



## Human Rights and Rule of Law in Cyberspace

The case of online child sexual exploitation and abuse



# **Respecting human rights and the rule of law when using automated technology to detect online child sexual exploitation and abuse**

**Independent experts' report**

**Directorate General of Human Rights and Rule of Law - DG I and  
Directorate General of Democracy - DG II**

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# Recommendation 8

The still evolving laws which are currently governing automated detection technology do not adequately address the challenge of preventing and protecting children from OCSEA while ensuring maximum privacy in online communication.

- ***Recommendation 8: Acknowledging the current legal lacunae, consideration should be given by CoE Member States to the need for a harmonised and sustainable legal framework which can provide legal certainty to SPs and address future technological developments.***



# Recommendation 6

The limited number of experts across different subject areas leads to discussions taking place in silos whereas the debate around the controversy surrounding the EC proposal highlighted the need for proposals for powerful system solutions aimed to prevent and combat OCSEA.

- ***Recommendation 6: Initiatives oriented at cross-sectional dialogue should be identified and supported.***



# Recommendation 7

It is worth noting the considerable weight given by relevant international bodies, the European Court of Human Rights and the Court of Justice of the EU to the need for protection from sexual offences against children, as well as the Lanzarote Convention and CSEA Directive, when reconciling child protection and data protection rights.

- ***Recommendation 7: The weight that is accorded to positive obligations against OCSEA under international and European human rights law, bearing in mind the best interest of the child, needs adequate appreciation in the legislative debate going forward.***



# International Sources

- United Nations Convention on the Rights of the Child Art. 34
  - require states to 'protect the child from all forms of sexual exploitation and abuse'
- Optional Protocol to the UNCRC on the Sale of Children, Child Prostitution and Child Pornography 2000
  - State's obligations to criminalise, prevent, investigate, prosecute, punish and cooperate internationally in order to prevent the sale of children, child prostitution and child pornography both within and across State borders
  - Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Committee on the Rights of the Child, CRC/C/156, 10 September 2019



# International Sources

- Rio De Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents (2008)
- Sustainable Development, Goals 5, 8 and 16
- UN Economic and Social Council, Commission on Crime Prevention and Criminal Justice, Countering child sexual exploitation and sexual abuse online (24 May 2019)



# Regional sources

- African Charter on the rights and welfare of the child
  - Article 16: Protection Against Child Abuse and Torture
  - ACWRWC – *TFA v Cameroon*
- Inter-American Court of Human Rights
  - *Guzman v Ecuador* 2020





# EU Sources

- Charter of Fundamental Rights of the European Union Art. 24
- Treaty of the European Union Art. 3(2)
- Treaty on the Functioning of the European Union Art. 83(1)
- Child Sexual Abuse Directive 2011



# Council of Europe

- Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)
- Revised European Social Charter Art. 17
- Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)
- Convention on Cybercrime (Budapest Convention)
- Recommendation on Guidelines to respect, protect and fulfil the rights of the child in the digital environment CM/Rec(2018)



# European Court of Human Rights

- Duty to protect against child sexual abuse grounded in Art. 3 and Art. 8 ECHR
  - X and Y v The Netherlands 1985
  - Stubbings v United Kingdom 1996
  - K.U. v Finland, 2009
  - O’Keeffe v. Ireland 2014
  - Y. v. Slovenia, 2015
  - M.G.C v Romania 2016
  - Trabajo Rueda v Spain 2017
  - A and B v Croatia 2019
  - X and others v Bulgaria 2021



# Architecture of positive obligations

- 'Maintain and apply in practice an adequate legal framework affording protection against acts of child sexual abuse, online and offline, by private individuals'
  - Ensure prevention is achieved through proactive regulatory mechanisms
  - Ensure that criminal law provisions for the effective punishment of OCSEA are in place
  - Apply criminal law provisions in practice through effective investigation and prosecution, and transnational cooperation



# Foundations of positive obligation

- ‘the right to human dignity and psychological integrity’ as expressed in
  - Art. 3 ECHR ... [which] ‘requires particular attention where a child is the victim of violence’ also supported by
    - Lanzarote Convention
    - Istanbul Convention
- ‘the right to respect for private life’
  - Art. 8 ECHR
- ‘best interests of the child as a primary consideration of all public authorities’ which requires domestic authorities to address the ‘child’s particular vulnerability and corresponding needs’ as expressed in
  - Art. 3 United Nations Convention on Rights of the Child
  - Art. 4 EU Charter of Fundamental Rights
- ‘the seriousness of the crimes of sexual exploitation of children’ as articulated in
  - Art. 83(1) Treaty of the Functioning of the European Union



# Fulfilling positive obligations

- Practical and effective
- Not theoretical or illusory
- Automated scanning necessary to 'practical and effective' combatting of OCSEA at scale



# Recommendation 1

More than twice as many types of sexual exploitation and sexual abuse of children exist today when compared to the late 90's. The prevalent use of information and communication technologies (ICTs) give rise to a situation in which children may be exposed to many of the same risks online as they are offline. The call for a concerted action to protect them from OCSEA is even stronger in light of the influence of the COVID-19 pandemic on the main threats behind OCSEA.

- ***Recommendation 1: Successful prevention and combating of the current forms of OCSEA require State actors to stay up to date and react to constant technological developments in this area, facilitated especially by the prevalent use of continuously evolving ICTs. The use of automated technology in the fight against OCSEA is, in this regard, essential.***



# Recommendation 2

There is an existing discrepancy between the use of automated detection technologies and the publicly available level of information on their adoption. This insufficient level of information makes it difficult for policymakers and regulators to develop a proper opinion on how to regulate these technologies and suggest adequate safeguards.

- ***Recommendation 2: To ensure a proper balance between privacy and protection of children against sexual exploitation and abuse fostering a dialogue between private sector companies and policymakers/regulators is of the utmost importance. Such dialogue should primarily aim at securing adequate transparency on the choice of the technology used and processes around its use.***





# Recommendation 3

The present, insufficient level of transparency on the quality and size of hashlists of known CSAM limits to some extent the potential of a technological solution in relation to the swift removal of such material.

- ***Recommendation 3: Initiatives aiming at improving coordination in this area should be indicated and supported as they are vital to the reliability of the reference databases. In this regard, it is also necessary to secure more clarity on how the accountability mechanisms are managed, including the recruitment and training of individuals employed by private sector companies who are responsible for the assessment of illegal content, such as CSAM.***



# Recommendation 4

When it comes to defining safeguards, a well-tested, well-documented and stable technology is a safer choice for policymakers and regulators. However, to address current challenges in regards to OCSEA it may be advisable or necessary to use more powerful technologies in an early phase of their development.

- ***Recommendation 4: To better maintain a balance between privacy and protection of children against sexual exploitation and abuse, defining the proper level of safeguards should take place as early as possible in the process of development of technology. Policymakers and regulators should place particular focus on the dataset used by that technology to train complex combinations of algorithms.***



# Balancing positive obligations

- States have a clear margin of appreciation in fulfilling positive obligations but:
- *'where a particularly important facet of an individual's existence or identity is at stake, or where the activities at issue involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed'* (A and B v Croatia 2019)



# Countervailing rights

- While the scope of the State's margin of appreciation in this context is narrow, the ECtHR has not yet required States to adopt a mandatory system of reporting by private parties.
- It is clear from both the ECtHR and CJEU jurisprudence that States cannot be required to negate countervailing rights to privacy and data protection.
- Member States consequently must find the optimum balance between the respect of countervailing negative rights protections to privacy and data protection, while also fulfilling the minimum standards required by the positive obligations placed upon them.



# Recommendation 9

The analysis of CoE data protection treaty norms, in light of applicable ECtHR jurisprudence, concludes that a bespoke public interest-based legal framework will provide the strongest lawful avenue for automatic scanning for OCSEA, related voluntary reporting and transborder flows of personal data, and that the Lanzarote Convention could represent shared standards on the definition of such a public interest.

- ***Recommendation 9: The CoE Member States are strongly encouraged, in line with their positive obligations to protect children against OCSEA, to establish a public interest-based framework grounded in the Lanzarote Convention, enabling SPs to automatically detect, remove, report and transfer OCSEA-related information under data protection and privacy conditions and safeguards listed in section 3.4.***