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**NOTE**

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From: Presidency

To: Permanent Representatives Committee/Council

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Subject: Council conclusions on digital empowerment to protect and enforce  
fundamental rights in the digital age

Approval  
= Statements

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The following statements will be entered in the Council minutes.

## Statement by the delegation of Bulgaria

Bulgaria attaches great importance to the topic of digital empowerment to protect and enforce fundamental rights in the digital age and therefore wishes to express its support for the proposed draft Council Conclusions on digital empowerment to protect and enforce fundamental rights in the digital age.

In 2018, the Bulgarian Constitutional Court adopted a decision stating that the Council of Europe's Convention on Preventing and Combatting Violence against Women and Domestic Violence ("Istanbul Convention") promotes legal concepts related to the notion of gender that are incompatible with main principles of the Bulgarian Constitution. Therefore, in line with the above-mentioned Decision of the Constitutional Court, the Republic of Bulgaria declares that the country cannot accept either the concept of gender or the gender-based approach of the Council of Europe's Convention or any other document that intends to differentiate between "sex" as a biological (women and men) category and "gender" as a social construct. Moreover, we strongly believe that when addressing fundamental rights in the context of the Charter of Fundamental Rights of the European Union, the Council should utilise the terminology of the Charter.

## Statement by the delegation of Hungary

Hungary recognizes and promotes equality between men and women in accordance with the Fundamental Law of Hungary, and the primary law, principles and values of the European Union, as well as commitments and principles stemming from the international law. Furthermore, equality between women and men is enshrined in the Treaties of the European Union as a fundamental value. In line with these and its national legislation, Hungary interprets the concept of 'gender' as reference to 'sex' and the concept of 'gender digital divide' as reference to the 'digital divide between women and men in points 5 and 8 of the Council conclusions on digital empowerment and fundamental rights.

Hungary's agreement to the adoption of the Council Conclusions on digital empowerment and fundamental rights and to the references made therein to various strategies and action plans of the European Commission and the Council of Europe cannot be interpreted as a general endorsement of all actions announced, terminologies used as well as references made in those strategies and action plans, especially when these actions, terminologies and references are direct connotations of the LGBTIQ Equality Strategy 2020-2025 and/or the Gender Equality Strategy 2020-2025 of the Commission.

## Statement by the delegation of Poland

Poland agrees to adopt the Conclusions on digital empowerment to protect and enforce fundamental rights in the digital age, appreciating the contribution of the Spanish Presidency to their preparation. Indeed, Poland shares the view that fundamental rights are the cornerstone of any democratic society and that their protection, both online and offline, is crucial to respect for human dignity.

However, approving the direction of the Conclusions, Poland questions some of the provisions that attempt to introduce a definition of the crime of 'hate speech' and use the vague concept of 'gender'.

It should be noted that Articles 2 and 3(3) of the Treaty on European Union, Article 10 of the Treaty on the Functioning of the European Union and Article 23 of the EU Charter of Fundamental Rights refer explicitly to equality between women and men and do not use the term 'gender', only 'sex'. The term 'gender' has no definition in EU fundamental law and therefore remains unclear and ambiguously understood in EU Member States. This observation raises the unequivocal conclusion that it is not possible to separate or distinguish with sufficient certainty a use of 'gender' that would ensure uniformity of interpretation. This means that it can be used to refer both to biological sex, but also to so-called socio-cultural sex. This doubt results in the impossibility of eliminating circumstances in which it would be possible to discriminate against certain social groups on the basis of their biological sex. The right of every person to equality before the law and protection against discrimination is a universal right recognised both internationally and in Polish law. However, the concept of 'gender' should be interpreted in accordance with the Polish constitutional order and tradition, as, according to Article 33 of the Constitution, the Republic of Poland strives to ensure equal rights in family, political, social and economic life for women and men. The Polish Constitution does not contain any reference to the undefined phrase 'gender'. The principle of respect for the national identity of the Member States prevails in such a case towards an interpretation in line with overriding legal principles. Poland therefore reserves the right to interpret the term 'gender' used in the text of the draft as being identical to the unambiguous and well-established term 'sex' (in the sense of male and female) in European Union law.

It is also important to recognise that 'hate speech' is still not part of the catalogue of Eurocrimes under Article 83(1) TFEU. The meaning of 'hate speech' is unclear and understood differently in each Member State. The provisions proposed in the Conclusions, defining 'hate speech' as 'incitement to violence and hatred', which can lead 'to physical violence, stalking, intimidation, objectification, harassment, sexual harassment and discrimination, including hate crime', may therefore be an attempt to circumvent the treaty procedure and in fact seek to introduce a definition of 'hate speech' into the EU legal order in non-legislative documents.

In addition, it should also be emphasized that the definition of 'hate speech' contained in the conclusions cannot be legally binding on any Member State. Moreover, it cannot serve as a basis for interpretation or reasoning by any judicial authority. The ambiguous concept of 'hate speech' used in official EU documents may jeopardise freedom of expression and, consequently, may constitute a violation of the rights and freedoms to express one's opinion.

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