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EUROPEAN COMMISSION

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on combating the sexual abuse, sexual exploitation of children and child pornography,
repealing Framework Decision 2004/68/JHA**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

Sexual abuse and sexual exploitation of children are particularly serious forms of crime as they are directed against children, who have the right to special protection and care. They produce long-term physical, psychological and social harm to victims and its persistence undermines the core values of a modern society relating to the special protection of children and trust in relevant State institutions. Despite a lack of accurate and reliable statistics, studies suggest that a significant minority of children in Europe may be sexually assaulted during their childhood, and research also suggests that this phenomenon is not decreasing over time, rather that certain forms of sexual violence are on the rise.

The general policy objective of the Union in this field, under Article 67 of the Treaty on the Functioning of the European Union, is to ensure a high level of security through measures to prevent and combat crime, which includes child sexual abuse and child sexual exploitation. In accordance with Article 83 of the Treaty on the Functioning of the European Union, this should be done primarily by establishing minimum rules concerning the definition of criminal offences and sanctions in the area of sexual exploitation of children. Specific objectives would be to effectively prosecute the crime; to protect victims' rights; and to prevent child sexual exploitation and abuse.

- **General context**

With regard to child victims, the main cause of this phenomenon is vulnerability resulting from a variety of factors. Insufficient response by law enforcement mechanisms contributes to the prevalence of these phenomena, and the difficulties are exacerbated because certain forms of offences transcend national borders. Victims are reluctant to report abuse, variations in national criminal law and procedure may give rise to differences in investigation and prosecution, and convicted offenders may continue to be dangerous after serving their sentences. Developments in information technology have made these problems more acute by making it easier to produce and distribute child sexual abuse images while offering offenders anonymity and spreading responsibility across jurisdictions. Ease of travel and income differences fuel so-called child sex tourism, resulting often in child sex offenders committing offences abroad with impunity. Beyond difficulties of prosecution, organised crime can make considerable profits with little risk.

National legislation covers some of these problems, to varying degrees. However, it is not strong or consistent enough to provide a vigorous social response to this disturbing phenomenon.

The recent Council of Europe Convention CETS No. 201 on the Protection of Children against Sexual Exploitation and Sexual Abuse ("the COE Convention") arguably constitutes the highest international standard for protecting children against sexual abuse and exploitation to date. On a global scale, the main international standard is the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 2000. However, not all Member States have yet acceded to this Convention.

- **Existing provisions in the area of the proposal**

At EU level, Council Framework Decision 2004/68/JHA, introduces a minimum of approximation of Member States' legislation to criminalise the most serious forms of child sexual abuse and exploitation, to extend domestic jurisdiction, and to provide for a minimum of assistance to victims. Although the requirements have generally been put into implementation, the Framework Decision has a number of shortcomings. It approximates legislation only on a limited number of offences, does not address new forms of abuse and exploitation using information technology, does not remove obstacles to prosecuting offences outside national territory, does not meet all the specific needs of child victims, and does not contain adequate measures to prevent offences.

Other EU initiatives in force or on the way partially address some problems which also affect child sexual offences. They include Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the internet, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, Decision No 854/2005/EC of the European Parliament and of the Council of 11 May 2005 establishing a multiannual Community Programme on promoting safer use of the internet and new online technologies, and Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

- **Consistency with the other policies and objectives of the Union**

The objectives are fully consistent with the EU policy of promotion, protection and fulfilment of children's rights in the internal and external policies of the EU. The EU explicitly recognised protection of children's rights in the Charter of Fundamental Rights of the European Union, specifically in Article 24. Furthermore, in its communication *Towards an EU Strategy on the Rights of the Child*, the Commission set itself the objective of maximising the use of its existing policies and instruments partly with a view to protecting children from violence and sexual exploitation inside and outside the EU. The objectives are also consistent with the Safer Internet Programme set up to promote safer use of the internet and new online technologies, particularly for children, and to fight against illegal content. The Safer Internet Programme contributes to preventing child sexual abuse through an array of measures including the empowerment and protection of minors, awareness raising and education, self-regulation and safety tools.

They are fully consistent with the Commission proposal for a Directive on preventing and combating trafficking in human beings and protecting victims.

The objectives are also consistent with the new EU Youth Strategy (Council Resolution 27 November 2009), which targets children and young people within the age range 13-20, and anchors European youth policy cooperation firmly in the international system of human rights. The EU Youth Strategy highlights that the life and future prospects of young people are significantly determined by the opportunities, support and protection received during childhood and calls upon stakeholders at local level to detect and help young people at risk and to signpost them to other services where needed and facilitate young people's access to health facilities.

This proposal was subject to in-depth scrutiny to ensure that its provisions were fully compatible with fundamental rights 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.

Particular attention was paid to Article 24 of the Charter of Fundamental Rights of the European Union, which lays down a positive obligation to act with the aim of ensuring the necessary protection of children. It states that children have the right to such protection and care as is necessary for their wellbeing. In addition, it requires that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration, which is also enshrined in the UN Convention on the Rights of the Child.

The provisions on criminalising new forms of abuse using the Internet, recognising special investigative techniques, prohibition from certain activities and the exchange of information to ensure implementation throughout the EU were specially scrutinised with regard to the right to respect for private and family life and the protection of personal data (Article 8 ECHR, Articles 7 and 8 of the Charter of Fundamental Rights of the European Union). Provisions to increase law enforcement against publishing and disseminating child abuse material, advertising child pornography or encouraging child sexual abuse, and on mechanisms to block access to internet pages containing child pornography were checked in particular with regard to freedom of expression (Article 10 ECHR, Article 11 of the Charter of Fundamental Rights of the European Union).

Where necessary, appropriate use may be made of funding possibilities available at the level of the European Union to support Member States' efforts to comply with the requirements of this directive.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

A broad range of experts in the field were consulted in three different meetings dealing both with child sexual abuse, sexual exploitation, and trafficking in human beings. This included, in particular, Representatives of Member States' Governments, Members of the Commission's Group of Experts on Trafficking in Human Beings, international organisations, notably the Council of Europe and UNICEF, NGOs, academia and research centres, and other public institutions. A number of experts and organisations have subsequently sent in submissions and provided information.

Discussions in the Council on the Commission proposal for a Framework Decision on this subject have provided information on Member States' legislation and current practice. This has to a large extent confirmed the need for a new EU framework approximating national legislation.

Summary of responses and how they have been taken into account

Key messages resulting from the consultation are:

- the need to incorporate improvements of the COE Convention;
- the need to criminalise forms of abuse not included in the current FD, in particular new forms of offences using IT;
- the need to eliminate obstacles to investigation and prosecution in cross-border cases;
- the need to ensure comprehensive protection of victims, in particular in investigation and criminal proceedings;
- the need to prevent offences through intervention programmes and treatment;
- the need to ensure that convictions and security measures that are imposed on dangerous offenders in one country are effective in all Member States.

The input received during the consultation has been taken into account in the Impact Assessment. Some of the suggestions made by different stakeholders in the consultation process have not been included in the proposal, for different reasons explained in the Impact Assessment.

• **Collection and use of expertise**

There was no need for external expertise.

• **Impact assessment SEC(2009) 355 and Impact assessment summary SEC(2009) 356**

Various policy options have been examined in the context of the previous proposal for a Framework Decision as a means to achieve the objective.

• Policy option (1): No new EU action

The EU would take no new action (legislation, non-policy instruments, financial support) to combat child sexual abuse and exploitation, while Member States could continue the process of signature and ratification of the COE Convention.

• Policy option (2): Complement existing legislation with non-legislative measures

Existing EU legislation, in particular Framework Decision 2004/68/JHA, would not be amended. Instead, non-legislative measures could be put in place to support coordinated implementation of national legislation. This would include exchanging information and experience in prosecution, protection or prevention, awareness raising, cooperation with private sector and encouragement of self regulation, or the setting up of mechanisms for data collection.

• Policy option (3): New legislation on prosecuting offenders, protecting victims, and preventing offences

A new legislative act would be adopted, incorporating the existing Framework Decision, certain provisions of the COE Convention, and additional elements not contained in either of these. It would cover prosecution of offenders, protection of the victims, and prevention of the phenomenon.

- Policy option (4): New comprehensive legislation to enhance prosecution of offenders, protection of victims and prevention of offences (as in option 3) plus non-legislative measures (as in option 2)

The existing provisions of Framework Decision 2004/68/JHA would be supplemented by EU action to amend substantive criminal law and procedure, protect victims, and prevent offences as under option 3, plus the non-legislative measures identified under option 2 to improve the implementation of national legislation.

Following the analysis of the economic impact, social impacts, and impacts on fundamental rights, options 3 and 4 represent the best approach to the problems and achieve the objectives of the proposal. The preferred option would be option 4, followed by option 3.

The Commission carried out an impact assessment to accompany the previous proposal for a Framework Decision of 25 March 2009 on combating the sexual abuse, sexual exploitation of children and child pornography, which is valid *mutatis mutandis* for the present proposal for a Directive. The report on the impact assessment is accessible at:

http://ec.europa.eu/governance/impact/ia_carried_out/cia_2009_en.htm#jls

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The Directive will both repeal and incorporate Framework Decision 2004/68/JHA to include the following new elements:

- On substantive criminal law in general

Serious forms of child sexual abuse and exploitation currently not covered by EU legislation would be criminalised. This includes, for instance, the organisation of travel arrangements with the purpose of committing sexual abuse, something particularly relevant, but not exclusively, in the context of child sex tourism. The definition of child pornography is amended to approximate it to the COE Convention and the Optional Protocol to the Convention on the Rights of the Child. Special consideration is given to offences against children in a particularly vulnerable situation.

In particular, the level of criminal penalties should be increased so that they are proportionate, effective and dissuasive. To determine the degree of seriousness and attach penalties proportionate to it, consideration is given to different factors which may intervene in very different sorts of offences, like the degree of harm to the victim, the level of culpability of the offender and the level of risk posed to society.

Accordingly, a number of relations between offences can be established. In general terms, activities involving sexual contact are more serious than those which do not; the presence of exploitation makes the offence more serious than its absence; coercion, force or threats are more serious than abuse of a position of power of the offender or weakness of the victim,

which in turn is more serious than free consent of the victim. Prostitution, which involves sexual activities and money, is more serious than pornographic performances, which may or may not include them; recruiting to prostitution or similar is more serious than mere causing, as it involves active seeking of children as commodities. On child pornography, production, usually involving recruiting and sexual contact with the child, is more serious than other offences like distribution or offering, which in turn are more serious than possession or access.

As a result of combining these different criteria, distinction is thus made between five different groups of offences, depending on their degree of seriousness, leading to accordingly different levels of penalties for the basic crimes.

- On new criminal offences in the IT environment

New forms of sexual abuse and exploitation facilitated by the use of IT would be criminalised. This includes on-line pornographic performances, or knowingly obtaining access to child pornography, to cover cases where viewing child pornography from websites without downloading or storing the images does not amount to "possession of" or "procuring" child pornography. Also the new offence of "grooming" is incorporated closely following the wording agreed in the COE Convention.

- On criminal investigation and initiation of criminal proceedings

A number of provisions would be introduced to assist with investigating offences and bringing charges.

- On prosecution of offences committed abroad

Rules on jurisdiction would be amended to ensure that child sexual abusers or exploiters from the EU, both nationals and habitual residents, face prosecution even if they commit their crimes outside the EU, via so-called sex tourism.

- On protection of victims

New provisions dealing with protection of victims (in a broad sense) will be included to ensure that victims have easy access to legal remedies and do not suffer from participating in criminal proceedings. They cover assistance and support to victims, and protection of victims specifically in criminal investigations and proceedings.

- On prevention of offences

Amendments would be introduced to help prevent child sexual abuse and exploitation offences, through a number of actions concentrating on previous offenders to prevent recidivism, and to restrict access to child pornography on the internet. The aim of restricting such access is to reduce the circulation of child pornography by making it more difficult to use the publicly-accessible Web. It is not a substitute for action to remove the content at the source or to prosecute offenders.

As a result, the proposal would also provide added value to the standard of protection set by the COE Convention in a number of ways. From the point of view of substance the proposal includes elements not contained in the COE Convention, such as ensuring implementation across the EU of prohibitions from activities with children imposed on offenders, blocking

access to child pornography on the internet, criminalising coercing a child into sexual relations with a third party, child sexual abuse through pornographic performances online, and a non-punishment clause for child victims. It also goes beyond the obligations imposed by the COE Convention regarding the level of penalties, free legal counselling for child victims and repression of activities encouraging abuse and child sex tourism. From a formal point of view, incorporating provisions from the Convention into EU law will facilitate faster adoption of national measures compared to national procedures for ratification, and ensure better monitoring of implementation.

- **Legal basis**

Articles 82 (2) and 83 (1) of the Treaty on the Functioning of the European Union

- **Subsidiarity principle**

The subsidiarity principle applies to the actions of the European Union.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reasons.

Child sexual exploitation and sexual abuse has a considerable cross-border dimension, which is most evident in child pornography and child sex tourism, but also appears in the need to ensure that children in all Member States should be protected from offenders from all Member States, who can travel easily. This requires EU action, notably to follow up on Council Framework Decision 2004/68/JHA and Council Decision 2000/375/JHA,¹ as the objective of effectively protecting children cannot be sufficiently achieved by Member States, either at central level or at regional or local level.

Action by the European Union can better achieve the objectives of the proposal for the following reasons.

The proposal will further approximate the substantive criminal law of Member States and rules on procedure, which will have positive impact on the fight against these crimes. Firstly, it is a way of avoiding a criminal preference for committing acts in Member States which have less severe rules; secondly, shared definitions make it possible to promote the exchange of useful common data and experience and to promote comparability of data; and thirdly, international cooperation is made easier. The proposal would also improve the protection of child victims. This is a humanitarian imperative and also a condition for victims to provide evidence necessary to prosecute offences. The effectiveness of prevention measures across the EU will be enhanced as well.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reason(s).

¹ Council Decision of 29 May 2000 to combat child pornography on the Internet (OJ L 138, 9.6.2000, p. 1).

This Directive 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, taking into account the need for accuracy of criminal legislation.

- **Choice of instruments**

Proposed instruments: Directive.

In the fight against sexual exploitation of children the approximation of the criminal laws and regulations of the Member States is necessary to improve cooperation in criminal matters. To this end the TFEU specifically envisages the adoption of directives only.

4. BUDGETARY IMPLICATION

The proposal has no implication for the EU budget.

5. ADDITIONAL INFORMATION

- **Repeal of existing legislation**

The adoption of the proposal will lead to the repeal of existing legislation.

- **Territorial scope**

The adoption of the proposal will be addressed to the Member States. The application of the resulting Directive to the United Kingdom, Ireland and Denmark will be determined in accordance with the provisions of Protocols (No 21) and (No 22) annexed to the Treaty on the functioning of the European Union.

Proposal for a

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**on combating the sexual abuse, sexual exploitation of children and child pornography,
repealing Framework Decision 2004/68/JHA**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2) and 83(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the ordinary legislative procedure⁴,

Whereas:

- (1) Sexual abuse and sexual exploitation of children, including child pornography constitute serious violations of fundamental rights, in particular the rights of the child to protection and care as is necessary for his or her well-being as stipulated by the UN Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union.
- (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 pornography⁵ 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. Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings⁶ establishes a set of victims' rights in criminal proceedings,

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ C , , p. .

⁵ OJ L 13, 20.1.2004, p. 14.

⁶ OJ L 82, 22.3.2001, p. 1.

including the right to protection and compensation. Moreover, the coordination of prosecution of cases of sexual abuse, sexual exploitation of children and child pornography will be facilitated by the adoption of Council Framework Decision 2009/948/JHA on prevention and settlement of conflict of jurisdiction in criminal proceedings⁷.

- (4) According to Article 34 of the UN Convention on the Rights of the Child, States Parties undertake to protect the child from all forms of sexual abuse. 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 Abuse⁸ 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. The child's best interests must be a primary consideration when carrying out any measures to combat these offences in accordance with the Charter of Fundamental Rights of the European Union and the UN Convention on the Rights of the Child. Framework Decision 2004/68/JHA should 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, various forms of sexual abuse and sexual exploitation facilitated by the use of information and communication technology. The definition of child pornography should also be clarified and brought closer to that contained in international instruments.
- (7) This Directive does not govern Member States' policies with regard to consensual sexual activities in which children may be involved and which can be regarded as the normal discovery of sexuality in the course of human development, taking account of the different cultural and legal traditions and of new forms of establishing and maintaining relations among children and adolescents, including through information and communication technologies.
- (8) 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. To ensure successful investigations and prosecutions of the offences referred to in this Directive, effective investigation tools should be made available to those responsible for the investigation and prosecutions of such offences. These tools may include covert operations, interception of communications, covert surveillance including electronic surveillance, monitoring of bank accounts or other financial investigations.

⁷ OJ L 328, 15.12.2009, p. 42.

⁸ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, made in Lanzarote, 25.10.2007, Council of Europe Treaty Series No. 201.

- (9) 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.
- (10) Measures to protect child victims should be adopted in their best interest, taking into account an assessment of their needs. Child victims should have easy access to legal remedies, including free legal counselling and representation and measures to address conflicts of interest where abuse occurs in the family. Moreover, child victims should be protected from sanctions, for example under national legislation on immigration or prostitution, if they bring their case to the attention of competent authorities. Furthermore, participation in criminal proceedings by child victims should not cause additional trauma as a result of interviews or visual contact with offenders.
- (11) 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.
- (12) 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.
- (13) Child pornography, which constitutes sex abuse images, is a specific type of content which cannot be construed as the expression of an opinion. To combat it, it is necessary to reduce the circulation of child abuse material by making it more difficult for offenders to upload such content onto the publicly accessible Web. Action is therefore necessary to remove the content at source and apprehend those guilty of making distributing or downloading child abuse images. The EU, in particular through increased cooperation with third countries and international organisations, should seek to facilitate the effective removal by third country authorities of websites containing child pornography, which are hosted in their territory. However as, despite such efforts, the removal of child pornography content at its source proves to be difficult where the original materials are not located within the EU, mechanisms should also be put in place to block access from the Union's territory to internet pages identified as containing or disseminating child pornography. For that purpose, different mechanisms can be used as appropriate, including facilitating the competent judicial or police authorities to order such blocking, or supporting and stimulating Internet Service Providers on a voluntary basis to develop codes of conduct and guidelines for blocking access to such Internet pages. Both with a view to the removal and the blocking of child abuse content, cooperation between public authorities should be established and strengthened, particularly in the interest of ensuring that national lists of websites containing child pornography material are as complete as possible and of avoiding duplication of work. Any such developments must take account of the rights of the end users, adhere to existing legal and judicial procedures and comply with the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. The Safer Internet Programme has set up a network of hotlines whose goal is to collect information and to ensure coverage and exchange of reports on the major types of illegal content online.

- (14) Since the objective of this Directive, namely to combat sexual abuse, sexual exploitation of children and child pornography, cannot be sufficiently achieved by the Member States alone and can therefore, by reasons of the scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principles of subsidiarity as referred to in Article 3 and Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in the latter Article, this Directive does not go beyond what is necessary to achieve that objective.
- (15) This Directive respects fundamental rights and observes the principles recognised in particular 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 Directive seeks to ensure full respect for those rights and has to be implemented accordingly.
- (16) [In accordance with Articles 1, 2, 3 and 4 of Protocol on the position of United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to participate in the adoption and application of this Directive] OR [Without prejudice to Article 4 of Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, the United Kingdom and Ireland will not participate in the adoption of this Directive and will not be bound by or be subject to its application]⁹. In accordance with Articles 1 and 2 of Protocol on the position of Denmark annexed to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is therefore not bound by it or subject to its application

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Subject matter

This Directive aims to establish minimum rules concerning the definition of criminal offences and sanctions in the area of sexual exploitation of children. It also aims to introduce common provisions to strengthen the prevention of the crime and the protection of its victims.

⁹ The final wording of this recital in the Directive will depend on the actual position of the UK and IRL, taken in accordance with the provisions of protocol (No 21).

Article 2
Definitions

For the purposes of this Directive:

- (a) ‘child’ shall mean any person below the age of 18 years;
- (b) ‘child pornography’ shall mean
 - (i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; or
 - (ii) any depiction of the sexual organs of a child for primarily sexual purposes; or
 - (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or
 - (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, regardless of the actual existence of such child, for primarily sexual purposes.;
- (c) ‘child prostitution’ shall mean the use of a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment in exchange for the child engaging in sexual activities, regardless of whether this payment, promise or consideration is made to the child or to a third person;
- (d) ‘pornographic performance’ shall mean the live exhibition, including by means of information and communication technology:
 - (i) of a child engaged in real or simulated sexually explicit conduct; or
 - (ii) of the sexual organs of a child for primarily sexual purposes;
- (e) ‘legal person’ shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

Article 3
Offences concerning sexual abuse

1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 5 is punishable.
2. Causing, for sexual purposes, a child who has not reached the age of sexual consent under national law to witness sexual abuse or sexual activities, even without having

to participate, shall be punishable by a maximum term of imprisonment of at least two years.

3. Engaging in sexual activities with a child who has not reached the age of sexual consent under national law shall be punishable by a maximum term of imprisonment of at least five years.
4. Engaging in sexual activities with a child, where:
 - (i) abuse is made of a recognised position of trust, authority or influence over the child shall be punishable by a maximum term of imprisonment of at least eight years; or
 - (ii) abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence shall be punishable by a maximum term of imprisonment of at least eight years; or
 - (iii) use is made of coercion, force or threats shall be punishable by a maximum term of imprisonment of at least ten years.
5. Coercing a child into sexual activities with a third party shall be punishable by a maximum term of imprisonment of at least ten years.

Article 4

Offences concerning sexual exploitation

1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 11 is punishable.
2. Causing a child to participate in pornographic performances shall be punishable by a maximum term of imprisonment of at least two years.
3. Profiting from or otherwise exploiting a child participating in pornographic performances shall be punishable by a maximum term of imprisonment of at least two years.
4. Knowingly attending pornographic performances involving the participation of children shall be punishable by a maximum term of imprisonment of at least two years.
5. Recruiting a child to participate in pornographic performances shall be punishable by a maximum term of imprisonment of at least five years.
6. Causing a child to participate in child prostitution shall be punishable by a maximum term of imprisonment of at least five years.
7. Profiting from or otherwise exploiting a child participating in child prostitution shall be punishable by a maximum term of imprisonment of at least five years

8. Engaging in sexual activities with a child, where recourse is made to child prostitution shall be punishable by a maximum term of imprisonment of at least five years.
9. Coercing a child to participate in pornographic performances shall be punishable by a maximum term of imprisonment of at least eight years.
10. Recruiting a child to participate in child prostitution shall be punishable by a maximum term of imprisonment of at least eight years.
11. Coercing a child into child prostitution shall be punishable by a maximum term of imprisonment of at least ten years.

Article 5

Offences concerning child pornography

1. Member States shall take the necessary measures to ensure that the intentional conduct referred to in paragraphs 2 to 6 is punishable.
2. Acquisition or possession of child pornography shall be punishable by a maximum term of imprisonment of at least one year.
3. Knowingly obtaining access, by means of information and communication technology, to child pornography shall be punishable by a maximum term of imprisonment of at least one year.
4. Distribution, dissemination or transmission of child pornography shall be punishable by a maximum term of imprisonment of at least two years.
5. Offering, supplying or making available child pornography shall be punishable by a maximum term of imprisonment of at least two years.
6. Production of child pornography shall be punishable by a maximum term of imprisonment of at least five years.

Article 6

Solicitation of children for sexual purposes

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

The proposal, by means of information and communication technology, by an adult to meet a child who has not reached the age of sexual consent under national law, for the purpose of committing any of the offences referred to in Articles 3 (3) and Article 5 (6), where this proposal has been followed by material acts leading to such a meeting, shall be punishable by a maximum term of imprisonment of at least two years.

Article 7

Instigation, aiding and abetting, attempt and preparatory offences

1. Member States shall take the necessary measures to ensure that the instigation of, aiding and abetting to commit any of the offences referred to in Articles 3 to 6 is punishable.
2. Member States shall take the necessary measures to ensure that attempts to commit any of the offences referred to in Article 3 (3) to (5), and (2) with regard to witnessing sexual abuse; Article 4 (2) to (3) and (5) to (11); and Article 5 (2) and (4) to (6) is punishable.
3. Member States shall take the necessary measures to ensure that the following intentional conduct is punishable:
 - (a) the dissemination of materials advertising the opportunity to commit any of the offences referred to in Articles 3 to 6;
 - (b) the organisation of travel arrangements with the purpose of committing any of the offences referred to in Articles 3 to 6.

Article 8

Consensual sexual activities between peers

The provisions of Article 3 (2), with regard to witnessing sexual activities, and (3); Article 4 (2) and (4) and Article 5 do not govern consensual sexual activities between children or involving persons who are close in age and degree of psychological and physical development or maturity, insofar as the acts did not involve any abuse.

Article 9

Aggravating circumstances

1. In so far as the following circumstances do not already form part of the constituent elements of the offences referred to in Articles 3 to 7, they shall be considered as aggravating circumstances for the purposes of this Directive:
 - (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/JHA¹⁰;
 - (f) the perpetrator has previously been convicted of offences of the same nature.
 - (g) the offence endangered the life of the child;
 - (h) the offence involved serious violence or caused serious harm to the child.
2. Where at least one of the aggravating circumstances referred to in paragraph 1 are present, Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 to 6 are punishable by effective, proportionate and dissuasive penalties which are more severe penalties than those foreseen in Articles 3 to 6 for the basic offence.

Article 10

Disqualification arising from convictions

1. In order to avoid the risk of repetition of offences, Member States shall take the necessary measures to ensure that a natural person who has been convicted of any of the offences referred to in Articles 3 to 7 may be temporarily or permanently prevented from exercising activities involving regular contacts with children.
2. Member States shall take the necessary measures to ensure that the measure referred to in paragraph 1 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 2009/315/JHA on the organisation and content of the exchange of information extracted from criminal records between Member States¹¹, Member States 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 3 to 7 of this Directive, information concerning the disqualification arising from conviction of any of the offences referred to in Articles 3 to 7 of this Directive 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. Member States shall take the necessary measures to ensure that the measure referred to in paragraph 1 imposed in another Member State, is recognised and enforced.

¹⁰ OJ L 300, 11.11.2008, p. 42.

¹¹ OJ L 93, 7.4.2009, p. 23.

Article 11
Liability of legal persons

1. Member States shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Articles 3 to 7 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on one of the following:
 - (a) a power of representation of the legal person;
 - (b) an authority to take decisions on behalf of the legal person;
 - (c) an authority to exercise control within the legal person.
2. Member States shall also take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission, by a person under its authority, of any of the offences referred to in Articles 3 to 7 for the benefit of that legal person.
3. Liability of legal persons under paragraphs 1 and 2 of this Article shall be without prejudice to criminal proceedings against natural persons who are perpetrators of, or accessories to, any of the offences referred to in Articles 3 to 7.

Article 12
Sanctions on legal persons

1. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 11 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, for example:
 - (a) exclusion from entitlement to public benefits or aid;
 - (b) temporary or permanent disqualification from the practice of commercial activities;
 - (c) placing under judicial supervision;
 - (d) judicial winding-up;
 - (e) temporary or permanent closure of establishments which have been used for committing the offence.
2. Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 11 (2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

Article 13

Non prosecution or non-application of penalties to the victim

Member States shall provide for the possibility of not prosecuting or imposing penalties on child victims of the offences referred to in Articles 4 and Article 5 (4) to (6) for their involvement in unlawful activities as a direct consequence of being subjected to those offences.

Article 14

Investigation and prosecution

1. Member States shall take the necessary measures to ensure that investigations into or the prosecution of the offences referred to in Articles 3 to 7 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. Member States shall take the necessary measures to enable the prosecution of any of the offences referred to in Articles 3, Article 4 (2) to (3) and (5) to (11), and Article 5 (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. Member States shall take the necessary measures to ensure that effective investigative tools are available to persons, units or services responsible for investigating or prosecuting offences referred to in Articles 3 to 7, allowing the possibility of covert operations at least in those cases where the use of information and communication technology is involved.
4. Member States shall take the necessary measures to enable investigative units or services to attempt to identify the victims of the offences referred to in Articles 3 to 7, in particular by analysing child pornography material, such as photographs and audiovisual recordings transmitted or made available by means of information and communication technology.

Article 15

Reporting suspicion of sexual exploitation or sexual abuse

1. Member States 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 3 to 7.
2. Member States shall take the necessary measures to encourage any person who knows about or suspects, in good faith, offences referred to in Articles 3 to 7 to report these facts to the competent services.

Article 16

Jurisdiction and coordination of prosecution

1. Member States shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 3 to 7 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 a habitual residence in its territory; or
 - (c) the offence is committed against one of its nationals or a person who has a 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. Member States shall ensure that its jurisdiction includes situations where an offence referred to in Articles 5 and 6, and insofar as is relevant, in Articles 3 and 7, is committed by means of information and communication technology accessed from its territory, whether or not it is based on its territory.
3. A Member State may decide that it will not apply or that it will apply only in specific cases or circumstances the jurisdiction rules set out in paragraph 1 (c) and (d) as far as the offence is committed outside its territory.
4. For the prosecution of any of the offences referred to in Articles 3 to 7 committed outside the territory of the State concerned, as regards paragraph 1 (b) of this Article, Member States shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition:
 - (a) that the acts are a criminal offence at the place where they were performed; or
 - (b) 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.

Article 17

General provisions on assistance, support and protection measures for victims

1. Victims of the offences referred to in Articles 3 to 7 shall be provided assistance, support and protection, taking into account the best interests of the child.
2. Member States shall ensure that, where the age of a person subject to the offences referred to in Articles 3 to 7 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 Article 18 and 19, pending verification of the age.

Article 18
Assistance and support to victims

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate time after criminal proceedings in order to enable them to exercise the rights set forth in Council Framework Decision 2001/220/JHA¹² on the standing of victims in criminal proceedings, and in this Directive.
2. Member States shall take the necessary measures to ensure that the specific actions to assist and support victims in the short and long term, in their physical and psycho-social recovery, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns.
3. Victims of any of the offences referred to in Articles 3 to 7 shall be considered as particularly vulnerable victims pursuant to Article 2 (2), Article 8 (4) and Article 14 (1) of Framework Decision 2001/220/JHA.
4. Member States shall take measures, where appropriate and possible, to provide assistance and support to the victim's family. In particular, Member States shall, where appropriate and possible, apply Article 4 of Council Framework Decision 2001/220/JHA to the family.

Article 19
Protection of child victims in criminal investigations and proceedings

1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, judicial authorities appoint a special representative for the child 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 child victim, or where the child is unaccompanied or separated from the family.
2. Member States shall ensure that child victims have immediate access to free legal counselling and to free legal representation, including for the purpose of claiming compensation
3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 3 to 7:
 - (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;

¹² OJ L 82, 22.3.2001, p. 1.

- (c) interviews with the child victim are carried out by or through 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.
4. Member States shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 3 to 7 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.
 5. Member States shall take the necessary measures to ensure, in criminal court proceedings relating to any of the offences referred to in Articles 3 to 7, that it may be ordered that:
 - (a) 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.

Article 20

Intervention programmes or measures

1. Member States shall take the necessary measures to ensure that persons convicted of offences referred to in Articles 3 to 7 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 3 to 7, with the aim of identifying appropriate intervention programmes or measures.
2. Member States 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.

3. Member States shall take the necessary measures to ensure that persons convicted of offences referred to in Articles 3 to 7, where appropriate considering the assessment referred to in paragraph 1:

- (a) may have access to the programmes or measures referred to in paragraphs 1 and 2;
 - (b) are offered access to the specific programmes or measures;
 - (c) are fully informed of the reasons for the proposal to have access to the specific programmes or measures;
 - (d) consent to participation in the specific programmes or measures in full knowledge of the facts;
 - (e) may refuse and are made aware of the potential consequences of a refusal .
4. Member States shall take the necessary measures to ensure that persons subject to criminal proceedings for any of the offences referred to in Articles 3 to 7 may have access to the programmes or measures referred to in paragraphs 1 and 2 of this Article, 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.
 5. Member States shall take the necessary measures to ensure that persons who fear that they might commit any of the offences referred to in Articles 3 to 7 may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of offences being committed.

Article 21

Blocking access to websites containing child pornography

1. Member States shall take the necessary measures to obtain the blocking of access by Internet users in their territory to Internet pages containing or disseminating child pornography. The blocking of access 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, as far as possible, are informed of the possibility of challenging it.
2. Without prejudice to the above, Member States shall take the necessary measures to obtain the removal of internet pages containing or disseminating child pornography.

Article 22

Repeal of Framework Decision 2004/68/JHA

Framework Decision 2004/68/JHA is hereby repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law.

References to the repealed Framework Decision shall be construed as references to this Directive.

Article 23
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [TWO YEARS FROM ADOPTION] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 24
Reporting

1. By [FOUR YEARS FROM ADOPTION] and every three years thereafter, the Commission shall submit a report to the European Parliament and the Council including any necessary proposal.
2. Member States shall send to the Commission all the information that is appropriate for drawing up the report referred to in paragraph 1. The information shall include a detailed description of legislative and non-legislative measures adopted pursuant to this Directive.

Article 25
Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 26
Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President