



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 15 October 2010

**Interinstitutional File:
2010/0064 (COD)**

14600/10

LIMITE

**DROIPEN 109
JAI 812
CODEC 978**

NOTE

from: Presidency
to: Delegations
No. prev. docs.: 13168/10 DROIPEN 91 JAI 708 CODEC 767
14279/10 DROIPEN 106 JAI 787 CODEC 932

Subject: 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

I. INTRODUCTION

Apart from few remaining reservations, the text on Articles 1-13 with exception of Article 10 submitted to the JHA Council¹ on 8 October 2010 will form a sufficient basis for the Presidency to enter into discussions with the European Parliament when an agreement will be found on the whole text, including the remaining Articles (Articles 10, 14-26).

In the present document, which takes into account the results of the discussions in the Council session on 8 October 2010 with regard to Articles 1-13 with the exception of article 10, the Presidency submits drafting proposals with regard to Articles 14-20 on the basis of the discussions in the Working Party on Substantive Criminal Law (DROIPEN) on 30 July 2010. Because the

¹ See document 14279/10 DROIPEN 106 JAI 787 CODEC 932.

Presidency intends to bring Articles 10 and 21 to CATS on 25 and 26 October, they will be dealt separately.

Reservations lodged by delegations and the Commission with regard to Article 10 and Articles 14-21 are set out in footnotes and reflect the stand of the discussions as of 30 July 2010 as set out in document 13168/10 DROIPEN 91 JAI 708 CODEC 767.

Furthermore, it should be noted that the Commission maintains a number of reservations, with regard to the text of Articles 1-13 with the exception of Article 10, as it arose from the session of the Council on 8 October 2010, in view of the future discussions with the European Parliament in the framework of the ordinary legislative procedure. Those reservations are not reflected in the text.

The text of the proposed Directive is subject to parliamentary scrutiny reservations by IE, LT and UK.

2010/0064 (COD)

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 EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) and 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure³,

¹ OJ C , , p. .

² OJ C , , p. .

³ OJ C , , p. .

Whereas:

- (1) Sexual abuse and sexual exploitation of children, including child pornography, constitute serious violations of fundamental rights, in particular the rights of the child to protection and care as is necessary for his or her well-being as stipulated by the UN Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union.
- (2) Child pornography, which consists of images of child sex abuse, and other particularly serious forms of sexual abuse and sexual exploitation of children are increasing and spreading through the use of new technologies and the internet.
- (3) Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography¹ approximates Member States' legislation to criminalise the most serious forms of child sexual abuse and sexual exploitation, to extend domestic jurisdiction, and to provide for a minimum level of assistance for victims. Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings² establishes a set of victims' rights in criminal proceedings, including the right to protection and compensation. Moreover, the coordination of prosecution of cases of sexual abuse, sexual exploitation of children and child pornography will be facilitated by the adoption of Council Framework Decision 2009/948/JHA on prevention and settlement of conflict of jurisdiction in criminal proceedings³.
- (4) According to Article 34 of the UN Convention on the Rights of the Child, States Parties undertake to protect the child from all forms of sexual abuse. The UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and, in particular, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse⁴ are crucial steps in the process of enhancing international cooperation in this field.

¹ OJ L 13, 20.1.2004, p. 14.

² OJ L 82, 22.3.2001, p. 1.

³ OJ L 328, 15.12.2009, p. 42.

⁴ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, opened for signature in Lanzarote, 25.10.2007, Council of Europe Treaty Series No. 201.

- (5) Serious criminal offences such as the sexual exploitation of children and child pornography require a comprehensive approach covering the prosecution of offenders, the protection of child victims, and prevention of the phenomenon. The child's best interests must be a primary consideration when carrying out any measures to combat these offences in accordance with the Charter of Fundamental Rights of the European Union and the UN Convention on the Rights of the Child. Framework Decision 2004/68/JHA should be replaced by a new instrument providing such comprehensive legal framework to achieve that purpose.
- (5a) In adopting legislation on substantive criminal law, the EU should ensure consistency of this overall legislation in particular with regard to the level of penalties. The Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties which indicate four levels of penalties should be kept in mind, in the light of the Lisbon Treaty. This Directive, because it contains an exceptionally high number of different offences, requires, in order to reflect the various degrees of seriousness, a differentiation in the level of penalties which goes further than what should usually be provided in EU legal instruments.
- (6) Serious forms of child sexual abuse and sexual exploitation should be subject to effective, proportionate and dissuasive sanctions. This includes, in particular, various forms of sexual abuse and sexual exploitation facilitated by the use of information and communication technology. The definition of child pornography should also be clarified and brought closer to that contained in international instruments.
- (6a) Disability, by itself, does not automatically constitute an impossibility to consent to sexual relations. However, the abuse of the existence of such a disability in order to engage in sexual activities with a child should be criminalised.
- (6aa) The maximum term of imprisonment provided for in this Directive for offences concerning sexual abuse should apply to sexual activities that are serious forms of sexual abuse of a child.
- (6ab) In order to reach the maximum term of imprisonment provided for in this Directive in offences concerning sexual exploitation, Member States may combine, taking into account their national law, the imprisonment terms provided for in national legislation in respect of offences concerning sexual abuse

- (6b) Knowingly obtaining access, by means of information and communication technology, to child pornography should be criminalised. To be liable, the person should both intend to enter a site where child pornography is available and know that such images can be found there. Sanctions should not be applied to persons inadvertently accessing sites containing child pornography. The intentional nature of the offence may notably be deduced from the fact that it is recurrent or that the offences were committed via a service in return for payment.
- (7) This Directive does not govern Member States' policies with regard to consensual sexual activities in which children may be involved and which can be regarded as the normal discovery of sexuality in the course of human development, taking account of the different cultural and legal traditions and of new forms of establishing and maintaining relations among children and adolescents, including through information and communication technologies. These issues fall outside of the scope of this Directive. It is up to Member States to define, with regard to these issues, what should and what should not be criminalised.
- (7a) Member States should provide for aggravating circumstances in their national law in line with the rules established by their legal system on aggravating circumstances and should ensure that these aggravating circumstances are available for judges to consider when sentencing offenders, although there is no obligation on judges to apply them. These circumstances should not be provided for by Member States in national legislation when irrelevant taking into account the nature of the specific offence. The relevance of the various aggravating circumstances provided for in this Directive should be evaluated at national level for each of the offences mentioned in this instrument.
- (7aa) Secondary victimisation should be avoided for victims of offences referred to in this Directive. In Member States where prostitution or the appearance in pornography is punishable, under national criminal law or other national law, it should be possible not to prosecute or impose penalties under these laws where the child concerned has committed these acts as a result of being victim of sexual exploitation or where the child was compelled to participate in child pornography.
- (7b) As an instrument of approximation of criminal law, this Directive provides for levels of penalties which should apply without prejudice to the specific criminal policies of the Member States concerning child offenders.

- (7c) Victims of sexual exploitation and abuse should receive assistance in the short and long term. Any harm caused by the sexual exploitation or abuse of a child is significant and should be addressed. Because of the nature of the harm caused by sexual exploitation or abuse, this aid should continue for as long as it is necessary for the child's complete physical and psychosocial recovery and may, in some cases, last into adulthood¹.
- (8) Investigating offences and bringing charges in criminal proceedings should be facilitated, to take into account the difficulty for child victims of denouncing abuse and the anonymity of offenders in cyberspace. To ensure successful investigations and prosecutions of the offences referred to in this Directive, their initiation should not depend, in principle, on reporting or accusation by the victim. The length of the sufficient period of time for prosecution should be determined in accordance with respective national law².
- (8a) Effective investigation tools should be made available to those responsible for the investigation and prosecutions of such offences. These tools may include (...) interception of communications, covert surveillance including electronic surveillance, monitoring of bank accounts or other financial investigations. Where appropriate and in accordance with national law, electronic surveillance should include the possibility for law enforcement authorities to use a false identity on the Internet, taking into account, inter alia, the principle of proportionality in relation to the rules of evidence and regarding the nature and seriousness of the offences under investigation³.
- (8b) Member States should encourage any person who has knowledge or suspicion of sexual exploitation or abuse of a child to report to the competent services. It is the responsibility of each Member State to determine the competent authorities to which such suspicions may be reported. These competent authorities should not be limited to child protection services or relevant social services. The requirement of suspicion "in good faith" should be aimed at preventing the provision being invoked to authorise the denunciation of purely imaginary or untruthful facts carried out with malicious intent.

¹ New recital inserted by the Presidency and inspired by the explanatory memorandum of the Lanzarote Convention, following concerns expressed by some delegations on the meaning of the necessity of providing assistance "*in the short and long term*" in Article 18 (2).

² Addition requested by IE, in line with the relevant parts of recital 8 of the text of the general approach agreed in the Council on the Directive on THB.

³ Addition proposed by the Presidency in relation to Article 14 (3).

- (9) Rules on jurisdiction should be amended to ensure that child sexual abusers or exploiters from the European Union face prosecution even if they commit their crimes outside the European Union, in particular via so-called sex tourism.
- (10) Measures to protect child victims should be adopted in their best interest, taking into account an assessment of their needs. Child victims should have easy access to legal remedies, including free legal counselling and representation and measures to address conflicts of interest where abuse occurs in the family. Moreover, child victims should be protected from sanctions, for example under national legislation on immigration or prostitution, if they bring their case to the attention of competent authorities. Furthermore, participation in criminal proceedings by child victims should not cause additional trauma as a result of interviews or visual contact with offenders.
- (10a) The Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings¹ establishes a set of victims' rights in criminal proceedings, including the right to protection and compensation. In addition children, victims of sexual abuse, sexual exploitation and child pornography should be given access to legal counselling and, in accordance with the role of victims in the relevant justice systems, to legal representation, including for the purpose of claiming compensation. Such legal help could also be provided by the competent authorities for the purpose of claiming compensation from the State. The purpose of legal counselling is to enable victims to be informed and receive advice about the various possibilities open to them. Legal counselling and, in accordance with the role of victims in the relevant justice systems, legal representation should be provided free of charge at least when the victim does not have sufficient financial resources in a manner consistent with the internal procedures of Member States.
- (10b) Member States should undertake all the necessary action to prevent or prohibit acts related to the promotion of abuse of children and child sex tourism. Different preventing measures could be considered such as e.g. the drawing up and reinforcement of a code of conduct and self-regulatory mechanisms in the tourism industry, the setting-up of a code of ethics or “quality labels” for tourist organisations combating child sex tourism or having explicit policy to tackle this form of tourism.

¹ OJ L 82, 22.3.2001, p. 1.

- (10c) In order to prevent the sexual exploitation and abuse of children, intervention programmes or measures targeting sex offenders should be proposed to them. These programs or measures should meet a broad, flexible approach focusing on the medical and psycho-social aspects and have a non-obligatory character. These intervention programmes or measures are without prejudice to intervention programmes or measures imposed by the competent judicial authorities¹.
- (11) To prevent and minimise recidivism, offenders should be subject to an assessment of the danger posed by the offenders and the possible risks of repetition of sexual offences against children. Modalities of such assessment, such as the type of authority competent to order and carry out the assessment or the moment in or after the criminal proceedings when this assessment should take place as well as modalities of effective intervention programmes or measures offered following this assessment should be consistent with the internal procedures of Member States. For the same objective of preventing and minimising recidivism, offenders should also have access to effective intervention programmes or measures on a voluntary basis. These intervention programmes or measures should not interfere with national schemes set up to deal with the treatment of persons suffering from mental disorders.
- (12) Where the danger posed by the offenders and the possible risks of repetition of the offences make it appropriate, convicted offenders should be temporarily or permanently prevented from exercising activities involving regular contacts with children, where appropriate. Implementation of such prohibitions throughout the EU should be facilitated.
- (13) Child pornography, which constitutes sex abuse images, is a specific type of content which cannot be construed as the expression of an opinion. To combat it, it is necessary to reduce the circulation of child abuse material by making it more difficult for offenders to upload such content onto the publicly accessible Web. Action is therefore necessary to remove the content at source and apprehend those guilty of making distributing or downloading child abuse images. The EU, in particular through increased cooperation with third countries and international organisations, should seek to facilitate the effective removal by third country authorities of websites containing child pornography, which are hosted in their territory.

¹ New recital inserted by the Presidency following concerns expressed by several delegations. Article 20 does not prevent Member States from imposing intervention measures or programmes as a sanction or as a measure during the pre-trial phase.

However as, despite such efforts, the removal of child pornography content at its source proves to be difficult where the original materials are not located within the EU, mechanisms should also be put in place to block access from the Union's territory to internet pages identified as containing or disseminating child pornography. For that purpose, different mechanisms can be used as appropriate, including facilitating the competent judicial or police authorities to order such blocking, or supporting and stimulating Internet Service Providers on a voluntary basis to develop codes of conduct and guidelines for blocking access to such Internet pages. Both with a view to the removal and the blocking of child abuse content, cooperation between public authorities should be established and strengthened, particularly in the interest of ensuring that national lists of websites containing child pornography material are as complete as possible and of avoiding duplication of work. Any such developments must take account of the rights of the end users, adhere to existing legal and judicial procedures and comply with the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. The Safer Internet Programme has set up a network of hotlines whose goal is to collect information and to ensure coverage and exchange of reports on the major types of illegal content online.

- (13a) The Council, in accordance with paragraph 34 of the Interinstitutional agreement on better law-making, should encourage Member States to draw up, for themselves and in the interest of the Union, their own tables, which will, as far as possible, illustrate the correlation between the Directive and the transposition measures and to make them public.
- (14) Since the objective of this Directive, namely to combat sexual abuse, sexual exploitation of children and child pornography, cannot be sufficiently achieved by the Member States alone and can therefore, by reasons of the scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principles of subsidiarity as referred to in Article 3 and Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Directive does not go beyond what is necessary to achieve that objective.

- (15) This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, protection of personal data, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties. In particular, this Directive seeks to ensure full respect for those rights and has to be implemented accordingly.
- (16) In accordance with Articles 1, 2, 3 and 4 of Protocol on the position of United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to participate in the adoption and application of this Directive. In accordance with Articles 1 and 2 of Protocol on the position of Denmark annexed to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is therefore not bound by it or subject to its application.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive aims 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. It also aims to strengthen the prevention of these crimes and to strengthen the protection of their victims.

Article 2

Definitions

For the purposes of this Directive:

- (a) ‘child’ shall mean any person below the age of 18 years;

- (aa) ‘age of sexual consent’ shall mean the age below which it is prohibited to engage in sexual activities with a child according to national law;

- (b) ‘child pornography’ shall mean
 - (i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; or
 - (ii) any depiction of the sexual organs of a child for primarily sexual purposes; or
 - (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or
 - (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes;

- (c) ‘child prostitution’ shall mean the use of a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment in exchange for the child engaging in sexual activities, regardless of whether this payment, promise or consideration is made to the child or to a third party;
- (d) ‘pornographic performance’ shall mean the organised live exhibition, aimed at an audience, including by means of information and communication technology:
 - (i) of a child engaged in real or simulated sexually explicit conduct; or
 - (ii) of the sexual organs of a child for primarily sexual purposes;
- (e) ‘legal person’ shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

Article 3

Offences concerning sexual abuse

1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 5 is punishable.
2. 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.
- 2a. Causing, for sexual purposes, a child who has not reached the age of sexual consent to witness sexual abuse, even without having to participate, shall be punishable by a maximum term of imprisonment of at least two years.

3. Engaging in sexual activities with a child who has not reached the age of sexual consent shall be punishable by a maximum term of imprisonment of at least five years.
4. Engaging in sexual activities with a child, where:
 - (i) 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 five 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
 - (ii) abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence 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 three years of imprisonment if the child is over that age; or
 - (iii) 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.
5. 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.

Article 4

Offences concerning sexual exploitation

1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 6 is punishable.
2. 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, or of at least two years if the child is over that age.

3. 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, or of at least five years if the child is over that age.
- 3a. 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, or of at least one year if the child is over that age¹.
4. 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.
5. 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.
6. 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 age².

¹ DE and EE maintained reservation on this paragraph. They propose to limit this offence to the situation referred to Article 21(2) of the Lanzarote Convention. The offence would therefore be limited to cases where the child has been recruited or coerced to participate in the pornographic performance.

² DE maintained a reservation on this paragraph.

Article 5

Offences concerning child pornography

1. Member States shall take the necessary measures to ensure that the intentional conduct, when committed without right, referred to in paragraphs 2 to 7 is punishable.
2. Acquisition or possession of child pornography shall be punishable by a maximum term of imprisonment of at least one year.
3. Knowingly obtaining access, by means of information and communication technology, to child pornography shall be punishable by a maximum term of imprisonment of at least one year.
4. (...)
5. Distribution, dissemination or transmission of child pornography shall be punishable by a maximum term of imprisonment of at least two years.
6. Offering, supplying or making available child pornography shall be punishable by a maximum term of imprisonment of at least two years.
7. Production of child pornography shall be punishable by a maximum term of imprisonment of at least two years.
8. It shall be within the discretion of the Member States to decide whether this Article applies to cases involving child pornography, as referred to in Article 2(b)(iii), where the person appearing to be a child was in fact 18 years of age or older at the time of depiction.
9. It shall be within the discretion of the Member States to decide whether paragraphs (2) and (7) apply to cases where it is established that pornographic material as defined in Article 2(b) (iv) is produced and possessed by the producer solely for his or her own private use, as far as no pornographic material as referred to in Article 2(b)(i) to (iii) has been used for the purpose of its production, and provided that the act involves no risk of dissemination of the material.

Article 6

Solicitation of children for sexual purposes

Member States shall take the necessary measures to ensure that the following intentional conduct is punishable:

The proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Articles 3(3) and Article 5(7) where this proposal has been followed by material acts leading to such a meeting, shall be punishable by a maximum term of imprisonment of at least one year.

Article 7

Instigation, aiding and abetting and attempt

1. Member States shall take the necessary measures to ensure that the instigation of, aiding and abetting to commit any of the offences referred to in Articles 3 to 6 is punishable.
2. Member States shall take the necessary measures to ensure that attempts to commit any of the offences referred to in Article 3(3) to (5), Article 4 (2) to (3) and (4) to (6), and Article 5(5) to (7) are punishable.

Article 8

Consensual sexual activities

1. It shall be within the discretion of the Member States to decide whether Article 3(2) and (3) apply to consensual 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.
2. It shall be within the discretion of the Member States to decide whether Article 4(3a) applies to a performance held within consensual relations where the child has reached the age of 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 insofar as no money or other forms of remuneration or consideration is given as payment in exchange for the pornographic performance.
3. It shall be within the discretion of the Member States to decide whether Article 5(2) and (7) apply to production, acquisition or possession of material involving children having reached the age of sexual consent where this material is produced and possessed with their consent and solely for private use of the persons involved, insofar as the acts did not involve any abuse.

Article 9

Aggravating circumstances

1. In so far as the following circumstances do not already form part of the constituent elements of the offences referred to in Articles 3 to 7, Member States shall take the necessary measures to ensure that the following circumstances may, in conformity with the relevant provisions of internal law, be regarded as aggravating circumstances, in relation to the relevant offences referred to in Articles 3 to 7 :
 - (a) (...)
 - (b) the offence was committed against a child in a particularly vulnerable situation, notably because of a mental or physical disability or a situation of dependence;
 - (c) the offence was committed by a member of the family, a person cohabiting with the child or a person having abused their authority;
 - (d) the offence was committed by several people acting together;
 - (e) the offences are committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA¹;
 - (f) the offender has previously been convicted of offences of the same nature;
 - (g) the offender has deliberately or by recklessness endangered the life of the child;
 - (h) the offence involved serious violence or caused serious harm to the child.

2. (...)

¹ OJ L 300, 11.11.2008, p. 42.

Article 10¹

Disqualification arising from convictions

Article 11

Liability of legal persons

1. Member States shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Articles 3 to 7 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on one of the following:
 - (a) a power of representation of the legal person;
 - (b) an authority to take decisions on behalf of the legal person;
 - (c) an authority to exercise control within the legal person.

2. Member States shall also take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission, by a person under its authority, of any of the offences referred to in Articles 3 to 7 for the benefit of that legal person.

3. Liability of legal persons under paragraphs 1 and 2 of this Article shall be without prejudice to criminal proceedings against natural persons who are perpetrators of, or inciters or accessories to the offences referred to in Articles 3 to 7.

¹ Taking into account the fact that this issue will be referred to CATS on 26 October, the Presidency suggests to examine this provision on the basis of document 14905/10 DROIPEN 113 JAI 842 CATS 80 CODEC 1030.

Article 12

Sanctions on legal persons

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 11(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, for example:
 - (a) exclusion from entitlement to public benefits or aid;
 - (b) temporary or permanent disqualification from the practice of commercial activities;
 - (c) placing under judicial supervision;
 - (d) judicial winding-up;
 - (e) temporary or permanent closure of establishments which have been used for committing the offence.

2. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 11(2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

Article 13

Non prosecution or non-application of penalties to the victim

Member States shall, in accordance with the basic principles of their legal system, provide for the possibility of not prosecuting or imposing penalties:

- (a) under national law on prostitution or pornographic performances, on child victims of offences referred to in Articles 4(2), (3), (4) and (5) ;
- (b) under national law on pornography, on child victims of offences referred to in Article 5(7) insofar as they have been compelled to commit the acts concerned.

Article 14

Investigation and prosecution

1. Member States shall take the necessary measures to ensure that investigations into or the prosecution of the offences referred to in Articles 3 to 7 are not dependent on a report or accusation being made by the victim or by its representative, and that the criminal proceedings may continue even if that person (...) has withdrawn (...) his statements¹.
2. Member States shall take the necessary measures to enable the prosecution of any of the offences² referred to in Articles 3³, Article 4 (2) to (3) and (4) to (6), and Article 5 (7)⁴ when pornographic material as defined in Article 2 (b) (i) to (iii) has been used⁵, for a sufficient period of time after the victim has reached the age of majority⁶ and which is commensurate with the gravity of the offence concerned.
3. Member States shall take the necessary measures to ensure that effective investigative tools, such as those which are used in organised crime or other serious crime cases (...) ⁷ are available to persons, units or services responsible for investigating or prosecuting offences referred to in Articles 3 to 7 (...).
4. Member States shall take the necessary measures to enable investigative units or services to attempt to identify the victims of the offences referred to in Articles 3 to 7, in particular by analysing child pornography material, such as photographs and audiovisual recordings transmitted or made available by means of information and communication technology.

¹ Following a request by IE, the recital (8) has been further developed in line with the text of the general approach agreed in the Council on the Directive on THB.

² PL, SE and LV asked for insertion of the wording “*serious offences*”. However, the current wording is in line with Article 33 of the Lanzarote Convention and it seems that the limitation to serious offences is already reflected by the offences contained in the exhaustive list.

³ DK wishes to exclude Article 3 (2) from the scope of this paragraph.

⁴ PL, DE, FI, SE, LV and HU ask for deletion of the reference to Article 5(7) (child pornography) which is not provided for in the Lanzarote Convention. NL, IT, UK and COM opposed this deletion.

⁵ Addition proposed by the Presidency following a compromise proposal by FI to exclude virtual child pornography.

⁶ EL wishes to add “*according to their national law*” after the reference to the age of majority. The Presidency draws the attention to the new definition of the age of consent in Article 2.

⁷ Following the last discussions, the reference to covert operations was deleted and recital 8a has been further developed.

Article 15

Reporting suspicion of sexual exploitation or sexual abuse

1. Member States shall take the necessary measures to ensure that the confidentiality rules imposed by national law on certain professionals (...) with the main duty to work with children do not constitute an obstacle to the possibility, for those professionals, of their reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of offences referred to in Articles 3 to 7¹.
2. Member States shall take the necessary measures to encourage any person who knows about or suspects, in good faith, offences referred to in Articles 3 to 7 to report these facts to the competent services.

¹ DE proposes the following changes : “*Member States shall take the necessary measures to ensure that the confidentiality rules imposed by national law on certain professionals with the main duty to work in contact with children do not constitute an obstacle to the possibility, for those professionals, of their reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that the life of a child is in danger or serious violence or serious harm to the child is likely to happen*”. RO, IT and COM have a scrutiny reservation on this insertion.

Article 16¹

Jurisdiction and coordination of prosecution

1. Member States shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 to 7 where:
 - (a) the offence is committed in whole or in part within its territory; or
 - (b) the offender is one of its nationals (...).
 - (c) (...)
 - (d) (...)

- 1a. Member States shall inform the Commission where they decide to establish further jurisdiction over an offence referred to in Articles 3 to 7 committed outside of its territory e.g. where :
 - (a) the offence is committed against one of their nationals or a person who has his or her habitual residence in the territory of that Member State; or
 - (b) the offence is committed for the benefit of a legal person established in the territory of that Member State; or
 - (c) the offender has his or her habitual residence in the territory of that Member State.

2. Member States shall ensure that its jurisdiction includes situations where an offence referred to in Articles 5 and 6, and insofar as is relevant, in Articles 3 and 7, is committed by means of information and communication technology accessed from its territory, whether or not it is based on its territory.

- 3 (...)

¹ RO entered scrutiny reservation on this Article. COM entered reservation on the modifications introduced in this Article, particularly the suppression of the reference to habitual residence in paragraph 1 (b) and the limitation of offences referred to in paragraph 4.

4. For the prosecution of any of the offences referred to in Article 3 (3), (4) and (5), Article 4 (2), (3), (4), (5) and (6), and Article 5 (7)¹ committed outside the territory of the State concerned, as regards paragraph 1 (b) of this Article, Member States shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the acts are a criminal offence at the place where they were performed.
- 4a. For the prosecution of any of the offences referred to in Articles 3 to 7 committed outside the territory of the State concerned, as regards paragraph 1 (b) of this Article, Member States shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed.

Article 17

General provisions on assistance, support and protection measures for child victims

1. Child victims of the offences referred to in Articles 3 to 7 shall be provided assistance, support and protection, taking into account the best interests of the child.
2. Member States shall ensure that, where the age of a person subject to the offences referred to in Articles 3 to 7 is uncertain and there are reasons to believe that the person is a child, the person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Article 18 and 19².

¹ DE and UK entered scrutiny reservation on this paragraph.

² FR, UK and RO opposed to the deletion of the terms “*pending verification of the age*”.

Article 18

*Assistance and support to victims*¹

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate time after criminal proceedings in order to enable them to exercise the rights set forth in Council Framework Decision 2001/220/JHA² on the standing of victims in criminal proceedings, and in this Directive.
2. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims in the short and long term³, in their physical and psycho-social recovery, are undertaken following an individual assessment⁴ of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns.
3. Child victims of any of the offences referred to in Articles 3 to 7 shall be considered as particularly vulnerable victims pursuant to Article 2 (2), Article 8 (4) and Article 14 (1) of Framework Decision 2001/220/JHA⁵.
4. Member States shall take measures, where appropriate and possible, to provide assistance and support to the family of the child victim when the family is in the territory of the Member State⁶. In particular, Member States shall, where appropriate and possible, apply Article 4 of Council Framework Decision 2001/220/JHA to the family.

¹ LV, LT, RO and IE entered a scrutiny reservation on this Article.

² OJ L 82, 22.3.2001, p. 1.

³ This paragraph is in line with Article 13 of the text of the general approach agreed in Council on the Directive on THB. The Presidency, following a concern expressed by FR and UK on the vagueness of "*in the short and long term*", proposes to add a new recital (7c), inspired by the explanatory memorandum of the Lanzarote Convention. IE proposes to limit the assistance to the period of investigation and criminal proceedings. UK wondered about the practical and financial consequences in the case where a national of an EU Member State suffered from an offence in another Member State and returns in his Member State of nationality.

⁴ AT wished to insert after "*individual assessment*" the phrase "*carried out in accordance with national procedures*".

⁵ DE and NL propose to delete this paragraph.

⁶ Modification in line with Article 13(2) of the text of the general approach agreed in Council on the Directive on THB, following a proposal by IE and supported by FR.

Article 19

Protection of child victims in criminal investigations and proceedings

1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a special representative for the child victim where, by national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim, or where the child is unaccompanied or separated from the family.
2. Member States shall ensure that child victims have immediate 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.
3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 3 to 7:
 - (a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;
 - (b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;
 - (c) interviews with the child victim are carried out¹ by or through professionals trained for this purpose;

¹ NL, supported by IE, proposed to insert the wording “*where necessary*”. Such addition is in line with the text of the general approach agreed in Council on the Directive on THB. It should be noted that the present Directive focuses on sexual offences where the need for interviews being conducted by or through professionals trained for this purpose is particularly relevant. Furthermore, the Lanzarote Convention does not provide for such limitation.

- (d) the same persons, if possible and where appropriate, conduct all interviews with the child victim;
 - (e) the number of interviews is as limited as possible and interviews are only carried out where strictly necessary for the purpose of criminal proceedings;
 - (f) the child victim may be accompanied by his or her legal representative or, where appropriate, an adult of his or her choice, unless a reasoned decision has been made to the contrary in respect of that person.
4. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 3 to 7 all interviews with the child victim or, where appropriate, with a child witness, may be audiovisually recorded and that these audiovisually recorded interviews may be used as evidence in criminal court proceedings, according to the rules under its national law.
5. Member States shall take the necessary measures to ensure, in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7, that it may be ordered that:
- (a) the hearing shall take place without the presence of the public;
 - (b) the child victim may be heard in the courtroom without being present, notably through the use of appropriate communication technologies.
6. Member States shall take the necessary measures to protect the privacy, the identity and the image of child victims and to prevent the public dissemination of any information that could lead to their identification¹.

¹ Proposal by the Presidency, following a suggestion of CZ to add the following paragraph “*Member States shall take the necessary measures to ensure the anonymity of child victims, vis-à-vis the public, in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7*”, and inspired by Article 31 (1) (e) of the Lanzarote Convention.

Article 19a¹

Advertising abuse opportunity and child sex tourism

²Member States shall take the necessary measures to prevent or prohibit³ :

- (a) the dissemination of material advertising the opportunity to commit any of the offences referred to in Article 3 to 6;
- (b) the organisation for others, whether or not for commercial purposes, of travel arrangements with the purpose of committing any of the offences referred to in Article 3 to 5.

Article 19aa⁴

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 Articles 3 to 7 may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of offences being committed.

¹ NL and AT entered scrutiny reservation on this Article. This Article was inserted after Article 19 in order to clarify that the prohibition or the prevention of such acts is not part of criminal provisions.

² UK proposes the following changes : « *Members States shall take the necessary measures to prevent or prohibit the following intentional conduct :*
(a) *the dissemination of material intended to encourage the commission of one of the offences referred to in Articles 3 to 6;*
(b) *the organization, for oneself or for others, whether or not for commercial purposes, of travel arrangements with the purpose of committing for sexual purposes an offence under Article 3(3)”*

³ A recital (10b) has been inserted to clarify what type of actions should be expected under the meaning ‘*prevent or prohibit*’.

⁴ SI entered scrutiny reservation on this Article.

Article 20¹

Intervention programmes or measures in the course of or after criminal proceedings

1. Without prejudice to intervention programmes or measures imposed by the competent judicial authorities², Member States shall take the necessary measures to ensure that effective intervention programmes or measures are made available with a view to preventing and minimising the risks of repeated offences of a sexual nature against children. These programmes or measures shall be accessible at any time during the criminal proceedings, inside and outside prison, according to the conditions laid down in national law.
2. Such intervention programmes or measures shall be adapted to meet the specific developmental needs of children who sexually offend, including those who are below the age of criminal responsibility.
3. Member States shall take the necessary measures to ensure that the following persons may have access to intervention programmes or measures referred to in paragraph 1 :
 - (a) persons subject to criminal proceedings for any of the offences referred to in Articles 3 to 7, under conditions which are neither detrimental nor contrary to the rights of the defence and to the requirements of a fair and impartial trial, and particularly with due respect for the rules governing the principle of the presumption of innocence; and
 - (b) persons convicted of any of the offences referred to in Articles 3 to 7.
4. Member States shall take the necessary measures to ensure that persons referred to in paragraph 3(a) and 3(b) are subject to an assessment of the danger presented by the person and possible risks of repetition of any of the offences referred to in Articles 3 to 7, with the aim of identifying appropriate intervention programmes or measures.

¹ LT and LV entered a scrutiny reservation on this Article.

² Addition proposed by the Presidency in order to meet the request of some delegations to clarify that intervention programmes or measures can be imposed by judicial authorities as a sanction or as a measure during the pre-trial phase. To be read in conjunction with a new recital (10c).

5. ¹Member States shall take the necessary measures to ensure that persons referred to in paragraph 3(a) and 3(b) to whom intervention programmes or measures in accordance with paragraph 4 have been proposed:

- (a) (...)
- (b) (...)
- (c) are fully informed of the reasons for the proposal;
- (d) consent to participation in the (...) programmes or measures in full knowledge of the facts;
- (e) may refuse and, in the case of convicted persons, are made aware of the possible consequences a refusal might have.

6. (...)

¹ CZ and SK entered a scrutiny reservation on this paragraph.

Article 21¹

Blocking access to websites containing child pornography

Article 22

Repeal of Framework Decision 2004/68/JHA

Framework Decision 2004/68/JHA is hereby repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law.

References to the repealed Framework Decision shall be construed as references to this Directive.

Article 23

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [TWO YEARS FROM ADOPTION] at the latest².
2. Member States shall transmit to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Directive.
3. When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

¹ Taking into account the fact that this issue will be referred to CATS on 26 October, the Presidency suggests to examine this provision on the basis of document 14905/10 DROIPEN 113 JAI 842 CATS 80 CODEC 1030.

² COM opposed the deletion of the reference to the correlation tables.

Article 24

Reporting

1. The Commission shall, By [FOUR YEARS FROM ADOPTION], 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 legislative proposal.

2. (...)

Article 25

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 26

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament

The President

For the Council

The President
