



EUROPEAN COMMISSION

*Brussels, 20.12.2022
C(2022) 9906 final*

Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation of the European Parliament and of the Council laying down rules for the prevention and combating of the sexual abuse of children {COM(2022) 209 final}.

The Commission appreciates that the Bundesrat decided to analyse this proposal and agrees on the importance of preventing and combatting online child sexual abuse. It welcomes the Bundesrat's support for the establishment of the EU Centre to facilitate the implementation of the new regulation while supporting service providers, law enforcement authorities and Europol, as well as national authorities.

The Commission agrees with the fundamental importance attached by the Bundesrat to freedom of expression and freedom of communication and the media. It also shares the Bundesrat's commitment to ensure that interferences with these rights be as limited as possible, imposed only when strictly necessary and proportionate to respect all the fundamental rights at stake.

In response to the more technical comments in the Opinion, the Commission would like to refer to the attached annex. The Bundesrat's Opinion has been made available to the Commission's representatives in the ongoing negotiations of the co-legislators, the European Parliament and the Council, and will inform these discussions.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

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Vice-President*

*Ylva Johansson
Member of the Commission*

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Annex

The Commission has carefully considered each of the issues raised by the Bundesrat in its Opinion and is pleased to offer the following clarifications.

1) The Commission is aware of the need to ensure the necessity and proportionality of any interference with the relevant fundamental rights enshrined in the Charter of Fundamental Rights of the EU which might result from the implementation of detection orders, especially in relation to detection in the context of interpersonal communications. Those rights include, in particular, the rights to privacy and personal data protection and the freedom of expression and information of the users of the services concerned. The proposal contains a series of safeguards that ensure the strict necessity and proportionality of detection orders.

First, the proposal frames detection as a last resort measure. All providers within its scope have to comply with risk assessment and risk mitigation measures. It is only when, despite the mitigation measures taken, a significant risk of use of the service in question for the purpose of child sexual abuse remains, that providers could be ordered to detect online child sexual abuse.

Secondly, once the need for a detection order arises, the proposal takes into account the necessity to ensure a fair balancing of all fundamental rights at stake and, in particular, to minimise the interference with the fundamental rights of the users. Specifically, the procedure to issue a detection order involves several steps and authorities. In particular:

- Before requesting the issuance of a detection order to a judicial or an independent administrative authority, the Coordinating Authority of establishment must prepare a draft request and notify it to the provider concerned and the EU Centre.*
- The EU Centre can offer its opinion, based, among other things, on its expertise on technologies.*
- The provider drafts an implementation plan and requests the opinion of the competent data protection authority.*
- Taking into account the draft implementation plan, the opinion of the data protection authority and the opinion of the EU Centre, the Coordinating Authority has to decide whether to request the issuance of the order. When doing so, it has to consider (i) whether the order is as targeted as possible, (ii) whether it is necessary and proportionate, (iii) whether available technologies exist that enable effective detection on the specific type of service concerned without entailing a disproportionate interference with the privacy of electronic communications.*
- The final decision on whether to issue a detection order belongs to a judicial or independent administrative authority. In view of their independent nature and the express requirements to that effect, the issuing authorities are to ensure a correct and unbiased balancing of all the fundamental rights involved.*

Thirdly, the proposal seeks to ensure that detection orders relating to the solicitation of children (so-called ‘grooming’) are as targeted as possible. A grooming detection order can only concern communications between (at least) an adult and a child below the age of 17 (the highest age of sexual consent in the EU). In addition, the proposal goes beyond what is required by Article 36 of the General Data Protection Regulation by requiring providers (i) to request the opinion of the data protection authorities on any draft implementation plan concerning the detection of grooming and (ii) to do so before a grooming detection order is even requested by a Coordinating Authority to the issuing authorities.

Finally, a number of complementary safeguards are foreseen, including rules on the technology and indicators to be used for the detection, strict time limits for the duration of the detection, regular review and users’ redress.

2) The proposal and, in particular, its Articles 7 to 11 do not allow for the collection of information that would allow for the profiling of users or any undue acquisition of knowledge on content concerning their private life. Under the proposal, detection is to be carried out using exclusively the indicators provided by the EU Centre. This requirement ensures that the detection of online child sexual abuse is conducted on a hit/no-hit basis, without any possibility for the detection technology run on the service to ‘understand’ the messages and to collect any further knowledge or information besides the existence of a match between the content detected, on the one hand, and one of the indicators, on the other hand. It is the existence of such a match that is reported by providers to the EU Centre and, if the latter confirms that the report is not manifestly unfounded, to the police. The proposal is not a criminal law instrument and does not alter the regime of exemptions from criminal liability or the evidentiary rules in force in the different member states. It is those rules that provide for professional secrecy and are to be applied by national authorities on a case-by-case basis.

3) Since detection of online child sexual abuse as envisaged in the proposal cannot lead to the collection of any further knowledge or information besides the existence of a match between the content detected, on the one hand, and one of the indicators of child sexual abuse provided by the EU Centre, on the other, the proposal is not expected to have any “chilling effect” on media freedom or affect in any way the security of communications between journalists and informants and their research activities. As mentioned above, the proposal is not a criminal law instrument and does not alter national rules on refusal to give evidence and prohibition on the use of evidence. Those remain unaffected in all fields, including that of investigative journalism.

4) The proposal establishes a harmonised set of rules for relevant service providers in the digital single market (i.e. providers of publicly available interpersonal communication services, providers of hosting services, providers of internet access services and app stores). Detection orders can only be issued in relation to publicly available interpersonal communication services and hosting services. The proposal does not regulate the media. Audiovisual services devoted to providing programmes, to the general public in order to inform, entertain or educate, under the editorial responsibility

of a media service provider, as well as the press, fall outside the scope of the proposal and are entirely unaffected by its content.

5) The Commission agrees with the importance of swift removal of child sexual abuse material. In this respect, the proposal does not affect existing notice and takedown mechanisms. Articles 14 to 15 of the proposal introduce proper enforcement possibilities by creating the possibility of issuing removal orders, which require the service providers concerned to remove the specific item of child sexual abuse material in question. In addition, it should be noted that a blanket removal obligation imposed on providers upon gaining knowledge of child sexual abuse material on their services could lead to unjustified removals and could also create interference with ongoing investigations.