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#### NOTE

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From:	Presidency
To:	Permanent Representatives Committee/Council
No. Cion doc.:	6241/24
Subject:	Proposal for a Directive of the European Parliament and of the Council on combating sexual abuse and sexual exploitation of children and child sexual abuse material and replacing Council Framework Decision 2004/68/JHA - Orientation debate

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#### Introduction

On 6 February 2024, the Commission presented a proposal for a recast of the Directive 2011/93/EU to strengthen criminal law on child sexual abuse and sexual exploitation. The revised rules aim to expand the definitions of offences and to ensure more effective investigation and prosecution and strengthen both prevention of child sexual abuse and sexual exploitation and assistance to victims. This proposal is complementary to the proposal for a Regulation that the Commission put forward in 2022, which sets out obligations for internet companies to detect, report and remove child sexual abuse material on their services.

## The objectives of the proposal

In the preparations of the proposal, the Commission considered that children in the EU are not sufficiently protected against certain aspects of child sexual abuse and exploitation, in particular in view of the increased role of online services that is evident in newer trends such as live distant child sexual abuse and the use of artificial intelligence (“AI”) to generate child sexual abuse images and videos. New emerging technologies like generative AI and extended reality also pose new risks for the safety of children online. New emerging trends, such as financial sexual extortion, while threats like online grooming or exploitation of child ‘self-generated’ sexual material continue to grow.

In addition, it has been observed that certain crimes cannot be brought to court due to persisting challenges related to investigation and prosecution. Challenges when it comes to prevention and assistance to victims are also at hand, in particular in view of the fact that many victims are only able to come forward many years after the offences have taken place.<sup>1</sup>

The assessments of the Commission are supported by independent studies. The 2023 Global Threat Assessment of the We Protect Global Alliance shows that child sexual exploitation and abuse online keeps escalating worldwide, in both scale and methods. The volume of Child Sexual Abuse Material reports analysed by the National Center for Missing and Exploited Children (NCMEC) has increased by 87% since 2019<sup>2</sup>.

To address these shortcomings, the proposal for a recast of Directive 2011/93/EU aims to ensure that all forms of child sexual abuse and exploitation, including those enabled or facilitated by technological developments, are criminalised. It also aims to ensure that national rules on investigation and prosecution provide for an effective fight against child sexual abuse and exploitation by taking into account recent technological developments, to improve both prevention and assistance to victims and to promote better coordination in preventing and combatting child sexual abuse across Member States and, at national level, among all parties involved.

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<sup>1</sup> See the Impact assessment Report, 6241/24 ADD 4.

<sup>2</sup> WePROTECT Global Alliance, Global Threat Assessment 2023, Assessing the scale and scope of child sexual exploitation and abuse online, to transform the response, 81 p.

## **The examination of the proposal by the Council**

The proposal for a Directive is under examination in the Working Party on Judicial Cooperation in Criminal Matters (COPEN).

The COPEN Working Party started its examination of the text by a presentation of the proposal and its impact assessment on 8 April and continued on 8 May. The first 18 Articles have thereby been analysed in detail. In addition, a debate on the topic of the legal framework and context related to the proliferation of AI generated images and videos and the proliferation of childlike sex dolls and childlike sex robots was organised in the CATS committee on 23 May, whereby a majority of delegations spoke out for addressing the issue of such images, videos, dolls and robots in the Directive.

The examination has revealed broad support from the Member States for the objectives of the proposal, although a number of mainly technical issues remain open in the said Articles. The Presidency has thereby identified at least two matters which may require political guidance for future work at expert level.

### **Issues to be debated at the Council meeting**

#### **1. Limitation periods**

##### *a) Background*

In the original text of the Directive, it was provided that prosecution of the serious offences falling under the Directive should be possible “for a sufficient period of time after the victim has reached the age of majority and which is commensurate with the gravity of the offence concerned”. In the recast proposal, the Commission has proposed a substantively more detailed rule with the following wording (Article 18(2)):

“This period of time [for which prosecution should be possible] ... shall be:

- (a) at least 20 years from the date the victim has reached the age of majority for the offences punishable under this Directive by a maximum penalty of at least 3 years of imprisonment;

- (b) at least 25 years from the date the victim has reached the age of majority for the offences punishable under this Directive by a maximum penalty of at least 5 years of imprisonment;
- (c) at least 30 years from the date the victim has reached the age of majority for the offences punishable under this Directive by a maximum penalty of at least 8 years of imprisonment.”

During the first examination of this provision in the COPEN Working Party on 8 May 2024, delegations expressed concerns as regards the proposed new rules. Some referred to the system-related difficulties to implement such a provision, given that limitation periods are often regulated horizontally in the general parts of national criminal codes, whereas others questioned whether the lengths of the limitation periods proposed are appropriate. The great majority of delegations however declared that the proposed new rules are still under scrutiny in the capitals.

b) Considerations of the Presidency

First of all, the Presidency considers that the offences concerned by this Directive belong to the most serious crimes that exist and that they must be fought by all means available under the laws of our societies. Further, it notes that the issue of limitation periods has been challenging to address in a number of previous instruments based on Article 83(1) TFEU. Delegations have often referred to their need to ensure that the national criminal laws remain coherent as regards rules on limitation periods and argued that specific limitations periods for individual instruments should be avoided, if there are not any strong reasons for them. The interest to ensure generally applicable rules in this sense have also been underlined during the preparations of the Council conclusions on the future of EU criminal law<sup>3</sup>.

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<sup>3</sup> 10000/24.

The Presidency considers that the combat against sexual abuse, sexual exploitation and child sexual abuse material constitutes an area which includes aspects so peculiar that they may justify rules with specific limitation periods. The most important aspect in this sense concerns the situation and status of the victims of such offences. There is clear and irrefutable evidence that a relatively long limitation period is needed to allow child victims to reach the sufficient maturity and awareness to report crimes.

Too short criminal limitation periods have in the past barred child victims from justice, which results in three societal impacts: (1) child victims are traumatized without receiving justice; (2) as the offenders are not identified, they can continue to sexually abuse children; and (3) the public does not learn about the factors that are behind child sexual abuse and exploitation in the society.

Victims of sexual abuse often have feelings of shame, guilt and self-blame. Sexual abuse very often takes place in secrecy, in a relationship of trust and authority, and is typically accompanied with social and cultural stigma, threats and/or trauma. Sexual trauma is associated with short-term and long-term psychological consequences. In the short term there can be feelings of fear, shock, guilt, anxiety, confusion and withdrawal. Furthermore, survivors of childhood sexual trauma are at high risk of posttraumatic stress disorder (PTSD), which includes intense fear, helplessness, reoccurring recollections or dreams, persistent avoidance of all things associated with the trauma, numbing and lack of responsiveness<sup>4</sup>. These consequences of childhood sexual abuse explain why a victim may be reluctant to report the crime to the authorities and why it can take a long time for victims to acknowledge the abuse and to take action. Many children do not disclose their experiences of sexual abuse until they become adults or even long after reaching adulthood. This poses problems in terms of evidence and the statute of limitations.

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<sup>4</sup> Nicole P. Yuan, Mary P. Koss, and Mirto Stone, “The Psychological Consequences of Sexual Trauma”, VAWnet. Org, *National Resource Center on Domestic Violence*, 2006.

In view of the difficulties encountered by victims of sexual abuse in childhood in reporting these crimes it appears that the best way to overcome this is to ensure there is sufficient time to initiate proceedings after the victim has reached the age of majority.

An argument against long limitation periods is that after a long period of time, there is in most cases a lack of clear physical evidence. Nevertheless, thanks to the progress of forensic science, it is possible to obtain biological evidence, such as DNA, in cases of sexual abuse and exploitation. The existence of graphic material recorded by the offenders is not uncommon as they record or take photographs of the crimes they commit. As explained above proliferation of CSAM is tremendous. Multiple complaints of sexual abuse against the same perpetrator are not unusual. Sometimes the victims don't know each other but they report similar abusive acts committed by the same offender. When sexual abuse occurs in institutions that care for children, there may be documentary evidence (i.e., medical and work history) that can help clarify the case.

Furthermore, it can still be useful to bring offenders of child sexual abuse to justice a long time after the offence. If the offender is guilty, for example, of consecutive offences in respect of different victims in an interval shorter than the limitation period in force, facts from an even more distant past could still be prosecutable. A long to unlimited opportunity to prosecute a criminal behaviour, can also have an educational and preventive effect.

## **2. AI generated images and videos**

### *a) Background*

In the recast proposal, the Commission has proposed the following definition on Child Sexual Abuse Material in article 2(d) : *“realistic images reproductions or representations of a child engaged in sexually explicit conduct of the sexual organs of a child, for primarily sexual purposes”*.

In art. 5 *the acquisition or possession, the knowing obtaining access, the distribution dissemination or transmission, the offering, supplying or making available* as well as *the production of child sexual abuse material* shall be punishable. During the meetings of the COPEN Working Party and in addition the CATS Committee, a debate on the topic of the legal framework and context related to the proliferation of AI generated images and videos and the proliferation of childlike sex dolls and childlike sex robots was organised.

More and more “deepfakes” are circulating on the internet. A “deepfake” can refer to a real person, who is a bearer of rights and to which protection can be granted. Deepfake technology can produce content that convincingly shows people saying or doing things they never did or create personas that never existed in the first place. These are the AI generated images. AI models can generate deepfake non-consensual pornographic images, but they can also generate photorealistic Child Sexual Abuse Material – using synthetic imagery featuring fictitious children, avatars of children and those which include real children. AI applications are capable of creating realistic images that are indistinguishable from real images. In addition, it should be noted that these applications are often trained on the basis of real child sexual abuse material, which underlines the seriousness of this phenomenon. Cases of perpetrators using generative AI to create child sexual abuse material and exploit children have been increasing. At the simplest level, AI allows perpetrators to generate hundreds of child sexual abuse images at an industrial scale in seconds with the click of a button.

b) Considerations of the Presidency

The Presidency considers that the combat against sexual abuse, sexual exploitation and child sexual abuse material constitutes an area which includes the criminalization of new emerging technological developments, such as AI generated child sexual abuse images and videos. These new developments pose various threats and raise many legal questions, including from the perspective of Union criminal law legal bases. The explosion of AI content will make it increasingly difficult for law enforcement to identify whether or not there is a real child in danger and has significant implications for law enforcement. Furthermore, offenders have the potential to use AI tools to groom children at scale. AI-generated child sexual abuse material also plays a significant role in the normalisation of offending behaviour and will potentially create a more permissive environment for perpetrators, putting ever more children at risk. In addition, there is also evidence that AI-generated child sexual abuse material has increased the potential for the re-victimisation of known child sexual abuse victims as their images are used over and over again.

In the light of these considerations, the Presidency would submit the following questions to ministers:

**Questions for ministers**

**Ministers are kindly invited to reply to the following questions:**

- a) **Do you agree that offences regarding sexual abuse, sexual exploitation and child sexual abuse material require specific considerations when it comes to ensuring that they can be prosecuted also a relatively long time after the offence was committed, and that rules on specific limitations periods for the relevant offences should therefore be included in the Directive?**
- b) **How should AI-generated child sexual abuse material be addressed from the perspective of criminal law and judicial cooperation?**

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