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 5 years if the child has not reached the age of sexual consent, and of at least 2 years of imprisonment if the child is over that age.

c) Offences concerning child pornography: besides the penalties already provided for in the 2004 Framework Decision, the 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, provided that the act involves no risk of dissemination of the material.

d) Solicitation of children for sexual purposes ("grooming"): 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. In case the production of child pornography or child abuse were preceded by an online invitation to the child, for instance in a chat, the maximum sentence must be at least one year higher than otherwise.

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. Generally, the penalty thresholds are reduced where the child has reached the age of sexual consent as defined by national legislation.

Aggravating circumstances: more severe sanctions were introduced for "aggravating circumstances", 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 where the offender has deliberately or recklessly endangered the life of the child.

Narrowing the supply of child pornography on the internet: with the new rules, the EU effectively responds to challenges following the internet revolution that made child pornography widely available. Prevention as well as protection of victims are among the main objectives. Concerning online child pornography, the text obliges Member States to ensure the prompt removal of such websites hosted in their territory and to endeavour to obtain their removal if hosted outside of their territory. In addition, Member States may block access to such web pages, but must follow transparent procedures and provide safeguards if they make use of this possibility.

Fighting sex tourism: the directive also aims to fight the sex tourism industry: first, by introducing compulsory jurisdiction over nationals who commit crimes abroad, and secondly by establishing preventive measures to that effect. This is meant to diminish demand for sexual services outside the EU.

Reliable check for EU nationals when applying for jobs related to the care of children: within the EU, higher protection of children will be achieved once Member States implement the directive and fully commit themselves to circulate data on disqualifications from their criminal records so as to prevent paedophiles moving abroad and taking advantage of free movement of workers within the EU. Under the new directive, Member States must ensure that convicted offenders can be prevented from exercising professional activities involving regular contacts with children. Employers recruiting for such activities must be able to request information about candidates' previous convictions.

Non prosecution or non-application of penalties to the victim: the Directive 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.

Assistance and support: Children shall be 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. The necessary steps shall be taken to ensure protection for children who report cases of abuse taking place within their family, as well as 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.

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 referred to in the Directive may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of such 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 of children.

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. The following persons may have access to the intervention programmes: persons subject to criminal proceedings for any of the offences referred to the Directive, and in compliance with the principle of the presumption of innocence; and persons convicted of any of the offences for similar offences.

Reporting: the Commission shall, by 18 December 2015, submit a report to the European Parliament and the Council assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by a legislative proposal.

Territorial provisions: in accordance with Protocols (No 21 and 22) annexed to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Directive, although Denmark is not taking part.

ENTRY INTO FORCE: 18.12.2011. From that date, this directive will replace the Framework Decision 2004/68/JHA.

TRANSPOSITION: 18.12.2013.