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NOTE

From: Presidency
To: Permanent Representatives Committee

Subject: Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse
– Policy debate

I. INTRODUCTION

1. On 11 May 2022, the Commission adopted the above proposal¹, that was accompanied by an impact assessment and a communication². The proposal, that is based on Article 114 TFEU, 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 and remove child sexual abuse material ('CSAM'), and to detect and report 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 competent authorities.

¹ 9068/22.

² 9068/22 ADD 1, ADD 2, ADD 3 and ADD 4; 9071/22.

2. In the Council, the proposal has, so far, been examined in 16 meetings of the Law Enforcement Working Party - Police (LEWP) with a view to making as much progress as possible towards a mandate for negotiations with the EP.
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 respect of 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 yet adopted its report.
4. The Presidency invited the European Data Protection Supervisor to present his assessment³ at the LEWP meeting on 19 January 2023. While stressing the seriousness of child sexual abuse, the EDPS raised concerns about the compliance with EU law of the proposed detection order. In the ensuing discussion, the Commission outlined the rationale behind its proposal, which was subsequently presented in a non-paper⁴.

II. DETECTION ORDER

5. The Presidency notes that the proposed detection order presents legal and technical challenges that must be assessed and discussed with a view to adopting a final legislative act with the EP that will stand up to judicial reviews and corresponds to the response considered adequate by Member States. In this context, the Council Legal Service issued a written opinion on the legality of the proposed detection order⁵.

³ Joint Opinion 4/2022 of July 2022 of the European Data Protection Board and European Data Protection Supervisor (WK 832/2023).

⁴ WK 832/2023 ADD 1

⁵ 8787/23.

6. The Council Legal Service concludes that, in light of the case law of the Court of Justice at this stage, the regime of the detection order with regard to interpersonal communications constitutes a particularly serious limitation to the rights to privacy and personal data protection enshrined in Articles 7 and 8 of the Charter. Such regime entails a serious risk of (i) not being in compliance with the requirement that the limitations to the fundamental rights must be provided for by law; (ii) compromising the essence of the above-mentioned fundamental rights in so far as it would permit generalised access to the content of interpersonal communications, or, (iii) in the alternative, not being in compliance with the proportionality requirement.
7. The Commission services disagree with the Council Legal Service's assessment outlined in point 6. The Commission services underline the need to balance all the fundamental rights at stake and conclude that the proposed detection order complies with the Charter.
8. The Presidency has gathered Member States' positions on four key issues concerning the detection order, addressing the topics of end-to-end encryption, the scope of the proposal (i.e. the inclusion, or exclusion, of interpersonal communication services and audio communications) as well as the issue of voluntary detection. All but three Member States have replied to these questions⁶. Several Member States have entered general and partial scrutiny reservations.

III. WAY FORWARD

9. The Presidency's assessment of Member States' positions on the scope of the application of the detection order is that a majority of Member States supports that the detection order is applied to interpersonal communication services as regards known CSAM, while the positions of a few Member States for unknown CSAM and grooming are more nuanced.
10. Member States' positions on appropriate provisions for end-to-end encryption – closely linked to interpersonal communications – were inconclusive.

⁶ WK 10235/2022 ADD 10 REV 2.

11. Moreover, a clear majority of Member States seems to support the inclusion of audio communications in the scope of the Regulation. This presupposes that interpersonal communication services are kept within the scope of the proposed regulation.
12. In light of the above, the Permanent Representatives Committee is invited to indicate:
- a) whether interpersonal communications should be included in the scope of the proposed detection order;
 - b) if this is the case, whether the proposed detection order for interpersonal communications should apply to known CSAM, unknown CSAM and grooming; and whether the proposed detection order should also apply to audio communications;
 - c) if it has guidance for further work on the proposed detection order for interpersonal communications, including the implications for end-to-end encryption.