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NOTE

by :	Presidency
to :	Article 36 Committee
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. The Article 36 Committee is invited to examine the text of Articles 1 to 13, except Article 10, and to submit the text of those Articles to COREPER and Council for general approach on this part of the Directive.

The Presidency submits in the Annex I to this Note the text of the relevant Articles, as they arose from the discussions in the Working Party. Remaining scrutiny reservations made by the delegations are reflected in the footnotes to the relevant Articles and outstanding issues relating to specific Articles are also highlighted under section II below.

II. PENDING ISSUES:

The two main issues raised by the delegations during the last discussions were the level of penalties and Article 13 on the possibility not to prosecute or not to punish victims of offences of this Directive.

1. Level of penalties:

All delegations underline the importance to keep consistency in level of penalties, as well as quality and legal certainty in this instrument as in all future instruments on substantive criminal law.

Some delegations entered scrutiny reservations on the general issue of level of penalties provided in this instrument. Most concerns seem to arise from the fact that some of the level of penalties proposed are not provided in the Council conclusions on the approach to apply regarding approximation of penalties (doc. 9141/02 DROIPEN 33 of 27 May 2002).

The approach taken in this Directive results from the up to twenty different offences provided in the Articles, which makes this instrument different to some extent from other directives in this field and which, in the eyes of the Presidency and most delegations, justifies a specific approach with regard to the level of penalties in order to reflect the differences in the seriousness of the various offences concerned.

In order to address the concerns of delegations which fear that this approach would create precedents for future instruments, the Presidency suggests adding the following recital :

“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. 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 Treaty¹. This Directive, because it contains an exceptionnally 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.”

With this recital in mind, CATS is invited to agree on the level of penalties provided in the Annex.

¹ **This sentence is taken from Council conclusions of 27 November 2009 on model provisions, guiding the Council's criminal law deliberations (doc.16542/2/09 JAI 868 DROIPEN 160).**

2. Article 13 on the possibility not to prosecute or not to punish victims of offences under this Directive:

Article 13 has been discussed on numerous occasions in the Working Party. In the text proposed in Annex, Article 13 is worded as follows:

“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 legislation on prostitution on child victims of offences referred to in Articles 4 [(2)], (3), [(4)] and (5);*
- (b) under national legislation on pornography on child victims of offences referred to in Article 5(7) insofar as they have been compelled to commit the acts concerned.”*

This provision is to be read with the following new recital:

“Secondary victimisation should be avoided for victims of offences referred to in this Directive. In Member States where prostitution or the appearance on pornography is punishable, under criminal law or other legislation, it should be possible not to prosecute or impose penalties under these legislations 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. This should only apply to child victims of these offences”

Both Article 13 and the recital make it clear that the exemption is limited to infringements of national legislation on prostitution and pornography. The scope is therefore much more limited than for the similar exemption discussed with regard to the Directive on Trafficking in Human Beings. The objective here is to avoid that child victims of sexual exploitation or child pornography will be victimized again by being prosecuted and fined themselves under national law on prostitution or pornography.

On the other hand, with this limitation in mind, almost all delegations can accept to extend this exemption not only to criminal offences but also to other infringements committed by the child victim, as long as they are strictly related to prostitution or pornography.

The main remaining issue is whether the consent of the child victim should be relevant or not (and, if yes, to what extent) to trigger this exemption.

It is understood that the objective is not to make it impossible to provide sanctions to be imposed on children who prostitute themselves autonomously. This should be left to the Member States and it is why Article 13 does not contain any reference to offences referred to in Article 4(6) which could take place without any third person exploiting the child.

It is also widely agreed that the exemption should cover at least cases where the child has been compelled to commit the infringement concerned. These cases are covered by the reference to Article 4(3) and (5) which refer to cases where the child victim was coerced, forced or threatened into prostitution or pornographic performances. With regard to child pornography, Article 13(b) clearly mentions this element of constraint. In the Working Party, two delegations, while needing more time to scrutinize the proposal, insisted on the need to limit this exemption to such cases.

However, most delegations support or can accept the proposal of the Presidency to also include cases where, although he has not been strictly speaking compelled to commit the infringement concerned, the child was influenced by a third person who caused, recruited, profited from or otherwise exploited the child to participate in prostitution or in pornographic performances. The exemption covers these cases through the reference to child victims of offences referred to in Article 4(2) and (4).

In the light of the above, CATS is invited to agree on Article 13 as described above and as contained in the Annex.

3. Other remaining issues:

There is already agreement on most of the text of Articles 1 to 13 of this directive. In order to reach a general approach on this part of the Directive in the JHA Council on 8-9 October 2010, delegations are invited to lift their remaining reservations on the text.

CATS is invited to submit the text of those Articles to COREPER and Council for general approach on this part of the Directive.

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. Council conclusions of April 2002 on the approach to apply regarding the approximation of penalties which indicates four levels of penalties should be kept in mind, in the light of the Lisbon Treaty¹. This Directive, because it contains an exceptionnally 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) The only existence of a (...) disability does not constitute automatically 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.

¹ This sentence is taken from Council conclusions of 27 November 2009 on model provisions, guiding the Council's criminal law deliberations (doc.16542/2/09 JAI 868 DROIPEN 160).

(6aa) The maximum term of imprisonment provided for in 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, taking into account their national law, accumulate the imprisonment terms provided for in national legislation to be applied to the offences concerning sexual abuse involved in those offences¹.

(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 accessing sites containing child pornography inadvertently. 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.

(7a) Member States should provide aggravating circumstances in their national legislation following the rules established by their legal system on aggravating circumstances. These circumstances should not be provided by Member States in national legislation when there is no relevancy taking into account the nature of the specific offence. The relevance of the various aggravating circumstances provided in this Directive should be evaluated at national level for each of the offences mentioned in this instrument².

¹ Inserted following a proposal from ES. COM and several delegations entered scrutiny reservations.

² Insertion following a request of FR and IT on what should be understood under the notion of '*relevant offences*'.

(7aa) Secondary victimisation should be avoided for victims of offences referred to in this Directive. In Member States where prostitution or the appearance on pornography is punishable, under criminal law or other legislation, it should be possible not to prosecute or impose penalties under these legislations 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. This should only apply to child victims of these offences¹.

(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.

...

¹ **Insertion following the modifications of Article 13.**

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 introduce common provisions to strengthen the prevention of these crimes and 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;
- (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 child¹ 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 purposes²;
- (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 person;

¹ HU is of the opinion that the wording “*appearing to be a child*” is too vague. It has to be noted that this notion is taken from the Framework Decision 2004/68/JHA.

² COM would prefer to bring back the following wording, contained in its original proposal: “*regardless of the actual existence of such child*”.

- (d) ‘pornographic performance’ shall mean the organised live exhibition, aimed at an audience¹, 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 3²

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 under national law to witness sexual activities, even without having to participate, is 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 under national law to witness sexual abuse, even without having to participate, is 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 under national law is punishable by a maximum term of imprisonment of at least five years.

¹ COM expressed doubts about the inclusion of the words “*organised*” and “*aimed at an audience*”.

² SE, DE, CZ, EE, LT, NL, DK insisted on the need to be consistent with the Council Conclusions of 2002 on level of penalties. SE and DE entered a general scrutiny reservation on Article 3 and COM entered a general scrutiny reservation on the level of penalties in Articles 3 to 6. COM and IT entered a scrutiny reservation on the differentiation based on the age of sexual consent.

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 is punishable by a maximum term of imprisonment of at least five¹ years if the child has not reached the age of sexual consent and of at least three years² 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 is 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 years³ of imprisonment if the child is over that age; or
 - (iii) use is made of coercion, force or threats is 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 is 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.

¹ LU entered a scrutiny reservation on the reduction to 5 years.

² IT and LU entered reservation on this level of penalty and prefer a level of penalty of five years.

³ IT and LU entered reservation on this level of penalty and prefer a level of penalty of five years.

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, recruiting, profiting from or otherwise exploiting a child to participate in pornographic performances 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, forcing or threatening a child to participate in pornographic performances is punishable by a maximum term of imprisonment of at least eight¹ 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 children is punishable by a maximum term of imprisonment of at least two years^{2 3}.
4. Causing, recruiting, profiting from or otherwise exploiting a child to participate in child prostitution is 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 age⁴.

¹ SI entered a reservation on the level of penalty of eight years.

² DE, SE, DK and AT proposed to reduce the level of penalty to one year.

³ DE and EE 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.

⁴ FI, AT, SE and EE wish to reduce the level of penalties to five and two years respectively. Previous discussions in the Working Party have however led to the conclusion that child prostitution is an offence of a more serious nature than pornographic performances. See also FD 2004/68/JHA which provides for higher penalties for child prostitution than for pornographic performances.

5. Coercing, forcing or threatening a child into child prostitution is 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.
- ¹6. Engaging in sexual activities with a child, where recourse is made to child prostitution is 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 age.

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.

¹ PT entered scrutiny reservation on this paragraph, the levels of penalties being too high.

¹6. 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 effective, proportionate and dissuasive criminal penalties.

Production of child pornography as referred to in Article 2(b)(i) and (ii) shall be punishable by a maximum term of imprisonment of at least five years if a child who has not reached the age of sexual consent is involved in it or of at least two years if the child is over that age².

8. Offences referred to in this Article do not cover 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 depiction³.

9. Offences referred to in paragraph 2 and 7 do not cover 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 for the dissemination of the material⁴.

¹ PL wishes to insert the possibility offered by Article 5(4) of the Framework Decision 2004/68/JHA which allows to other sanctions, including non-criminal sanctions or measures, for conducts relating to virtual child pornography.

² SI entered a scrutiny reservation on the level of penalty.

³ AT entered provisional scrutiny reservations on this drafting. COM entered a reservation on this paragraph.

⁴ COM, LT, DK and IT entered a scrutiny reservation on this paragraph which has been inserted following a request from DE and which is based on Article 3 (2) (c) of FD 2004/68/JHA.

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 under national law, 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) is punishable¹.

¹ COM entered a reservation on the limitation of the offences covered by this paragraph, in comparison to the original proposal.

Article 8¹

Consensual sexual activities between peers

1. The provisions of Article 3 (2) and (3) shall not 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 abuse².

- ³2. The provision of Article 4 (3a) shall not apply 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. The provisions of Article 5 (2) and (7) shall not 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.

¹ It is understood that the objective is to make it possible for Member States to decide not to apply exceptions provided for in this provision. The Legal Service of the Council confirmed that the current wording, together with recital 7, is sufficiently clear in that regard.

² FR entered a reservation on the reference to persons “*who are close in age and degree of psychological and physical development or maturity*”.

³ Proposal by UK. Several delegations entered scrutiny reservation, while SE can support this proposal.

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, be¹ regarded as aggravating circumstances, in relation to the relevant offences referred to in Articles 3 to 7 :
 - (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/JHA²;
 - (f) the offender has previously been convicted of offences of the same nature³;
 - (g) the offender has deliberately or by recklessness endangered the life of the child⁴;
 - (h) the offence involved serious violence or caused serious harm to the child.

2. (...)

[Article 10

*Disqualification arising from convictions]*⁵

¹ COM and LU entered a reservation on the inclusion of a reference to national law. Many delegations expressed however support for this new wording. The flexibility provided here is unavoidable because of the number of different offences provided in the directive and the resulting decision approved in the group to avoid linking each aggravating circumstance to specific offences and to specific level of penalties.

² OJ L 300, 11.11.2008, p. 42.

³ PT and UK wish to delete this circumstance which refers to the offender and not to the gravity of the offence. However, this circumstance is provided for in Article 28 (g) of the Lanzarote Convention.

⁴ COM entered a reservation on the limitations brought with the words “*deliberately or by recklessness*”. CZ wishes to replace ‘*endangered the life*’ by ‘*caused the death*’.

⁵ This Article 10 is not part of the articles which are submitted to CATS, Coreper and Council for a general approach.

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 benefit¹ 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 person².

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, inciters or accessories in the offences referred to in Articles 3 to 7.

¹ AT wished to add here “*or in violation of a duty of the legal person*”.

² AT wished to add at the end of the paragraph “*or in violation of a duty of that legal person*”. UK lodged a scrutiny reservation on paragraph 2 of the Article.

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 13¹

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 penalties²:

- (c) under national legislation on prostitution on child victims of offences referred to in Articles 4 [(2)], (3), [(4)] and (5)³;
- (d) under national legislation 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 To be read with the new recital (7aa).

² This notion of “penalties” covers penalties of administrative and criminal nature (see doc. 14166/04 ADD1 REV1 of 12 November 2004). CZ wishes to limit this Article only to criminal offences.

³ FR and DE insist to limit this exemption to acts that the child has been compelled to commit. See the cover note for further explanation.