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NOTE

from : German and Austrian Delegations
to : Working Party on Substantive Criminal Law

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Subject: Proposal for a Council Framework Decision on combating the sexual abuse,
sexual exploitation of children and child-pornography, repealing Framework
Decision 2004/68/JHA
- Proposal by Germany and Austria

Delegations will find in the Annex a proposal by German and Austrian delegations, concerning Article 7 (1) - (3) (Penalties and aggravating circumstances) of the above mentioned proposed Framework Decision.

Article 7

Penalties and aggravating circumstances

1. Each Member State shall take the necessary measures to ensure that the offences referred to in
 - (a) Article 2 para. 1 letters d) and e), Article 3 letter d), Article 4 letters d) and e) and Article 5 are punishable by a maximum term of imprisonment of at least one to three years.
 - (b) Article 2 para. 1 letters a), b) numbers ii) and iii), Article 3 letters a), b) – profiting from or otherwise exploiting a child for such purposes - and c), Article 4 letters a), b) and c) are punishable by a maximum term of imprisonment of at least two to five years.
 - (c) Article 2 para. 1 letter b) number i) and letter c), Article 3 letter b) – coercing a child into child prostitution or into participating in pornographic performances - are punishable by a maximum term of imprisonment of at least five to ten years.
2. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 4 letters a), b) and c) are punishable by a maximum term of imprisonment of at least five to ten years where the offences are committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA .
3. Each Member State shall take the necessary measures to ensure that the offences referred to in
 - a) Article 2 para. 1 letters a), b) numbers ii) and iii), Article 3 letters a), b) – profiting from or otherwise exploiting a child for such purposes – and c) are punishable by a maximum term of imprisonment of at least five to ten years.
 - b) Article 2 para. 1 letter b) number i) and letter c), Article 3 letter b) – coercing a child into child prostitution or into participating in pornographic performances - are punishable by a maximum term of imprisonment of at least ten years.

where at least one of the following circumstances applies, in so far as they do not already form part of the constituent elements of the offence:

- (a) the child has not reached the age of sexual consent under national law;
- (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 perpetrator has previously been convicted of offences of the same nature.
- (f) the offence endangered deliberately or by gross negligence the life of the child;
- (g) the offence involved serious violence or caused serious harm to the child.

Reasons:

The sanctions proposed in Article 7 do not correspond to the sanctioning systems of all Member States. In part, they are just slight variations that do not signify any evaluative difference. It is therefore suggested that provision be made for sanctions that correspond to the Council Conclusions on approximation of sanctions of 25/26 April 2002. There are no apparent reasons for dispensing with the Council Conclusions of 25/26 April 2002, which offer a solution to apply in precisely these conflict situations – a solution that is acceptable to all Member States.

Furthermore, it does not seem appropriate to make provision for the same level of sanctioning for all the criminal offences dealt with in Articles 2 to 6. These are criminal offences of varying degrees of gravity so that gradation is needed on the sanctions level as well. One can divide the criminal offences regulated in the Framework Decision into three groups, namely

- offences concerning sexual exploitation and sexual abuse involving the use of coercion; these are, at the same time, the gravest criminal offences, and they are the criminal offences listed in Article 2 para. 1 letter b) number i) and letter c) as well as in Article 3 letter b – coercing a child into child prostitution or into participating in pornographic performances;

- offences concerning sexual exploitation and sexual abuse not involving coercion as well as production and dissemination of child pornography under Article 2 para. 1 letters a), b) numbers ii) and iii), Article 3 letters a), b) – profiting from or otherwise exploiting children for such purposes – and c), Article 4 letters a) to c); and,
- as the criminal offences that are the least grave, the offences preparatory to sexual abuse and to sexual exploitation, as well as the use of child pornography under Article 2 para. 1 letters d) and e), Article 3 letter d), Article 4 letters d) and e) as well as Article 5.

The sanction that would appear as appropriate for the gravest criminal offences is to be found at level 3 of the Council Conclusions on approximation of sanctions (imprisonment for up to at least five to ten years); for less serious penalties the appropriate sanction would appear to be level 2 (imprisonment for up to at least two to five years) and for the least serious criminal offences it would appear to be level 1 (imprisonment of at least one to three years).

The reference in Article 6 (instigation, aiding and abetting, attempt and preparatory offences) should be deleted to enable Member States to make appropriate distinctions between perpetration (of a criminal offence) and accessoryship, as well as between completed criminal offences and an attempt to commit a criminal offence. This also corresponds to all previous Framework Decisions.

As regards cases of aggravating circumstances, it is suggested that

- they be treated in a uniform way where such circumstances are made to lead, in each case, to the next higher sanctioning level, and that there is no renewed distinction made between various serious aggravating circumstances;
- they are not applied to the least serious preparatory offences and the use of child pornography, in respect of which they would amount to practically nothing at all (it is, for instance, impossible to endanger a child's life or cause him/her serious harm solely by establishing contact with the child for the purposes of sexual abuse);
- account be taken of the fact that the aggravating circumstances that are victim-related do not match the criminal offences under Article 4. For this reason, they are only applicable to criminal offences of sexual abuse and of sexual exploitation of children. It is solely the aggravating circumstance of commission within the framework of a criminal organisation

that applies to Article 4. There is also a practical need for this. But the proposal put forward here avoids making provision for aggravating circumstances that would amount to nothing in practice (it is not conceivable for there to be a case where the victim of a criminal offence of disseminating virtual child pornography is a child who, because of a mental or physical disability or of a situation of dependence, is in a particularly vulnerable situation, or where the offender is a member of the victim's family).

In paragraph 3 letter f) there is a need for restriction to deliberate or grossly negligent endangering of the life of the child. It is not acceptable for objective causation of danger already to be evaluated as a circumstance leading to a more severe penalty.
