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NOTE

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| by : | Presidency |
| to : | Council |
| 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:

A proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA, was submitted by the Commission to the Council on 26 March 2009 and was based on the recent Council of Europe Convention CETS No 201 on the protection of children against sexual exploitation and sexual abuse, opened for signature in Lanzarote on 25.10.2007 (Lanzarote Convention) and on the Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography, which it repeals.

The discussions in the Working Party on Substantive Criminal Law started under Czech Presidency and continued under Swedish Presidency on this proposal.

After entry into force of the Lisbon Treaty, the Commission presented to the European Parliament and to the Council on 29 March 2010 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 which incorporates some of the results of the previous discussions in the Council.

Under the Spanish and the Belgian Presidencies, the Working Party on Substantive Criminal Law continued the discussions during ten meeting days.

This document takes account of the results of the debate in CATS on 24 September and in COREPER on 29 September 2010.

Remaining reservations made by the delegations are reflected in the footnotes to the relevant Articles. It should be noted that the Commission maintains a number of reservations on the modifications made by the Council with a view to future discussions with the European Parliament. These reservations have not been reflected in the current text as the Commission will take part in future discussions with the European Parliament.

IE, LT and UK entered parliamentary scrutiny reservations on the proposal.

The Presidency invites delegations that still maintain reservations to lift them, and invites the Council to agree on a partial, general approach exists on Articles 1-13 (with the exception of Article 10). The Presidency further invites the Council to note that this text, together with the text of the remaining Articles (Articles 10, 14-26) that are still to be agreed, will form a sufficient basis for the Presidency to enter into discussions with the European Parliament.

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**

(Only recitals which form part of the compromise proposals related to Articles submitted for a general approach are reproduced below)

...

(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.

...

(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.

...

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 **Two delegations entered 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 **One delegation entered a scrutiny 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 10
Disqualification arising from convictions]¹

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 **This Article 10 is not part of the articles which are submitted to Coreper and Council for a general approach.**

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 penalties¹:

- (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.

¹ **One delegation entered a reservation on the fact that infringements other than criminal offences may be covered.**