



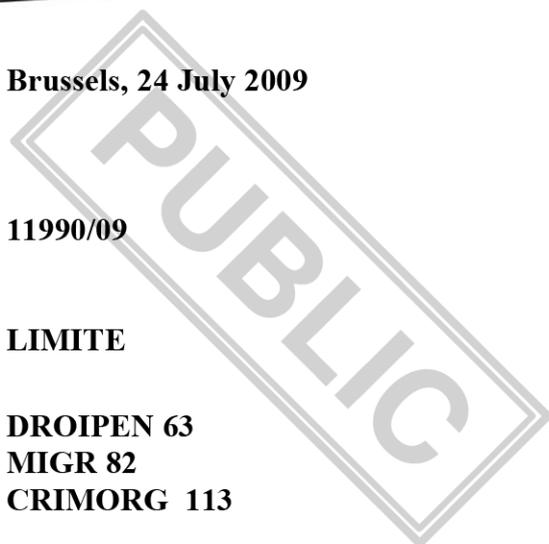
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Subject : Compendium of comments by Member States on the proposal for a Council  
Framework Decision on combating the sexual abuse, sexual exploitation of  
children and child pornography, repealing Framework Decision 2004/68/JHA

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Delegations will find attached a compendium of the comments by Member States on the text of the above mentioned proposal for a Framework Decision.

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## AUSTRIA and GERMANY

Proposal of the delegations of Austria and Germany concerning Article 7. 1 - 3 (Penalties and aggravating circumstances) – Proposal for a council framework decision on combating the sexual abuse, sexual exploitation of children and child pornography repealing Framework decision 2004/68/JHA (8150/09 REV DROIPEN 16)

### *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 accessory ship, 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.

## Czech Republic

**Written observations of the Czech Republic (CZ) on the Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child-pornography, repealing Framework Decision 2004/68/JHA**

3 June 2009, Ministry of Justice of the Czech Republic

The Czech Republic would like to make the following preliminary comments on the Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child-pornography, repealing Framework Decision 2004/68/JHA.

Definitions. Art. 1 Lit. b) child pornography. The Czech Republic considers the term “non-existing child” rather misleading. During the initial meeting of DROIPEN the COM explained that the provision should cover situations where an initial misuse of a real child was behind the criminal offence and is not intended to cover paintings, drawings or computer visualisations (comics, etc). To avoid any ambiguity, we propose to redraft the definition of the child pornography in a sense that it covers realistic images of a child, without reference to a non-existent child. The definition would read as follows:

*“child pornography” shall mean*  
*any material that visually depicts a child, or any person appearing to be a child, or realistic images of a child [regardless its actual existence], engaged in real or simulated sexually explicit conduct;*  
*or*  
*any depiction for primarily sexual purposes of the sexual organs of a child, or of any person appearing to be a child, or for those purposes of realistic images of the sexual organs of a child [regardless its actual existence];*

As regards Lit. d) pornographic performances, we would like to suggest the specification of the definition, so that it explicitly refers to live performances. The definition would read: “(...) *shall mean the live exhibition in front of a live audience (...).*”

The Czech Republic may also support the idea behind the IT proposal for inserting: “*an audience which views it via remote connection*” into Lit. d), which would clarify that also the web-cam broadcastings should be covered.

2. Penalties for natural persons. As regards the Article 7, the Czech Republic considers as necessary a more appropriate differentiation between criminal penalties required for the listed criminal offences with view to the gravity and seriousness of the particular offences. Accordingly, the circumstances listed in the proposal, which shall qualify for higher penalties, should be linked more precisely to the particular offences.

Moreover, with respect to proposed levels of the penalties, the Czech Republic is of the view that the Council conclusions of 24 -25 April 2002 on the approach to apply regarding approximation of penalties (9141/02 DROIPEN 33) should be taken into account. The level of sanctions should be construed in such a way, that it leaves certain flexibility to the Members State to maintain a coherence of their national penal systems.

After the preliminary examination, the Czech Republic may support the criterion of use of coercion for differentiation of levels of penalties as suggested in the drafting proposal of Austria and Germany. Furthermore, to distinguish between more and less grievous offences, we suggest to consider whether the criminal offence is pointed directly or indirectly against a child.

3. Article 8 Para 4. As regards the mutual recognition of disqualifications arising from convictions, in the view of the Czech Republic it would be more appropriate to deal with this issue in a separate legal instrument, since the principle of mutual recognition of decisions requires a detailed set of rules and conditions for its application (e.g. such as the type and nature of decisions to which it should apply, reasons for refusal of the recognition, rules for recognition and enforcement etc.)

However, as the first step, it should be reconsidered, whether the Member States are prepared to go further than in 2007, when the discussions on the initiative of the Kingdom of Belgium with a view to the adoption by the Council of a Framework Decision on the recognition and enforcement in the European Union of prohibitions arising from convictions for sexual offences committed against children failed.

4. Non-punishment clause. The Czech Republic understands and generally welcomes the aim of the proposed provision; however, it needs to be drafted very carefully, so that it does not allow for an unwanted general decriminalization of the persons mentioned.

Therefore, with respect to the text proposed by the Commission, from our point of view further re-drafting and clarifications would be needed. First of all, the Czech Republic would suggest the inclusion of the phrase “*in accordance with the basic principles of its legal system*” in conformity with Article 26 of the Convention on combating trafficking in human beings. Secondly, it should be clarified whether the term “unlawful activity” should cover all unlawful activities or should apply only to criminal activities. Finally, we would like to limit scope of the Article 11 to the cases, in which the child victim has been compelled to an unlawful/criminal activity.

5. Jurisdiction. The Czech Republic may accept the broadening of the scope of jurisdiction even to extraterritorial cases, as provided for by the current proposal, when the serious crimes of sexual abuse and exploitation of children are at stake, however, subject to the following comments.

As regards the concept of habitual residence, Czech Republic is of the opinion that further specification of the term “*habitual residence*” both in letter b) and c) of the para. 1 is needed. The Czech Republic has some concerns that it may be difficult to apply this principle in practice with view to determining whether the person habitually resides in the respective Member State. If the concept of habitual residence is kept, we suggest to insert at least a reference to stateless persons who has his or her habitual residence in its territory, which is a concept adopted in Article 31(1) (d) of the Convention on combating trafficking in human beings.

6. Risk Assessment. The Czech Republic is of the opinion that it needs to be clarified at what stage of the criminal proceedings the risk assessment shall be undertaken. Furthermore, we would like to stress that according to the criminal law system in the Czech Republic, there is no mechanism which would allow for imposition of a duty to be subject to the risk assessment and order any additional restrictions or penalties, at the time the penalty or protective measure (i.e. safeguarding detention or protective treatment) have been duly executed by the person convicted.

Therefore, in our opinion the risk assessment envisaged in the proposal should be linked either as an obligatory step to the phase of imposition of sanctions, including their enforcement, or may serve as a voluntary measure directly linked to the intervention programs. However, these two cases shall be clarified and separated so that it is unequivocal, to whom and how they shall be applied.

Finally, with view to the proportionality principle it should be considered whether, in case of obligatory risk assessment, this should apply to perpetrators of any criminal offence listed in the proposal or only of the most serious ones.

7. Intervention programs. This provision is very broadly drafted and further drafting is needed. The intervention programs need to be specified, namely with view to the persons to which they should be applicable, with view to their voluntary or mandatory basis etc.

Moreover, the relevant Article should leave more flexibility to the Member States with respect to the intervention programs, namely taking into account the financial feasibility of every single Member State.

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## FINLAND

The Finnish delegation wishes to make the following preliminary and non-exhaustive proposals to amend the text:

### Article 1

**Article 1 paragraph 1 letter (b) number i) and letter (d) number i)** should be changed so that the word ‘simulated’ would be replaced by a word ‘realistic’.

### Article 2:

**Article 2 paragraph 1 letter (e)** should be changed so that it applies only to a child who has not reached the age of sexual consent under national law.

The word ‘simulated’ should be replaced by a word ‘realistic’.

### Article 4

The Finnish delegation remarks that the option for reservations that is included in the Lanzarote Convention (CETS 201) article 20 paragraph 4 is not included regarding Council’s proposal **article 4 letter (e)**.

The Finnish delegation proposes that a new paragraph 2 would be added into article 4:

“Each Member State may reserve the right not to apply, in whole or in part, paragraph 1 (e).”

### Article 6

An attempt may perhaps not be relevant to all the offences referred to in **article 6 paragraph 2**. There should be an option for the Member States to reserve the right not to apply the paragraph in relation to certain offences. The reason for this is that there should be some flexibility for the Member States to adjust the provisions and the sanctions to fit better their system of criminal laws.

**Article 6 paragraph 3** should be deleted. In most cases these sorts of acts would already be covered by the provisions concerning aiding and abetting. Also the suggested provisions are too indefinite considering the general requirements for criminal provisions.

If the offences referred to in paragraph 3 will be included in the Framework Decision in spite of what has been said above, they should be moved to an article of its own. The reason for this is that the heading of the article suggests that the article is meant to be about general questions related to criminal law (such as aiding and abetting and attempt) and paragraph 3 includes provisions for individual offences.

In any case, term ‘preparatory offences’ should be removed from the heading because it suggests that the criminal liability would be extended to cover preparatory stages of the offence that take place before an act is considered an attempt.

### **Article 7**

The Finnish delegation supports the idea behind the proposal for paragraphs 1 and 2 of the delegations of Austria and Germany. However it should be considered carefully which offences should be in each category in terms of maximum penalties. That is, the seriousness of different offences perhaps still needs to be re-evaluated.

The Finnish delegation suggests that paragraph 3 should be formed in a similar manner with the Lanzarote Convention article 28 which includes aggravating circumstances:

“Each Member State shall take the necessary legislative or other measures to ensure that the following circumstances, in so far as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of internal law, be taken into consideration as aggravating circumstances in the determination of the sanctions in relation to the offences established in accordance with this Framework Decision:

- (a) the offence seriously damaged the physical or mental health of the victim;
- (b) the offence was preceded or accompanied by acts of torture or serious violence;

- (c) the offence was committed against a particularly vulnerable victim;
- (d) the offence was committed by a member of the family, a person cohabiting with the child or a person having abused his or her authority;
- (e) the offence was committed by several people acting together;
- (f) the offence was committed within the framework of a criminal organisation;
- (g) the perpetrator has previously been convicted of offences of the same nature.”

The motivation for this is that there needs to be some flexibility for the Member States to adjust the provisions and the sanctions to fit their criminal law systems. The Member States should be able to maintain some uniformity in their own criminal law systems and between the sanctions imposed for child sexual abuse and sexual exploitation and the sanctions imposed for other crimes. Furthermore, the Commission’s proposal does not seem to be in line with the Council’s conclusions on the approximation of penalties given in 2002.

The Finnish delegation also wants to point out that the Commission’s proposal is problematic because it does not differentiate between an attempt, aiding and abetting and a committed crime.

### **Article 8**

The reference to article 16 should be removed from **paragraph 1**.

**Paragraphs 2-4** should be removed completely for the reasons brought out in the Working Party meeting on 12 and 13 May 2009.

### **Article 12**

In **article 12 paragraph 2** it is said that the Member States shall enable the prosecution of any of the offences referred to in the Framework Decision for a sufficient period of time after the victim has reached the age of majority. The Lanzarote Convention includes a similar provision but it refers only to certain offences. The period of limitation should be in relation to the seriousness of the offences. Therefore the Finnish delegation suggests that the article should be changed in a way that it is limited to certain offences.

The mention about covert operations should be removed from the **article 12 paragraph 5**. The need for such measures should be evaluated individually when it comes to different types of offences. In Finland covert operations are considered to be exceptional investigation measures and to be used only with the most serious offences. It is also unknown to us if ‘covert operations’ are similarly defined in all Member States.

### **Article 13**

**Paragraph 5** should be removed from the article. There already exist regulation on this topic and it is unnecessary to have overlapping legal provisions on the same subject.

### **Article 14 and 15**

It should be considered if it is necessary to have specific provisions on these topics or would it be better to have only one framework decision that covers victims of all types of offences.

### **Article 15**

**Paragraph 3** should be changed in a way that the part “the judge may order” would be moved to the end of the first two lines in the paragraph:

“Each member state shall take the necessary measures to ensure, in criminal court proceedings relating to any on the offences referred to in articles 2 to 6, that the judge may order:

hearing to take place without the presence of the public;

the child victim to be heard in the courtroom without being present, notably through the use of appropriate communication technologies.”

The reason for this suggestion is that the judge is in any case the one who makes the decision on procedural issues. The suggested form is also more appropriate for legislative formulation.

## **Article 16**

**Article 16** should be changed in a way that it corresponds with the Lanzarote Convention article 15 paragraph 3:

“Each Member State shall provide, in accordance with its internal law, for an assessment of the dangerousness and possible risks of repetition of the offences established in accordance with this Framework Decision with the aim of identifying appropriate programmes or measures.”

The reason for this is that it seems to be unclear what exactly is meant by the article in the Commission’s proposal. It seems that it would be required to assess all persons convicted of any of the offences referred to in the Framework Decision. This does not seem practical or appropriate. Also it is unclear how and when this assessment would be carried out.

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## GERMANY

The German Delegation would like to express their thanks to the Czech Presidency for the opportunity of submitting written comments and making proposals for amendments with regard to the Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child-pornography, repealing Framework Decision 2004/68/JHA.

The German Delegation should like to make the following comments and proposals for amendment in relation to Articles 12, 13 and 16 of the current Draft (discussions concerning Article 8 appear to be very much in a state of flux so that it appears premature to make a concrete proposal regarding the provision at this stage. We do, however, intend to state our position with regard to this provision at a later date).

We should like to emphasize that in our opinion the following suggestions already represent the upper limit as regards the obligatory requirements which the Framework Decision should contain, if at all. This applies in particular insofar as the draft Framework Decision aims once again to go beyond the already very far-reaching provisions of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which was concluded as recently as 2007 after long and intensive negotiations.

1. We propose the following wording for Article 12 para. 2 (changes underlined):

“2. Each Member State shall take the necessary measures to enable prosecution of any of the offences referred to in Article 2, Articles 3 letters a, b and c, Article 5 and Articles 6 para. 1 and 2 for a sufficient period of time after the victim has reached the age of majority and which is commensurate with the gravity of the offence concerned.“

## Reasons:

The provision was to be brought into line with the provisions of Article 33 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ("CoE-Convention"). It exceeds this, however, to a reasonable degree by including Article 2 para. 1 letters c, d and e and Articles 5 and 6. In the CoE Convention the provision was limited after a long and intensive debate and for good reason (in particular having regard to proportionality) to certain cases of severe sexual abuse (cf. also Explanatory Report No. 232). In particular, offences in connection with child pornography were excluded, there being no sufficient justification here for including them. In addition to considerations with regard to proportionality, the purpose of the limitation provisions is also significant here. This is intended to ensure that a crime does not fail to be prosecuted merely because the minor victim was not in a position to report the offence. This shall apply, in particular, when perpetrator and victim are in a relationship of proximity or dependency, making it difficult for the child to report the crime before it has been extricated from the relationship. There is, however, no such relationship between the disseminator or possessor of child pornography or between the person viewing child pornography and the child depicted. Most importantly, discovery of such offences does not generally depend upon the child reporting a criminal offence. Rather, the pictures themselves provide the crucial focus of investigations. There is, additionally, a practical aspect: frequently, it will not be possible to determine the exact age of the child depicted. Consequently, it will not be possible to determine when the child will reach the age of majority. Finally, Article 6 para. 3 makes no reference at all to any concrete victim of the preparatory acts referred to therein, in respect of whom the question of such victim having reached the age of majority might be an issue, as in this case there has not been any abuse nor even any attempted abuse. These provisions, too, must therefore be exempted.

2. Germany proposes amending Article 13 as follows:

(a) The clause "or the offender has his or her habitual residence in its territory" in paragraph 1 letter b and the clause "or a person who has his or her habitual residence in its territory" in paragraph 1 letter c should be deleted.

(b) The possibility of a reservation should be included in paragraph 1 (d) in line with Article 8 para. 2 of Council Framework Decision 2004/68/JHA.

(c) Paragraph 3 shall be amended to read as follows:

"For the prosecution of any of the offences referred to in Article 2, Article 3 letters a, b and c, and Article 4 letter a, committed outside the territory of the State concerned, as regards paragraph 1 letter b, each Member State 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. "

(d) Paragraph 4 should be deleted or replaced by a reference to the new Council Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.

Reasons:

Article 13 para. 1 letters b and c go too far if they also include offences committed abroad by or against foreigners who have their habitual residence in a country's territory. These requirements not only go way beyond Article 25 of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (to cover foreign perpetrators who have their habitual residence within its territory Article 25 para. 3 CoE-Convention allows the possibility of a reservation of rights; and with regard to foreign victims who have their habitual residence in its territory Article 25 para. 2 of the Convention expressly contains no obligatory but an "endeavour" provision, as expressly clarified in marginal note 170 of the Explanatory Report), they are not objectively justified either. Active and passive nationality are recognised principles of international criminal law for establishing jurisdiction, but the same does not apply to the principles of active and passive "domicile". A group of experts recently put forward this opinion in the "AU-EU Expert Report on the Principle of Universal Jurisdiction" of 16 April 2009 (Council Document No. 8672/09 JUSTPEN 7; nos. 8 and 12). In addition, when asked to do so the Commission was unable to demonstrate any concrete need for this extensive provision. Generally speaking, the EU legislature should take care not to give the false impression, by constantly extending the Member States' jurisdiction that they could impose their standards of criminal prosecution the world over.

This is not possible in practice, especially given the frequent problems in providing evidence that are associated with the prosecution of offences committed abroad. This was also emphasised in the Expert Report mentioned in the above (no. 25). In the long term a credibility problem will arise if jurisdiction is extended ever further to offences committed abroad without it actually being possible to exercise that jurisdiction.

The same applies to Article 13 para.1 letter d (offence was committed for the benefit of a legal person established in the territory of that Member State). Why - deviating from the general standard - the possibility of a reservation is not to be provided here in particular is not apparent, especially since the Commission was here also unable to demonstrate a concrete need for such an extension. The - customary - possibility of a reservation should be introduced here too.

The provisions of Article 13 para. 3 were to be brought into line with the provisions of Article 25 para. 4 of the CoE-Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. There it was decided after long and intensive negotiations and with good reason, that only in the severest cases of crimes would one consciously distance oneself from the central requirement of international jurisdiction that the acts be a criminal offence at the place where they are performed (as expressly stated in marginal note 171 of the Explanatory Report). The provision thus focuses on such offences for which the commission abroad by nationals (so-called sex tourism) is at the very least not atypical, which, on the other hand does not apply, for instance to the distribution, acquisition and possession of child pornography. Such considerations continue to apply unchanged and continue to be correct. This is all the more true as here, too, the Commission has not yet demonstrated any concrete need for such an extensive provision. Germany, however, is prepared (in order to achieve “added value” by comparison to the CoE-Convention, to waive its right of reservation contained in Article 25 para. 5 CoE-Convention for this area. In this way, a uniform implementation of these standards could be guaranteed at EU level.

4). Germany proposes the following wording for Article 16 (changes underlined):

„Article 16

### **Risk Assessment**

1. Each Member State shall take the necessary measures to ensure that persons finally convicted to a sentence of imprisonment in respect of offences referred to in Article 2, Articles 3 letters a, b and c, and Article 4 letter a are subject during imprisonment, to an assessment of the danger presented by the person and possible risks of repetition of any such offences with the aim of identifying suitable intervention programmes or measures while in prison.

2. The assessment referred to in paragraph 1 shall be periodically reviewed to take account of changes in circumstances that have an impact on the danger and possible risks.”

Reasons:

A comprehensive obligation to carry out a risk assessment without exceptions appears to be justified only in cases of particularly grave sexually motivated crimes, namely crimes pursuant to Articles 2, Articles 3 letters a to c, and Article 4 letter a. Particularly grave offences in accordance with the provisions mentioned above are additionally characterised by the fact that an enforceable prison sentence was imposed in respect thereof. The provision requires restricting, however, from a temporal perspective, too. A suitable point in time is the time of enforcement of the prison sentence. A further argument in favour thereof is that a continuous and regular review of the condition of the convicted person is only possible in the context of a prison sentence.

## **IRELAND**

As was stated at the Working Party meeting on Substantive Criminal Law on 20-21 April 2009, the proposal is subject to both a Parliamentary Scrutiny Reservation and a General Scrutiny Reservation.

Ireland reserves the right to submit further observations, if this is deemed necessary, following more detailed examination of the proposal.

### ***Article 2 – Offences concerning sexual abuse***

We view paragraph (2) as being too broad in its scope – it is perfectly possible for older children to sexually exploit younger children. The paragraph needs to be qualified so that where a person under 18 sexually exploits another person under 18, then an offence takes place. Perhaps the provision of a 2 or 3 year age gap would partially meet the concerns although provision should also be made for an age below which any sexual activity between the older child and the younger child would be an offence.

### ***Article 9 – Liability of legal persons***

Consideration should be given to including State or Public bodies e.g. any statutory body charged with promoting and protecting the welfare of children.

### ***Article 11 - Non application of sanctions to victims***

As currently worded, the article could be viewed as interfering with the independence of the Director of Public Prosecutions. It would be appreciated if the text could be amended by the addition of the reference to providing for the possibility of non-prosecution “in accordance with the basic principles of the legal systems of Member States.”

## ***Article 12 – Investigation and prosecution***

It is difficult to see how it would be possible for a prosecution to commence for certain offences without a victim statement. Perhaps the text could be amended at 12(1) to read ‘*Each Member State shall allow for the possibility...*’

It is noted that the legal basis for this Framework Decision derives from Articles 29, 31(1)(e) and 34(2)(b) of the Treaty of the European Union. Article 29 provides for offences against children. As part of the objective to be achieved, Article 31(1)(e) provides for adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. There may be a *vires* issue in relation to relying on Article 31(1)(e) as a legal basis in circumstances where rules under this sub article do not provide for criminal acts relating to children.

## ***Article 14 - Protection and assistance to victims***

### ***Article 15 – Participation of child victims in criminal investigations and proceedings***

It is suggested that, with the exception of Article 14(1), the remainder of Article 14 and Article 15 be incorporated as standard provisions in a revised Framework Decision on the standing of victims in criminal proceedings for all child victims of crime including victims of sexual abuse. The revision of the 2001 Framework Decision on standing of victims could have a separate article on children as well as vulnerable victims. This would involve standard provisions for all victims in one instrument. These provisions could also be accessed by the 2009 Framework Decision on human trafficking. This would involve negotiations on contentious points in the working group on the revision of the 2001 Framework Decision on the standing of victims in criminal proceedings.

In this scenario, Article 14(1) – a technical provision referring only to Article 14 – would not be incorporated into the revision of the 2001 Framework Decision on the standing of victims in criminal proceedings. Also, there might be resource and other considerations in relation to 14(3) – individual assessment for each child prior to taking measures to assist recovery – if applied to all

child victims. It could either be left in the revised Framework Decision on sexual abuse, sexual exploitation and child pornography of 2009 or be a subset in the new children article for especially vulnerable child victims in the revised 2001 Framework Decision on the standing of victims in criminal proceedings. Then, children subject to sexual abuse and sexual exploitation could be defined as vulnerable for the purposes of the new Framework Decision on the standing of victims in criminal proceedings, in the 2009 Framework Decision on sexual abuse and sexual exploitation of children. This would be a version of s. 9(1) of the Framework Decision on Human Trafficking, which defines trafficked children as vulnerable for the purposes of three articles in the Framework Decision on the standing of victims in criminal proceedings.

Alternatively, if Article 14 and 15 are to remain in the current Framework Decision, the following comment applies to Article 14(4).

Under the common law system, the State takes on the role of prosecutor. There are two parties, the prosecution and the defence. The defence has free legal representation. When it comes to the Complainant, that person cannot have separate legal representation in court because it could entail the defendant not getting a fair trial if the system provided for having two set of barristers against one in front of a jury. The only case where separate legal representation is provided for can be found in section 34 of the Sex Offenders Act 2001. This provides for separate legal representation for complainants in rape and serious sexual assault cases where application is made to the court by the defence seeking leave to adduce evidence or cross-examine about the Complainant's past sexual experience with any person. Such applications are made in the absence of the jury.

We could not go further than that – a child could not have legal representation separate from the prosecution.

Article 15(2) proposes that the interviews of all child victims of sexual offences should be recorded. We believe that the recording of such interviews should be restricted to children under 14 years of age.

### *Article 17 – Intervention programmes or measures*

This Article has resource implications for the Member States. We believe Member States should have more flexibility in deciding what to fund and what not to fund. We support the view that “shall” be changed to “may” in order to provide such flexibility.

### *Article 18 – Blocking access to websites containing child pornography*

As currently worded, the proposal would appear to impose a mandatory obligation on all Member States to introduce a system of internet filtering for illegal child pornography content. We note that several Member States do not have in place any system of internet content filtering. Several Member States which do have content filtering in place do so on the basis of a voluntary approach by individual Internet Service Providers (ISP).

The introduction of a mandatory blocking system would have significant financial cost implications, both for the ISPs themselves in operating the system and for the police authorities in managing and resourcing any blocklist. Also ISPs would most likely demand indemnity from the State in the event of the introduction of such a system to protect them from litigation in cases where legitimate websites were blocked due to such a blocking system. Having regard to international experience, there is every possibility that legitimate websites would be blocked accidentally and this could give rise to legal claims against the State.

Further, it is unlikely that the two year timeline for implementation of the FD would be sufficient for the necessary legislative measures likely to be required to ensure implementation.

There is also a very real ongoing international debate about how effective blocking systems really are – most blocking systems address only standard webpages and it is our information that most of the most objectionable material is transmitted via “peer to peer” filesharing systems, which are technically much more difficult to block. It is likely that if blocking is introduced, most illegal

material will migrate to filesharing systems and will be even more difficult to detect. It is generally accepted that, at best, blocking systems will only prevent inadvertent access by internet users to illegal content.

In the circumstances, it would be preferable if Article 18 was reworded to ensure that Member States are given the flexibility to determine their own approaches to the issue of blocking and to ensure that voluntary self-regulation systems are allowed as an alternative approach. A suggested rewording of the Article is as follows:

***“Article 18***

*Subject to its own legal system, each Member State may take measures, which it considers appropriate and proportionate, to enable the competent judicial or police authorities to order or similarly obtain the blocking of access by internet users to internet pages containing or disseminating child pornography, subject to adequate safeguards to ensure that blocking is limited to what is necessary, that users are informed of the reason for the blocking and that content providers are informed of the possibility of challenging it...Alternatively, Member States may pursue voluntary self-regulatory approaches to the issue of blocking illegal child pornography content.”*

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## ITALY

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(1)(e) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament<sup>1</sup>,

Whereas:

- (1) Sexual abuse and sexual exploitation of children, including child pornography, constitute serious violations of human rights and of the fundamental right of a child to a harmonious upbringing and development.
- (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 pornography<sup>2</sup> 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.
- (4) 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 Abuse are crucial steps in the process of enhancing international cooperation in this field.

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<sup>1</sup> OJ C [...], [...], p. [...].

<sup>2</sup> OJ L 13, 20.1.2004, p. 14.

- (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. Any measure to combat these offences should be carried out in the best interests of and respecting the rights of the child. Framework Decision 2004/68/JHA needs to be replaced by a new instrument providing such comprehensive legal framework to achieve that purpose.
- (6) Serious forms of child sexual abuse and sexual exploitation should be subject to effective, proportionate and dissuasive sanctions. This includes, in particular, new forms of sexual abuse and sexual exploitation facilitated by the use of information technologies. The definition of child pornography should also be clarified and brought closer to that contained in international instruments.
- (7) 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.
- (8) 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.
- (9) Child victims should have easy access to legal remedies and should not suffer for participating in criminal proceedings.
- (10) 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, and should have access to effective intervention programmes or measures on a voluntary basis.
- (11) 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.

(12) To combat child pornography, especially where the original materials are not located within the EU, mechanisms should be put in place to block access from the Union's territory to internet pages identified as containing or disseminating child pornography.

(13) In accordance with the principles of subsidiarity and proportionality, this Framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose.

(14) This Framework Decision respects fundamental rights and observes the principles recognised 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 Framework Decision seeks to ensure full respect for those rights. This Framework Decision does not intend to govern consensual sexual activities between minors.

HAS ADOPTED THIS FRAMEWORK DECISION:

#### Article 1

#### *Definitions*

For the purposes of this Framework Decision:

- (a) "child" shall mean any person below the age of 18 years;
- (b) "child pornography" shall mean<sup>1</sup>

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<sup>1</sup> On this definition, considerable puzzlement has been expressed at the assumption that virtual images which are produced without using any real image of an existing child or which represent an adult with the appearance of a child can be regarded as equivalent in all respects to child pornography, as this amounts to a moral judgment rather than the punishment of offensive behaviour towards a child. This conclusion is based on the objective fact that in such situations, since no child victim is involved, there is no discernible legal object to be protected. The Italian delegation nevertheless thinks that this case could justifiably be taken into account in Article 6(3), q.v.

- (i) **any material that visually depicts a child engaged in real or simulated sexually explicit conduct; or**
- (ii) **any depiction for primarily sexual purposes of the sexual organs of a child;**

(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;

**(d) "pornographic performance" shall mean the exhibition in front of one or more spectators<sup>1</sup> who witness it live, including at a distance through information and communication technologies:<sup>2</sup>**

- (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) "information system" shall mean any device or group of inter-connected or related devices, one or more of which, pursuant to a programme, perform automatic processing of data.

## Article 2

### *Offences concerning sexual abuse*

1. Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable:

(a) engaging in sexual activities with a child who has not reached the age of sexual consent under national law;

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<sup>1</sup> It is proposed that the word "audience" be replaced by "one or more spectators" in order to cover cases where the performance is intended for only one person.

<sup>2</sup> The Explanatory Report of the Lanzarote Convention leaves it up to the Parties to prepare definitions which contain references to the commercial or non-commercial nature of such performances and to the public or private aspect.

- (b) engaging in sexual activities with a child, where:
- (i) use is made of coercion, force or threats; or
  - (ii) abuse is made of a recognised position of trust, authority or influence over the child; or
  - (iii) abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence;
- (c) coercing a child into sexual activities with a third party;
- (d) **intentionally causing, for sexual purposes, a child who has not reached the age of sexual consent under national law to:**
- (i) **engage in real or simulated sexually explicit conduct or exhibit their sexual organs,**  
**or**
  - (ii) **witness sexual abuse or sexual activities<sup>1</sup>.**

2. The provisions of **points 1(a) and (d)(i)<sup>2</sup>**, are not intended to govern consensual sexual activities between children.

Article 3<sup>3</sup>

*Offences concerning sexual exploitation*

**1. Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable:**

- (a) **recruiting, inducing or coercing a child to engage in prostitution or encouraging child prostitution**
- (b) **profiting from child prostitution or exploiting a child for such purposes**

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<sup>1</sup> The limit of the age of consent should accompany this wording; it is therefore proposed that it be incorporated in the offence of child corruption covered by point (d); it is further proposed that the words "even without having to participate" be deleted, as doubts about their interpretation might arise in implementing the law.

<sup>2</sup> This change is necessary because the offences previously covered separately in points (d) and (e) of paragraph 1 have been brought together.

<sup>3</sup> It is very important to determine precisely and definitively which offences fall within the category of sexual abuse and which in that of sexual exploitation. This applies in particular to child-pornography networks and the need again to place them in the category of sexual exploitation.

(c) **engaging in sexual activities with a child, where recourse is made to child prostitution.**

2. **Each Member State shall take the necessary measures to ensure that the following intentional conduct whether undertaken by means of an information and communication system or not, is punishable:**

(a) **recruiting, inducing or coercing a child to participate in pornographic performances or encouraging such participation**

(b) **knowingly attending pornographic performances involving the participation of children**

(c) **producing child pornography**

(d) **distributing, disseminating, transmitting, offering, supplying or making available child pornography**

(e) **owning, possessing or holding child pornography<sup>1</sup>**

(f) **knowingly obtaining access, more than once, including through payment, by means of an information or communication system, to child pornography<sup>2</sup>.**

#### Article 4

#### *Solicitation of children for sexual purposes*

Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable: the proposal, **by means of an information or communication system**, 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 2(a) and 3(2)(c)**, where this proposal has been followed by material acts leading to such a meeting.

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<sup>1</sup> It was decided to insert the three forms of conduct because they refer to three distinct types of involvement with child pornography:

**Ownership:** an individual's full rights to an object, to the exclusion of any third-party rights

**Possession:** the power exercised by an individual over an object either independently or with the exception of direct surveillance by a person who has greater legal power over the same object (an individual who has possession of an object cannot be accused of theft of that object, as theft presupposes dispossession).

**Holding:** the de facto power exercised by an individual over an object, within the sphere of supervision by the possessor, e.g. a waiter is the holder of the dishes in the restaurant where he works, but he does not have possession of them and therefore commits a theft if he removes them.

<sup>2</sup> As the phrase "for a prolonged period" used previously is considered much too imprecise and might give rise to doubts about interpretation, it is proposed that it be deleted.

Article 5

*Sex tourism*

**Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable:**

- (a) undertaking journeys outside the territory of the home State for the purpose of engaging in the offences referred to in Articles 2 and 3. In accordance with Article 13(3), the taking of such measures shall not be subordinated to the condition that the acts are a criminal offence at the place where they were performed.**
- (b) organising or advertising, for oneself or for others, whether or not for commercial purposes, travel arrangements with the aim of engaging in the offences referred to in Articles 2 and 3.**

Article 6

*Instigation, aiding and abetting, attempt and preparatory offences*

1. Each Member State shall take the necessary measures to ensure that the instigation of, and aiding and abetting to commit the offences referred to in Articles 2 to 5 is punishable.
2. Each Member State shall take the necessary measures to ensure that attempts to commit any of the offences referred to **in Articles 2, 3 and 5** is punishable.
- 3. Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable: dissemination of materials advertising the opportunity to commit any of the offences referred to in Articles 2 to 5, including through:**
  - (a) any material that visually depicts a person appearing to be a child, or realistic images of a non-existent child, engaged in real or simulated sexually explicit conduct; or**
  - (b) any depiction for primarily sexual purposes of the sexual organs of a person appearing to be a child, or of realistic images of a non-existent child.**

## Article 7

### *Penalties and aggravating circumstances*

1. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2 to 6 are punishable by a maximum term of imprisonment of at least six years.

2. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2 to 6 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 offences are committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA<sup>1</sup>;
- (f) the perpetrator has previously been convicted of offences of the same nature.

3. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2 to 6 are punishable by a maximum term of imprisonment of at least twelve years where at least one of the following circumstances applies:

- (a) the offence endangered the life of or caused serious harm to the child;**
- (b) the offence involved serious violence to the child.**

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<sup>1</sup> OJ L 300, 11.11.2008, p. 42.

4. With a view to preventing and minimising the risks of repeated offences referred to under Articles 2 to 6, each Member State may, where appropriate taking into account the personal circumstances of the offender and in particular the risk assessment referred to in Article 16, provide for the criminal penalties referred to in paragraphs 1, 2 and 3, to be accompanied by other sanctions or measures under national law, which shall include specific intervention programmes or measures as referred to in Article 17.

## Article 8

### *Disqualification arising from convictions*

1. Where it is established, in accordance with the assessment referred to in Article 16 **or otherwise**<sup>1</sup>, that the person presents a danger and there is a possible risk of repetition of the offences, each Member State shall take the necessary measures to ensure that a natural person, who has been convicted of any of the offences referred to in Articles 2 to 6, may be temporarily or permanently prevented from exercising activities involving regular contacts with children.
2. Each Member State shall take the necessary measures to ensure that the measure consisting in temporarily or permanently preventing the person convicted of any of the offences referred to in Articles 2 to 6 from exercising activities involving regular contacts with children is entered in the criminal record of the convicting Member State.
3. By way of derogation from Articles 7(2) and 9(2) of the Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States<sup>2</sup>, each Member State shall take the necessary measures to ensure that, for the purpose of effectively implementing the measure consisting in temporarily or permanently preventing the person from exercising activities involving regular contacts with children, in particular insofar as the requesting Member State subjects access to certain activities to conditions to ensure that candidates have not been convicted of any of the offences referred to in Articles 2

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<sup>1</sup> This change is designed to prevent a decision on disqualification being linked exclusively to an assessment of the risk of repetition of one of the offences provided for in the Framework Decision.

<sup>2</sup> Adopted at the JHA Council of 26-27 February 2009. Final reference pending publication.

to 6 of this Framework Decision, information concerning the disqualification arising from conviction of any of the offences referred to in Articles 2 to 6 of this Framework Decision is transmitted when requested under Article 6 of that Framework Decision from the central authority of the Member State of the person's nationality, and that personal data concerning such disqualification provided under Article 7(2) and (4) of that Framework Decision may in all cases be used for such purpose.

4. Each Member State shall take the necessary measures to ensure that the measure consisting in temporarily or permanently preventing the person convicted of any of the offences referred to in Articles 2 to 6 from exercising activities involving regular contacts with children, imposed in another Member State, is recognised and enforced.

#### Article 9

#### *Liability of legal persons*

1. Each Member State shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Articles 2 to 6 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 has made possible the commission, by a person under its authority, of any of the offences referred to in Articles 2 to 6 for the benefit of that legal person.

3. Liability of legal persons under paragraphs 1 and 2 shall be without prejudice to criminal proceedings against natural persons who are perpetrators of, or accessories to, any of the offences referred to in Articles 2 to 6.

4. For the purpose of this Framework Decision "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 10

##### *Sanctions on legal persons*

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 9(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, 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. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 9(2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

#### Article 11

##### *Non-application of sanctions to the victims*

Each Member State shall provide for the possibility of not prosecuting or imposing penalties on child victims of the offences referred to in **Article 3(1) and (2)(c)** for their involvement in unlawful activities as a direct consequence of being subjected to those offences<sup>1</sup>.

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<sup>1</sup> This change is made necessary by the new text of Article 3, which now covers the offences previously assigned to Articles 3 and 4.

## Article 12

### *Investigation and prosecution*

1. Each Member State shall take the necessary measures to ensure that investigations into or the prosecution of the offences referred to in Articles 2 to 6 are not dependent on a report or accusation being made by the victim, and that the criminal proceedings may continue even if the victim has withdrawn their statements.
2. Each Member State shall take the necessary measures to enable the prosecution of any of the offences referred to in Articles 2 to 6 for a sufficient period of time after the victim has reached the age of majority and which is commensurate with the gravity of the offence concerned.
3. Each Member State shall take the necessary measures to ensure that the confidentiality rules imposed by national law on certain professionals called upon 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 a child is the victim of offences referred to in Articles 2 to 6.
4. Each Member State shall take the necessary measures to encourage any person who knows about or suspects, in good faith, offences referred to in Articles 2 to 6 to report these facts to the competent services.
5. Each Member State shall take the necessary measures to ensure effective investigation and prosecution of the offences referred to in Articles 2 to 6, allowing the possibility of covert operations at least in those cases where the use of an information system is involved.
6. Each Member State shall take the necessary measures to enable investigative units or services to identify the victims of the offences referred to in Articles 2 to 6, in particular by analysing child pornography material, such as photographs and audiovisual recordings transmitted or made available by means of an information system.

## Article 13

### *Jurisdiction and coordination of prosecution*

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 2 to 6 where:
  - (a) the offence is committed in whole or in part within its territory; or
  - (b) the offender is one of its nationals or has their habitual residence in its territory; or
  - (c) the offence is committed against one of its nationals or a person who has their habitual residence in its territory; or
  - (d) the offence is committed for the benefit of a legal person established in the territory of that Member State.
  
2. Each Member State shall ensure that its jurisdiction includes situations where an offence referred to in Articles 4 and 5, and insofar as is relevant, in Articles 2 and 6, is committed by means of an information system accessed from its territory, whether or not the information system is on its territory.
  
3. For the prosecution of any of the offences referred to in Articles 2 to 6 committed outside the territory of the State concerned, as regards paragraph 1(b), each Member State 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.
  
4. For the prosecution of any of the offences referred to in Articles 2 to 6 committed outside the territory of the State concerned, as regards paragraph 1(b), each Member State 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.

5. When an offence referred to in Articles 2 to 6 falls within the jurisdiction of more than one Member State and when any one of the Member States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders, with the aim, if possible, of centralising proceedings in a single Member State. To this end, Member States may have recourse to Eurojust or any other body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action.

In deciding which Member State will prosecute the offenders, special account shall be taken of the following factors:

- (a) the Member State in the territory of which the acts were committed;
- (b) the Member State of which the perpetrator is a national or resident;
- (c) the Member State of origin of the victims;
- (d) the Member State in the territory of which the perpetrator was found.

#### Article 14

#### *Protection of and assistance to victims*

1. Each Member State shall ensure that, where the age of a person subject to the offences referred to in Articles 2 to 6 is uncertain and there are reasons to believe that the person is a child, the person is presumed to be a child and receives immediate access to protection and assistance in accordance with this Article.

2. Each Member State shall take the necessary measures to ensure that judicial authorities appoint a special representative for the victim where, by national law, the holders of parental responsibility are precluded from representing the child in criminal proceedings as a result of a conflict of interest between them and the victim, or where the child is unaccompanied.

3. Each Member State shall take the necessary measures to ensure that the specific actions taken to protect and to assist victims, in the short and long term, in their physical and psycho-social recovery, are adopted following a specific assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns.

4. Each Member State shall take the necessary measures to ensure that where appropriate victims of the offences referred to in Articles 2 to 6 have access to free legal counselling and free legal representation in criminal proceedings relating to those offences.

5. Victims of any of the offences referred to in Articles 2 to 6 shall be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings<sup>1</sup>.

**6. Each Member State shall take the necessary measures to guarantee the privacy of victims, the protection of their identity and depictions of them, and to prevent the public dissemination of any information making it possible to identify them, in accordance with national legislation.**

7. Each Member State shall take all measures possible to ensure appropriate assistance for the victim's family. In particular, each Member State shall, where appropriate and possible, apply Article 4 of Council Framework Decision 2001/220/JHA to the family.

8. The protection and assistance measures referred to in this Framework Decision shall apply in addition to the provisions Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA.

#### Article 15

#### *Participation of child victims in criminal investigations and proceedings*

1. Each Member State shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 2 to 6:
  - (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;

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<sup>1</sup> OJ L 82, 22.3.2001, p. 1.

- (c) interviews with the child victim are carried out by professionals trained for this purpose;
- (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.

2. Each Member State shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 2 to 6 all interviews with the child victim or, where appropriate, with a child witness, may be videotaped and that these videotaped interviews may be used as evidence in criminal court proceedings, according to the rules under its national law.

3. Each Member State shall take the necessary measures to ensure, in criminal court proceedings relating to any of the offences referred to in Articles 2 to 6, that:

- (a) the judge may order the hearing to 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.

## Article 16

### *Risk assessment*

1. Each Member State shall take the necessary measures to ensure that persons convicted of offences referred to in Articles 2 to 6 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 2 to 6, **with the aim of identifying appropriate intervention programmes or measures.**

2. The assessment referred to in paragraph 1 **may be** periodically reviewed to take account of changes in circumstances that have an impact on the danger and possible risks.

## Article 17

### *Intervention programmes or measures*

1. Each Member State 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.

Such intervention programmes or measures shall be adapted to meet the specific developmental needs for children who sexually offend, including those who are below the age of criminal responsibility.

2. Each Member State shall take the necessary measures to ensure that persons convicted of offences referred to in Articles 2 to 6 where appropriate subject to possible risks of repetition:

- (a) may have access or be offered access to the programmes or measures mentioned in paragraphs 1 and 2;
- (b) are offered access to specific programmes or measures appropriate to the danger and possible risks of repetition of any of the offences referred to in Articles 2 to 6;
- (c) are fully informed of the reasons for the proposal to have access to the programmes or measures;
- (d) consent to participation in the specific programme or measure in full knowledge of the facts;
- (e) may refuse and are made aware of the potential consequences of refusal.

3. Each Member State shall take the necessary measures to ensure that persons subject to criminal proceedings for any of the offences referred to in Articles 2 to 6 may have access to the programmes or measures referred to in paragraphs 1 and 2, 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.

4. Each Member State shall take the necessary measures to ensure that persons who fear that they might commit any of the offences established in accordance with Articles 2 to 6 may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of offences being committed.

#### Article 18

##### *Blocking access to websites containing child pornography*

Each Member State shall take the necessary measures to enable the competent judicial or police authorities to order or similarly obtain the blocking of access by internet users to internet pages containing or disseminating child pornography, subject to adequate safeguards, in particular to ensure that the blocking is limited to what is necessary, that users are informed of the reason for the blocking and that content providers are informed of the possibility of challenging it.

#### Article 19

##### *Social responsibility of undertakings*

**Each Member State shall encourage the private sector, in particular the communication and information technologies sector, the tourism and travel industry and the banking and financial sectors, as well as civil society, to participate in drawing up and implementing policies to prevent the sexual exploitation and abuse of children and to apply internal standards of self-regulation and co-regulation.**

#### Article 20

##### *International cooperation*

**Each Member State shall cooperate in accordance with the provisions of this Framework Decision in applying the relevant applicable international and regional instruments, and the agreements based on uniform or reciprocal legislation and on internal legislation, to the greatest possible extent in order to:**

- (a) prevent and combat the sexual exploitation and abuse of children;**
- (b) protect and assist victims;**

- (c) **conduct investigations or procedures concerning offences established pursuant to this Framework Decision.**

**Each Member State shall take the necessary legislative or other measures to ensure that victims of an offence established pursuant to this Framework Decision and perpetrated on the territory of a Member State other than that in which they reside may lodge a complaint with the competent authorities of their State of residence.**

**If a Member State which makes mutual assistance in criminal matters or extradition subject to the existence of an agreement receives a request for cooperation in criminal matters or extradition from a Member State with which it has not concluded such an agreement, it may regard this Framework Decision as a legal basis for mutual assistance in criminal matters or for extradition in connection with offences established pursuant to this Framework Decision.**

**Each Member State must undertake to incorporate, where necessary, the prevention and combating of sexual exploitation and abuse of children in development-aid programmes carried out to help third countries.**

## **Article 21**

### ***Study of the phenomenon***

**Each Member State shall take the necessary legislative or other measures to set up or designate data-collection mechanisms or information points at national or local level, in collaboration with civil society, thereby making it possible, in compliance with data-protection requirements, to observe and assess the phenomena of sexual exploitation and abuse of children.**

## **Article 22**

### ***Territorial scope***

This Framework Decision shall apply to Gibraltar.

Article 23

***Repeal of Framework Decision 2004/68/JHA***

Framework Decision 2004/68/JHA is hereby repealed.

Article 24

***Implementation***

1. Member States shall take the necessary measures to comply with this Framework Decision by [two years from adoption] at the latest.
2. By [two years from adoption] the Member States shall transmit to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national legislation the obligations imposed on them under this Framework Decision. By [four years from adoption] on the basis of a report reflecting this information and a written report from the Commission, the Council shall assess the extent to which the Member States have complied with this Framework Decision, and shall consider the need for amendments.

Article 25

***Entry into force***

This Framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Council  
The President

### **Additional comments by the Italian delegation**

Given the choice of option 4 (the result of combining options 2 and 3) as set out in the impact assessment for the text, the Italian delegation would stress that the text should include an ad hoc article on preventive measures to be drafted on the basis of the Lanzarote Convention.

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## LATVIA

### **Latvian comments with regard to the Proposal for a Council Framework Decision on preventing and combating the sexual exploitation of children and child pornography, repealing Framework Decision 2002/68/JHA**

Regarding Article 1 Paragraph e) of the Framework Decision Latvia considers that the definition of ‘information system’ has to be revised in accordance to the terminology used in the Framework Decision Proposal, that is, it should cover distinct fields of technology, e.g., the Internet, mobile phones, web cameras etc.

Concerning Article 3 of the Framework Decision Proposal defining offences concerning sexual exploitation of children Latvia assumes that it has to be extended by providing the criminal liability for a child’s engagement both in prostitution and pornographic performances without emphasising the element of enforcement, because the engagement as such (voluntary or enforced) is criminally punishable. The Article 3 has to be extended providing that organisation of pornographic performances in which children take part is punishable (in such case it would be possible to held liable even legal entities on behalf of which such performances are organized).

Concerning Article 4 Paragraph e) of the Framework Decision Proposal Latvia considers that the term ‘knowingly obtaining access’ has to be specified. Latvia supports the opinion that persons who by means of information systems observe child pornography, have to be punished, but at the same time the cases when a person accidentally opens website containing child pornography have to be separated from cases when a person observes such materials knowingly and on regular basis.

Concerning Article 5 of the Framework Decision Proposal Latvia considers that the mentioned provision is narrowed with a condition - where this proposal has been followed by material acts leading to such a meeting. Latvia has opinion that in such redaction the provision does not meet the aim – to protect children against solicitation both by the help of information systems and any other kind of solicitation. Therefore, Latvia proposes to express Article 5 of the Framework Decision Proposal in the following redaction:

*„Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable:*

*The proposal, irrespective to the way how a proposal is expressed, by an adult to meet a child who has not reached the age of sexual consent according to the relevant provisions of national law, for the purpose of committing any of the offences referred to in Article 2.1 (a), (d), (e), Article 3 (a), (b) and Article 4 (a)”.*

Furthermore the attention has to be paid to the fact that in the result of solicitation, e.g., in the Internet, the pornography may be created even without meeting each other.

Concerning activities covered by Article 6 Paragraph 3 of the Framework Decision Proposal Latvia considers that mentioned activities – dissemination of advertising materials and travel arrangements – are covered by Paragraph 1 and 2. Moreover, Latvia has an opinion that there is no necessity to allege to all offences mentioned in Paragraphs between 2 and 5. Furthermore, Latvia does not feel sure if the term ‘travel arrangements’ can be perceived undoubtedly, e.g., if a travel has to be considered as organized when a person has bought her/himself a plane ticket; and at the same time it has to be made clear if the term refers only to trips made abroad or within the borders of one country. Latvia has opinion that the provision has to be clear and unambiguously understandable in all Member States, therefore it proposes to delete the Paragraph 3 of Article 6 of the Framework Decision Proposal.

Concerning Article 7 of the Framework Decision Proposal Latvia proposes to avoid from listing definite penalties as it considers that penalties for offences mentioned in the Framework Decision Proposal have to be set individually by each Member State on the bases of their legal system and penalties policy. Moreover, setting the minimal amount of maximum penalty the aim – to set equal penalties for equal offences in all Member States – is not reached, as in each separate case a judge has rights to apply an individual sanction after evaluating the evidences. Therefore, we suggest to express the Paragraph 1 in the following edition: *„Each Member State shall take the necessary measures to ensure that an offence referred to in Articles 2 to 6 is punishable by effective, proportionate and dissuasive criminal penalties”*. Furthermore, Latvia does not support the gradation of penalties covered by Article 7 as each commitment has to be studied in details evaluating its importance and applying adequate penalty.

Furthermore, Latvia considers that a special article covering aggravating circumstances have to be introduced thus separating them from qualifying circumstances. For example, the aggravating circumstance mentioned in Article 7 Paragraph 1 (f) cannot be defined as qualifying (as it is said in the present edition of Article). Because the mentioned circumstance is personal quality and such circumstance does not influence the punishment, but the legislator, in case of such aggravating circumstance, has no rights to state the type of penalty. The Criminal Law of Latvia covers special article in which all aggravating circumstances are listed and there are no relation between them and a definite type of penalty. Furthermore, not all aggravating circumstances mentioned in Article 7 of the Framework Decision Proposal are mentioned as qualifying circumstances in the Criminal Law. Therefore, the implementation of this Article could cause difficulties.

Concerning Article 8 of the Framework Decision Proposal we would like to indicate that the mentioned provision should be harmonized with the Council Framework Decision on the organisation and content of the exchange of information extracted from the criminal records between Member States that has been approved during the Justice and Home Affairs Council on February 26-27, 2009.

Furthermore, Latvia considers that the term ‘measures’ used in Article 8 has to be specified because the present version does not make it clear if the term ‘measures’ has to be perceived as restriction of rights deriving from convictions or any extra measures.

Article 72, Paragraph 3 (4) of Protection of the Rights of the Child Law states that persons who have been punished for immorality or sexual solicitation of children cannot work as managers or employees of childcare, educational, health care and other such institutions where children are staying, irrespective to the discharge of criminal record. However, the mentioned provision is not included in the criminal record of Latvia. Still Latvia would like to indicate that in the European Commission announcement to European Parliament on February 21, 2006 on Disqualifications Arising from Criminal Convictions in the European Union (SEC(2006)220) it is stated that disqualifications deriving from the conviction in a criminal case may be applied in administrative and disciplinary processes that arise from criminal records. Latvia considers if the term ‘measures’ states for restriction of rights deriving from the conviction then it is not compulsory in all cases to

apply extra sanction – disqualification, because in Latvia it would overlap with the general prohibition deriving from Article 72, Paragraph 3 (4) of Protection of the Rights of the Child Law; such situation requests amendments in articles of the Special Part of Criminal Law. But if the term ‘measures’ is perceived in wider meaning – not only as extra sanctions applied by the court – then such approach would be supported by Latvia but then arises difficulties to exchange such information among Member States.

Concerning Article 8, Paragraph 4 of the Framework Decision Proposal the legal mechanism used to acknowledge and adopt the activities enforced in one country is not clear as there is no such mechanism in the level of EU.

Concerning Article 9 of the Framework Decision Proposal Latvia considers that it is necessary to evaluate if the reference has to be made to all offences listed in Article 2 to 6, as there are some offences which cannot be committed for the benefit of a legal person.

Considering the Article 11, which imposes Member States not prosecute or impose penalties for victims, Latvia indicates that it cannot support the mentioned redaction as the provision is too uncertain. Furthermore, it contradicts the national legal system. Therefore, we propose to Express the above mentioned provision as follows: „Each Member State in accordance to basic principles of its legal system shall provide the possibility of not prosecuting or imposing penalties on child victims of the offences referred to in Articles 3 and 4(a) for their involvement in unlawful activities as a direct consequence of being subjected to those offences.”

Please, take into consideration that only the person directing the proceedings will be able to judge if a definite person has to be dismissed from penalty or not. It has to be taken into consideration that persons who have suffered from such criminal offences has rights on just trial.

Concerning Article 12, Paragraph 2 of the Framework Decision Proposal Latvia indicates that it cannot support the present redaction, because according to Latvian legal acts limitation period is set on the basis of gravity of the offence committed and not on the basis of the age of the victim. Latvia considers that such exception cannot be applied to all offences mentioned in the Framework Decision Proposal as not all offences are so grave to apply the above mentioned exclusion from the general order defining the limitation period calculations. Still a person who has committed an

offence has rights to know when such limitation period will come into existence as according to Article 90 of the Constitution of the Republic of Latvia everyone has right to know his/her rights. In the present case person's right to know his/her rights would be essentially limited; furthermore, the mentioned right is absolute and cannot be limited. Therefore, Latvia proposes to add reference on the national legal system to the above mentioned provision thus making it optional.

Concerning Articles 12, Paragraph 4 to 6 of the Framework Decision Proposal Latvia considers that such provisions are too declarative and they should be included in the recitals of the Framework Decision; because by adopting the Framework Decision Proposal in the present redaction the implementation of the provisions into national legislation will be difficult.

Concerning Article 13, Paragraph 1(e) Latvia expresses doubts on the scope of a term 'habitual residence' as it may cause legal burden to Member State law enforcement institutions in cases when a person has more than one permanent place of residence and the legislation states that it is compulsory to initiate the criminal proceedings (principle of legality) thus providing the possibility to break the principle of *ne bis in idem*.

Concerning the principle of jurisdiction covered by Article 13, Paragraph 3 of the Framework Decision Proposal stating that jurisdiction is not limited by the condition that the acts are a criminal offence at the place where they were performed; Latvia indicates that in the present edition it cannot support the provision as it contradicts Latvian legislation. Latvia proposes to substitute word 'shall take' with words 'may take' thus ensuring the flexibility of the provision. Besides we consider that even in the Framework Decision Proposal Member States have the rights to choose to realize or not to realize their own jurisdiction.

Concerning Article 13, Paragraph 4 of the Framework Decision Proposal Latvia considers that this provision has to be moved to Article 12 of the Framework Decision, as it refers to the initiation of criminal process and not to the jurisdiction.

Latvia considers that it is necessary to cross out Article 13, Paragraph 5 of the Framework Decision Proposal by replacing it with reference on the Framework Decision on Prevention and Settlement of Conflicts of Jurisdiction in Criminal Proceedings approved in the Justice and Home Affairs Council on April 6, 2009.

Latvia may support Article 14, Paragraphs 1 to 3 and 7, where protection and assistance to victims is defined, of the Framework Decision Proposal in general, but it considers that there is no use to consider the implementation of new single measure for protection of rights of victims as long as the Framework Decision 2001/220/TI is in force; thus ensuring the homogeneity and preventing from coexistence of similar acts.

Concerning Article 14, Paragraph 4 of the Framework Decision Proposal Latvia would like to indicate that it has to be supplemented with condition that a victim has access to free legal counselling and free representation in criminal proceedings accordingly to his/her financial situation and possibilities.

Concerning Article 14, Paragraph 5 of the Framework Decision Proposal Latvia considers that the term ‘particularly vulnerable victim’ has to be clearly defined otherwise the provision is not clear and it may cause difficulties when implementing it in the national legislation.

Concerning the responsibility to ensure appropriate assistance for the victim’s family covered by Article 14, Paragraph 6 of the Framework Decision Proposal Latvia considers that the provision is stated too strict. Therefore, Latvia proposes to replace words ‘shall take’ with ‘may take’ that making the provision more flexible. Taking into consideration the fact that the mentioned responsibility will require funding it has to be made optional for Member State.

Concerning Article 15 of the Framework Decision Proposal Latvia would like to indicate that in case if measures mentioned in Paragraph 1 (b), (c) and (d) are referred to any person (that is, even to 14 to 18 years old persons) this provision is too wide. Latvia has an opinion that the mentioned provisions have to be referred at least to persons having not reached 14 years of age.

Concerning Article 16 of the Framework Decision Proposal defining risk assessment Latvia indicates that it cannot support it in the current edition. Latvia considers that in Paragraph 1 words ‘shall take’ have to be substituted with ‘may take’ as the mentioned risk assessment is foreseen for all offences and convicted persons covered by the present Framework Decision Proposal, therefore, essential funding would be necessary to implement actions. Furthermore, it is not clearly defined in Article if the mentioned risk assessment has to be accomplished prior or after serving the sentence.

As well, it is not clear if such risk assessment has to take place at the period when the sentence is imposed. And Article does not state the regularity and duration of period when such risk assessment has to be implemented.

Concerning Article 17 of the Framework Decision Proposal Latvia indicates that it cannot support conditions on intervention programmes or measures in the present redaction. Latvia considers that in Paragraph 1 words ‘shall take’ have to be substituted with ‘may take’ as such responsibility to provide intervention programmes or measures has to be in the competence of each Member State. Due to the present economic situation Latvia cannot provide intervention programmes at every level of criminal proceedings. Furthermore, according to Latvian legislation intervention programmes cannot be adapted to persons below the age of criminal responsibility; therefore, third sentence of Article 17, Paragraph 1 cannot be supported in the present redaction. As well, Latvia considers that the term ‘measures’ covered by the present Article requires explanation as the current edition does not provide it. And it has to be defined who applies such intervention programmes and measures (court, special institution).

Concerning conditions covered by Article 17, Paragraphs 2 to 4 Latvia indicates that it cannot support the provision in the present edition as the development and implementation of such intervention programmes will require large financial and administrative resources, currently unavailable for Latvia; therefore, such conditions have to be made optional and as well, they have to be realized in accordance to conditions of Member State’s legislation.

Concerning the condition covered by Article 18 of the Framework Decision Proposal blocking access to websites containing child pornography Latvia considers that it is necessary to include provision defining the order so that blocking of such website would be equal in all Member States.

Concerning Article 21 of the Framework Decision Proposal and taking into account the large number of Council decision that have to be implemented and the necessity of financial recourses for implementation of this framework decision Latvia proposes to extend the term of implementation mentioned in Article 21 from two years to three years.

## LITHUANIA

1. Paragraph 2 of Article 2 of the Proposal provides that certain provisions of the Article can't be interpreted as criminalising respective voluntary activities of children themselves. However, this approach is not maintained in Article 4 of the Proposal, effectively providing for criminal prosecution of children making videos or photographs of themselves. At the same time, it is necessary to point out that age difference between the children can be substantial, e.g. those who are 12 and 17 years of age. Therefore, the provision has to be made more concrete so that the children must be equally under the age from which they can consent to sexual intercourse.
2. Subparagraph b of paragraph 3 of Article 6 of the Proposal should be specified. It is unclear whether the proposal criminalises trips of this kind organised by third persons, or whether criminal liability is also provided against persons who have made their own travel arrangements in order to engage in sexual exploitation of, or use sexual coercion against a child (children).
3. We are of the opinion that the sanctions specified in Article 7 of the proposal should be in correspondence with Justice and Internal Affairs Council on April 24th – 25th, 2002. Therefore, we would suggest that the penalties and their scope set forth in the Proposal be aligned with the penalty levels specified in the conclusions. Besides, the criminal offences enumerated in the Proposal differ substantially in terms of character and degree of dangerousness, therefore punishments for these offences should also differ. In general, we suggest that Member States be given more flexibility in establishing the cases when sexual exploitation of children should incur more severe criminal liability. For instance, the effective criminal laws of the Republic of Lithuania already provide for a sentence of up to 15 years of imprisonment for the gravest cases of sexual exploitation of children. However, these cases are not in full correspondence with the criteria set forth in the Proposal and we can't really see reasons why the system of penalties for sexual offences against children should be constructed in this particular way rather than in some other way. Minute and too-detailed enumeration of aggravating circumstances would not be in full compliance with the principles of proportionality and subsidiarity that form the basis of the present Proposal.
4. The term aggravating circumstances is used in Article 7 of the Proposal, thus leaving it unclear whether the Proposal considers them as being the circumstances qualifying a criminal offence and increasing the degree of dangerousness of a criminal offence, or whether they are the circumstances which a court of law would take into account when individualising the punishment.

We would suggest that the term is not used at all. The omission would not affect the content of the Article whatsoever, and would make the provisions much clearer.

5. Subparagraph c of paragraph 2 of Article 7 can't be applied absolutely to all criminal offences because it will not increase the dangerousness of the offence in all cases.

6. The qualification criterion of a criminal offence specified in paragraph f of Article 7 of the Proposal raises certain doubts. The legal system of the Republic of Lithuania does not provide for a possibility to establish a circumstance of this nature in the qualified element of a criminal offence because it is recognised that repetitiveness characterises the subject of a criminal offence and his/her dangerousness to the public, but is not indicative of a greater degree of dangerousness of the criminal offence itself. Therefore, the criterion is taken into account only for the purposes of individualisation of the perpetrator's punishment by making it bigger within the limits of the sanction. Renouncement of the criterion was also influenced by the conclusion of the Constitutional Court of the Republic of Lithuania that establishing the criterion as an element of a criminal offence is contrary to the Constitution of the Republic of Lithuania. It is therefore proposed that this criterion is linked only with its influence when imposing sentence, depriving of rights and applying intervention programs.

7. The provision of subparagraph a) of paragraph 3 of Article 7 of the Proposal should be specified because it leaves unclear whether the threat to a child's life might be caused through recklessness, or deliberate effort is required. It is proposed to take into account item 2 of subparagraph b) of paragraph 2 of Article 5 of the effective Council Framework Decision 2004/68/TVR dated 22nd December 2003 and supplement subparagraph a) of paragraph 3 of Article 7 of the Proposal with the words deliberately or by recklessness.

8. We propose that a new aggravating circumstance is added in Article 7 of the Proposal: offence against two and more children.

9. We propose that the wording which may include specific intervention programmes or measures <...> be used in paragraph 4 of Article 7 of the Proposal because the provision can't be compulsory and selective at the same time.

10. It is worthwhile pointing out that paragraph 1 of Article 8 of the proposal pays insufficient attention to mixed systems, i.e. when the legislation of a Member State (rather than a court ruling) prohibits employment in certain positions of individuals who have been tried for sexual offences against children.

11. While recognising the necessity to exchange information about prohibition on engagement in actions related to regular contact with children, nevertheless it is important to note that paragraphs 2, 3 and 4 of Article 8 are insufficient for the purposes of regulating such a complex procedure because they cover but a small part of this complex mechanism.

12. We are of the opinion that the criterion specified in Article 11 of the Proposal that allows to establish the cases when a victim involved in unlawful activity should be excused from criminal liability, is too wide and in certain cases will not allow to establish direct causal relationship.

Besides, it is worthwhile pointing out that establishment of such a provision would be too abstract, permitting excuse from criminal prosecution for various offences differing by their degree of gravity or nature, which might be a violation of the requirements of the proportionality principle.

At the same time it is worthwhile considering whether such offences committed by a victim might not be judged under provisions of physical or psychological coercion influence, necessary defence, necessity and other such provisions available in the legal systems of the Member States.

13. It is proposed that the provision set forth in paragraph 2 of Article 12 of the Proposal that criminal prosecution should continue for a sufficient time after the victim has come of age be specified. It is worthwhile debating whether excessive periods of prescription and criminal proceedings would not be in violation of the proportionality principle and be contrary to the requirement of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that criminal charges brought against a person in court proceedings should be heard within a reasonable time. It is worthwhile pointing out that the wording and which is commensurate with the gravity of the offence concerned has unclear relationship with the beginning of the paragraph which says that a victim who has come of sexual consent age should in all cases have a possibility to apply to law enforcement institutions.

14. It is worthwhile noting that paragraph 5 of Article 12 of the Proposal is contrary to the provisions of the Lanzarote Convention: firstly the reference to the principles of the national legislation has been dropped, second, the words where appropriate have been excluded. Thus, the provision raises serious doubts regarding its compliance with the proportionality principle because application of such measures should be proportionate to the gravity of the offence.

15. It is worthwhile noting that not all of the criminal jurisdiction principles set forth in Article 13 of the Proposal, are provided for in the Criminal Code, therefore, should Lithuania decide to approve of the supplement to Article 13, in accordance with subparagraph c) of paragraph 1 of Article 13 of the Proposal it should include the principle of individual interests protection into the CC by thus expanding the scope of its criminal jurisdiction. This would restrict the possibilities of other states to apply their criminal jurisdiction, therefore, such expansion of the scope of criminal jurisdiction is undesirable.

16. The Council Framework Decision which is being adopted deals with prevention and settlement of collisions of implementing jurisdiction in criminal proceedings, therefore one would presume that paragraph 5 of Article 13 of the Proposal is unnecessary in the present Proposal, and that the Framework Decision mentioned above could be regarded as the regulatory framework for legal relations of that sort.

17. It is worthwhile considering a possibility to provide for a preventive measure – a warning system in the Member States, i.e. entering of certain search words or searching for information in other ways would trigger a warning about attempted use of illegal content information.

18. Lithuania is of the opinion that the rights of and guarantees to victims set forth in Articles 14 – 15 of the Proposal would rather be provided for in a horizontal document, e.g. Council Framework Decision (2001/220/TVR) on the standing of victims in criminal proceedings. Otherwise the problem of inconsistency of legal provisions might arise among legal instruments of the European Union as well as national legislative provisions. Besides, such individual provisions are especially difficult to be implemented in the national legislation.

19. It has to be noted that implementation of certain provisions of the Proposal shall call for organisational – technical, material and human resources (Articles 7, 8, 12, 14, 15, 16, 17 and 18 of the Proposal), therefore it is worthwhile debating whether a period beyond 2 years or individual extended periods should be established to implement the provisions.

20. It is proposed that provisions of paragraphs 14 and 18 of the Proposal be specified because implementation of certain prevention aspects and support measures obligates Member States to set up a prevention and support system whose measures should apply even in the cases when such support and assistance is not necessary to the victim. Also, there are doubts about practical implementation of certain provisions of Article 18 regarding blocking access to websites containing child pornography.

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## POLAND

### Art. 1

Poland supports keeping compatibility with existing definitions envisaged in Council of Europe Convention *on the Protection of Children against Sexual Exploitation and Sexual Abuse*.

Poland does not exclude from the definition of child pornography any form of audible activity of the child. However, Poland is of the opinion that involvement of the child in “pornographic call line” (according to Spanish proposal) does not belong to the definition of child prostitution. On the contrary, it belongs to definition of the child pornography.

The definition of pornographic performance is a new input in comparison to the Convention. This matter seems to be very disputable for many delegations. Also Poland prefers not to extend the scope of the instrument in this case in comparison to the Convention.

### Art. 2

Poland is of the opinion that Article 2 par. 2 should be supplemented by Article 2 par. 1 letter d. The problem arises if a 17 years old male gives an information to 14 years old male on a sexual activity between their colleagues almost at the same age. It seems to be arguable whether such circumstance would be sufficient for criminal liability of that 17 years old boy or not.

Therefore Poland is of the opinion that also par. 1 letter d should be covered by Article 2 par. 2 of the draft.

### Art. 5

According to Article 23 of the Convention “*each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies (...)*”. In Article 5 of the draft there is no connection to “communication technologies”. In case of intentional omission of that additional measures used to solicitation, Poland's supports to supplement Article 5 by this expression.

Art. 7

The level of penalties should follow the Council Conclusions from April 2002 *on the approach to apply regarding approximation of penalties*. The Member States should be empowered to distinguish the level of sanctions in relevance to gravity of the offence and all circumstances accompanied the offence and set a higher maximum penalty threshold.

Art. 11

The expression “unlawful activity” is not clear enough because it suggests every kind of activity against the law which may include not only criminal but also administrative responsibility or every kind of misdemeanour. Making use of non-punishment clause envisaged in Article 26 of the Council of Europe Convention *on Action against Trafficking in Human Beings* is dependable on taking unlawful activity resulting from compulsion. The draft provides for general non-punishment rule resulting from becoming a victim. So in case where former victim of sexual abuse (or which would be even more disputable, of sexual prostitution in which the child was voluntary involved) incites other child to be engaged in child pornography or prostitution, the victim – perpetrator according to current draft should be benefited from non - punishment clause. The manner how to deal with such victims which becomes offenders should be left to the court deciding on each case. The most justifiable solution would be the reference to rules envisaged in national law in relation to special treatment for offenders who for example have cooperated with law enforcement authority.

In other case, Poland supports solution envisaged in Article 26 of the Convention *on Action against Trafficking in Human Beings*.

Art. 12

Article 12 par. 5 gives Member States opportunity to make advantage of undercover operations which are suitable to counterfeit the offences referred to in Articles 2 to 6 at least committed with involvement of an information system. The question appears whether covert operations should be also used in less serious cases or not. Poland is of the opinion that the competent authority should be empowered to decide in which cases it might be necessary to make use of it.

That is why Poland proposes to add to Article 12 par. 5 the condition “*where appropriate*” after wording “to ensure”.

#### Art. 13

The rules of jurisdiction concerning person who has his or her habitual residence in the territory of Member States go too far. Neither the current Framework Decision nor the Council of Europe Convention *on the Protection of Children against Sexual Exploitation and Sexual Abuse* (Article 25 par. 3 of the Convention gives right not to apply jurisdiction over non - nationals) does not oblige the Member States to establish jurisdiction over the offences committed by or against persons who has his or her habitual residence in the territory of Member States.

Poland supports solution safeguarding flexibility for each Member State whether to establish their jurisdiction over offences committed by or against non-nationals as envisaged in the Convention or not.

Furthermore Article 13 par. 5 is superfluous in respect of general approach reached by the Council concerning the draft of Framework Decision *on prevention and settlement of conflicts of jurisdiction in criminal matters*. For that reason Article 13 par. 5 should be either deleted or should give reference to the obligations to enter into direct consultations covered by Articles 9 and 10 of the draft of that Framework Decision.

#### Art. 14

Article 14 par. 4 obliges Member State to ensure the victims access to free legal counseling and free legal representation in criminal proceeding. In general, Poland supports such a obligation. However, there are cases where economic situation of the victim does not need any financial support. In these situations the helping hand given by the State results in relevant costs. Nevertheless, the wealthy victim because of financial situation its family will not make use of the appointed by the State legal counselor (especially in cases when the young victim is willing to take part in pornographic performance or in child prostitution being 16 or 17 years old).

Therefore Poland is of the opinion that a obligation to ensure the victims access to free legal counseling and free legal representation should be restricted only to those cases where economic situation of the victim needs such a support.

Art. 16 and 17

Poland does not find considerable problems concerning execution of measures resulting in temporarily or permanently prohibition of regular contacts with children as long as they are outcome of serving the sentence (referral to Article 8 par. 1 and 2). However, if the convicted person has been examined all of the measures resulting from the sentence there is no legal possibility to impose on that person other measures even though they would prevent from repetition of any offences referred to in Articles 2 to 6. So even if there were a presumption that the offender might commit another crime there is no legal entitlement to apply any intervention program toward the offender. Only upon the consent of such a person it might be applied any treatment or another intervention measure.

That is why, Poland supports such a solution where the imposition of other measures than resulting from the sentence and committed crime, would depend on the consent of the person concerned.

## ROMANIA

### Article 1 - Definitions

For assuring the logical structure of the proposal, we suggest that the definition of “legal person” should be stricken out from article 9 to become article 1 (f):

(f) ‘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 7 – Penalties and aggravating circumstances

We consider that more flexibility is needed to allow for a wider range of appreciation on the part of the Member States as far as the penalty system is concerned. We deem that the maximum level of penalties should be established differently according to the types and gravity of the offences (*e.g.* the possession of child pornography should not be punished with the same penalty as the production of child pornography as the latter is more serious). Thus, it would be more appropriate that the special maximum of the penalties should find itself between some limits.

We also consider that the reference of the article 6 should be deleted for allowing the Member States to incriminate and sanction the attempt according to the basic principles of their national legal system.

### Article 11 – Non application of sanctions to the victim

We propose to maintain the wording from the article 26 from the Council of Europe Convention on Action against Trafficking in Human Beings:

Each Member State shall, in accordance with the basic principles of its legal system, provide for the possibility of not ~~prosecuting or~~ imposing penalties on victims of trafficking in human beings for their involvement in unlawful activities ~~as a direct consequence of being subject to any of the illicit means referred to in article 1 and 2,~~ to the extent that they have been compelled to do so.

We suggest eliminating *the prosecution* because this could be an impediment for the prosecution agency to investigate and to gather evidence for other crimes committed and related to the crimes of sexual abuse, sexual exploitation of the children or child pornography.

#### Article 12 – Investigation and prosecution

We support those Member States which consider that the paragraphs 3<sup>rd</sup> and 4<sup>th</sup> should be moved to article 14 – *Protection of and assistance to victims* for the reason that these provisions are included in the chapter IV – *Protection measures and assistance to victims* of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Convention).

#### Article 13 – Jurisdiction and coordination of prosecution

We would like to introduce scrutiny reservation.

## **Slovak Republic**

Art. 4 letter e) – SK is for specification of this provision by limitation of this offence to intentional conduct by introducing of certain elements (e.g. repetition, payments) in order to exclude accidental access

Art. 7 – For the determination of the criminal penalties for the offences introduced by the proposal - SK supports the wording consistent with the Council conclusions on the approach to apply regarding approximation of penalties adopted on 25 and 26 April 2002, which provides more flexibility for the Member States to consider the seriousness of the criminal conducts; SK respects opinions of some MSs to apply wording that would distinguish between a *completed criminal* offence and an *attempt* to commit an offence, but those provisions should keep also the flexibility for those MSs that have similar sanctions levels for both of the abovementioned conducts

Art. 8 para. 4 – SK has certain misgivings according to the very general text of para. 4 in the context of its purpose (recognition of preventing measures) and it should be preferably dealt within a separate proposal taking into account the need for regulation of connected issues (conditions of recognition, grounds for refusal...)

Art. 11 – SK would have difficulties to support the non-punishment in its current wording. The wording should be changed along the lines with the similar provision in Council of Europe Convention on Action on Trafficking in Human Beings (art. 26). The SK suggests to limit the wording of Art. 11 to the possibility of non imposing the penalty and delete the reference on “not prosecuting”. Moreover, there is a need to consider the possible conflict with the principle of legality.

Art. 12 para. 5 – SK prefers wording that would respect the principle of proportionality in provisions related to the possibility of covert operations use and modify this provision in order to keep the reference to “fundamental principles of internal law” (Art. 30 of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse).

Art. 13 para. 1 letter c) – SK is of the opinion that the element of „habitual residence“ should be deleted and limit the application of passive personality to the most serious offences; the other alternative would be application of this provision based on the optional principle.

## Slovenia

Slovenia reserves its general scrutiny reservation to the FD and to both Articles mentioned above. Slovenian criminal law system is not familiar with the content of the mentioned Articles - risk assessment and intervention programmes- and implementation would in that respect present great budgetary and practical consequences. In general, Slovenia would like more simplified structure and clearer wording of both Articles.

In respect of Article 16 Slovenia doubts the necessity that all persons convicted of offences referred to in Articles 2 to 6 are subjected to an assessment of danger. We would need additional explanation on the extent of assessment and clear standing of the time in the criminal procedure in which the assessment would take place. We propose that some clarification and time limitation is added in the second paragraph, concerning periodical review.

First paragraph, point b should be appropriately merged with Article 8.

In respect of Article 17 Slovenia proposes that the text regarding the intervention programmes is drafted in line with the Lanzarote Convention regarding the part in which it provides a Party to adapt the intervention programmes in accordance with its internal law. When discussing availability of intervention programmes it should also be taken into consideration that such programmes could not always prove successful for all types of offenders, in particular those with least chances of re-socialisation.

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## United Kingdom

UK Comments on the draft Framework Decision on combating the sexual abuse, sexual exploitation of children and pornography.

The UK welcomes the opportunity to provide comments on the draft Framework Decision which updates and repeals existing Framework Decision 2004/68/JHA, in addition to the comments made at the Working Groups which took place on 20/21 April and 11/12 May.

The UK is generally supportive of the aims of the proposed Framework Decision and acknowledges many of the provisions incorporate aspects of the agreed in the Council of Europe (CoE) Convention 2007 on the protection of children from sexual exploitation and sexual abuse.

Whilst we support the principles behind the proposal the UK would wish to make the following additional comments about a number of Articles in the proposed Framework Decision.

### Article 1

This Article sets out the definitions for some of the terms used in the Framework Decision. We believe that in respect of the definition of a “pornographic performance”, The definition in paragraph (d)(i) should reflect that it is intended to capture performances which are only produced for primarily sexual purposes.

### Article 2

This article sets out the offences relating to child sexual abuse. Paragraph 2 ensures that consensual sexual activity between minors is not governed by the offences stipulated at paragraph 1(a) and 1(e). We support the protection for consensual sexual activity between minors, however the offence at paragraph 1(e), as currently drafted, would still capture consensual activity between an adult and a minor over the age of consent and these individuals should also have similar protections. The offence at paragraph 1(e) could therefore contain a reference to the child not having reached the age of consent, as in paragraphs 1(a) and (d).

The text in paragraph 1(b)(iii) also prohibits engaging in sexual activity with a child where they are in a ‘particularly vulnerable situation’. This includes mental or physical disability. We do not consider that a person above the age of consent with a physical disability is automatically unable to determine whether or not they wish to engage in sexual activity. Individuals in vulnerable situations need to be protected but individuals who have a physical disability and are over the age of consent should have the same rights to partake in consensual sexual activity as any other person over the age of consent.

### Article 3

The UK fully supports the measures to tackle child prostitution. In previous discussions the Commission indicated that pornographic performance may include performances on the Internet. The proposal in respect of attending pornographic performances (paragraph (d)) does not exempt minors over the age of consent and we are concerned that it may inadvertently criminalise lawful behaviour between couples who are over the age of consent.

### Article 4

The UK remains concerned that some exceptions from the 2004 FD have been dropped, namely for those cases where images are produced by people over the age of consent for their own private use or in cases where the individual in a picture could be proven to be over the age of 18 at the time the picture was taken (even though they may have appeared to be a child in the picture). We firmly believe that such activity should not be inadvertently criminalised.

### Article 5

This Article is aimed at tackling the offence of ‘solicitation’ or ‘grooming’. The wording of the Article restricts ‘solicitation’ to situations where it is done only by means of an ‘information system’. Whilst we are broadly content with the provision we feel that ‘grooming’ is a sexually exploitative behaviour which occurs both online and offline and the Article should not be limited in that way. However it is possible that this exploitative behaviour is tackled in different ways in different Member States. We would welcome further discussion.

## Article 6

This Article has been expanded from its equivalent in the 2004 FD to include preparatory offences so that organising travel arrangements with the purpose of sexual offending and advertising the opportunity to commit such offences is covered. We understand that the paragraph 5(3) Article is aimed at tackling the commercial activities around ‘sex tourism’ but we believe that this should be clearer. Perhaps 3(b) could refer to “the commercial organisation of travel arrangements ...”

## Article 7

12. We support the principle that these offences should carry substantial penalties but have concerns about the very substantial increases from the previous Framework Decision. We also wish to be reassured that any Article does not limit the discretion of the Judiciary in making sentencing decisions on the basis of the evidence in the particular case. We understand that this Article will be subject to further review in light of the concerns raised about its relationship to the Council conclusions of 24-25 April 2002 on the approach to apply regarding approximation of penalties (9141/02 DROIPEN 33). We look forward to further discussions.

## Article 8

Requires Member States to temporarily or permanently disqualify convicted child sex offenders from taking part in activities involving regular contact with children. The Commission proposes that the disqualification be recorded on the offender’s criminal record and that this information be provided to other Member States if they make a request for that individual’s criminal record. The UK strongly supports the objective of exchanging information and allowing its use for this purpose, but does not support the requirement that disqualifications should be recorded on the criminal record. We record this information, but not on the criminal record. We also find it regrettable that we will be allowed to use the fact of a disqualification to disqualify an EU national living in the UK from working with children, but will not be allowed to use any information on the convictions that led to the disqualification. To the United Kingdom it is important that we are able to use all the relevant information, not just a part and would therefore suggest that the derogation from Framework Decision 2009/315/JHA applies not just to the disqualification but to the offences that resulted in the disqualification.

## Article 10

This Article for the most part reflects the text of the existing Framework Decision but we note that relevant paragraphs use the word “penalties” rather than “sanctions”. We would favour referring to “sanctions”, in line with the title of the Article, the current Framework Decision, Lanzarote Convention and other 3<sup>rd</sup> Pillar instruments. In addition, the word ‘penalties’ carries a criminal connotation, whereas the examples of sanctions given at paragraph 1 are not classed as criminal in many Member States. The language used in the current FD and Convention is therefore more appropriate.

## Article 11

Requires Member States to provide for the possibility of not prosecuting or imposing penalties on child victims where they may have been involved in prostitution, pornographic performances or the production of child pornography. The UK is broadly content with this Article but believes that it may need a small change to improve its clarity by adding the word ‘either’ after ‘of’ in the first line.

## Article 12

In Article 12(6), we would suggest the text be amended slightly by adding the words in italics to say “Each MS shall take the necessary measures to enable units ... *to attempt* to identify ...” as this is more realistic. It is important that all Member States invest in this kind of technology but even with the right equipment, it is not always possible to perform this work successfully.

## Article 13

This Article on jurisdiction seeks to require wide ranging extra-territorial jurisdiction for the offences in this Framework Decision. As a general principle, the UK believes that crimes should be prosecuted where they occur. UK law thus concerns itself mainly with crimes committed wholly or in part in the UK with only a few exceptions. In addition, we would question the practicality of the proposal and do not believe it is realistic to expand jurisdiction in the way envisaged. We prefer a more practical approach which allows member States to apply extra-territorial jurisdiction in the flexible way envisaged in the previous Framework Decision and the equivalent clauses in the Lanzarote Convention (2007).

The Article also requires Member States to cooperate where both may establish jurisdiction and stipulates factors to be taken into account when deciding which of these States is to prosecute. The Council recently agreed a Framework Decision on preventing and resolving conflicts of jurisdiction and we believe the article or recitals could refer to that Framework Decision instead of creating new and difference rules here.

#### Article 14

The UK is supportive of protections for child victims but will need clarification of some aspects of these wide-ranging proposals. Article 14(1) provides for the simple presumption that a victim is a child, where their age is not determined, for the purposes of protection and assistance. The UK has concerns about this proposal and how it may impact on assessing age where that is in doubt. We believe the scope of this requirement should be limited.

We are unsure of the concern behind Article 14(2), unless it is directed at cases where the child is a party to the proceedings. If so, perhaps the text could be clarified by adding the words “where the victim is a party to proceedings.”

With regard to Article 14(3) which requires Member States to assist victims in their short-term and long-term “physical and psycho-social recovery.”, we do not think this Article, about the long term health care of victims, is wholly appropriate in an instrument about criminal investigations and proceedings.

In respect of Article 14(4) which proposes free legal aid for child victims, this does not appear to take into account the different legal systems used by Member States particularly those where victims are not parties to proceedings which are brought instead by the prosecution. We would suggest that the words “where the victim is a party to proceedings” be added to reflect this.

#### Article 15

In Article 15(1), we would suggest that we remove the word “strictly” in 15(1)(e) because this provision is otherwise identical to that in the Council of Europe Convention and we do not think it appropriate to create two subtly different thresholds.

Article 15(3) requires certain protections be provided during court proceedings. As it is important as a general rule that justice be done in public, we would suggest that Article 15(3)(a) be tailored more specifically to protect the child and the keep as much of the hearing open as possible. It could be amended to provide that “the judge may order that *the child victim may give evidence* without the presence of the public”.

In our view, Article 15(3)(b) should also be subject to judicial discretion. We imagine that this is intended, but the drafting could be clarified by adding the words “the judge may order” (as in 3(a)). Alternatively, the words “the judge may order” could be placed before elements (a) and (b).

## Article 16

This Article requires Member States to conduct risk assessments on offenders in respect of the danger presented and possible risk of repeat offending and also requires periodic review of all risk assessments. All offenders convicted of these offences are subject to risk assessment in the UK. However the assessment may find that the offender does not require an intervention programme or that a subsequent assessment is necessary. Intervention programmes and periodic reviews should only be applied where appropriate. Nor do we believe that there should be an unequivocal right for an offender to seek periodic review of a risk assessment.

The UK has also some concerns about Article 16 (1)(b) as it is not appropriate that this Article, which is closely linked to Article 17 on intervention programmes or measures, should also require that decisions to disqualify should also be subject to periodic reviews. Disqualification decisions have already been dealt with in Article 8.

## Article 17

Article 17 requires Member States to provide intervention programmes for persons who fear they may commit any of the stipulated offences; persons accused of child sexual offences and convicted child sex offenders. There are already voluntary organisations which provide support for potential offenders and it should not always be necessary the State to provide all such support.

## Article 18

This Article requires that Member States to take the necessary measures to enable the “competent judicial or police authority to order or similarly obtain blocking of access by internet users to internet pages containing or disseminating child pornography”. Such blocking already successfully occurs in the UK with the voluntary action by the Internet industry using a list of websites, produced by the Internet Watch Foundation (IWF). We are supportive of the use of blocking but it is not clear why the Commission has suggested that the authority to block access is restricted to judicial and police authorities. We consider that a competent, independent and expert body, such as the IWF, can conduct this function without recourse to the courts or the police. The European Commission’s work on the Safer Internet Programme also envisages collaborative approaches between industry, law enforcement and the State in preventing the distribution of child abuse material and this Article should therefore provide for more flexibility in identifying competent authorities to facilitate the blocking of access to child abuse material.

## Article 21

26. This Article on Implementation asks Member States to transmit to the Commission the text of the provisions transposing into their national legislation the obligations imposed by the Framework Decision. Common law countries would not necessarily use legislation to transpose all these obligations but may use other regulations or guidance and the wording in the Article should reflect this if possible.

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