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NOTE

From:	Presidency
To:	Delegations
Subject:	Proposal for a Directive on combating sexual abuse and sexual exploitation of children and child sexual aubse material (recast) – Debrief from the inter-institutional technical meetings of 3 and 4 September

The Presidency will, at the meeting of COPEN on 16 September, debrief delegations on the third and fourth inter-institutional technical meetings. The Presidency took note of the delegations' interventions during the last JHA Counsellors meeting on 9 July and is grateful for the subsequent written contributions over the last weeks. The Presidency used the arguments and examples provided by the delegations during the discussions with the European Parliament.

The co-legislators had a constructive exchange regarding articles 1 to 5a (line 80-139h in the four-column table) at the inter-institutional technical meetings, held on 3 and 4 September. Delegations should note that some specific topics were left aside for the moment. These include the lines related to consent (lines 85a, 113-116), and the sanction levels for the different offences. Moreover, the lines where both mandates are identically the same are flagged in the four-column table as "identical to be endorsed at the political trilogue" (lines 1-12, 14, 16, 18, 21, 25, 28, 31, 41, 56, 65, 67-72, 73-75, 76-80, 82-85, 86, 96-97, 125-126, 139, 140-141, 150, 152, 155, 159, 167, 170-174, 175, 179, 183, 185-187, 190, 192, 195-196, 200, 202, 210, 212, 218, 223-230, 234, 238, 243-244, 261, 266, 270, 273-276, 288, 294, 297, 311, 313-319, 321, 336, 338, 342, 344-345, 348-354, 355-365 (Annex)).

The Presidency shares the key takeaways of the discussion below and invites the delegations to reflect upon them. At the meeting, the Presidency will invite delegations to indicate where they take a strong stance in addition to their written comment and previous interventions. They will also be asked whether the additional information provided below – such as the argument of alignment with existing legal framework – could have an impact regarding the flexibility of those delegations who have previously rejected the proposed changes from the Parliament Additionally, delegations that have not yet commented on the proposed changes will be asked to share their positions.

Delegations will also receive the latest version of the four-column table for their convenience.

Article 1 – Subject matter (line 80-81)

Line 81: The Parliament is willing to accept the change from the Council mandate (replacing "sanctions" by "penalties"), if the Council does likewise with the change proposed by the Parliament (adding "including if committed by means of information and communication technology"). The Presidency indicated that the wording of the Parliament is better suited for a recital.

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Article 2 – Definitions (line 82-98)

Line 87: The intention of the Parliament in this line (deletion of "visually") is to broaden the scope of the Directive and to go beyond visual material only. Such amendment would be in line with article 14(2) of the UN Cybercrime Convention, which defines the term "child sexual abuse or child sexual exploitation material" as "*visual material, and may include written or audio content*". The Presidency challenged the Parliament's position, indicating that such broadened scope would encompass a too wide range of material (audio, descriptions, storytelling), and invited the Parliament to provide specific examples in order to assess how the different cases would play out. The Parliament will revert back on this line.

Line 88: The first amendment from the Parliament (deletion of "depiction" to replace it by "any representation, by whatever means") is aligned with the amendment in the previous line 87, according to Parliament, in order to avoid any loopholes. The Presidency invited the Parliament to indicate what loopholes would not be covered by the current wording as in the Council General Approach ("any depiction"). As for the second amendment, the Parliament proposes to replace "sexual organs" by "intimate parts", as it would allow to cover relevant body parts other than the sexual organs (such as breasts, anus, hips) and is in line with the Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence (see article 5(1)(a), and recitals 19 and 20).

Line 89: The amendments in this line were not further discussed as they refer to the same points as in lines 87 and 88.

Line 90: The term "pseudophotographs" is introduced by the Parliament following the example of the British legal system, defined as: *"A pseudo-photograph is an image made by computer graphics, or otherwise, which appears to be a photograph. This can include photos, videos, tracings and derivatives of a photograph or data that can be converted into a photograph. While the term 'indecent' isn't defined in legislation, it can include penetrative and non-penetrative sexual activity"*.[1] The intention of the Parliament is to criminalise data that can be used to produce CSAM.

[1] See: Indecent imagery of children (IIoC) - His Majesty's Inspectorate of Constabulary and Fire & Rescue Services

Even though the Presidency agreed with the intention, it was also flagged whether the terms "image" or "representation" could suffice. As for the last part of the Parliament's amendment, "regardless of the method of creation or manipulation, including by using artificial intelligence, deepfake technologies, or augmented, extended, or virtual reality settings", the Presidency insisted such wording is not suited for the operative part of the text, but indicated the possibility of moving the text to a recital. The Parliament showed some openness to such proposal.

Line 91: The Presidency explained the underlying reason for the deletion of this line, and subsequently explained the new offence introduced in Article 5a in the Council's General Approach. The co-legislators agreed on the need to have manuals and instructions covered by the Directive. However, their positions diverge on how the Directive should cover them: while the European Parliament considers these to be CSAM, the Council sees them as of preparatory nature that should be criminalised in a separate Article.

Line 92: The Presidency challenged the added value of the Parliament's amendment (introducing "gain, advantage, benefit"), as the term "remuneration" is extensive enough to cover this wording. The Parliament explained that renumeration refers to a financial advantage, while there could be other types of non-material advantage (e.g. social). It was agreed that the lawyers linguist will review and assess the wording.

Line 93: The Parliament proposes to introduce "of one or more" to clarify that there could be one person or several part of the audience (since the term "audience" is a collective noun). The Presidency proposed to include "one or more **spectators**". This proposal was declined as the word "spectators" is related to the scope (visual – see explanation above in line 87). The Parliament could also not agree on adding "one or more **persons**".

Line 94: The Presidency provisionally agreed with the amendment proposed by the Parliament to introduce "**acts or** conduct".

Line 98: The Presidency explained that the amendment of the Parliament would entail a stricter definition of peers. The Parliament took note of the Council's position and will revert back.

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Article 3 – Offences concerning sexual abuse (line 99-116)

The Presidency explaining the structure proposed by the Council for article 3 in detail. The Parliament understood the logic of the reorganisation proposed by the Council, and agreed provisionally to show some flexibility in this regard. However, the Parliament still holds their position concerning the lack of distinction regarding age of sexual consent. From their point of view, the level of penalties should not be linked to the age of sexual consent. The Parliament and the Presidency mandated the Commission to prepare a table to easily compare the mandates of both co-legislators in this article.

The following lines in article 3 were specifically discussed:

Lines 99 and 100: the Presidency provisionally accepted the Parliament's amendment in line 99 (the adding of "child" in the head liner). Line 100 was provisionally agreed, with the caveat of a revision of the cross-references at a later stage.

Line 101: With their amendment, the Parliament aims to address a gap referring to children above the age of sexual consent but who do not consent to witness sexual activities. The Presidency challenges this case scenario providing an example where the conduct of a 17 year-old child sharing a picture with a peer via social media without previous consent would entail an imprisonment of 1 year. The Parliament will reflect on the cases scenarios that they would like to cover and revert back.

Line 101a: The Presidency challenged this amendment introduced by the Parliament, questioning whether it should not be covered in another legal instrument (e.g. Digital Service Act). The Commission confirmed that there is no legal basis for such amendment, and that the provision is indeed already covered in the Digital Service Act. The Parliament took note of these comments and will revert back.

Line 103 and 103a: The main difference between the Parliament and Council, aside the level of penalties, is that the Council makes a distinction between offences with or without penetration. The Parliament showed some openness to consider such distinction, and thus accepting the Council's mandate "other than those set out in paragraph 6". The second difference refers to the introduction by the Parliament of "with themselves", which the Presidency agreed to discuss with the Council. The Presidency proposes to discuss this point at the COPEN meeting in conjunction with line 111a (article 3(7), point (ba)).

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Line 104: The Parliament sees positively the amendment proposed by the Council, and suggests to add “or with themselves”.

Line 106: The amendment of the Parliament introducing “mental, **intellectual, sensory** or physical disability” aims to be as exhaustive as possible, as well as to acknowledge and give visibility to these groups (e.g. intellectual disability: Down syndrome, sensory disability: blind and deaf people). The amendment is in line with article 11 of the Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence and article 1 of the UN Convention on the Rights of Persons with Disabilities. The Presidency pointed out that this level of detail could pose a risk, as it could leave other groups out of scope, or at least focus more on some rather than others. The Parliament refuted this, indicating that the list is introduced by “in particular”, which addresses the Presidency’s concern.

Line 107: The Parliament intends to cover more ground with a more exhaustive wording in this line (by adding “physical or psychological violence, blackmail or other”). The Presidency struggled to see the added value of the amendment, given that the terms coercion and force are already included in the provision. The Commission proposed to envisage a recital instead.

Line 108: The Presidency explained that the deletion of coercing, forcing and threatening in this line is due to the reorganisation of the article in the Council’s General Approach, and are duly covered in line 107 and 108f.

Line 112: The intention of the Parliament is to cover child above the age of sexual consent, ensuring all the offences apply to them.

Article 4 – Offences concerning sexual exploitation (line 117-124a)

Lines 117 and 118: The Presidency provisionally accepted the Parliament’s amendment in line 117 (the adding of “child” in the head liner). Line 118 was provisionally agreed, with the caveat of a revision of the cross-references at a later stage.

Line 119: The Presidency explained again the importance of keeping the distinction based on the age of sexual consent. The Parliament heard the Council’s position, and it was agreed to discuss this horizontal issue at a later stage.

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Line 124a: The Parliament highlighted the importance of adding sexual extortion. The Commission explained in detail the grooming process, which is composed of two steps. The first step, covered by article 6, is when the relationship and trust are built between the child and the offender, leading to the sharing of content. Once the content is shared, the second step takes place, when the victim is threatened. This second step would be covered in this new line 124a. The Presidency welcomed the thorough explanation by the Commission.

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Article 5 – Offences concerning child sexual abuse material (line 125-139a)

Line 127: the Parliament's amendment aims to include the provision the possession of CSAM and the reference to AI systems. The Parliament indicates that research and studies show that the possession of CSAM for personal use leads to the real harm to children. For instance, CSA victims could be harmed by being aware that CSAM is circulating freely, available to paedophiles who could create additional content. The Parliament considers it a good step that both co-legislators want to ban CSAM created with AI, but the Parliament wants to go a step further and forbid the AI systems that enable the creation of CSAM. The Presidency challenged the causality between the possession of material for personal use and the real harm to children, and invited the Parliament to share the research mentioned. As for the AI systems, the Presidency shared an exhaustive list of questions concerning this technology, and proposed to discuss the possibility of moving the wording to a recital.

Article 5a – Offences concerning instructions to commit offences (line139b-139h)

Article 5a was discussed along line 91 (see above).

If time allows, the Presidency proposes to discuss the following articles (6 to 10) and reflect upon open points and possible compromises, in particular:

- Article 6: The Presidency invites delegations to indicate their flexibility to accept the Parliament's amendments, on the condition that the changes from the General Approach are also accepted.

- Article 8a and 8b: The Presidency has noted the delegations' positions on these two articles and has no further points to add. The Parliament will be invited to explain their position and share the arguments at the next inter-institutional meeting, which the Presidency will then convey to the delegations.

The next inter-institutional meeting will take place on 24 September. Delegations are welcome to submit their written comments, if any, by 22 September.

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