

- **Classification:** Classified – for official use only
- **Date:** 30 November 2022
- **From:** Permanent Representation of Germany to the EU, Brussels
- **To:** Federal Foreign Office
- **Copy to:** BMI (Federal Ministry of the Interior and Community), BMJ (Federal Ministry of Justice), BMWK (Federal Ministry for Economic Affairs and Climate Action), BMDV (Federal Ministry for Digital and Transport), BMFSFJ (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth), BKAMT (Federal Chancellery), BMF (Federal Ministry of Finance), BMG (Federal Ministry of Health)
- **Subject:** Meeting of the European Council's Law Enforcement Working Party (LEWP) (Police) on 24 November 2022

I. Summary and assessment

The meeting focused specifically on observations on agenda items 3, concerning 'Cooperation in the area of covert surveillance', and 7, concerning the draft Regulation for combatting child sexual abuse more effectively. Under agenda item 6, the document entitled 'LEWP networks and expert groups – Objectives, governance and relations with the LEWP' was approved by the Council Working Party.

Next meeting: 6 December 2022

II. Details

Agenda item 7: Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse

As part of the discussions on Articles 1 and 2, AT entered a scrutiny reservation and referred to the AT Parliament's position on the CSA Regulation. AT repeated concerns regarding the fundamental rights concerned in relation to the intended detection orders and suggested that the discussion on these important issues be continued. FR stated that the possibility to order detection measures in respect of known CSAM was consistent with CJEU case-law. With regard to new CSAM, FR sought an assessment from COM on the extent to which the ordering of detection measures in relation to new CSAM was in accordance with the case-law of the CJEU and whether or not such measures constituted general supervision.

COM responded that the draft provision did not define any general supervision, nor did it contradict CJEU case-law. First of all, no provision was made for general detection, only for targeted detection. Unlike currently, detection under the COM draft Regulation was permissible only as a last resort and subject to a court order (or order of an independent judicial authority). A multi-stage procedure formed the basis of detection orders, during which the identification of a risk on the part of the services concerned in the particular case provided the grounds for issuing an order. Orders could be issued only if they were proportionate, that is to say, if appropriate technologies were available and the orders were as targeted as possible. It was important to establish that the CJEU did not simply rule on whether the detection of known material was permissible. Detection measures concerning new material that closely resembled already known material were also permissible. The draft also met that criterion. The classifiers for detecting new CSAM were developed on the basis of already known CSAM. COM felt that the detection of new CSAM was particularly

important, as it could be used to prevent ongoing or future abuse. By entering new CSAM in the hash database, it was possible to prevent its dissemination and, as a result, prevent revictimisation of those concerned.

SI repeated its scrutiny reservation; the draft was moving in the right direction. Further detailed debate was necessary, in particular with regard to Article 7. BE repeated its scrutiny reservation; it welcomed the definition set out in Article 2(x). According to FI, issues arose regarding proportionality. Some concerns expressed by FI were shared by the EDPS. FI suggested restricting the scope of the draft Regulation in order to guarantee a greater balance of fundamental rights. FI was not currently in a position to communicate specific proposals on a restriction of scope. Delegates were interested to hear the positions of the other MS, especially DE. DE made comments as directed, entered a scrutiny reservation and criticised the discrepancy in the age of 'child users' with national provisions. In response to a question by FI, DE stated that the scope of the draft Regulation should be readdressed in the future; there was currently no coordinated position in this regard. DE's argument on raising the age of child users was addressed by NL. It was argued that a uniform age of 18 across the EU would lead to a discrepancy with national provisions. In NL, the relevant age was 16 years. COM reiterated that a uniform age at EU level was determined to ensure the greatest possible harmonisation of the internal market. In a situation where reference was had to the relevant national age limits, new obstacles to the integrated internal market would be created.

With regard to Article 3, the Chair stated that the period laid down in Article 3(4)(a) had been extended to ensure there were no gaps in the review procedure. On instruction, DE submitted that a reasonable period seemed sensible. BE asked whether there should also be further guidance on 'how' the risk was to be assessed. COM considered the original period of 2 months to be perfectly reasonable. The updated assessment was intended to focus solely on the aspects that had changed since the relevant detection order had been issued. COM maintained that it was open to a fleshing out by COM of the parameters of risk assessment.

On Article 4(3), FR commented that age verification measures must not be restricted to self-declarations by users. These arrangements had to be laid down in the draft text.

On Articles 7 and 8, BE questioned why COM had to be informed pursuant to Article 7(4) where the Coordinating Authority deviated from the EU Centre's recommendation. COM explained that a substantial discrepancy in the opinions of the Coordinating Authority and the EU Centre was important information which COM would take into account when issuing the guidelines for the implementation of the CSA Regulation.

FR suggested fleshing out the requirements with regard to 'significant risk'. The TCO Regulation could be used as a model. For example, the issuance in the past 12 months of two removal orders could be included as a specific feature. A distinction between services already operational in the EU and those only recently set up in the EU was to be considered. FI expressed doubts about the proportionality of Article 7: questions were raised about oversight of the services, and how the choice of technology affected the relevant fundamental rights. Forming an assessment of the article was challenging. COM replied that the draft made the distinction between the different CSAM content, in particular with regard to the conditions governing the issuance of detection orders.

The Chair stated that Article 8(2) had been adapted to take account of the MS with more than one official language.

BE considered that the requirements laid down in Article 10 in relation to the criteria governing appropriate technologies should be supplemented to include features described as 'suitable and not easy to circumvent'. NL emphasised that Article 10 must not undermine encryption and suggested introducing clarification on this point in Article 10(3); on instruction, DE supported this proposal.

COM commented that the draft Regulation was technologically neutral. The tech workshops had shown that technical solutions were available to facilitate the detection of CSAM even in the encrypted environment.

With regard to Article 12, COM stated that extending the suspension of the providers' obligation to inform the users could lead to misunderstandings. Informing the users concerned was an essential measure allowing them to exercise their fundamental rights. The COM draft provided for two time periods within which the duty to inform could be suspended: first, a 3-month time period, during which the provider does not inform the user, unless the information is released by the EU Centre because it established that the report was manifestly unfounded; subsequently, the provider could be requested to suspend further the provision of the information so as not to interfere with investigations. That second time period laid down in the COM draft Regulation does not exceed 18 months (see Article 48). The combination of both time periods amounted to a possible total time period of 21 months. COM felt that this should not be extended. According to the compromise text, the first time period was extended to 6 months, and provision was also made for a further possible extension of 6 months. This could amount to an overall time period of 36 months, which COM considered to be too long.

FR suggested reducing the time period in Article 14(2) to one hour, in alignment with the TCO Regulation. There was a keen interest at the meeting to hear the views of the other MS on this point. BE and PL felt that there were concerns about the practical organisation of oversight of the other national authorities by the Coordinating Authorities. NL proposed a simplification of the procedure for the issuance of removal orders.

BE, IE and DE welcomed the supplementary provisions on cross-border removal orders in Article 14a. BE queried whether a definition of 'content provider' was necessary. IE and DK likewise welcomed the possibility of cross-border orders in principle, but the rules governing their use would have to be laid down in an uncomplicated manner. The TCO Regulation, according to IE, was not a suitable model: terrorist material and CSAM clearly differed. NL entered a scrutiny reservation. COM voiced concerns about the wording of Article 14a which was inconsistent with previous wording. COM was also concerned that the draft was made more complex by the introduction of cross-border orders.

BE and NL were critical of the deletions from Article 16(4) of the provisions weighing up the benefits or otherwise of blocking orders. On instruction, DE submitted that there were, in its view, issues to be addressed also in this regard. Deletions were also viewed critically by COM.

As instructed, DE submitted that the provisions of Article 18a needed to be fleshed out further.

DE – supported by BE – welcomed the strengthening of the rights of persons concerned in Article 21(3). As a result, amendments could also be necessary in paragraphs 1 and 2.

As regards Article 25, FR suggested that the time period in paragraph 1 should be extended to one year, in keeping with the model in the TCO Regulation. FR called for the deletion (redlining) of Article 25(9). The reintroduction of the independence requirement for the Coordinating Authorities made it necessary to delete Article 25(9). As instructed, DE supported the criticism levelled against Article 25(9) together with the amendments in Article 26 – the comments were supported by IE. BE also considered Article 25(9) to be a redline provision.

With regard to Article 26(4), HU commented that the additional requirement of ‘integrity’ was self-evident and, therefore, did not need to be included. FR commented that the existence of an independent Coordinating Authority that takes fundamental rights into account was to be welcomed in principle. FR objected to the reintroduction of the independence requirement in Article 26(1): no such distinction was applied to the other competent authorities. The Chair explained that the expression ‘free from any external influence’ related to the performance of the task in hand and, therefore, was not to be construed generally. AT took the view that the independence of the Coordinating Authority was an absolute necessity. BE – supported by IE – suggested a further alignment of the wording of the independence requirement with the TCO Regulation.

The Chair thanked the meeting for its excellent cooperation, also demonstrated in the two technology workshops. The Chair announced that it would be submitting a progress report at the JHA Council on 8 December 2022. SE announced that the CSA Regulation would be a focal point of its Presidency. The first meeting on the CSA Regulation would take place on 19 and 20 January 2023.