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COMMISSION OF THE EUROPEAN COMMUNITIES

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2009/0049 (CNS)

Proposal for a

**COUNCIL FRAMEWORK DECISION**

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

{SEC(2009) 355}  
{SEC(2009) 356}

## 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 29 of the Treaty on the European Union, is to prevent and combat offences against children, which includes child sexual abuse and child sexual exploitation. This should be done by building a more coherent framework for combating these crimes under the third pillar and by increasing its effectiveness. Specific objectives would be to effectively prosecute the crime; to protect victims' rights; to prevent child sexual exploitation and abuse; and to establish effective monitoring systems.

- **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 against child 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 European Charter of Fundamental Rights, 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.

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 EU Charter, 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 internet abuse, 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 EU Charter). 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 EU Charter).

## 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.

#### 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**

Various policy options have been examined 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 68/2004/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 Framework Decision 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 68/2004/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 listed in the Work Programme, the report on which is accessible at:

[http://ec.europa.eu/governance/impact/cia\\_2009\\_en.htm](http://ec.europa.eu/governance/impact/cia_2009_en.htm)

### 3. LEGAL ELEMENTS OF THE PROPOSAL

#### • Summary of the proposed action

The Framework Decision 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. Special consideration is given to offences against children in a particularly vulnerable situation, such as unaccompanied children.

#### – 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 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. A mechanism to coordinate prosecution in cases of multiple jurisdictions is included, but may be superseded once the Proposal for a Framework Decision on conflict of jurisdiction in criminal proceedings is adopted<sup>1</sup>.

#### – On prosecution of offences committed abroad

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

#### – On protection of victims

New provisions will be included to ensure that victims have easy access to legal remedies and do not suffer from participating in criminal 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

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<sup>1</sup> Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, tabled on 20 January 2009 by the Czech Republic, Poland, Slovenia, Slovakia and Sweden, Council Document No 5208/09.

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 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**

Article 29, Article 31(1)(e), Article 34(2)(b) of the Treaty on 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,<sup>2</sup> as the objective of effectively protecting children cannot be sufficiently achieved by Member States alone.

Action by the European Union will 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

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<sup>2</sup> Council Decision of 29 May 2000 to combat child pornography on the Internet (OJ L 138, 9.6.2000, p. 1).

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).

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

- **Choice of instruments**

Proposed instruments: Framework Decision.

Other means would not be adequate for the following reason(s).

In the field of police and judicial cooperation in the fight against crimes such as child sexual abuse and sexual exploitation, only a Framework Decision permits to approximate national legislation.

Other means would not be adequate for the following reason(s).

Non-legislative measures and self regulation would improve the situation in certain areas where implementation is crucial. However, in other areas where new legislation is essential, the benefits would be modest. This applies to criminal prosecution and conviction for conduct involving various forms of child abuse and exploitation that would have to be explicitly covered by law (*nulla poena sine lege*, Article 7 of the ECHR, Article 49 of the EU Charter), and certain measures involving interference in fundamental rights, which also need to be taken ‘in accordance with the law’ (Articles 8 and 10 of the ECHR, and Article 52(1) of the EU Charter).

#### 4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

#### 5. ADDITIONAL INFORMATION

- **Repeal of existing legislation**

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

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 Parliament<sup>3</sup>,

Whereas:

- (1) Sexual abuse and sexual exploitation of children, including child pornography constitute serious violations of human rights and of the fundamental right of a child to a harmonious upbringing and development.
- (2) Child pornography, which consists of images of child sex abuse, and other particularly serious forms of sexual abuse and sexual exploitation of children are increasing and spreading through the use of new technologies and the internet.
- (3) Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography<sup>4</sup> approximates Member States' legislation to criminalise the most serious forms of child sexual abuse and sexual exploitation, to extend domestic jurisdiction, and to provide for a minimum level of assistance for victims.
- (4) The UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and, in particular, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse are crucial steps in the process of enhancing international cooperation in this field.
- (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

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<sup>3</sup> OJ C , , p. .

<sup>4</sup> OJ L 13, 20.1.2004, p. 14.

rights of the child. Framework Decision 2004/68/JHA needs to be replaced by a new instrument providing such comprehensive legal framework to achieve that purpose.

- (6) Serious forms of child sexual abuse and sexual exploitation should be subject to effective, proportionate and dissuasive sanctions. This includes, in particular, new forms of sexual abuse and sexual exploitation facilitated by the use of information technologies. The definition of child pornography should also be clarified and brought closer to that contained in international instruments.
- (7) Investigating offences and bringing charges in criminal proceedings should be facilitated, to take into account the difficulty for child victims of denouncing abuse and the anonymity of offenders in cyberspace.
- (8) Rules on jurisdiction should be amended to ensure that child sexual abusers or exploiters from the European Union face prosecution even if they commit their crimes outside the European Union, in particular via so-called sex tourism.
- (9) Child victims should have easy access to legal remedies and should not suffer for participating in criminal proceedings.
- (10) To prevent and minimise recidivism, offenders should be subject to an assessment of the danger posed by the offenders and the possible risks of repetition of sexual offences against children, and should have access to effective intervention programmes or measures on a voluntary basis.
- (11) Where the danger posed by the offenders and the possible risks of repetition of the offences make it appropriate, convicted offenders should be temporarily or permanently prevented from exercising activities involving regular contacts with children, where appropriate. Implementation of such prohibitions throughout the EU should be facilitated.
- (12) To combat child pornography, especially where the original materials are not located within the EU, mechanisms should be put in place to block access from the Union's territory to internet pages identified as containing or disseminating child pornography.
- (13) In accordance with the principles of subsidiarity and proportionality, this Framework Decision confines itself to the minimum required in order to achieve those objectives at European level and does not go beyond what is necessary for that purpose.
- (14) This Framework Decision respects fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union and notably human dignity, the prohibition of torture and inhuman or degrading treatment or punishment, the rights of the child, the right to liberty and security, freedom of expression and information, protection of personal data, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties. In particular, this Framework Decision seeks to ensure full respect for those rights. This Framework Decision does not intend to govern consensual sexual activities between minors.

HAS ADOPTED THIS FRAMEWORK DECISION:

*Article 1*

**Definitions**

For the purposes of this Framework Decision:

- (a) 'child' shall mean any person below the age of 18 years;
- (b) 'child pornography' shall mean
  - (i) any material that visually depicts a child, or any person appearing to be a child, or realistic images of a non-existent child, engaged in real or simulated sexually explicit conduct; or
  - (ii) any depiction for primarily sexual purposes of the sexual organs of a child, or of any person appearing to be a child, or of realistic images of a non-existent child;
- (c) 'child prostitution' shall mean the use of a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment in exchange for the child engaging in sexual activities, regardless of whether this payment, promise or consideration is made to the child or to a third person;
- (d) 'pornographic performance' shall mean the exhibition in front of a live audience:
  - (i) of a child engaged in real or simulated sexually explicit conduct; or
  - (ii) of the sexual organs of a child for primarily sexual purposes;
- (e) 'information system' shall mean any device or group of inter-connected or related devices, one or more of which, pursuant to a programme, perform automatic processing of data.

*Article 2*

**Offences concerning sexual abuse**

1. Each Member State shall take the necessary measures to ensure that the following intentional conduct is punishable:
  - (a) engaging in sexual activities with a child who has not reached the age of sexual consent under national law;
  - (b) engaging in sexual activities with a child, where:
    - (i) use is made of coercion, force or threats; or

- (ii) abuse is made of a recognised position of trust, authority or influence over the child; or
  - (iii) abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence;
- (c) coercing a child into sexual activities with a third party;
  - (d) intentionally causing, for sexual purposes, a child who has not reached the age of sexual consent under national law to witness sexual abuse or sexual activities, even without having to participate;
  - (e) intentionally causing, for sexual purposes, a child to engage in real or simulated sexually explicit conduct or exhibition of sexual organs, including through information and communication technologies.
2. The provisions of paragraph 1(a) and 1(e) are not intended to govern consensual sexual activities between children.

### *Article 3*

#### **Offences concerning sexual exploitation**

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

- (a) recruiting a child into child prostitution or into participating in pornographic performances;
- (b) coercing a child into child prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes;
- (c) engaging in sexual activities with a child, where recourse is made to child prostitution;
- (d) knowingly attending pornographic performances involving the participation of children.

### *Article 4*

#### **Offences concerning child pornography**

Each Member State shall take the necessary measures to ensure that the following intentional conduct whether undertaken by means of an information system or not, 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) knowingly obtaining access, by means of an information system , to child pornography.

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

#### *Article 6*

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

1. Each Member State shall take the necessary measures to ensure that the instigation of, aiding and abetting to commit any of the offences referred to in Articles 2 to 5 is punishable.
2. Each Member State shall take the necessary measures to ensure that attempts to commit any of the offences referred to in Articles 2 to 4 is punishable.
3. Each Member State 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 2 to 5;
  - (b) the organisation of travel arrangements with the purpose of committing any of the offences referred to in Articles 2 to 5.

#### *Article 7*

### **Penalties and aggravating circumstances**

1. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2 to 6 are punishable by a maximum term of imprisonment of at least six years.
2. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2 to 6 are punishable by a maximum term of imprisonment of at least ten years where at least one of the following circumstances applies, in so far as they do not already form part of the constituent elements of the offence:

- (a) the child has not reached the age of sexual consent under national law;
  - (b) the offence was committed against a child in a particularly vulnerable situation, notably because of a mental or physical disability or a situation of dependence;
  - (c) the offence was committed by a member of the family, a person cohabiting with the child or a person having abused their authority;
  - (d) the offence was committed by several people acting together;
  - (e) the offences are committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA<sup>5</sup>;
  - (f) the perpetrator has previously been convicted of offences of the same nature.
3. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 2 to 6 are punishable by a maximum term of imprisonment of at least twelve years where at least one of the following circumstances applies:
- (a) the offence endangered the life of the child;
  - (b) the offence involved serious violence or caused serious harm to the child.
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, which shall include specific intervention programmes or measures as referred to in Article 17.

#### *Article 8*

#### **Disqualification arising from convictions**

1. Where, in accordance with the assessment referred to in Article 16 it is established that the person presents a danger and there is a possible risk of repetition of the offences, each Member State shall take the necessary measures to ensure that a natural person, who has been convicted of any of the offences referred to in Articles 2 to 6, may be temporarily or permanently prevented from exercising activities involving regular contacts with children.
2. Each Member State shall take the necessary measures to ensure that the measure consisting in temporarily or permanently preventing the person convicted of any of the offences referred to in Articles 2 to 6 from exercising activities involving regular contacts with children is entered in the criminal record of the convicting Member State.

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<sup>5</sup> OJ L 300, 11.11.2008, p. 42.

3. By way of derogation from Articles 7(2) and 9(2) of the Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States<sup>6</sup>, each Member State shall take the necessary measures to ensure that, for the purpose of effectively implementing the measure consisting in temporarily or permanently preventing the person from exercising activities involving regular contacts with children, in particular insofar as the requesting Member State subjects access to certain activities to conditions to ensure that candidates have not been convicted of any of the offences referred to in Articles 2 to 6 of this Framework Decision, information concerning the disqualification arising from conviction of any of the offences referred to in Articles 2 to 6 of this Framework Decision is transmitted when requested under Article 6 of that Framework Decision from the central authority of the Member State of the person's nationality, and that personal data concerning such disqualification provided under Article 7(2) and (4) of that Framework Decision may in all cases be used for such purpose.
4. Each Member State shall take the necessary measures to ensure that the measure consisting in temporarily or permanently preventing the person convicted of any of the offences referred to in Articles 2 to 6 from exercising activities involving regular contacts with children, imposed in another Member State, is recognised and enforced.

#### *Article 9*

#### **Liability of legal persons**

1. Each Member State shall take the necessary measures to ensure that legal persons may be held liable for any of the offences referred to in Articles 2 to 6 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person, based on one of the following:
  - (a) a power of representation of the legal person;
  - (b) an authority to take decisions on behalf of the legal person;
  - (c) an authority to exercise control within the legal person.
2. Member States shall also take the necessary measures to ensure that legal persons may be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission, by a person under its authority, of any of the offences referred to in Articles 2 to 6 for the benefit of that legal person.
3. Liability of legal persons under paragraphs 1 and 2 shall be without prejudice to criminal proceedings against natural persons who are perpetrators of, or accessories to, any of the offences referred to in Articles 2 to 6.

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<sup>6</sup> Adopted at the JHA Council of 26-27 February 2009. Final reference pending publication.

4. For the purpose of this Framework Decision ‘legal person’ shall mean any entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations.

#### *Article 10*

#### **Sanctions on legal persons**

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 9(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, for example:
  - (a) exclusion from entitlement to public benefits or aid;
  - (b) temporary or permanent disqualification from the practice of commercial activities;
  - (c) placing under judicial supervision;
  - (d) judicial winding-up;
  - (e) temporary or permanent closure of establishments which have been used for committing the offence.
2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 9(2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

#### *Article 11*

#### **Non application of sanctions to the victim**

Each Member State shall 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 unlawful activities 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.
2. Each Member State shall take the necessary measures to enable the prosecution of any of the offences referred to in Articles 2 to 6 for a sufficient period of time after

the victim has reached the age of majority and which is commensurate with the gravity of the offence concerned.

3. Each Member State shall take the necessary measures to ensure that the confidentiality rules imposed by national law on certain professionals called upon to work in contact with children do not constitute an obstacle to the possibility, for those professionals, of their reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of offences referred to in Articles 2 to 6.
4. Each Member State shall take the necessary measures to encourage any person who knows about or suspects, in good faith, offences referred to in Articles 2 to 6 to report these facts to the competent services.
5. Each Member State shall take the necessary measures to ensure effective investigation and prosecution of the offences referred to in Articles 2 to 6, allowing the possibility of covert operations at least in those cases where the use of an information system is involved.
6. Each Member State shall take the necessary measures to enable investigative units or services to identify the victims of the offences referred to in Articles 2 to 6, in particular by analysing child pornography material, such as photographs and audiovisual recordings transmitted or made available by means of an information system.

### *Article 13*

#### **Jurisdiction and coordination of prosecution**

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

subordinated to the condition that the acts are a criminal offence at the place where they were performed.

4. For the prosecution of any of the offences referred to in Articles 2 to 6 committed outside the territory of the State concerned, as regards paragraph 1(b), each Member State shall take the necessary measures to ensure that its jurisdiction is not subordinated to the condition that the prosecution can only be initiated following a report made by the victim in the place where the offence was committed, or a denunciation from the State of the place where the offence was committed
5. When an offence referred to in Articles 2 to 6 falls within the jurisdiction of more than one Member State and when any one of the Member States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders, with the aim, if possible, of centralising proceedings in a single Member State. To this end, Member States may have recourse to Eurojust or any other body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action.

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

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

#### *Article 14*

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

1. Each Member State shall ensure that, where the age of a person subject to the offences referred to in Articles 2 to 6 is uncertain and there are reasons to believe that the person is a child, the person is presumed to be a child and receives immediate access to protection and assistance in accordance with this Article.
2. Each Member State shall take the necessary measures to ensure that judicial authorities appoint a special representative for the victim where, by national law, the holders of parental responsibility are precluded from representing the child in criminal proceedings as a result of a conflict of interest between them and the victim, or where the child is unaccompanied.
3. Each Member State shall take the necessary measures to ensure that the specific actions taken to protect and to assist victims, in the short and long term, in their physical and psycho-social recovery, are adopted following a specific assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns.

4. Each Member State shall take the necessary measures to ensure that where appropriate victims of the offences referred to in Articles 2 to 6 have access to free legal counselling and free legal representation in criminal proceedings relating to those offences.
5. Victims of any of the offences referred to in Articles 2 to 6 shall be considered as particularly vulnerable victims pursuant to Article 2(2), Article 8(4) and Article 14(1) of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings<sup>7</sup>.
6. Each Member State shall take all measures possible to ensure appropriate assistance for the victim's family. In particular, each Member State shall, where appropriate and possible, apply Article 4 of Council Framework Decision 2001/220/JHA to the family.
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*

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

1. Each Member State shall take the necessary measures to ensure that in criminal investigations of any of the offences referred to in Articles 2 to 6:
  - (a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;
  - (b) interviews with the child victim take place, where necessary, in premises designed or adapted for this purpose;
  - (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

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<sup>7</sup> OJ L 82, 22.3.2001, p. 1.

the child victim or, where appropriate, with a child witness, may be videotaped and that these videotaped interviews may be used as evidence in criminal court proceedings, according to the rules under its national law.

3. Each Member State shall take the necessary measures to ensure, in criminal court proceedings relating to any of the offences referred to in Articles 2 to 6, that:
  - (a) the judge may order the hearing to take place without the presence of the public;
  - (b) the child victim may be heard in the courtroom without being present, notably through the use of appropriate communication technologies.

#### *Article 16*

#### **Risk assessment**

1. Each Member State shall take the necessary measures to ensure that persons convicted of offences referred to in Articles 2 to 6 are subject to an assessment of the danger presented by the person and possible risks of repetition of any of the offences referred to in Articles 2 to 6, with the aim of:
  - (a) identifying appropriate intervention programmes or measures; and
  - (b) determining the need for the offender to be temporarily or permanently prevented from exercising activities involving regular contacts with children.
2. The assessment referred to in paragraph 1 shall be periodically reviewed to take account of changes in circumstances that have an impact on the danger and possible risks.

#### *Article 17*

#### **Intervention programmes or measures**

1. Each Member State shall take the necessary measures to ensure that effective intervention programmes or measures are made available with a view to preventing and minimising the risks of repeated offences of a sexual nature against children. These programmes or measures shall be accessible at any time during the criminal proceedings, inside and outside prison, according to the conditions laid down in national law.

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

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

- (a) may have access or be offered access to the programmes or measures mentioned in paragraphs 1 and 2;
  - (b) are offered access to specific programmes or measures appropriate to the danger and possible risks of repetition of any of the offences referred to in Articles 2 to 6;
  - (c) are fully informed of the reasons for the proposal to have access to the programmes or measures;
  - (d) consent to participation in the specific programme or measure in full knowledge of the facts;
  - (e) may refuse and are made aware of the potential consequences of refusal .
3. Each Member State shall take the necessary measures to ensure that persons subject to criminal proceedings for any of the offences referred to in Articles 2 to 6 may have access to the programmes or measures referred to in paragraphs 1 and 2, under conditions which are neither detrimental nor contrary to the rights of the defence and to the requirements of a fair and impartial trial, and particularly with due respect for the rules governing the principle of the presumption of innocence.
4. Each Member State shall take the necessary measures to ensure that persons who fear that they might commit any of the offences established in accordance with Articles 2 to 6 may have access, where appropriate, to effective intervention programmes or measures designed to evaluate and prevent the risk of offences being committed.

#### *Article 18*

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

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

#### *Article 19*

#### **Territorial scope**

This Framework Decision shall apply to Gibraltar.

#### *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.

*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*