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NOTE

From:	Presidency
To:	Delegations
Subject:	Proposal for a Directive on combating sexual abuse and sexual exploitation of children and child sexual abuse material (recast) – Revised version of some of the Presidency's compromise proposals

Delegations will find below a revised version of some of the articles included in the ST 6391/26 (changes are indicated in yellow).

Article 3 - Offences concerning child sexual abuse

Article 3

*Offences concerning **child** sexual abuse*

1. Member States shall take the necessary measures to ensure that the **intentional** conduct referred to in paragraphs 2 to 8 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 […] year.

3. 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 […] years.

3a. Where the child has reached the age of sexual consent, the conduct referred to in the ~~first subparagraph~~ paragraph 3 shall be punishable by a maximum term of imprisonment of at least […] years, where:

(a) abuse is made of a recognised position of trust, authority or influence over the child; or

(b) abuse is made of a particularly vulnerable situation of the child, in particular because of a physical, mental, intellectual or sensory disability or a situation of dependence; or

(c) use is made of coercion, force or threats.

4. Engaging in sexual activities, **other than those set out in paragraph 6,** with a child who has not reached the age of sexual consent or causing a child **who has not reached the age of sexual consent** to engage in sexual activities with ~~another~~ **a third person[1] or with themselves** shall be punishable by a maximum term of imprisonment of at least […] years.

4a. Engaging in sexual activities, other than those set out in paragraph 7, with a child who has reached the age of sexual consent and does not consent to the act, or causing a child who has ~~not~~ reached the age of sexual consent to engage in non-consensual sexual activities with ~~another~~ a third person or with themselves, shall be punishable by a maximum term of imprisonment of at least […] years.

5. Engaging in sexual activities with a child, **or causing a child to engage in sexual activities with ~~another~~ a third person or with themselves, [as provided for in paragraph 4 and 4a],** where:

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[1] As suggested by one delegation, the Presidency considers the change from "with another person" to "a third person" brings clarity to the text.

(a) 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 […] years if the child has not reached the age of sexual consent, and of at least […] years of imprisonment, if the child is over that age; or

(b) abuse is made of a particularly vulnerable situation of the child, in particular because of a ~~mental or physical~~ disability or a situation of dependence, shall be punishable by a maximum term of imprisonment of at least […] years if the child has not reached the age of sexual consent, and of at least […] years of imprisonment if the child is over that age; or

(c) use is made of coercion, force or threats shall be punishable by a maximum term of imprisonment of at least […] years if the child has not reached the age of sexual consent, and of at least […] years of imprisonment if the child is over that age.

~~6. 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 […] years if the child has not reached the age of sexual consent, and of at least […] years of imprisonment if the child is over that age~~.

6. The following intentional conduct shall be punishable by a maximum term of imprisonment of at least […] years:

(a) engaging with a child ~~below~~ **who has not reached** the age of sexual consent in ~~any act of~~ **sexual activities entailing** vaginal, **or** anal ~~or oral~~ **penetration** ~~of a sexual nature,~~ **with any bodily part or object, or oral penetration with a genital bodily part**;

(b) causing a child ~~below~~ **who has not reached** the age of sexual consent to engage with ~~another~~ **a third** person **or with themselves** in ~~any act of~~ **sexual activities entailing** vaginal, **or** anal ~~or oral~~ **penetration** ~~of a sexual nature,~~ **with any bodily part or object, or oral penetration with a genital bodily part**.

~~7. Where the child is above the age of sexual consent and does not consent to the act, the conduct referred to in paragraph 7 shall be punishable by a maximum term of imprisonment of at least […] years~~.

The following intentional conduct shall be punishable by a maximum term of imprisonment of at least […] years:

(a) engaging with a child who has reached the age of sexual consent and does not consent to sexual activities in sexual activities entailing vaginal, or anal penetration, with any bodily part or object; or oral penetration with a genital bodily part;

(b) causing a child who has reached the age of sexual consent and does not consent to sexual activities, to engage with a third person or with themselves in sexual activities entailing vaginal or anal penetration with any bodily part or object, or oral penetration with a genital body part.

~~**6b**~~

[9. Notion of consent]

Recital 13:

(13) 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. **For the purposes of this Directive, the notion of disability should be understood broadly, including mental, intellectual, sensory or physical impairments.**

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Article 6a – Sexual extortion

Article 6a – Sexual extortion

Member States shall take the necessary measures to ensure that intentionally threatening a child with the disclosure of child sexual abuse material depicting that child or a child having a close personal relationship with that child to one or more persons in order to obtain money, further child sexual abuse material, or any other form of remuneration or consideration in exchange, shall be punishable by a maximum term of imprisonment of at least […] years if the child has not reached the age of sexual consent, and of at least […] years of imprisonment, if the child is over that age.

Article 7 - Solicitation of livestreaming of child sexual abuse or sexual exploitation

Article 7

*Solicitation **of livestreaming** of **child** sexual abuse **or sexual exploitation***

Member States shall take the necessary measures to ensure that intentionally promising or giving any person money, or other form of remuneration or consideration, ~~to cause them to commit~~ **for the purpose of accessing, or making accessible to** ~~another~~ **a third person, a livestream of the activities described in** any of the offences listed in **[**Article 3(4), **(4a)**, (5), (6), **and** (7), ~~and (8)~~**],** **[**Article 4(2) and (3) and Article 5(6)**]** is punishable by a maximum term of imprisonment of at least […] years.

Article 8a – Travelling for the purpose of sexual abuse and sexual exploitation of children and Article 11 – Aggravating circumstances

The Parliament is strongly insisting on article 8a and already flagged that a discretionary clause would not be sufficient to strike a compromise (bearing in mind that article 5b remains in bracket in the compromise package). Given the importance of article 11 within the Council mandate, the Presidency is exploring possible compromise packages for both articles. Delegations will find below several options for compromise on article 8a and article 11.

Option A:

The first option would combine article 11, safeguarding "one or more" in the chapeau, accompanied by a non-regression clause (new wording compared to ST 6391/26), and article 8a with a limited scope (only applying to articles 3 to 5, and not to articles 3 to 8b as initially proposed by the Parliament).

Article 11

Aggravating circumstances

[~~In so far as~~ **To the extent that** the following circumstances do not already form part of the constituent elements of the offences referred to in Articles 3 to 9 Member States shall take the necessary measures to ensure that**, in relation to the relevant criminal offences referred to in those Articles, one or more of** the following circumstances ~~may~~ **can**, in accordance with the relevant provisions of national law, be regarded as aggravating circumstances~~, in relation to the relevant offences referred to in Articles 3 to 9~~:

(a) the offence was committed against a child in a particularly vulnerable situation, such as a child with a ~~mental or physical~~ disability, in a situation of dependence or in a state of physical or mental incapacity;

(b) the offence was committed by a member of the child's family, a person cohabiting with the child or a person who has abused a recognised position of trust, authority or influence on the child;

(c) the offence was committed by several persons acting together;

(d) the offence was committed within the framework of a criminal organisation within the meaning of Council Framework Decision 2008/841/JHA

(e) the offender has previously been convicted of offences of the same nature;

(f) the offender has deliberately or recklessly endangered the life of the child;

(g) the offence involved serious violence or caused serious harm to the child;

(h) the offence was committed repeatedly;

(ha) the offender posed as a minor or a peer;

(i) the offence was committed with the use or threat of using a weapon; or

(j) the offence was committed by causing **intentionally taking advantage of** the victim to take, use or be affected by drugs, alcohol or other intoxicating substances**'s intoxicated state**.

(ja) the offence was motivated by one or more of the grounds protected under Article 21 of the Charter of Fundamental Rights of the European Union.

New Article 11b - Non-regression clause

The implementation of this Article shall not constitute grounds for reducing the circumstances to be regarded as aggravating circumstances in accordance with the relevant provision of national law in force at the moment of the entry into force of this Directive.

[Article 8a

Travelling for the purpose of sexual abuse and sexual exploitation of children

Member States shall take the necessary measures to ensure that travelling to a country other than that Member States for the purpose of committing, or contributing to the commission of, any of the offences referred to in Article 3 to 5 is punishable as a criminal act when committed intentionally.]

Option B:

The second option would entail that article 11 includes two lists of aggravating circumstances (mandatory and non-mandatory like the previous option B in the previous Presidency note), while article 8a would be deleted.

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Option C:

In the third option, the Presidency would keep article 8a between brackets since Europol, according to the Parliament, can share evidence and arguments supporting the need to criminalise such offence. Against this backdrop, the Presidency will invite Europol to present their data on this point at the next COPEN meeting if delegations agree. In case this is the preferred option for delegations, the Parliament will request a political commitment that the article will be carefully examined at a later stage.

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