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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse – Progress report

I. INTRODUCTION

1. On 11 May 2022, the Commission adopted a proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse (CSA)¹. The proposal was accompanied by an impact assessment and a communication².

¹ 9068/22.

² 9068/22 ADD 1, ADD 2 and ADD 3; 9071/22.

2. The proposal, based on Article 114 TFEU, intends to effectively address the use of online services for the purpose of CSA. It has two main building blocks. First, relevant online service providers, such as providers of hosting services and interpersonal communication services would be obliged to detect, report, remove or block known and new online child sexual abuse material (CSAM), as well as detect and report solicitation of children ('grooming'). Second, a new, decentralised EU agency (the 'EU Centre') would be set up to enable the implementation of the proposed Regulation, together with a network of national Coordinating Authorities and competent authorities. As acknowledged in the Explanatory Memorandum to the proposal, the measures contained in the proposal would affect the exercise of the fundamental rights of the users of online services.
3. In the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) is the lead committee for the negotiations on the proposal. It appointed MEP Javier Zarzalejos (EPP, ES) as rapporteur in October 2022. In the meantime, the EP coordinators decided to request the European Parliament Research Service to prepare an impact assessment covering a wide range of issues linked to fundamental rights and proportionality issues. The LIBE Committee has not adopted its report yet.
4. In July 2022 the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) adopted Joint Opinion 4/2022. While acknowledging that CSA is a particularly serious and heinous crime and the objective of combating it is an objective of general interest recognised by the Union, the EDPB and EDPS stress that any limitations of fundamental rights must comply with the requirements of the Charter of Fundamental Rights of the European Union. They consider that the proposal raises serious concerns about the proportionality of the interference with and limits to the fundamental rights to privacy and to the protection of personal data.
5. The European Economic and Social Committee delivered an opinion on the proposal in September 2022. The Committee supported the principle of the proposal and asked to make improvements to the text and to make it more specific in order to safeguard secrecy of correspondence and respect for privacy.

II. WORK WITHIN THE COUNCIL

6. In the Council, the examination of the proposal has been carried out in the Law Enforcement Working Party - Police (LEWP). The LEWP discussed the proposal during its meetings on 5 and 20 July, 6 and 22 September, 5 and 19 October and 3 and 24 November 2022. The entire proposal was examined during the above LEWP meetings. The Presidency presented several revisions of the text of Chapters I to III, which address the following issues: subject matter and scope, definitions, obligations of online service providers and supervision, enforcement and cooperation.
7. At the informal meeting of Home Affairs Ministers and at the informal COSI meeting in July 2022 in Prague, the Presidency secured general political support for the proposal, pending technical examination at the Working Party level. The Presidency stressed that the proposal was technologically neutral and future-proof, and that a balance must be found between the protection of children on the one hand, and the protection of privacy and other fundamental rights of users of online services on the other.
8. The Presidency presented a major conceptual change regarding the issuance of individual types of orders - detection orders and orders to remove and block CSAM. A new type of order, the delisting order, was also introduced. Removal, blocking and delisting orders would be newly issued by the competent authorities of the Member States. Detection orders would be the only orders issued by a judicial authority or another independent administrative authority of a Member State because this type of order is the most sensitive in relation to interference with the fundamental rights of users of relevant online service providers. Under the Commission proposal, all categories of orders would be issued by a judicial authority or another independent administrative authority. For the sake of greater flexibility, this power has been entrusted to the competent authorities for removal, blocking and delisting orders. Pending the lifting of scrutiny reservations, it would seem that a majority of Member States could support this change as it would allow them to maintain existing systems and structures to combat CSA.

9. Following a Presidency request, the Commission prepared two documents helping to clarify issues and questions raised by Member States. One document³ includes a flowchart of the CSA detection process and a comparative analysis of the relevant legislation (CSA, Digital Services Act, Terrorism Content Online, GDPR and the Interim Regulation). A second document⁴ outlines the relations between the new EU Centre, the Coordinating Authorities and Europol.
10. The Presidency also organised two workshops with the participation of the Commission and experts from the capitals, based on discussion papers and on Member States' questions and requests for clarifications. The first workshop took place on 29 September and was devoted to the technologies used to detect known and new CSAM and grooming, while the second workshop which took place on 16 November addressed age verification tools. Both workshops provided an opportunity for Member States to delve deeper into the topics addressed by the proposal, while allowing for direct interaction between capital-based experts and technical experts. The workshops were highly appreciated by Member States and were praised for providing much needed clarifications on how some of the proposed provisions could work in practice and confirming the technological feasibility of the proposal. Thanks to these workshops, it appears that fighting online CSA is possible. Technologies exist to detect known and unknown CSAMs. Grooming is more complicated, but constantly evolving technology exists. Technical solutions also exist to detect CSA online in end-to-end encrypted systems, such as the detection of content on the user's side before the actual encryption. The second workshop on age verification tools showed different techniques used by private companies to identify the age of users of online services, as well as new technologies under development.

³ WK 10409/2022.

⁴ WK 13981/2022.

11. Another supporting event organised by the Presidency in cooperation with the EP and the Commission was the screening of the Czech documentary film ‘Caught in the Net’, preceded by a panel discussion on the topic of solicitation of children, in which representatives of the Presidency and the film producer took part. MEP Hilde Vautmans (Renew/BE) gave the opening speech. The Presidency also represented the Council in several conferences aimed at the fight against online CSA such as the Child Safety Online Conference 2022 and a high-level event on *How can we use technology to ensure safety for children online?* during the first-ever European Parliament ‘Technology Awareness Week’.
12. Although discussions on the proposal are still ongoing in the LEWP, several key issues have already been identified that will require more detailed discussions in the future:

Chapter I / General provisions – Subject matter, scope and definitions

Several terms used in the proposal have been defined differently to other related EU legislation, such as the Digital Services Act or the Terrorism Content Online Regulation. It was therefore necessary to harmonise some of these definitions to ensure coherence and legal certainty between individual legislative acts. In this context the Commission clarified that the proposal acts as a *lex specialis* to the Digital Services Act.

Furthermore, some other terms may need to be defined to facilitate the uniform interpretation of the proposed provisions.

An important discussion took place regarding the definition of ‘child user’, which is linked to the criminal offence of grooming according to Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography. The directive being under revision by the Commission, how the age of sexual consent is defined in the directive will need to be considered when defining a ‘child user’ in the proposed regulation.

Another important change in this first chapter was the inclusion of a definition of ‘online search engines’ following the addition of delisting obligations under Chapter II.

Chapter II / Obligations of providers of relevant information society services to prevent and combat online CSA

When issuing individual types of orders to providers of online services, the need to protect children and the privacy and other fundamental rights of users of online services should be carefully considered. Likewise, the work of law enforcement authorities must be kept in mind.

The Presidency proposed to simplify the architecture of the text, so that only detection orders will be issued by a judicial authority or another independent administrative authority, while competent authorities will have the power to issue removal, blocking and delisting orders.

Member States generally welcomed this change in the issuance of removal and blocking orders and the addition of delisting orders. However, further discussions are needed at the technical level on those issues since several Member States still have important concerns about the impact on the protection of the right to privacy and other fundamental rights. The complexity and length of the procedure for issuing detection orders has also been highlighted by several Member States.

At the LEWP meeting on 19 October, the Council Legal Service indicated that it would issue a written opinion on the proportionality of detection orders.

Chapter III / Supervision, Enforcement and Cooperation - Coordinating Authorities for CSA issues

The Presidency presented two sets of compromise texts on this Chapter that were focused on the independence requirements to be complied with by the Coordinating Authorities. Several Member States had a scrutiny reservation on this Chapter considering the important impact those provisions may have on existing national structures. They acknowledged that the compromise texts were going in the right direction as they provided more flexibility to Member States.

Member States found it particularly challenging to devise efficient solutions for setting up Coordinating Authorities under the Terrorism Content Online Regulation, the Digital Services Act and this proposal all at once while complying with the requirements provided for in these pieces of legislation.

The issue concerning the identification and submission of online CSA by the Coordinating Authorities to the EU Centre following diligent assessment of judicial authorities or other independent authorities was discussed extensively as several Member States pointed out the risk of delays and lack of resources and expertise.

Chapter IV / EU Centre to prevent and combat CSA and cooperation with Europol

As indicated above, the Commission proposed to set up a new EU agency, to be located in The Hague, given the need for close cooperation with Europol. The EU Centre and Europol could share some of the administrative expenses such as human resources, accounting and IT equipment. Under the proposal as presented by the Commission, Europol's main tasks and competences in relation to CSA would not be affected.

General scrutiny reservations were entered in respect of the whole Chapter; partial scrutiny reservations were entered in respect of the location of the seat of the EU Centre. The most frequent issues and questions raised by Member States in Chapter IV concerned budget, risk of duplication with Europol's tasks, risk of competition between Europol and the EU Centre for expert staff dealing with CSA, lack of recognition of the role of hotlines in dealing with CSA reports, data protection issues regarding the processing of CSA reports by the EU Centre, the reporting process by the EU Centre of online CSA to Europol and law enforcement authorities, the creation of a database of reports by the EU Centre, as well as the creation of databases of indicators of online CSA.

Chapter V / Data collection and transparency reporting

Delegations had strong misgivings against the provisions on data collection and reporting which they deemed too cumbersome for law enforcement authorities. They pointed to the fact that further discussions will be needed on whether the EU Centre was to receive data on ongoing criminal proceedings. Member States have indicated the need to protect personal data and limit the information to be collected and shared.

Chapter VI / Final provisions

Several delegations asked for a later application date and for the Interim Regulation (EU) 2021/1232 to be repealed at a later stage to avoid a gap between the detection based on the Interim Regulation and the proposed Regulation. Ideally, both regulations should remain in force concomitantly for a while to avoid such gap.

III. CONCLUSION

13. The Presidency is committed to working closely with the incoming Presidency in order to facilitate the continuation of the discussions in the LEWP and to ensure smooth progress on the file in the Council.
14. In the light of the above, the Permanent Representatives Committee and the Council are invited to take note of the progress made on the examination of the proposed Regulation.