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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) - Examination of the presidency note

The purpose of the next JHA Counsellors meeting on 23 October is to discuss the progress of the negotiations on the Proposal for a Directive on combating sexual abuse and sexual exploitation of children and child sexual abuse material (recast). The Presidency will update delegations on the latest developments during the inter-institutional technical meetings held on the 14th and 15th October. The Presidency will also take the opportunity to table some compromise proposals, some of them drafted with the input from delegations during the last COPEN meeting (16 September) and their subsequent written contributions as well as the bilateral meetings. The Presidency is grateful for the input provided by all delegations, which allows for fruitful discussions with the European Parliament.

At the JHA Counsellors' meeting on 6 October, the Presidency had the opportunity to provide delegations with an intermediate debrief about the ongoing negotiations. To ensure transparency, the information provided during this briefing has been also included in this document. Furthermore, tabled compromises have been included for delegations' consideration.

Article 2 - Definitions

Line 90: The Presidency took note of the delegations' positions regarding the term "pseudophotographs", introduced by the Parliament in their mandate. The Presidency has instead suggested introducing a recital as a compromise with the Parliament.

The text proposed below could be inserted in recital 10 or 11, and would read as follows:

Recital 10 (line 22) - changes marked in **in bold and underlined** in relation to the General Approach:

> 10) Child sexual abuse material frequently includes images recording the sexual abuse of children. It may also include images of children involved in sexually explicit conduct, or of their sexual organs, where such images are produced or used for primarily sexual purposes and exploited with or without the child's knowledge. Furthermore, the concept of child sexual abuse material also covers realistic images of a child, where a child is engaged or depicted as being engaged in sexually explicit conduct for primarily sexual purposes.
>
> **The term image includes images of all kinds, regardless of the method of creation or manipulation, including by using artificial intelligence, deepfake technologies, or augmented, extended, or virtual reality settings. The term image includes e.g. images in printed publications, photographic images including film and videograms. It also includes pseudo-photographs, i.e. an image made by computer graphics, or in any other way, that appears to be a photograph.**

Recital 11 (line 23) - changes marked **in bold and underlined** in relation to the General Approach:

> 11) Research has shown that limiting the dissemination of child sexual abuse material is not only crucial to avoid the re-victimisation linked to the circulation of images and videos of the abuse but is also essential as a form of offender-side prevention, as accessing child sexual abuse material is often the first step towards hands-on abuse, regardless of whether it depicts real or simply realistic abuse and exploitation.

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The Presidency invites delegations to indicate – by the show of flags - whether they could accept the above compromise text for a recital.

Line 96: the Commission proposes to align the definition of legal persons with the one provided in Article 2(a) of Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, which reads as follows:

"**(6) 'legal person' means any legal entity having such status under the applicable national law, except for States or public bodies exercising State authority and for public international organisations".**

The Presidency invites delegations to indicate – by the show of flags - whether the above definition is acceptable.

Article 3 – Offences concerning child sexual abuse

Article 3 has been subject to lengthy discussions between the Parliament and the Presidency. The co-legislators have discussed two key aspects of this article: The structure, on the one hand, and the distinction based on the age of sexual consent, on the other one.

Structure

The Presidency has insisted on the importance of the structure proposed for Article 3 as in the General Approach. The Parliament has showed openness towards the structure proposed by the Council, and reaffirmed their provisional flexibility in this regard.

Distinction based on the age of sexual consent

The distinction based on the age of sexual consent has been subject of extended discussions between the Parliament and the Presidency, particularly in relation to the offences in Article 3 (Offences concerning child sexual abuse) and Article 6 (Solicitation of children for sexual purposes). The Presidency has exposed a wide range of arguments (for instance the ability of children above the age of sexual consent to give consent, and the challenges as for the burden of proof) to keep the distinction based on the age of sexual consent throughout the text. While the Parliament understands the reasoning and is open to consider it, they also point out – as a matter of principle – that all children should be protected against certain offences, regardless of their age.

In conclusion, while the Parliament demonstrates understanding of the Council's need to differentiate the penalties depending on the child is above or below the age for sexual, the Parliament insists that exposure to sexual activities and child sexual abuse should never be acceptable, and that proposing to meet a child with the purpose of committing a sexual offence, according to the directive, should always be criminalised.

Against this backdrop, the Presidency is envisaging the possibility to broaden the scope of some of the offences to cover children above the age of sexual consent. The offences under discussion with the Parliament are:

- Article 3(2) – line 101 (to witness sexual activities, including pornographic content)
- Article 3(2a) – line 101a (dissemination of pornographic content online)
- Article 3(3) – line 102 (to witness sexual abuse)
- Article 6(1)(a) – line 142 (proposing to meet a child with the purpose of committing and offence)
- Article 6(2) – line 144 (soliciting of a child by an adult to produce or share CSAM-materiel – with no requirement of use of coercion or threats.)

In the spirit of a compromise, the Presidency suggests to accept broadening the scope of Article 3(3) and Article 6(1), 6(2) to children above the age of sexual consent, if the Parliament on the other hand accepts the Council's structural need for distinction between children above or under the age for sexual consent. At the same time, the Presidency will insist on maintaining the scope for Article 3(2) regarding exposure to sexual activities.

The Presidency invites delegations to indicate – by the show of flags – whether they see room for flexibility to accept the Presidency's proposal to expand the scope for Article 3(3) and Article 6(1), 6(2) – if the Parliament agrees to the Council's structure.

As for line 99 and 100: Following the input from delegations, these lines have been provisionally agreed.

Line 101: The Parliament has insisted on retaining the exposure to pornographic content, which is important to them, while the Presidency maintained its disagreement.

Line 101a: The Presidency has reiterated the lack of legal basis for this amendment. The Parliament is currently not in a position to withdraw this amendment.

Line 103: In the spirit of compromise, the Presidency conveyed the Council's preliminary flexibility to accept the wording "**or with themselves**", with the caveat of keeping the distinction between children below and above the age of sexual consent, and not including it in the definition of rape as indicated by the delegations.

Line 106: In the spirit of compromise, the Presidency has proposed to accept the wording from the Parliament's mandate, "mental, **intellectual, sensory** or physical disability". As indicated in ST 12602/25, such wording is aligned 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. Moreover, the wording is introduced by "in particular", ensuring it is a non-exhaustive list. In this context, the Presidency has insisted that – if agreed to – that the order is aligned, as proposed by some delegations, ensuring a full alignment with the two legal instruments mentioned above.

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Line 107: The co-legislators discussed the possibility of moving the wording "**physical or psychological violence, blackmail or other**" to a recital. The Parliament was receptive to this suggestion, but a final confirmation is still pending.

Article 4 – Offences concerning child sexual exploitation

Line 117: The Presidency has indicated acceptance of adding "child" in the heading.

Line 118: The cross-references in this line is to be updated, depending on the outcome of the including - or not - of Article 4(7a).

Line 119-124: These lines will be dealt with in a future horizontal discussion on penalties levels.

Article 5 – Offences concerning child sexual abuse material

Line 132: The Presidency has defended the Council position, emphasizing that Member States cannot accept a change from "may" to "shall" in article 5(7). The Parliament has stressed the importance of this article, highlighting that organisations play a vital role in combatting child sexual abuse material, and that they often find themselves with an unclear legal basis, and thereby risk of prosecution. The Parliament has insisted on Member States must be obligated to provide legal certainty for their work, especially for hotlines not run by authorities. The Parliament has shown some openness to that such an obligation would not apply for Member States public authorities running such hotlines. The Parliament urged the Council to illustrate, with concrete examples, the challenges Member States would face with issuing authorizations.

The Commission clarified that the legal basis of the directive does not allow for harmonizing of the legal frameworks as to *when* an authorization should be given. The focus should rather be on the content of the authorization, at least to a certain extent. The Commission highlighted that the proposal does not oblige Member States to give authorizations – they may choose not to.

The Presidency invites delegations to provide concrete examples on which challenges Member States would face with issuing the mentioned authorizations.

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Article 6 – Solicitation of children for sexual purposes

Line 142: The Parliament has explained that the addition of the term "including" broadens the scope to also cover, for example, physical meetings (also relevant in line 144). The Parliament has, furthermore, proposed to include the wording "that could lead" in this provision to cover situations where the meeting between the offender and the child is planned but does not take place due to unforeseen circumstances. The Commission has informed that the wording "leading", in the current directive as well as in the Lanzarote Convention, does not indicate that there has to have been an actual meeting. In the view of a compromise and for legal clarity, the Commission has – as an alternative to the Parliament's proposed change "that could lead" – drafted a suggestion for a recital, specifying that a physical meeting is not required to have taken place:

> **(22a) The proposal to meet a child for the purpose of committing child sexual abuse and exploitation offences should be criminalised where that proposal was followed by material acts leading to such a meeting. This requires concrete actions, such as, for example, the fact of the perpetrator arriving at the meeting place, regardless of whether the meeting actually takes place.**

The original provision in the 2011 Directive included in Article 6(1) derives from Article 23 of the Lanzarote Convention. In coherence, the proposed recital is also taken from the Lanzarote Convention (see point 160 in the explanatory memorandum).

The Presidency invites delegations to indicate – by the show of flags - whether they could accept the following:

1. **Broadening of the scope in line 142 to include physical meetings, during which a child receives a proposal to meet either online or in person for the purpose of committing any of the mentioned offences, mentioned in Article 6(1).**

2. **The proposed recital (22a).**

Line 143 and 145: The Presidency has explained that "force" was removed because the offenses in question pertain to online violations. Since the Parliament has emphasized a desire to extend the provision to cover solicitation occurring face-to-face (as indicated by the addition of "including"), it therefore supports retaining "force".

Line 144-145: The Council has proposed "depicting that child", instead of "a child" as suggested by the Parliament. The Parliament holds that the Council wording would reduce the provision's scope and effectiveness, thereby decreasing the protection to children since only a specific child would benefit from such protection. The Parliament has given as an example a child who is forced to send images of his/her siblings. The wording proposed by the Council would mean that this example is not covered by the scope of the article.

Line 124a and 146: In the spirit of compromise, the Presidency has tabled the following new proposal:

> **Article 6(3). Any person who threatens a child to disclose to one or more third parties child sexual abuse material depicting [that child/any children], with the aim of obtaining money or any other form of remuneration, benefit or consideration in exchange, shall be punishable by a maximum term of imprisonment of at least [x months/x years].**

The Presidency invites delegations to indicate – by the show of flags - whether they could accept the following:

1. **An expansion of the scope of Article 6(2) in line 144-145 to CSAM depicting any child instead of "that child".**

2. **The compromise proposal regarding Article 6(3) to be inserted in line 146, which would be a way of welcoming the Parliaments proposal on so-called sextortion in line 124a.**

Article 7 – Solicitation of sexual abuse

Line 149: The Presidency has in the spirit of compromise, and based on a proposal drafted by the Commission, prepared a new compromise proposal in order to cover the following situations: Solicitation to commit sexual abuse and solicitation of livestreaming of child sexual abuse or sexual exploitation. The compromise proposal reads as follows:

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Changes are marked **in bold and underlined** in relation to the General Approach:

> "**Article 7 - Procurement of live distant child sexual abuse**
>
> Member States shall take the necessary measures to ensure that intentionally promising or giving **any person** money, or **any** other form of remuneration**, benefit** or consideration, **to cause them or another person to commit** any of the offences listed in Article 3(4), (4a) (5), (6) and (6a), Article 4(2) and (3) and Article 5(6), **for the purpose of obtaining access to, or making available to another person, any of the activities described in those offences in real time using information and communication technologies,** is punishable by a maximum term of imprisonment of at least **x** years."

The Presidency invites delegations to indicate – by the show of flags - whether they could accept the proposed compromise, or to share alternative suggestions.

Article 8 – Operation of an online service for the purpose of child sexual abuse or sexual exploitation

Line 151: The Presidency shared the reasoning for the amendments in the General Approach. The Parliament expressed some openness to accept the first amendment, proposed by the Council, "designed or adapted", but opposed to the deletion of "or encourage". The Presidency asked the Commission whether "encouragement" was not already covered by other provisions, such as Article 9 on aiding and abetting. However, the Commission rejected this, explaining that Article 8 constitutes an autonomous criminal offence with a distinct penalty framework and therefore, does not overlap with Article 9.

The Presidency invites delegations to indicate – by the show of flags - whether they could accept maintaining "or encourage" or, alternatively, share arguments for the deletion.

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Article 8a – Travelling for the purpose of sexual abuse and sexual exploitation of children

Line 151b: The Parliament presented this new provision on travelling for sexual purposes, inspired by Article 9 of the Counter-terrorism Directive 2017/541. The Parliament confirmed that the intended geographical scope of the provision is travelling both to another Member State or to a third country. The Presidency raised concerns regarding the relation between this provision and attempt in article 9(2), and on how the two articles would be read in conjunction. Furthermore, it was raised as a concern that the cross-reference was difficult to understand (for instance the self-reference). The Parliament will propose a new wording for the provision, together with a new recital possibly, as well as clear examples of situations within the scope. It was also agreed for the Legal Services of both co-legislators to study the provision.

Article 8b – Other offences related to sexual abuse and sexual exploitation of children

Line 151d: The Parliament presented this new provision and exchanged views with the Presidency on it. Letter (a) has been moved from Article 26 to strengthen the prevention element and going from appropriate measures to penalisation. The Presidency questioned whether this would not be already covered in article 9(1), while the Commission acknowledged its added value. The intention in letter (b) is to ensure that extortion is duly covered in the directive. The Parliament indicated this point is not amongst their priority, and they are therefore open to explore a recital instead. The Presidency also questioned, whether the scope would not be already covered in article 9(2). The Commission pointed out that coercion is already covered throughout the Directive and overlaps should be thus avoided. Letter (c) is inspired in the Counter-terrorism Directive 2017/541 and was included to ensure coherence with article 8a. The Presidency, supported by the Commission, indicated this point is already covered by Member States in their national legislative frameworks. Moreover, the Presidency asked why the Parliament did not retain in this new provision letter (b) from Article 26 (line 293: the organisation of travel arrangements for others). The Parliament will revert on this article.

The Presidency invites delegations to indicate – by the show of flags - whether they could provisionally accept maintaining the provisions 8a and 8b in a revised form, or alternatively share arguments for the deletion.

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Article 9 – Incitement, aiding, abetting and attempt

Lines 153 and 154: The Presidency highlighted, amongst other things, the importance of avoiding a situation of "inciting to inciting" or "attempt to attempt" which could be the consequence of the proposed language of the Parliament, when reading Article 9 in conjunction with the proposed language of the Parliament to Article 6 and 7, in particular. It was agreed to review the cross-references at a later stage (once a compromise proposal for the mentioned articles would be in place).

Article 10 – Consensual sexual activities (without discussion on consent in lines: 161a, 163-165, 166)

Line 156, 157, 158 and 162 regarding a mandatory obligation for Members States not to criminalise certain behaviour between peers as proposed by the Parliament: The Parliament explained that its intention in these lines is to strengthen the exemption of criminalisation of peers to ensure a strong protection. The Presidency raised its concerns, which was shared by the Commission, regarding the negative obligation not to criminalise. Elaborating on these concerns of the Presidency, the Council Legal Service questioned the Parliament's approach to exempt the criminalisation, instead of the sanctioning. It was agreed that the Legal Services of both co-legislators would continue their examination of the matter as to whether the proposed approach would be legally sound. The Commission suggested that instead of a "**shall not**" clause, the following wording could be proposed "**Article x, y, z shall not apply to…**". The cross-references would remain the same.

For example, Article 10(1), line 156, would read:

> 1. Article 3(2), **(4)** and **(6)** shall not apply to consensual sexual activities between peers, in so far as the acts did not involve any abuse **or exploitation**.

The Presidency invites delegations to indicate – by the show of flags - whether they could provisionally accept the approach, proposed by the Commission, as a compromise.

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Line 156 and 162 regarding the Parliament's amendment "provided that there is no abuse of trust or dependency between the peers": The Parliament explained that they intend to provide a broader definition of trust. The Presidency acknowledged the Parliament's intention, but suggested to avoid over specific provisions, which would limit the scope of the protection. The Commission supported the argument of the Presidency. The Parliament agreed to revert, following the exchange.

Line 160: The Presidency provided its arguments to delete "above the age of sexual consent", which would allow to cover all children and their peers. The Parliament understood the benefits of such amendment, which was supported by the Commission, while pointing out that line 161 would then need to be refined accordingly, since it refers to consent (and children below the age of sexual consent cannot consent). The Commission acknowledged that this wording, coming from the Lanzarote Convention, is not ideal and suggested to replace it by "mutually agreed".

Presidency invites delegations to indicate – by the show of flags - whether they could provisionally accept the proposed language "mutually agreed", instead of "consent".

Article 11 – Aggravating circumstances

Line 168: The Presidency explained how the amendments from the General Approach aimed at aligning the text with the Envicrime Directive. The Parliament stated their preference to keep the original meaning as in the Commission proposal.

Line 169: The Parliament expressed the importance to precise the different types of disabilities and the deprivation of liberty in the Directive and suggested to have a recital in that regard. The Commission pointed out the connection to line 106 (Parliament's amendment "mental, intellectual, sensory or physical disability"). As for their amendment "against a child of a young age", it intends to grant further protection to children below the age of sexual consent. It was agreed to discuss this amendment at a later stage, since it relates to the horizontal point on the age of sexual consent.

Line 176: The Presidency explained the reasons for the deletion of the commission of offences repeatedly.

Line 176a: The Parliament explained that their amendment aims at covering situations where the offender manipulates the victims to be perceived as a peer or a minor.

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Line 177: The Presidency explained the reasons for the deletion of the use or threat of using a weapon.

Line 178: The Parliament did not object to the amendments of the Council and will revert.

Line 178a: The Parliament indicated that this amendment relates to the motivation to commit the offence. The Presidency, and the Commission, raised concerns regarding the amendment, and failed to see its added value. The Parliament will bring further information on their intention.

The Presidency invites delegations to indicate:

a) **Their arguments to defend line 168, in particular the inclusion of "one or more".**

b) **Whether – by the show of flags - they have flexibility to accept a recital in relation to the Parliament's amendment "mental, intellectual, sensory or physical disability, deprived of liberty or whose liberty is restricted" (line 169).**

c) **Additional arguments in relation to line 176 (deletion of letter (h) "the offence was committed repeatedly").**

d) **Whether – by the show of flags - they have flexibility to accept the Parliament's amendment in line 176a (adding letter (ha) "the offender posed as a minor or a peer").**

e) **Additional arguments in relation to line 177 (deletion of letter (i) "the offence was committed with the use or threat of using a weapon").**

Article 12 – Disqualification arising from convictions

Line 180: The Parliament explained their amendments. On the one hand, "and organised voluntary activities" aims at covering activities other than professional ones. On the other hand, "or facilitating" aims at broadening the scope to cover different types of involvement adults might have in activities with children, even when acting as intermediaries. The Parliament confirmed "facilitating" could include for instance a bus driver transporting children to a given place for an activity, or a coordinator of volunteers in a youth organisation. The Presidency, supported by the Commission, raised its concern regarding this second amendment, indicating the little value it would bring.

Line 181: The Presidency explained the amendments proposed in the General Approach, which the Parliament considers restricting the scope by limiting to "at least the child protection, education, childcare, health care sectors". This scope would leave out other sectors, such as social or religious groups (e.g. boy or girl scouts), which the Parliament deems important to cover. To cover additional types of professional relationships, the Parliament's amendments specifically intend to include "contracting staff, consultants and volunteers". The Commission suggested a recital to include such wording.

Line 182: The Parliament confirmed that their amendment "from the authorities to the requesting party" refers to the national authorities having submitted a query to obtain the criminal records of a given individual. The Commission proposed to have a recital instead. No immediate objections were formulated regarding the amendment proposed in the General Approach.

The Presidency invites delegation to indicate:

a) **Whether there is flexibility to accept "and organised voluntary" from the Parliament's mandate in line 180.**

b) **Whether they could accept a recital concerning the wording "or contracting staff, consultants and volunteers" from the Parliament's mandate in line 181.**

c) **Whether they could accept a recital concerning the wording "from the authorities to the requesting party" from the Parliament's mandate in line 182.**

Article 13 – Liability of legal persons

Lines 184: The Presidency explained the changes included in the General Approach, intending to align the proposal with the Envicrime Directive. The Parliament will revert on this line.

Lines 188 and 189: The Presidency presented the linguistic changes proposed in the General Approach. The Parliament had no immediate objection against such changes.

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Article 14 – Penalties on legal persons

Lines 191 and 191a: The Presidency explained the changes proposed in the General Approach for these lines, which ensure an alignment with the Envicrime Directive. The Parliament showed some openness to consider these changes and will revert.

Lines 193 and 194: The Parliament expressed some openness to accept the linguistic changes proposed in the General Approach.

Line 197: Upon request of the Parliament, the Commission confirmed that the deletion of "temporary or permanent" as proposed in the General Approach does not modify the original meaning from the Commission proposal. The Parliament will reflect on the change proposed and revert.

Line 197a: The Parliament's amendment referring to public interest is based on article 7(2)(j) of the Envicrime Directive and article 7(1)(h) of the Violation of Union Restrictive Measures Directive.

The Presidency could see the added value of this amendment and invites delegations – by the show of flags - to indicate their flexibility to accept it.

Lines 198 to 199b: The co-legislators had a preliminary discussion on these lines. The Presidency explained how the General Approach follows the system of previous instruments in the field of judicial cooperation in criminal matters. While the Parliament proposes to follow such system as well, the amount diverge to the ones included in the Council's mandate, indicating that the higher amount should be retained.

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For the delegations' convenience, the table below displays the different mandates together with the approach included in the Envicrime Directive and Violation of Union Restrictive Measures Directive:

Directive	**Sanctions for natural persons (years of imprisonment)**	**Sanctions for legal persons**	
		% of the global turnover	**fixed amount**
Environmental Criminal Law (Art. 5 and 7)	10 / 8 / 5	5%	EUR 40 million
	3	3%	EUR 24 million
Restrictive measures (Art. 5 and 7)	5 / 3	5%	EUR 40 million
	1	1%	EUR 8 million
CSAD – GA	1	1%	EUR 8 million
	5	3%	EUR 24 million
CSAD - Parliament	2	1%	EUR 8 million
		whichever is higher	
	3	5%	EUR 40 million
		whichever is higher	

The Presidency invites delegations to express arguments in favour of the General Approach as well as possible venues for compromises.

Lines 199c and 199d: The co-legislators initially agreed that the content of lines 199c and 199d was essentially identical, with only minor linguistic differences. The Commission was mandated by both co-legislators to draft a compromise proposal combining both mandates.

Article 15 – Non-prosecution or non-application of penalties to the victim

The Presidency presented the General Approach. The Parliament did not present any initial objections to the amendments proposed.

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