

# BALANCING THE RIGHT TO PRIVACY WITH THE CHILDREN'S RIGHT TO PROTECTION FROM ONLINE SEXUAL EXPLOITATION

## Executive Summary

The advancement of technologies, including Artificial Intelligence (AI), ushers in a new era of opportunities for children to learn, play, and socialise. However, these technologies also provide new avenues for criminal activities, including those by sex offenders. In 2023, online platforms reported 105,6 million images and videos containing child sexual abuse materials (CSAM). In order to tackle this issue, the European Commission has proposed a Regulation to prevent and combat child sexual abuse ("the Proposed CSA Regulation"). In setting obligations for online platforms operating in the European Union (EU) to detect CSAM online, it has sparked controversy with some privacy rights organisations concerned about its potential impact on the right to privacy.

## Aim of the Report

This report examines the Proposed CSA Regulation and its implications for child protection from online child sexual exploitation (OCSE), as well as its compatibility with privacy rights under the EU Charter and the European Convention on Human Rights (ECHR).

## Methodology and Limitations

The research method combines doctrinal research with an analysis of the case law from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The report assesses whether a restriction on the right to privacy can be justified (justification assessment) and to what extent such a limitation is reasonable (proportionality assessment).



# Key Findings

## The Proposed CSA Regulation

The Proposed CSA Regulation establishes a **standardised legal framework** to address children's right to be protected from online sexual harm. The Proposal requires online service providers to evaluate risks of OCSE and minimise them through mitigation measures. When mitigation measures are deemed as insufficient, the Regulation foresees the use of detection technologies through orders issued by competent authorities.

To mitigate potential privacy implications of detection technologies, the Proposed CSA Regulation establishes a comprehensive process, with several authorities assessing the necessity for a detection order and how to minimise interference with privacy rights, including through a data protection impact assessment. **The procedure established by the Proposed CSA Regulation is heavily focused on the impact on privacy rights with little attention to the impact of the rights of children or the privacy rights of child victims whose imagery continue to circulate.** This is exemplified by the fact that the Proposed CSA Regulation does not foresee a similar assessment on the implications of the measures or absence thereof on children's rights through a child rights impact assessment.

## Human Rights at Play

Under EU law, **the right of children to be protected from OCSE** can be inferred from several rights under the EU Charter, including the rights to human dignity, to the integrity of the person; the prohibition of inhuman or degrading treatment; as well as the rights of children to have the protection and care necessary for their well-being, and for which the child's best interests must be a primary consideration.

Article 7 of the EU Charter and Article 8 of the ECHR enshrine **the right to protection of private and family life**, both imposing positive obligations on States to actively protect privacy and negative obligations to avoid unjustified interference.

The right to privacy is not absolute. Under Article 52(1) of the EU Charter, limitations may be imposed on the exercise of the rights contained in it. As a result, **interference in the right to privacy may be allowed under strict conditions** laid down in law and the jurisprudence. The interference must:

1. Be provided for by clear and understandable laws;
2. Respect the essence of the right concerned;
3. Genuinely meet objectives of general interest or protect the rights of others;
4. And adhere to the principle of proportionality.

The below presents a summary of whether the Proposed CSA Regulation would meet the criteria as interpreted set by the jurisprudence of the CJEU and the ECtHR.

## Criterion 1: Provided for by Law

The requirement of legality under EU law mandates that limitations to fundamental rights must be clearly outlined in legislation and meet certain criteria for **accessibility**, **foreseeability** and **judicial oversight**. The table below presents how the Proposed CSA Regulation meets those criteria.

Criteria	Legal Basis	How does the Proposed CSA Regulation meet the criteria?
Accessibility	In <i>Maximillian Schrems v Data Protection Commissioner</i> , the CJEU affirmed that the EU legislation enacting measures interfering with the right to privacy must “lay down clear and precise rules governing the scope and application of a measure”.	The Proposal: <ul style="list-style-type: none"><li>• Is understandable and foreseeable for the average person</li><li>• Clearly outlines the extent to which the right to privacy will be limited</li><li>• Describes the exact procedures that must be followed for the issuance of a detection order.</li></ul>
Foreseeability	In <i>Maximillian Schrems v Data Protection Commissioner</i> , the CJEU specified that the EU legislation must impose “minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data”.	The Proposed CSA Regulation: <ul style="list-style-type: none"><li>• Details the circumstances when detection would be required</li><li>• Regulates the issuing detection orders</li><li>• Ensures data protection safeguards.</li></ul>
Judicial oversight	In <i>Ligue des Droits Humains ASBL v Conseil des Ministres</i> , the CJEU confirmed that “the lawfulness of all automated processing must be open to review by the data protection officer and the national supervisory authority, [...] as well as by the national courts in the context of the judicial redress”.	The CSA Regulation: <ul style="list-style-type: none"><li>• Ensures due process through judicial and supervisory oversight</li><li>• Guarantees individualised evaluation along with avenues for redress</li><li>• Limit the detection orders in time, requiring regular oversight for reissuance.</li></ul>

Importantly, national authorities, not online service providers (as it is the case currently), would make decisions on whether detection should occur and the scope of detection, subject to verification by the EU Centre to prevent unfounded reports. These safeguards establish **clear limits on privacy interference**, ensuring compliance with the first criteria of Article 52(1) of the EU Charter.

Criterion 2: Respecting the Essence of the Right Concerned

Criterion	Legal Basis	How does the Proposed CSA Regulation meet the criterion?
Respecting the Essence of the Right Concerned	<p>In order for an interference with a certain right to be lawful, it may not undermine the core essence of the right concerned.</p> <p>In <i>Digital Rights Ireland</i>, the CJEU acknowledged that the Data Retention Directive intruded on privacy by requiring ISPs to retain telecom data. However, the Court ruled it did not violate the essence of privacy rights since it did not permit access to communication content and did not allow for a “full overview” of an individual’s private life.</p>	<p>The CSA Regulation:</p> <ul style="list-style-type: none"><li>• Focuses on detecting child CSAM and grooming patterns</li><li>• Does not grant general access to content data</li><li>• Only target specific services which have proven to present significant risk of online CSA despite mitigation measures</li><li>• Detection measures would only arise from a Court order based on an implementation plan laying down the guarantees for minimising interference.</li></ul>

The proposed CSA regulation only grants access to the data necessary to detect CSAM and, thus, **maintains the essence of privacy rights** under Article 7 of the EU Charter.

Criterion 3: Genuinely Meeting an Objective of General Interest or the Need to Protect the Rights and Freedoms of Others

Criterion	Legal Basis	How does the Proposed CSA Regulation meet the criterion?
Objective of General Interest	<p>In <i>La Quadrature du Net</i>, the CJEU identified three distinct categories of public interest objectives. One of them is combating crime and safeguarding public security, which includes the sexual exploitation of children. The objective of combating serious crime can justify the general and indiscriminate retention of certain types of data if it meets specific requirements and safeguards such as being limited in time, the availability of effective judicial review and substantive safeguards against risks of abuse.</p> <p>ECtHR case law, like <i>Trabajo Rueda v. Spain</i>, supports the legitimate aim of crime prevention, particularly in cases of OCSE.</p>	<p>The CSA Regulation:</p> <ul style="list-style-type: none"><li>• Aims at detecting and removing CSAM and grooming, a serious crime</li><li>• The detection orders are limited in time, ensure safeguards against risk of abuse and mechanism of redress.</li></ul>

The proposed CSA Regulation **genuinely pursues an objective of general interest by combating online sexual exploitation of children** and thus meets the third criterion of Article 52(1) of the EU Charter.

## Criterion 4: Respect the Principle of Proportionality

Given the absence of hierarchy between fundamental rights, it is necessary, in the event of conflict, to find an equilibrium between those rights. This refers to the principle of proportionality. The latter is composed of three substantive requirements. The table below presents how the Proposed CSA Regulation meets those criteria.

Criteria	Legal Basis	How does the Proposed CSA Regulation meet the criteria?
<b>Appropriateness</b>	<p>The measure must be appropriate to achieve the objective that is pursued, that is to say it must be at least capable of contributing to its achievement.</p> <p>In <i>Poland v Parliament and Council</i>, the CJEU added that the appropriateness is assessed based on the nature of the rights, as well as the extent and seriousness of the interference. The CJEU acknowledged the growing importance of electronic communication and data retention as a valuable tool for criminal investigations.</p>	<ul style="list-style-type: none"> <li>Automated detection has been found to be the only suitable way to sufficiently detect CSAM at scale.</li> <li>Detection of CSAM helps to prevent the re-victimisation of children, helps rescue children from ongoing or imminent abuse, helps remove illegal content from online platforms, as well as prevents further offending.</li> </ul>
<b>Necessity</b>	<p>The criteria of necessity is assessed by whether there is any other measure which would be equally appropriate while being less restrictive and whether the proposed measure does not go beyond what is necessary to achieve the objective.</p> <p>In <i>Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen</i>, the CJEU clarified that the means implemented to achieve the objective do not go beyond what is necessary to achieve it.</p> <p>In <i>La Quadrature du Net</i> case, the CJEU indicated that, the assessment of necessity must account as to whether “the detection of offences committed online may therefore prove impossible without recourse to a legislative measure”. The CJEU confirmed that such scenario “may occur, inter alia, in cases involving particularly serious child CSA offences”.</p>	<p>The Proposed CSA Regulation:</p> <ul style="list-style-type: none"> <li>Implements safeguards to prevent abuse of power</li> <li>The required data protection assessments and implementation plans will play a role in having companies to deploy detection tools that are the least privacy-intrusive.</li> <li>When it comes to the necessity of detecting OCSE, the Proposed CSA Regulation accounts for the fact that the online content detected consists in itself of a crime, in addition to being content indicative of crimes committed offline</li> </ul>
<b>Proportionality <i>stricto sensu</i></b>	<p>The Advocate General Saugmandsgaard Øe in the case <i>Tele2 Sverige AB v Post- och Telestyrelsen</i> emphasises that the principle of proportionality requires balancing the measure’s benefits in achieving its legitimate objective against its negative impact on fundamental rights in a democratic society.</p>	<p>We argue the interference with the right to online privacy is proportional</p> <ul style="list-style-type: none"> <li>It strives to uphold essential values including children’s right to protection against harm</li> <li>It is the only effective way to address the issue of child sexual abuse and exploitation</li> </ul>



# Key Recommendations

Safeguarding children from OCSE through CSAM detection order would constitute a legitimate justification to potential interference into the right to privacy under the EU Charter as proposed by the CSA Regulation. Ultimately, it is the responsibility of policymakers to ensure an adequate framework that properly balances both privacy and child protection. The findings of this analysis underscore the necessity and effectiveness of automated detection methods. Based on this analysis, we recommended that the CSA regulation:

- Promotes a flexible system of detection by creating a legal basis for **voluntary detection** alongside the legal framework for automatic detection methods.
- Examines the technical characteristics and constraints of each platform in order to provide **platform-specific mitigations**.
- Puts forth the importance of **Child Safety by Design** in combating OSCE.
- Promotes a **child rights risk assessment** approach alongside the already existing data protection impact assessment approach.



**“It should not be a choice between both. It should be privacy and safety.”**

Child from the Netherlands participating in the VOICE research<sup>1</sup>.