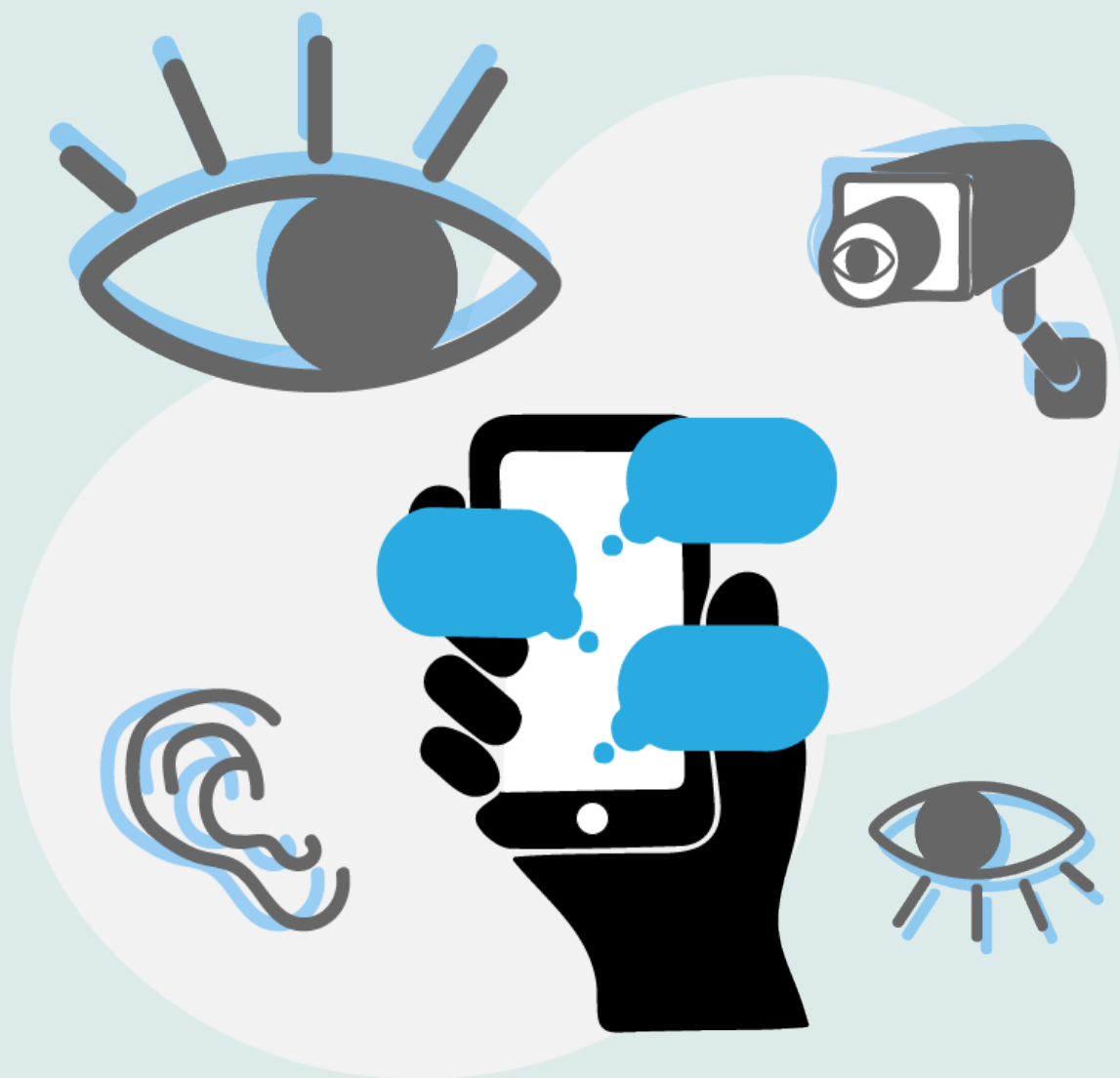


POLICY BRIEF ON THE PROPOSAL FOR A REGULATION LAYING DOWN RULES TO PREVENT AND COMBAT CHILD SEXUAL ABUSE

by Civil Liberties Union for Europe



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On 11 May 2022, the European Commission published a *Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse* (Proposal).¹ The Proposal would oblige online platforms, including hosting, interpersonal communications and other service providers, to scan user's content and/or meta-data, and report, remove, and/or block already known and new online child sexual abuse material as well as instances of communication identified as child grooming. The Proposal also seeks to establish a new EU agency and a network of national Coordinating Authorities which would be responsible for overseeing the implementation of the measures foreseen by the regulators.

Child sexual abuse is a heinous crime European Union Member States must work closely together to prevent and combat. Nevertheless, upon analysing the Proposal, the Civil Liberties Union for Europe is of the opinion that the measures envisaged by the European Commission are fundamentally misplaced as they would constitute a disproportionate interference with Article 7 ("Respect for private and family life"), Article 8 ("Protection of personal data"), Article 11 ("Freedom of expression and information"), and Article 12 ("Freedom of assembly and of association") of the *Charter of Fundamental Rights of the European Union* (Charter).²

Such an interference with our fundamental rights would be unacceptable even if European democracies were in a better shape. However, in a European Union where fundamental rights are already insufficiently respected, authoritarianism is on the rise, and the rule of law is declining,³ the Proposal (should it be accepted in its current draft) would in all probability be abused, leading to the further erosion of our freedoms. Therefore, the Civil Liberties Union for Europe calls on legislators to abandon the current draft of the Proposal and fundamentally rethink its regulatory approach to prevent and combat child sexual abuse.

Mass surveillance

Article 3 and 4 of the Proposal mandates service providers to conduct risk assessments and implement mitigation measures in response to the risk that their services will be used to share known and new child sexual abuse material or for child solicitation. Service providers will be obliged to report any information indicating potential online child sexual abuse discovered by the implemented mitigation measures, or, should their measures be deemed insufficient by the Coordinating Authority, any of said information discovered as a result of detection orders. Pursuant to Article 7, the Coordinating Authority may seek detection orders encompassing an entire service, that is, not

1 *Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse, COM(2022) 209 final.*

2 *Charter of Fundamental Rights of the European Union.*

3 *Liberties Rule of Law Report 2022.*

only limited to selected communications, but, for example, to all chat and audio communications conducted on a given interpersonal communication service. Just as the surveillance scope of law enforcement is not limited to communications flagged as having good reason to find suspicious, similarly, the remit of the proscribed detection is alarmingly wide. Detection orders for grooming can be issued for the maximum duration of 12 months, while detection orders for new and for known child sexual abuse material can be issued for a maximum duration of 24 months.

The Civil Liberties Union for Europe is concerned that Articles 3, 4 and 7 of the Proposal enable indiscriminate filtering and monitoring of all online chat (and possibly audio) communication conducted on a given service for a prolonged time (with the possibility of being repeated), effectively establishing online mass surveillance in Europe. The mandatory risk mitigation measures and potential detection orders service providers will be subjected to will in practice erase the security benefits of end-to-end encryption and intrude on all user's privacy. Due to the limitation of technology, service providers will likely share fully private and lawful communications in large quantities with the law enforcement ("false positives"), and in addition to violating Article 7 and Article 8 of the Charter, they would also limit Article 12 by filtering out fully legal speech. In addition, notwithstanding the multi-step procedure preceding detection orders, the Proposal in its current draft creates the real possibility of governmental abuse.

End-to-end encryption

Encryption is a crucial tool to enable the privacy and security of online communication. By protecting the confidentiality of online communication, it contributes to the right to information and to freedom of expression in a non-negligible way. Strong encryption technologies keep journalistic sources safe and enable whistleblowers to speak up. Additionally, they allow confidential communication between doctors and patients, or lawyers and clients, or human rights advocates and members of vulnerable communities.

According to Recital 26, the Proposal: "should not be understood as incentivising or disincentivising the use of any given technology, provided that the technologies and accompanying measures meet the requirements of this Regulation. That includes the use of end-to-end encryption technology, which is an important tool to guarantee the security and confidentiality of the communications of users, including those of children". However, in practise it would heavily disincentivize the use of end-to-end encryption, removing the technical guarantee that the sender and receiver can communicate confidentially without needing to fear being eavesdropped on. The technical measures introduced in the Proposal as potential solutions for service providers to meet the requirements posed by the Proposal while using end-to-end encryption are incompatible with the very aim of said technology. With the implementation of such measures, journalistic sources will no longer be able to trust that they can safely share information with the media and many will refrain from doing so. In other

words, the Proposal would have a chilling effect on the freedom of expression enshrined in Article 11 of the Charter. In addition, it would undermine the free and safe communication between members of the above-mentioned groups.

Potential for abuse

By permitting public authorities to have generalised access to the content of communications between all users of a given service with the purpose of detecting solicitation of children, the Proposal opens up a real possibility for abuse by authoritarian political powers. This is because many of the key elements of the proposal are ill-defined. Risk mitigation measures service providers are asked to implement (in order to avoid facing a detection order) allow providers to tolerate an acceptable amount of risk. However, whether their compliance is sufficient under the Proposal is a matter of subjective interpretation (e.g., “despite any mitigation measures that the provider may have taken or will take, the service is used, to an appreciable extent, for the dissemination” of child sexual abuse material). If the Cooperating Authority, enjoying a very broad margin of appreciation, decides that mitigation measures applied by the service provider are insufficient, a detection order is foreseen to be issued by a judicial or administrative authority. By allowing such a broad margin of appreciation to national authorities in the issuing of detection orders, the Proposal endangers the safe functioning of all democratic actors critical to governments, among them human rights watchdogs and activist groups. When

authorities can get access to the communication between human rights defenders and members of activist groups on the pretence of searching for child abuse material, the freedom of association enshrined in Article 12 of the Charter is further undermined. This, in the current state of developments in the European Union, where civic space is shrinking and critical voices face more and more hostile treatment, must categorically be avoided.⁴

Conclusion

The European Commission concluded that of the five main policy options to combat online child sexual abuse (depicted in the Explanatory Memorandum of the Proposal), the most stringent option is to be pursued. According to the Commission, the Proposal that sets out the details thereof ensures “proportionality through the introduction of rigorous limits and safeguards so as to ensure, in particular, the required fair balance of fundamental rights”.

The Civil Liberties Union for Europe is of the opinion that the Proposal in its current form does not successfully strike a fair balance of fundamental rights. The *Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse* needs to be fundamentally rethought so that the measures proscribed by the legislators do not cause more harm than they prevent.

⁴ *Bringing Human Rights and Article 2 Values to Life.*

Policy Recommendations

Measures opening up the possibility of indiscriminate online mass surveillance are to be avoided.

Measures undermining the safety and confidentiality of end-to-end encryption are to be avoided.

The core concepts of the legislation should be better defined so that the risk of potential abuse by politically captured national authorities is significantly reduced.

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

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