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Concerning Position paper - New EU proposal for a regulation laying down the rules to prevent and combat child sexual abuse calls for a substantive discussion

Social media and online platforms increasingly play a facilitating role in the sexual exploitation of and sexual violence against children. For example, online platforms play a facilitating when they are used for the dissemination of child sexual abuse material, but also when these online platforms are used for the recruitment of children for sexual purposes (grooming). Online detection is therefore crucial in the fight against sexual violence against children and child sexual exploitation.

The *Proposal for a regulation laying down the rules to prevent and combat child sexual abuse* (the CSA proposal) of the European Union (EU) was announced in the EU strategy for a more effective fight against child sexual abuse. It establishes uniform obligations for online service providers to more effectively combat child sexual abuse through their platforms. The proposal was published by the European Commission on May 11, 2022 and submitted to the Council of the European Union and the European Parliament.

What does the regulation entail?

The regulation requires providers of hosting services (services that provide space to store information, images, or other content accessible through a website) and of interpersonal communication (such as messaging and e-mail services) to carry out a risk assessment of misuse of their services for the dissemination of known or new child sexual abuse material or for the recruitment of children for sexual purposes. Providers are also required to implement mitigation measures. In addition, the regulation includes targeted obligations for certain providers to detect such abuse, to report it to the yet to be established EU Centre, to remove or disable access to, or to block online child sexual abuse material when ordered.

The question is whether the regulation in its current form will achieve its intended purpose and is therefore effective in combating child sexual abuse and protecting victims. The proposal for the regulation has led to much discussion in the Netherlands. The National Rapporteur believes that such an important proposal for a regulation to prevent and combat child sexual abuse should be carefully considered.

Strengthening preventive approach

Supporters of the regulation point to the positive contribution that implementation of the proposal can have on combating child sexual abuse. Currently, the vast majority of reports of child sexual abuse material come from only a small number of online service providers. These providers voluntarily scan their services for the presence of child sexual abuse material. These providers do so under provisions of a temporary derogation of Directive 2002/58/EC that expires in August 2024. After this temporary regulation expires, it will no longer be possible to scan for the presence of child sexual abuse material on a voluntary basis. It is positive that the proposal for the new regulation requires all providers of hosting or interpersonal communication services to take measures to prevent and combat child sexual abuse through their platforms.

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Child rights organizations point out that this regulation strengthens the preventive approach to address online child sexual abuse. Providers will be required to assess the risk their services are being misused for the purpose of online child sexual abuse and propose mitigation measures, such as introducing mandatory age verification to access platforms or apps. This risk assessment and the proposed mitigation measures will be reviewed by a National Coordinating Authority. In the Netherlands, this authority will be the *Autoriteit Online Terroristisch en Kinderpornografisch Materiaal* (ATKM).

Under the regulation, voluntary detection of child sexual abuse material and recruitment of children for sexual purposes by online service providers, as is currently done, will no longer be allowed. Scanning for the presence of child sexual abuse material and grooming and its detection by these providers will only be allowed if a detection order has been issued by a judge. These detection orders will first be reviewed by the ATKM.

Disproportionate violation of right to privacy

The regulation is also being criticized, both in the Netherlands and from the EU Committees dealing with the regulation. The first point of critique concerns the disproportionate violation of the right to privacy of platform users. Although much information is still lacking about the exact impact the regulation will have on the scanning of the content of interpersonal communications, many authorities point out that the regulation as it stands could harm the prohibition of general monitoring obligations. This criticism is mainly based on the possibility of detection orders included in the proposal. Because the current proposal lacks concrete conditions under which a detection order can be issued and thus when providers must detect the sharing of child sexual abuse material or the solicitation of children on their platform, it is difficult to assess whether the safeguards adequately address user privacy.

Thus, there is a risk that the interpersonal communications of random citizens, including children, could be arbitrarily monitored and listened to. Among others, the Legal Service of the Council of the European Union and the European Parliamentary Research Service have expressed concerns that obligations of scanning interpersonal communications could lead to unlawful generalized monitoring and surveillance, and it might thus violate the prohibition on general surveillance obligations. These organizations therefore point out that the present proposal will not meet the criterium that any invasion of privacy must be necessary and

proportionate for the purpose pursued, and it will thus likely fail the proportionality test.

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Although the *Nederlandse Autoriteit Persoonsgegevens* (the Dutch DPA), the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) acknowledge that procedural safeguards are in place to achieve a detection order, they share the concerns of the Legal Service of the Council of the European Union and the European Parliamentary Research Service that the measures in the proposal in its current form pose too great a risk of a far-reaching invasion of privacy.

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Question marks effectiveness proposed measures

The second criticism concerns the limited effect that some parties believe the regulation will have on combating child sexual abuse. First, it is argued that existing software is not reliable enough and therefore insufficiently capable of effectively detecting new child sexual abuse material and the solicitation of children for sexual purposes. Whereas matching-technology with a relatively low rate of error is used to detect known child sexual abuse material, this matching-technology cannot be used to detect new child sexual abuse material and solicitation of children for sexual purposes. For these, algorithmic software with a potentially large error rate is used, meaning that in many cases there will be false-positive results where citizens are falsely identified by the system as perpetrators of a crime. Even with a relatively low error rate on a large bulk of data, this represents a disproportionate drain on police capacity. The capacity required to process, prioritize and investigate these notifications will be at the expense of other investigative options, such as the proactive detection of (online) child sexual abuse. According to some parties, the latter form of policing is more effective and leads to better cases.

An additional impact assessment was conducted at the request of the European Parliament. In the impact assessment, the European Parliamentary Research Service seriously questions the effectiveness of the proposed measures.

Human rights violations content moderators

A third point of criticism, that has not got much attention, is also about the possible violation of human rights as a result of the regulation. Images automatically detected by software as potentially illegal will then always have to be assessed by human eyes. Currently, online service providers often outsource this manual content moderation to companies in low-income countries. This means that large groups of people, at low wages and with little to no regard for psychological well-being, work long hours in which they must persistently assess images. When the regulation is accepted and implemented, more online service providers will begin to detect child sexual abuse on their platforms. Given the rate of error of existing software, it is likely that more potentially illegal images will be detected. The question of how the manual content moderation of this should take place is currently not being adequately addressed.

In conclusion

The current proposal for the regulation does not yet pay sufficient attention to the impact of the regulation upon implementation, first in terms of its impact on fundamental human rights and second in terms of its effectiveness in addressing

sexual violence against children. Information on the impact the regulation will have is lacking. Since its launch, the proposal has been discussed by various parties including EU member states, investigative agencies, child rights NGOs and privacy watchdogs. The discussion is characterized by a contradiction between protecting children from sexual abuse and protecting their right to privacy.

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On the one hand, supporters of the proposal believe the regulation is necessary to effectively protect children from online sexual violence. Opponents of the regulation argue that the right to privacy of both children and adults is disproportionately violated. The contradictions used to characterize the discussion surrounding the regulation leave little room for nuanced debate and are incorrect because the goal of all involved is to protect children from sexual violence. A discussion in opposites stands in the way of a substantive discussion about the most effective way to protect children from sexual violence.

The National Rapporteur has closely followed the discussion on the EU proposal for a regulation and talked to experts in policy, politics and at NGOs. The European Parliament and the Council of the European Union are currently considering the proposal and have requested various committees to study and give their opinion on the proposal. On the basis of these opinions and studies, the European Parliament and the Council of the European Union are determining their position on the proposal and will begin consultations on the proposal this fall. The Dutch government is involved in negotiating this proposal.

The Dutch Minister of Justice and Security disregarded a motion passed by the House of Representatives to prohibit client-side scanning (scanning the content of messages even before they are sent and therefore before end-to-end encryption has been applied), in addition to scanning end-to-end encrypted communications. The Minister argued that excluding client-side scanning would further limit her already limited bargaining power. This is a remarkable statement given that the Netherlands would not be alone in this criticism. Germany and Austria also take a critical stance on the proposal, especially when it comes to end-to-end encrypted communication scanning and client-side scanning. Germany says it will only consider the proposal if significant changes are made.

It is positive that the EU is taking steps to establish uniform obligations for all online service providers to reduce the risks of child sexual abuse occurring through their services. Moreover, the regulation includes measures that make the detection of child sexual abuse material more transparent. Discussion in the Netherlands between the Parliament and the Government on the regulation has so far focused mainly on the impact of the regulation on encrypted communications. However, the National Rapporteur sees more risks in the proposal and invites the Dutch government to have a broader discussion and to include the considerations discussed in this position paper in its negotiations. If necessary, the Dutch government could propose to extend the temporary regulation currently in effect in order to create more time to have the necessary substantive discussions and answer underlying questions. The National Rapporteur believes that such an important proposal for a regulation to strengthen the prevention and combat of child sexual abuse, and which will be directly applicable in all member states, should be done in a carefully considered manner.