


# Procedure file



The information here reflects the current status of the procedure

 Existing summary

## Identification

Reference	<b>COD/2010/0064</b>
Title	<b>Combating sexual abuse, sexual exploitation of children and child pornography (repeal. Framework Decision 2004/68/JHA)</b>
Legal Basis	TFEU 083-p1-a1; TFEU 082-p2
Dossier of the committee	LIBE/7/02673
Subject(s)	4.10.03 Child protection, children's rights 7.30.30.02 Action to combat violence and trade in human beings 7.40.04 Judicial cooperation in criminal matters
Stage reached	<i>Awaiting Parliament 1st reading / single reading / budget 1st stage</i>

## Stages

Stages	Documents: references			Dates	
	Source reference		Equivalent references	of document	of publication in Official Journal
Commission/Council: initial legislative document 	EC	COM(2010)0094	C7-0088/2010	29/03/2010	
Document annexed to the procedure 	EDPS	N7-0080/2010		10/05/2010	C 323 30.11.2010, p. 0006
Economic and Social Committee: opinion, report	ESC	CES1173/2010		15/09/2010	
EP: draft report by the committee responsible	EP	PE452.564		24/01/2011	

## Forecasts




11/04/2011	Council: debate or examination expected
09/06/2011	Council: political agreement on final act expected
22/06/2011	EP plenary sitting (indicative date)

## Agents


### European Parliament

Committee	Rapporteur / Co-rapporteurs	Political group	Appointed
Civil Liberties, Justice and Home Affairs (responsible)	Angelilli Roberta	PPE	26/01/2010
<i>Culture and Education (opinion)</i>	Kammerevert Petra	S&D	03/05/2010
<i>Women's Rights and Gender Equality (opinion)</i>	Yannakoudakis Marina	ECR	04/05/2010

### European Commission and Council of the Union

European Commission DG	Justice	Transmission date : 24/03/2010	
Council of the Union 	Justice and Home Affairs (JHA)	meeting : 3051	of : 02/12/2010
Council of the Union 	Justice and Home Affairs (JHA)	meeting : 3034	of : 07/10/2010
Council of the Union 	Justice and Home Affairs (JHA)	meeting : 3018	of : 03/06/2010

## Summaries

 02/12/2010 - Council's activities
The Council reached a general agreement on new EU-wide rules which will make it possible to combat sexual abuse, sexual exploitation of children and child pornography more effectively.

The negotiations with the European Parliament can now begin, with **the aim being to reach a first reading agreement as soon as possible.**

#### 07/10/2010 - Council's activities

The Council discussed the proposal for a directive on combating the sexual abuse, sexual exploitation of children and child pornography. Ministers focused on Articles 1-13 (with the exception of Art. 10) of the current version of the text.

Almost all member states agreed on the current wording of these articles. Only two delegations maintained their reservations on Art. 4(3), which concerns situations where children knowingly attend pornographic performances.

Articles 1-13 (with the exception of Art. 10) specify, among other things, the scope of offences and the level of penalties in the following areas:

- sexual abuse, sexual exploitation of children and child pornography;
- solicitation of children for sexual purposes by means of information and communication technology ('grooming');
- instigation, aiding and abetting, attempt.

They also concern provisions on aggravating circumstances, the liability of and sanctions on legal persons as well as the possibility not to prosecute or impose penalties on the child victims.

#### 03/06/2010 - Council's activities

The Spanish presidency informed justice ministers about the state of play concerning a directive on combating the sexual abuse, sexual exploitation of children and child pornography.

In March 2010, the Commission adopted its proposal on the file. Once adopted, the new rules will replace framework decision 2004/68/JHA. The goal is to further approximate national legislation and to improve international law enforcement and judicial cooperation.

Among the outstanding issues are:

- the definition of child pornography;
- the categorisation of offences;
- instigation, aiding and abetting, and preparatory acts for offences of this kind;
- the criminalisation of intentional access to child pornography by computerised means;
- how to deal with unintended access to web sites;
- the length of sentences;
- the extension of territorial jurisdiction;
- the blocking of websites with child pornography content as a complementary measure to the efforts to eliminate the source content;
- including unreal characters (images, cartoons, etc.) within the concept of child pornography (in this respect, the Commission has noted that the aim is to criminalise images which reproduce reality);
- assessing and offering rehabilitation programmes to the perpetrators of such crimes.

#### 10/05/2010 - Document annexed to the procedure

##### **Opinion of the European Data Protection Supervisor 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.**

**To recall:** on 29 March 2010, the Commission adopted a 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. The proposal intends to repeal a Framework Decision adopted on 22 December 2003, due to some **shortcomings** of this previous legislation. The new text would improve the fight against child abuse with regard to the following aspects: criminalisation of serious forms of child abuse in relation for instance to child sex tourism, protection of unaccompanied children; criminal investigation and coordination of prosecution; new criminal offences in the IT environment; protection of victims; prevention of offences.

With regard to the objective to prevent offences, one of the tools would be the restriction of access to child pornography on the internet.

The EDPS has noted the main purpose of the proposal. His intention is not to question the need to put in place a better framework providing for adequate measures to protect children against abuses. He nevertheless wishes to stress the impact of some of the measures envisaged in the proposal, **such as the blocking of websites and the setting-up of hotlines, on the fundamental rights to privacy and data protection of different individuals involved.** For this reason, he has decided to submit this brief opinion at his own initiative.

##### **Analysis of the proposal**

The data protection issues relate to two aspects of the proposal, which are not specific to the fight against child abuse but to any initiative aiming at the collaboration of the private sector for law enforcement purposes. These issues have already been analysed by the EDPS in different contexts, especially related to the fight against illegal content on the Internet.

With regard to the proposal, the two elements of concern may be described as follows:

**(1) The role of service providers with regard to the blocking of websites:** the proposal foresees two possible alternatives to block access from the Unions' territory to internet pages identified as containing or disseminating child pornography: mechanisms to facilitate blocking by order of competent judicial or police authorities, or voluntary actions by Internet Service Providers to block the internet pages on the basis of codes of conducts or guidelines.

The EDPS questions the criteria and conditions leading to a blocking decision: while he could support actions taken by police or judicial authorities in a well defined legal framework, he has **strong doubts about the legal certainty of any blocking operated by private parties**.

He questions first of all the possible monitoring of the internet which could lead to such blocking. Monitoring and blocking may imply different activities, including scanning the internet, identifying unlawful or suspect websites and blocking access to end users, but also monitoring online behaviour of end-users who are trying to access or download such content.

These **surveillance activities** have consequences in terms of data protection, as personal data of various individuals will be processed, be it information about victims, witnesses, users or content providers.

In this context, the EDPS:

- underlines that monitoring the network and blocking sites would constitute a purpose unrelated to the commercial purpose of ISPs: this would raise issues with regard to lawful processing and compatible use of personal data under the Data Protection Directive;
- questions the criteria for blocking and stresses that a code of conduct or voluntary guidelines would not bring enough legal certainty in this respect;
- underlines the risks linked with possible blacklisting of individuals and their possibilities of redress before an independent authority.


The EDPS has already stated at several occasions that 'the monitoring of Internet user's behaviour and further collection of their IP addresses amounts to an interference with their rights to respect for their private life and their correspondence. Considering this interference, more appropriate safeguards are needed to ensure that monitoring and/or blocking will only be done in a strictly targeted way and under judicial control, and that misuse of this mechanism is prevented by adequate security measures.

**(2) The setting-up of a network of hotlines:** a network of hotlines is foreseen by the Safer Internet Programme on which the EDPS has issued the opinion referred to above. One of the comments of the EDPS relate precisely to the conditions according to which information would be collected, centralised and exchanged: there is a need for a precise description of what should be considered as illegal or harmful content, who is enabled to collect and keep information and under what specific safeguards. This is particularly important considering the consequences of reporting: in addition to the information related to children, personal data of any individual connected in some way with the information circulating on the network could be at stake, including for instance information on a person suspected of misbehaviour, be it an internet user or a content provider, but also information on a person reporting a suspicious content or the victim of the abuse. The rights of all these individuals should not be overlooked when developing reporting procedures: they should be taken into account in compliance with the existing data protection framework.

The information collected by these hotlines will also most probably be used for prosecution during the judicial stage of the case. In terms of quality and integrity requirements, additional safeguards should be implemented in order to guarantee that this information considered as digital evidence has been properly collected and preserved and will therefore be admissible before a court.

Guarantees related to the supervision of the system, in principle by law enforcement authorities, are decisive elements to comply with. Transparency and independent redress possibilities available to individuals are other essential elements to be integrated in such a scheme.

**Conclusion:** while the EDPS has no reason to challenge the development of a strong and effective framework to fight against sexual abuse, sexual exploitation of children and child pornography, he insists on the need to ensure legal certainty with regard to all actors involved, including Internet Service Providers and individuals using the network. The mentioning in the proposal of the need to take into account the fundamental rights of end users is welcome but not sufficient: it should be complemented by an obligation for Member States to ensure harmonised, clear and detailed procedures when fighting illegal content, under the supervision of independent public authorities.

 29/03/2010 - Commission/Council: initial legislative document

**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.