



**COUNCIL OF
THE EUROPEAN UNION**

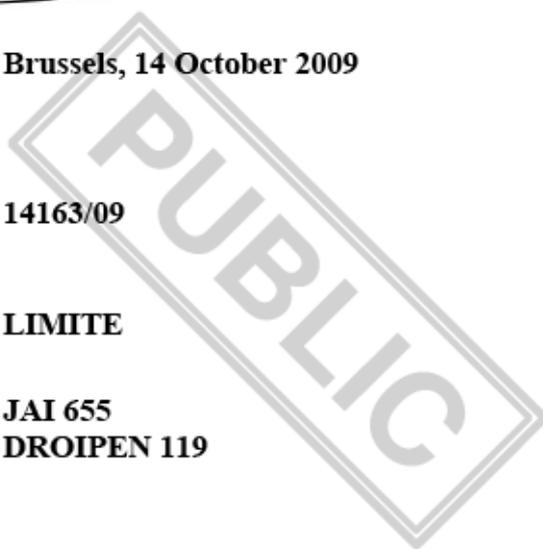
Brussels, 14 October 2009

**Interinstitutional File:
2009/0050 (CNS)**

14163/09

LIMITE

**JAI 655
DROIPEN 119**



NOTE

from :	Presidency
to :	Working Party on Substantive Criminal Law
No. prev. doc.	13780/09 DROIPEN 109
No. Cion prop.	8150/09 DROIPEN 16 MIGR 36 CRIMORG 50 + REV 1 (en) + 8150/09 ADD 1 + ADD 1 COR 1 + ADD 2 COR 2
Subject :	Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA

The Working Party on Substantive Criminal Law met on 27 - 28 July 2009 and also on 8 October 2009 to continue the examination of 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, on the basis of respectively document 11425/09 DROIPEN 52 MIGR 79 CRIMORG 102 and document 13780/09 DROIPEN 109.

The text of the draft Framework Decision, following the discussions in the Working Party, is set out in the Annex. Modifications of Articles 1-7 with regard to the text set out in document 13780/09 and of Articles 8-22 with regard to the text set out in document 8150/09 DROIPEN 16 MIGR 36 CRIMORG 50 are underlined. Deletions are marked by [...]. Comments by delegations are included in footnotes.

CZ, DK, EE, IE, FR, LT, NL, SI, SE and UK lodged a Parliamentary scrutiny reservations while DE, LV, PT, SI and UK entered general reservations.

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 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 Parliament¹,

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 pornography² 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.

¹ OJ C, p.

² OJ L 13, 20.1.2004, p. 14.

- (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.
- (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)³ ‘child pornography’ shall mean
 - (i) any material that visually depicts a child engaged in real [...] sexually explicit conduct;
 - (ii) any material that visually depicts a child engaged in simulated sexually explicit conduct for primarily sexual purposes [...];
 - (iii) any depiction for primarily sexual purposes of the sexual organs of a child;
 - (iv)⁴ any material that visually depicts a person appearing to be a child [...], engaged in real [...] sexually explicit conduct;
 - (v) any material that visually depicts a person appearing to be a child, engaged in simulated sexually explicit conduct, for primarily sexual purposes;
 - (vi) realistic images of a non-existent child engaged in sexual explicit conduct; or

³ CZ has entered a scrutiny reservation on this point.

⁴ Some delegations pointed at the possibility of opt-out in article 3(2)(a) of the current FD where a real person appearing to be a child is actually over 18 years old.

- (vii) any depiction for primarily sexual purposes of the sexual organs of a person appearing to be a child or realistic images of the sexual organs of a non-existent child.⁵
- (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 live exhibition [...], including by means of information and communication technology:
- (i) of a child engaged in real sexually explicit conduct; or
 - (ii) of a child engaged in simulated sexually explicit conduct, for primarily sexual purposes; or
 - (iii) of the sexual organs of a child for primarily sexual purposes;⁶
- [(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.]⁷
- (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.

⁵ The points have been inserted to meet the need to differentiate child pornography involving (verified) ”real” children from other forms of child pornography, see Article 7 and 12(2). No change in the definition of what is considered to be child pornography is intended.

⁶ DK, NL and UK have scrutiny reservations on (d).

⁷ The term “information system” has been replaced by “information and communication technology” in the new draft, for which there may be a need for a definition. Proposal from IT to insert the following definition: "Information and communication technology" shall mean any technical device able to perform processeing (allowing) and transmitting (broadcasting) of data and information through digital equipment".

Article 2⁸

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;
 - (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) causing, for sexual purposes, a child who has not reached the age of sexual consent under national law to witness sexual abuse or sexual activities;

⁸ AT and CY have scrutiny reservations on Article 2.

[(e)⁹ ¹⁰ causing, for sexual purposes, a child who has not reached the age of sexual consent under national law to engage in real or simulated sexually explicit conduct or exhibition of sexual organs, including through information and communication technologies.]¹¹

2. The provisions of paragraph 1(a) and 1(e) are not intended to govern consensual sexual activities between children or between a child and a person just above the age of 18 years, where [...] it is obvious that the act did not involve any abuse in view of, inter alia¹², a slight difference in age or development between them.¹³

⁹ DE, FI, PT and UK have scrutiny reservations on (e).

¹⁰ Some MS have made remarks on the fact that the provision on pornographic performances in article 3 is not limited to children under the age of sexual consent.

¹¹ COM proposes that paragraph 1(e) is to be deleted, as it now is covered by the definition of pornographic performance and the criminalisation for causing a child to participate in such a performance (Article 3 (a)). COM argues that the limitation to children under the age of sexual consent would be maintained if the exception for consensual activities between persons over the age of sexual consent is kept in a separate provision.

¹² COM opposes to adding "inter alia", as it could legitimize non punishment of child abuse for any reason.

¹³ COM proposes to move paragraph 2 to a new article, also including opt-out-possibilities in connection to article 3 and 4, drafted as follows:

ARTICLE 4 a

"1. The provisions of Article 2, paragraph 1(a) are not intended to govern consensual sexual activities between children, or between young adults shortly above the age of 18 years and children above the age of sexual consent, where, in view of the slight difference in age and development between the children or between the adult and the child, it is obvious that the act did not involve any abuse.

2. A Member State may exclude from criminal liability conduct relating to pornographic performances referred to in Article 3 (a) and (d) and conduct relating to child pornography referred to in Article 4(1)(a) and (d) regarding production and possession of child pornography, insofar as the conduct involves only children who have reached the age of sexual consent under national law, or children and young adults shortly over the age of 18 years, where these images are produced and possessed by themselves with their consent and solely for their own private use."

Offences concerning sexual exploitation

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

- (a)¹⁶ recruiting or causing a child to participate in child prostitution or pornographic performances;
- (b) coercing a child into child prostitution or to participate in pornographic performances [...];
- (c) profiting from or otherwise exploiting a child for the purpose of child prostitution or pornographic performances;¹⁷
- (d) engaging in sexual activities with a child, where recourse is made to child prostitution; or
- (e)¹⁸ knowingly attending pornographic performances involving the participation of children.¹⁹

¹⁴ NL has a scrutiny reservation.

¹⁵ COM proposes opt-out-possibility in new article for private and consensual pornographic performances inside a relationship, see note related to article 2(2).

¹⁶ FR and UK have scrutiny reservations on a).

¹⁷ Point (b) split into two points – (b) and new (c) – to meet the need to differentiate in article 7 and 12.

¹⁸ EE and FI entered scrutiny reservations. UK has scrutiny reservation with regard to performances involving children above the age of sexual consent who participate with full consent.

¹⁹ DE, EE, PL and FI prefer an opt-out-possibility in line with CoE PC-ES Article 21(2), that limits the application to performances where the children involved have been “recruited“ or “coerced” into such performances.

Article 4

Offences concerning child pornography

1. Each Member State shall take the necessary measures to ensure that the following intentional conduct, when committed without right is punishable:
 - (a) production of child pornography;
 - (b) distribution, dissemination or transmission of child pornography;
 - (c) offering, supplying or making available child pornography;
 - (d) acquisition or possession of child pornography;
 - (e)²⁰ knowingly obtaining access, by means of information or communication technology²¹, to child pornography, where, [inter alia]²², the obtaining of access is repeated [...] or is paid for.²³

²⁰ AT, EE and FI has entered a reservation on the wording of the COM proposal. LT wanting a longer list of criteria, entered a scrutiny reservation.

²¹ The term "information or communication technology" is subject to further consideration, see footnote to Article 1(e).

²² COM and ES oppose "inter alia"; they want a more binding provision where these facts should be considered relevant to issue of intentionality, in line with article 20 of PC-ES, but without the possibility of opt-out as in PC-ES.

²³ COM proposes an alternative text, closer to that of the explanatory report (p. 140) to CoE PC-ES article 20: "knowingly obtaining access, by means of [...] information or communication technology[...], to child pornography. Intentionality of the conduct may be deduced, inter alia, where access is repeated, has included a large amount of child pornography or is paid for".

2.²⁴ A Member State may exclude from criminal liability conduct relating to Article 4(1)(a) and (d) regarding production and possession of pornographic material involving only children who have reached the age of sexual consent under national law or children who have reached the age of sexual consent and persons just above the age of 18 years, where these images are produced and possessed by them[...] with their consent and solely for their own private use.²⁵
26 27 28

Article 5

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 information or communication technology, by an adult to meet a child who has not reached the age of sexual consent under national law, for the purpose of committing any of the offences referred to in Articles 2(1)(a) and 4(1)(a), where this proposal has been followed by material acts leading to such a meeting.²⁹

²⁴ DE and EE entered a scrutiny reservation.

²⁵ AT, DK, DE, LT, PL and UK, propose opt-out-possibility as in CoE PC-ES Article 20(3).

²⁶ Some Member States also want opt-out-possibility as in CoE PC-ES Article 20(3) on possession and production of material consisting of simulated representations or realistic images of a non-existent child. Others want opt-out for the whole of paragraph 1(e) as in PC-ES Article 20(4).

²⁷ COM proposes opt-out-possibility in new article, see note related to article 2(2).

²⁸ FR and UK want opt-out-possibility as in article 3(2)(a) of the current FD where a person appearing to be a child is actually over 18.

²⁹ LV suggests to delete "information or communication technology" but add "where this proposal has been followed by material acts leading to such a meeting" at the end of the paragraph.

Article 6

Instigation, aiding and abetting, and attempt

1. Each Member State shall take the necessary measures to ensure that the instigation of or aiding and abetting to commit any of the offences referred to in Articles 2 to 5 is punishable.
- 2.³⁰ Each Member State shall take the necessary measures to ensure that attempts to commit any of the offences referred to in Article 2(1)(a), (b) and (c), Article 3(a), (b) and (c) and Article 4(1)(a) and (b) is punishable.^{31 32}
3. [...] ³³

*Article 6a*³⁴

Prevention of advertising abuse opportunity and sex tourism

1. Each Member State shall take the necessary measures to prevent or prohibit the dissemination of materials advertising offences referred to in Articles 2 to 4.³⁵

³⁰ RO entered a scrutiny reservation on this paragraph.

³¹ Conclusion of discussions is that criminalisation of attempt should be limited to serious criminal acts and criminal acts that are relevant in practice as attempt. PC-ES Article 24(3) gives a possibility of opting-out for some of the offences.

³² COM also want attempt of 2(1)(e) and 4(1)(d) and (e) to be punishable. Stresses that in all these cases attempt is possible and relevant.

³³ The large majority of delegation does not support the provision proposed by COM. Some propose to use the solution in PC-ES Articles 8 (2) and 9(2).

³⁴ As the Article replaces Article 6(3) it has now been placed near that Article. As it has no connection to Articles 7-13 it could be placed thereafter.

³⁵ Based on CoE PC-ES article 8(2). Not relevant to advertise the possibility of grooming.

2.³⁶ Each Member State shall encourage tourism and travel industry to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children during travel outside the territory of the Member State concerned and to implement internal norms through self-regulation or co-regulation.^{37 38 39}

³⁶ IE and PT entered a scrutiny reservation.

³⁷ Based on CoE PC-ES article 9(2).

³⁸ COM opposes the new provision relating only to self-regulation, as this is not sufficient to deter businesses making profit out of organising child sex tourism. Additionally, the COM raises doubts as to the possibility for such a provision to be contained in a Framework Decision, which is intended to approximate legislation.

³⁹ IT, supported by COM, proposes an article on sex tourism as follows:

“Article 6b

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.”

Penalties⁴³

1. Each Member State shall take the necessary measures to ensure that the offences referred to in:
 - (a) Article 2(1)(d) and (e), Article 3(e), Article 4(1)(a) to (c) – when involving material referred to in Article 1(b)(iv), (v), (vi) and (vii) –, (d) and (e) and Article 5 are punishable by a maximum term of at least between one to three years of imprisonment,
 - (b) Article 2(1)(a), (b)(ii) and (iii) and (c), Article 3(a), [...] (c) and (d) and Article 4(1)(a) to (c) – when involving material referred to in Article 1(b)(i), (ii) and (iii) – are punishable by a maximum term of at least between two to five years of imprisonment,
 - c) Article 2(1)(b)(i) and Article 3(b) [...] are punishable by a maximum term of at least between five to ten years of imprisonment.

2. Each Member State shall take the necessary measures to ensure that the offences referred to in Article 4(a) to (c) – when involving material referred to in Article 1(b)(i), (ii) and (iii) – are punishable by a maximum term of at least between five to ten years of imprisonment, where the offences are committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA^{44 45}.

⁴⁰ COM does not oppose the principle of making distinctions between different types of offences and imposing differentiated levels of penalties. However, the COM is of the opinion that level of penalties for some offences should be raised to the level above, as in many cases the level does not correspond to the seriousness of the offence, the trauma it produces to the victim, and the social alarm they create.

⁴¹ The Presidency will work on a table describing different levels of penalty related to each criminal provision.

⁴² A number of Member States entered scrutiny reservations: BG, LT, NL, RO, SI and UK.

⁴³ The heading has been shortened, since the provision does not deal with aggravating circumstances, but rather qualifying circumstances for higher penalty levels.

⁴⁴ OJ L 300, 11.11.2008, p. 42.

⁴⁵ COM proposes that the fact that the offence was committed within a framework of a criminal organisation is to be considered as one among other qualifying circumstances.

3.⁴⁶ Each Member State shall take the necessary measures to ensure that the offences referred to in⁴⁷ [...]

(a) Article 2(1)(a), (b)(ii) and (iii) and Article 3 (a), (c) and (d) are punishable by a maximum term of imprisonment of at least five to ten years,⁴⁸

(b) Article 2(1)(b)(i) and (c) and Article 3(b) [...] are punishable by a maximum term of imprisonment of at least ten years⁴⁹,

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:⁵⁰

- (i) the child has not reached the age of sexual consent under national law;
- (ii) the offence was committed against a child who was particularly vulnerable⁵¹, notably because of a mental or physical disability or a situation of dependence;
- (iii) the offence was committed by a member of the family, a person cohabiting with the child or a person having abused their authority;
- (iv) the offence was committed by several people acting together;

⁴⁶ PL entered a scrutiny reservation.

⁴⁷ ES, PT and FI want to separate aggravating circumstances from penalty levels, as in CoE PC-ES Article 28. PL wants only in specific cases circumstances to be taken into consideration. RO and SI wants more flexibility.

⁴⁸ COM proposes at least twelve years.

⁴⁹ COM proposes at least twelve years.

⁵⁰ The circumstance that the perpetrator has previously been convicted of offences of the same nature has been left out as Member States have stressed that reoffending does not qualify the crime as such, and is only relevant in relation to the offender. PL has a reservation on the qualifying circumstances.

⁵¹ NL entered a scrutiny reservation on "particularly vulnerable".

- (v) the offence has deliberately or by gross negligence endangered the life of the child;
- (vi) the offence was committed by use of serious violence or has caused particularly serious harm to the child.

3a. Each Member State shall take the necessary measures to ensure that an offence referred to in Article 6 is punishable by effective, proportionate and dissuasive penalties.

4. With a view to preventing and minimising the risks of repeated offences referred to under Article 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.

Article 8

Disqualification arising from convictions

- 1.⁵² In order to avoid the risk of repetition of offences each Member State shall in accordance with the basic principles of its national law 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 [...] prevented from exercising activities⁵³ involving regular contacts with children that are likely to imply an increased risk of criminal behaviour.^{54 55}
- [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.

⁵² FI and SI entered a scrutiny reservation on the paragraph. ES entered a reservation on the permanent character of the measure.

⁵³ FI, SI and HU pointed out that the provision needed to be limited to “professional” activities. Other MS underlined the need for flexibility in relation to different systems of MS.

⁵⁴ It is the nature of the activity and the contact with children through that activity that is to imply an increased risk of re-offending, not the risk of repetition in general. This would mean that not every imaginable contact with children through the activity necessarily would have to be banned. For example, working in a food store, could be tolerated, even though children go there to buy food.

⁵⁵ According to the COM, the addition is not necessary as the factor would be taken into consideration by the judge when imposing the disqualification. Also COM means that it could cause problems for MS if the disqualification would follow directly from the law.

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 States⁵⁶, 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 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.]⁵⁷

⁵⁶ Adopted at the JHA Council of 26-27 February 2009. Final reference pending publication.

⁵⁷ Paragraphs 2-4 have not been subject to second reading yet. Not redrafted at this stage.

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. [...] ⁵⁸

⁵⁸ Definition of 'legal person' moved to Article 1.

Article 10

Penalties for 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^{59 60}

Non prosecution or non-application of penalties to the victim

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 child victims of the offences referred to in Articles 3 and 4(a) for their involvement in criminal activities they have been compelled to commit as a direct consequence of being subjected to those offences.

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.

⁵⁹ Redrafted in line with the FD on trafficking in human beings.

⁶⁰ COM is of the view that "compelled" means something different in relation to children than in relation to victims of THB.

- 2.⁶¹ Each Member State shall take the necessary measures to enable the prosecution of any of the offences referred to in Article 2(a), (b) and (c), Article 3 (a), (b) and (c), and Article 4 (a) – when production has involved material referred to in Article 1(b)(i), (ii) and (iii)⁶² – 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.⁶³
3. [...]⁶⁴
4. [...]⁶⁵
5. Each Member State shall take the necessary measures, in accordance with the basic principles of its legal system, to ensure effective investigation and prosecution of the offences referred to in Articles 2 to 6, allowing the possibility of at least in cases where the use of information or communication technology is involved, covert operations[...].^{66 67}

⁶¹ Redrafted taking DE-proposal as well as discussions into account. Limited to criminal acts where offender and victim typically are relatively close, where the offender can use influence or control over the victims ability to report.

⁶² Only when an actual child is involved and the age of the child is known the provision can be effectively used. Inspired by PC-ES, Article 33.

⁶³ COM wants the provision to also include at least article 2 (d) and (e).

⁶⁴ Moved to new Article 12a.

⁶⁵ Moved to new Article 12a.

⁶⁶ The term “covert operation” has been questioned by some MS. A better term is not easy to find. Possibly more explanatory information on what is meant and/or *not* meant can be given in the preamble text. To some extent it may be more a question of adjusting different language versions.

⁶⁷ According to the COM the term to be used is "covert operations" [COE convention, Art 30.5; "undercover operations" (UN Convention on Organised Crime, Art 20); or "Covert investigations" (Article 14, Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union); this instrument even describes them "Covert investigations - 1. The requesting and the requested Member State may agree to assist one another in the conduct of investigations into crime by officers acting under covert or false identity (covert investigations)"].

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 [...] information or communication technology.

Article 12a⁶⁸

Reporting suspicion of sexual exploitation or sexual abuse

1. 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.

2. 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.

⁶⁸ Both paragraphs moved from Article 12(3) and (4). In line with CoE PC-ES Article 12.2.

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 his or her habitual residence in its territory⁶⁹; or
 - (c) the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory⁷⁰; or
 - (d) the offence is committed for the benefit of a legal person established in the territory of that Member State⁷¹.

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 [...] information or communication technology⁷² accessed from its territory, whether or not it is based on its territory.

⁶⁹ DE, SI, PL among others want an opt-out-possibility on habitual residence. CZ, SI and UK entered a scrutiny reservation.

⁷⁰ Some MS want an opt-out possibility on victim-jurisdiction (passive personality principle).

⁷¹ Some MS want an opt-out-possibility on 1(d).

⁷² Concept to be further considered.

3. For the prosecution of any of the offences referred to in Article 2(a), (b), (c) and (e), Article 3 and Article 4(1)(a) to (c)⁷³ 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.⁷⁴
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.
- [5.⁷⁵ 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;

⁷³ COM opposes excluding the rest of Article 4, as this could easily facilitate the creation and functioning of safe havens for child pornography activities (including acquisition) in third countries, including activities run by Member States' nationals.

⁷⁴ Redrafted, taking DE-proposal as well as discussions into account with the aim of targeting in particular criminal acts linked to child sex-tourism. In line with PC-ES, Article 25(4).

⁷⁵ Whether a provision on conflicts of jurisdiction should be included in this FD will be discussed.

- (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

[...] Assistance and support to victims⁷⁶

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 in order to receive immediate access to assistance, support and protection [...] in accordance with Articles 14 and 15.

2. [...] ⁷⁷

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

4. [...] ⁷⁸

⁷⁶ Heading adjusted in accordance with the redraft of FD on trafficking in human beings. The Article has not been discussed in detail yet.

⁷⁷ Moved to article 15 (4).

⁷⁸ Moved to article 15 (5).

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 proceedings⁷⁹.
6. Each Member State shall take all measures possible to ensure appropriate assistance to 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.
7. 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

Protection of child victims in criminal investigations and proceedings⁸⁰

1. Without prejudice to the rights of the defence, 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;

⁷⁹ OJ L 82, 22.3.2001, p. 1.

⁸⁰ Heading adjusted in accordance with the FD on trafficking in human beings.

- (b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;
- (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) it may be ordered that the hearing shall 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.

4.⁸¹ Each Member State shall take the necessary measures to ensure that, in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, judicial authorities appoint a special representative for the victim where, by national law, the holders of parental responsibility are precluded from representing the child [...] as a result of a conflict of interest between them and the victim, or where the child is unaccompanied.⁸²

5.⁸³ Each Member State shall take the necessary measures to ensure that where appropriate, in accordance with the role of victims in the relevant justice system, 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.⁸⁴

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 in terms of 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.

⁸¹ Moved from article 14(2).

⁸² In line with the wording in the FD on THB: "in criminal investigations and proceedings, in accordance with the role of victims in the relevant system".

⁸³ Moved from article 14(4).

⁸⁴ In line with the wording in the FD on THB: "in criminal investigations and proceedings, in accordance with the role of victims in the relevant system".

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 18⁸⁵

Blocking access to websites containing child pornography⁸⁶

Each Member State shall take the necessary measures to obtain the blocking of access by Internet users to Internet pages containing or disseminating child pornography, inter alia, by facilitating the competent judicial or police authorities to order such blocking or by supporting and stimulating Internet Service Providers on a voluntary basis to block such Internet pages. The blocking shall be 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.

⁸⁵ PT entered a (positive) scrutiny reservation.

⁸⁶ COM and several MS agree that a flexible provision allowing, as an alternative, for effective blocking on a voluntary basis would meet with the aim of the provision, for example PPP-solutions (Public Private Partnership).

Article 19

Territorial scope

This Framework Decision shall apply to Gibraltar.⁸⁷

Article 20

Repeal of Framework Decision 2004/68/JHA

Framework Decision 2004/68/JHA is hereby repealed.

Article 21

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.

⁸⁷ Subject to confirmation by ES and UK.

Article 22

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
