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NOTE

From:	Presidency
To:	Permanent Representatives Committee
No. prev. doc.:	12611/23
Subject:	Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse – Partial general approach

I. INTRODUCTION

1. On 11 May 2022, the Commission adopted the above proposal¹ accompanied by an impact assessment and a communication. The proposal is based on Article 114 TFEU and has two main building blocks. First, online service providers, such as providers of hosting services and interpersonal communication services, would be obliged to prevent the dissemination, detect, report and remove child sexual abuse material ('CSAM'), and to prevent, detect and report the solicitation of children ('grooming'). Second, a new decentralised EU agency (the 'EU Centre') would be set up to support the implementation of the proposed Regulation, together with a network of national Coordinating Authorities and other competent authorities.

¹ 9068/22

2. In the Council, the proposal has been examined in 24 meetings of the Law Enforcement Working Party - Police (LEWP-P) to prepare a mandate for negotiations with the European Parliament.
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. Following a request by the EP coordinators, the European Parliament Research Service issued a complementary impact assessment on 13 April 2023 covering inter alia the impact of the proposal on fundamental rights, the prohibition of general monitoring obligations and the necessity and proportionality of the obligations for providers to detect, report and remove CSAM. The LIBE Committee has not adopted its report yet.
4. The Permanent Representatives Committee had a policy debate on the above proposal on 31 May 2023. Most delegations considered that the scope of the detection order should include interpersonal communication and cover all forms of online child sexual abuse (known and new CSAM, and solicitation of children), while some objected to that. Most delegations considered that encrypted communications should be included whereas some delegations had concerns related to cyber security. Delegations agreed that no legal void should occur, and therefore, if need be, the “Temporary Regulation”² should be extended.

II. CHANGE IN THE SCOPE OF DETECTION ORDERS

5. The Presidency notes that the work in the LEWP-P was concluded on 14 September 2023 without having sufficient support from delegations for the compromise text, in particular with regard to the scope of the detection orders, which raised some concerns about proportionality.

² Regulation (EU) 2021/1232 of the European Parliament and of the Council of 14 July 2021 on a temporary derogation from certain provisions of Directive 2002/58/EC as regards the use of technologies by providers of number-independent interpersonal communications services for the processing of personal and other data for the purpose of combating online child sexual abuse.

6. The Presidency therefore suggests limiting for the time being the scope of the detection orders to known CSAM. The relevant provisions related to detection orders for new CSAM and the solicitation of children should only start to apply in the future, once it will have been further established that the detection technologies are sufficiently reliable and accurate. However, new CSAM and solicitation of children would remain within the provisions of the Regulation related to preventative measures.
7. In practical terms, the Presidency considers that two mechanisms could achieve this objective: an activation clause and a review clause.
8. Under a mechanism linked to an activation clause, the EU Centre would be required to monitor and contribute to technological developments and to carry out a technical assessment of the reliability and accuracy of technologies to detect new child sexual abuse material and/or the solicitation of children, based on quantifiable and measurable parameters. Based on the EU Centre's assessment, the Commission would then propose an implementing act to provide for the modalities of application to detection orders for new material and/or grooming. Regarding the power to adopt an implementing act, this is normally conferred on the Commission. However, given the significant implications of such widening of the scope of detection orders, the Presidency suggests conferring the task to adopt that implementing act on the Council.
9. Under a review clause, the Commission would be invited to assess the necessity and feasibility of including new child sexual abuse material and/or the solicitation of children in the scope of detection orders, taking into account in particular the reliability and accuracy of the detection technologies available on the market. The EU Centre should support the Commission in this task by monitoring and contributing to the technological developments and providing input to the Commission's assessment. This might lead to a legislative proposal by the Commission, and it would then be up to the co-legislators to decide whether to expand the scope of detection orders.
10. At the same time, the limitation of the scope of the detection order would also require a further strengthening of preventive and mitigating measures in order to avoid a gap in the protection of children.

11. During its consultations in preparation of the meeting of Coreper, the Presidency came to the conclusion that the two above approaches could be combined in order to address the concerns of several delegations. The Presidency therefore suggests using an activation clause regarding new child sexual abuse material, including all the safeguards outlined in point 8 of this note, and a review clause regarding the solicitation of children.
12. It also emerged from consultations that the outcome of Coreper's previous discussion in May this year remains valid as regards encryption. This means that encrypted material should remain within the scope of the Regulation.
13. Finally, the Presidency also notes that a solution should be provided to enable the continuation of the current regime of voluntary detection for new material and grooming.

III. WAY FORWARD

14. The Presidency aims at a partial general approach at the meeting of the Council on 19 October 2023, excluding Article 42 about the selection of the seat of the EU Centre which should be the subject of an inter-institutional procedure following the example of the selection of the seat of the Anti-Money Laundering Authority (AMLA).
15. *In the light of the above, the Permanent Representatives Committee is invited to indicate whether it can support the Presidency's suggestion to limit the scope of the detection orders to known CSAM, on the understanding that:*
 - *the future application of the relevant provisions related to detection orders for new CSAM would be subject to the adoption of a Council implementing act (activation clause); and*
 - *the future inclusion of the relevant provisions related to detection orders for the solicitation of children would be subject to a new legislative proposal (review clause).*