Technical document for the EP (13.04.2011.)

The following document contains proposals with a view to facilitating the discussions of the EP, noting that some of them may have to be fine-tuned in the light of the progress of the negotiations..

Article 1 - *Subject matter*

The Council would agree to the compromise proposed by the EP:
"It also aims to introduce provisions to strengthen the prevention of the crime and the protection of its victims."

Article 2 – *Definitions*

- On compromise AM 1 and compromise AM 2:child pornography –child abuse material

The Council proposes the following language for a recital:

Option 1

While child pornography includes records of child sexual abuse, it is not limited to cases where abuse actually takes place and is recorded. Besides referring to recordings of non-consensual sexual acts, child pornography should also cover situations where there is misuse of images that are taken in accordance with the law and on a voluntary basis, ie. when an image is used in an abusive way, given that this also may be a source of distress or trauma for the victim.

Option 2:

While child pornography includes records of child sexual abuse, it is not limited to that. Given the trauma and the distress of the victim, it includes also the abusive use of images and recordings of non -consensual sexual conduct, made with right and on a voluntary basis.

- On AM 99 "of a virtual image" – the Council would like to ask the EP to consider that this does not add any new element to the definition. If the concern is related to the non-existing children or to the question of a montage, the COM proposal is much clearer.
- "On AM 100: "depicted as being engaged in" seems to refer to a simulated conduct which is already covered by under (i) and (iii).

The Council can accept its text of GA or the text, as proposed by the Commission and a recital :
Text of the Article

> "(iv) realistic images of a child, **regardless of its actual existence**, engaged in sexually explicit conduct or realistic images (...).

Text of the recital
"*Realistic images of a child, where a child is engaged or depicted as being engaged in sexually explicit conduct, is also covered by the concept of child pornography, regardless of the actual existence of the child.*"

- child sexual exploitation in travel and tourism – waiting for EP proposal

- organised live exhibition, aimed at an audience – the Council would like to use the language of the GA.

Article 3 – *level of penalties*
Please note that this is one of the outstanding issues to be discussed in more details with the rapporteur.
❖As to paras (2) and (2a): differentiation of penalties according to the type of activities witnessed – the Council believes a well balanced text should emphasise the more serious nature of the act described in para (2a) where the level of penalty is in line with COM proposal, ie. two years. For the sake of proportionality, (2) should also refer to a lower level of penalty.

❖As to para 4: 8 years is too high for the Council as this would imply the indirect harmonisation of the minimum level of penalties (as opposed to harmonisation being limited to the maximum level) – as in most Member States, the minimum level matching the 8 years of maximum level is relatively high. Therefore the Council suggests 5 years as a maximum level of penalties.

❖ On the question of fines: there is a strong chance for a compromise – see Art 10a.

Article 4
Please note that the Council wishes to raise the level of penalties in para 2.

Article 5

❖With regard to to "when committed without right" / lorsqu'ils ne peuvent être légitimés/ ohne entsprechende Berechtigung/ allorché non autorizzate:

The Council pleads in favour of using these terms as it is a well established criminal law concept, also used in the following cases:

- Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems
- Council Framework Decision 2004/757/JHA of 25 october 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking - Article 2
- Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography – Article 3.
- 2001/413/JHA: Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment - Article 3

Proposal for an explanation in a recital (after para 141 of the explanatory memorandum of the Lanzarote Convention):

"In the context of child pornography, the term 'without right' allows the Member States to provide a defence in respect of conduct related to "pornographic material" having for instance medical, scientific or similar merit. It also allows activities carried out under domestic legal powers such as the legitimate possession of child pornography by the authorities in order to institute criminal proceedings. Furthermore, it does not exclude legal defences or similar relevant principles that relieve a person of responsibility under specific circumstances, for instance where telephone or internet hotlines carry out activities to report those cases."

❖ AM 174 and 175 and the EP's proposal to merge paras 2 and 3 of the Council's GA:
It is better to keep paras (2) and (3) separate. See Art. 8 (3) for instance where the exception applies only to the former case. The Council is very much in favour of its GA. MS do not wish to enlarge the scope of this provision

With regard to para (9) of the Council's GA, keeping the references provide for the clearest message for the legislator. A recital would be able to clarify the extent of the exception. *Member States remain free to decide whether acquisition, possession or production of child pornography shall be punishable in cases where it is established that the realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child were produced and possessed by the producer solely for his or her own private use, and no pornographic material depicting a real child has been used for the purpose of its production, provided that the act involves no risk of dissemination of the material. Here you repeat the Article, enumerating the conducts.*

Article 6 – *grooming*

With regard to "otherwise solicit" The division in two paras is rejected as this provision is to protect children under the age of sexual consent. Furthermore, which one is meant?
-"the proposal by an adult to a child (...) to otherwise solicit a child for the purpose of committing (the offences), where this proposal has been followed by material acts leading to (...) such contact shall be punishable" – this is confusing language
-"otherwise solicit a child for the purpose of committing the offences, where this proposal has been followed by material acts leading to such contact shall be punishable" = This is the attempt of the act described in Article 5 (2)-(3).

Article 9 - Aggravating circumstances
The following language is proposed, building on amendments submitted by both institutions:

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, **Member States shall take the necessary measures to ensure that the following circumstances can, in conformity with the relevant provisions of national legislation as well as with rules of judicial discretion, practice or guidance, be regarded** as aggravating circumstances, **in relation to the relevant offences referred to in Articles 3 to 7:**

- the offence was committed against a child in a particularly vulnerable situation, ***such as*** a mental or physical disability or a situation of dependence ***or physical incapacity***;
- the offence was committed by a member of the family, a person cohabiting with the child or a person having abused their ***recognised position of trust or*** authority;
- the offence was committed by several people acting together;
- ***the offence has been committed for the main purpose of economic revenue;***
- the offences are committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA[1]**;**
- the **offender** has previously been convicted of offences of the same nature;

[1] OJ L 300, 11.11.2008, p. 42.

- the **offender has deliberately or by recklessness** endangered the life of the child;
- the offence involved serious violence or caused serious harm to the child.
- ***the offender has intentionally used different means to target a great number of children to multiply his chances of committing the crime***.

Article 10 – disqualifications
Please note that this is one of the outstanding issues to be discussed in more details with the rapporteur. However, the first two paragraphs could be as follows:

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 at least professional activities involving regular contacts with children.

1a. Member States shall take the necessary measures to ensure that employers, when recruiting a person for professional or organised voluntary activities involving regular contacts with children, are entitled to be informed, in accordance with national law, by any appropriate way, such as direct access, access upon request or via the person concerned, of the existence of convictions for an offence referred to in Articles 3 to 7 entered in the criminal record, or of any disqualification to exercise activities involving regular contacts with children arising from a conviction for an offence referred to in Article 3 to 7.

Article 10a – *Seizure and confiscation*

In case the idea of "fines" can be settled this way, the Presidency has suggests to align the text to the text of the THB Directive (Article 7).

Seizure and confiscation

Member States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences referred to in Articles 3-5.

Recital: *In combating sexual exploitation of the children, full use should be made of existing instruments on the seizure and confiscation of the proceeds of crime, such as the United Nations Convention against Transnational Organized Crime and the Protocols thereto, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime , and Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime Related Proceeds, Instrumentalities and Property . The use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims' assistance and protection, including compensation of victims and Union trans-border law enforcement activities, should be encouraged.*

Article 13 – *non prosecution*
The following language would be in line with the THB proposal and is therefore suggested as a compromise solution:

"Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of child abuse and child exploitation for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 4(2), (3), (4) and (5), as well as in Article 5(7)."

Article 14 – *investigation and prosecution*

With reference to the debate on the use of covert investigative tools, while keeping the Council text which strikes the right balance, please consider the following idea for a recital:

"Effective investigation tools should be made available to those responsible for the investigation and prosecutions of such offences. These tools may include interception of communications, covert surveillance including electronic surveillance, monitoring of bank accounts or other financial investigations, taking into account, inter alia, the principle of proportionality and the nature and seriousness of the offences under investigation. Where appropriate and in accordance with national law, such tools should also include the possibility for law enforcement authorities to use a false identity on the Internet".

The Presidency is of the view that the debate should be inspired by Article 30 para 5 of Lanzarote Convention.