Council of the European Union
General Secretariat

PUBLIC

Interinstitutional files:
2024/0035 (COD)

Brussels, 05 May 2026

WK 6369/2026 INIT

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NOTE

From: To:	General Secretariat of the Council Delegations
N° Cion doc.:	ST 6241 2024 ADD 1 + ST 6241 2024 ADD 2 + ST 6241 2024 ADD 3 + ST 6241 2024 ADD 4 + ST 6241 2024 ADD 5 + ST 6241 2024 INIT
Subject:	CSAD - Joint DE/FR/RO/SE-Compromise proposal on consent

Below delegations will find a draft article and recital on consent. The text has been jointly prepared by Germany, France, Romania, and Sweden. (Recast of the Directive combatting child sexual abuse and exploitation)

Article

(a) a non-consensual act with a child who has reached the age of sexual consent is understood as an act which is performed without the child's consent given voluntarily, as a result of the child's free will assessed in the context of the surrounding circumstances, or where the child is unable to form a free will due to the presence of circumstances referred to in paragraph 5, or due to other circumstances, such as sleep, surprise, and state of unconsciousness;

(b) the consent can be withdrawn at any moment before or during the act;

(c) consent cannot be inferred exclusively by the child's silence, verbal or physical non-resistance or by any past or present relations with the offender.

Recitals

(15c) Engaging in sexual activities with children who have reached the age of sexual consent should be punishable if the child does not consent. The child's consent must be given voluntarily by the child, as a result of the child's freely formed will considered in the context of the relevant surrounding circumstances.

In cases in which the child is unable to form a free will, consent cannot be deemed to exist. Such situations could be considered when abuse is made of a recognised position of trust, authority or influence over the child. Persons upholding such a trust or authority could for example work in schools or as supervisors of the child in a work-related or sporting context or be close family such as parents, stepparents and grandparents. It also includes situations where abuse is made of a particularly vulnerable situation of the child, for example where the child has a disability. This also applies to situations where use is made of coercion, force or threats. Other relevant surrounding circumstances that should be taken into account include situations where the child is sleeping, unconscious, in a state of frozen fright or intoxicated in a manner impacting its ability to form a free will as well as situations where the child is taken by surprise, or caught off guard, or the act is committed unexpectedly so that the child has no opportunity to make a decision on participation in the sexual act.

(15d) Voluntary participation must be present at the time the sexual act is performed. Consent to participate can be withdrawn at any moment before or during the act. The fact that a person has indicated in advance that he or she wants to participate in a sexual act does not mean that a later sexual act should be considered voluntary. Voluntary participation must be present throughout the sexual act.

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(15e) Consent cannot be inferred solely from the child's silence, verbal or physical non-resistance or past sexual conduct or by any past or present relations with the offender. A person who voluntarily participates in a sexual act expresses their willingness to participate in some way, e.g. words or deeds. The lack of such expression can be understood as meaning that the participation is not voluntary. Therefore, a child who, for example, is sleeping or unconscious cannot be considered to consent.

(15f) Recitals 15c, 15d, 15e and Article 3(9) do not seek to limit the circumstances in which it can be considered that a child does not consent to a sexual act.

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