

HEARING

COMBATING SEXUAL ABUSE, SEXUAL EXPLOITATION OF CHILDREN AND CHILD PORNOGRAPHY

ORGANIZED BY THE LIBE COMMITTEE OF THE EUROPEAN PARLIAMENT

Tuesday 28 September 2010

Please allow me to start by thanking the Committee on Civil Liberties, Justice and Home Affairs of the Parliament for inviting the European Union Agency for Fundamental Rights to participate in this hearing in order to comment on the legislative proposal for a Directive of the European Parliament and the Council on combating sexual abuse, sexual exploitation of children and child pornography.

The Proposal for a Directive in this field is very much welcomed by the FRA, on the basis of the startling evidence of sexual abuse, sexual exploitation of children and child pornography in the European Union. This proposal is an important step forward in the protection of the rights of the child in the European Union, an aspect of human rights protection in which the Agency is particularly engaged, as the rights of the child, including the protection of children, constitutes one of the key thematic areas of the work of the Agency under its current multi-annual framework. In addition, the Agency also works on the question of respect for private life and the protection of personal data.

The Proposal is grounded on two articles of the Treaty on the Functioning of the European Union:

- Article 67, which establishes the Union's duty to ensure a high level of security through measures to prevent and combat crime, and
- Article 83, by which the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension.

The proposal also points at sexual abuse and sexual exploitation of children as particularly serious forms of crime, noting that children have a right to special protection and care. It also highlights its consistency "with other policies and objectives of the Union", such as the explicitly recognized protection of children's rights in article 24 of the Charter of Fundamental Rights of the European Union. According to this article: "children shall have the right to such protection and care as is necessary for their well-being" and "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".

It is useful to recall that in addition, Article 3 of the Treaty on European Union now enshrines the Union's obligation **to promote** the protection of the rights of the child. As the Court of Justice of the European Union mentioned in its judgment of 27 June 2006 on the Case C-540/03: 'European Parliament *versus* Council of the European Union supported by Commission of the European Communities and by Federal Republic of Germany': the Convention on the Rights of the Child, which binds each of the Member States, is one of the international instruments for the protection of human rights "of which it takes account in applying the general principles of Community law". Given that all EU Member States are also parties to the Optional Protocol to the Convention on the Rights of the Child on the Sale of children, Child Prostitution and Child Pornography - although three Member States have not yet ratified it -¹ we may not wait too long for a similar pronouncement of the Court concerning this Protocol. Finally, we should not forget that the Council of Europe Convention on the

¹ The Czech Republic, Luxembourg, and Malta.

Protection of Children against Sexual Exploitation and Sexual Abuse has recently been signed by the majority of the EU Member States and ratification follows at a good pace.² The pro-active involvement of the EU in order to implement the rights of the child in this domain can now be considered as an imperative.

Importantly, the Proposal also considers its consistency with policies and objectives of the EU concerning the right to respect for private and family life and the protection of personal data (as per Article 8 of the European Convention on Human Rights and Articles 7 and 8 of the Charter of Fundamental rights of the European Union), as well as with regard to freedom of expression (Article 10 of the European Convention on Human Rights and Article 11 of the Charter). In fact, the proposal requires a delicate 'balancing act' to accommodate the fulfillment of several fundamental rights.

The Proposal refers to the impact assessment carried out to accompany the previous proposal for a Framework Decision of 25 March 2009 of the same title, as valid, *mutatis mutandis*, for the present Proposal. However, as the present Proposal highlights, it incorporates important new elements, such as the establishment – or the increase in many Member States – of criminal penalties and the introduction of the obligation for Member States to take the necessary measures to remove Internet pages containing or disseminating child pornography. The nature and importance of these measures requires that an appropriate impact assessment be conducted.

The opportunities which the new technologies - and especially the Internet - provide for the enjoyment of the right to freedom of expression should be cherished, protected, and promoted. At the same time it is the responsibility of European citizens participating in a democratic system under the rule of law, and of their elected representatives, to determine what constitutes the particular 'content' which violates the rights and freedoms of others; and

² Only the Czech Republic, Hungary and Latvia have not yet signed this Convention.

for members of the judiciary and State authorities responsible for the prosecution of crime to ensure that no infringements of the right to privacy and freedom of expression are incurred in prosecuting 'content which violates the rights and freedoms of others'.

The jurisprudence of the European Court of Human Rights regarding the interpretation of Articles 10 and 8 of the European Convention on Human Rights provides clear guidance as to what can be considered as 'content which violates the rights and freedoms of others'. The role of civil society organizations and democratic institutions to act as watchdogs in ensuring that criminal prosecution generally responds to due process and is not misused, is crucial, and will remain so in the future. This includes their role ensuring that the right to freedom of expression is not impinged upon, through the violation of the fundamental rights of those investigated for alleged violations of the rights of the child, including through the use of the Internet and the new information technologies.

The Proposal spells out the requirement of 'intentional' behaviour by the offender in several of its articles. This is of particular importance in establishing the link between use of the Internet and criminal conduct. The use of Internet, and other products of the new information technologies poses a challenge for a large number of European citizens, who lack the technical knowledge to have full control over their use. Accordingly, Article 5, paragraph 3 of the Proposal, dealing with offences concerning child pornography, establishes the requirement of 'knowingly' obtaining access.

The fundamental rights of persons convicted of offences deserve consideration in connection with Article 10 of the Proposal, which deals with 'Disqualification arising from convictions'. This aims to avoid the risk of repetition of offences, envisaging the derogation from Articles 7(2) and 9(2) of the Council Framework Decision 2009/315/JHA on the organization and content of the exchange of information extracted from criminal records between Member States. This derogation could benefit from a delimitation of the type of personal data which

can be used, through the qualification of the general reference to 'personal data' currently envisaged. This can contribute to facilitate the safeguard of the right to privacy of the persons convicted to the greatest extent possible.

The fundamental rights of persons convicted of offences also deserve consideration in relation to the 'Intervention programmes and measures' envisaged under Article 20 of the Proposal. Concerning the 'consent' of persons to Intervention programmes or measures, paragraph 3 of Article 20 establishes an obligation for Member States "to take the necessary measures to ensure that persons convicted of offences ... (d) consent to participation in the specific programmes or measures in full knowledge of the facts" and "(e) may refuse and are made aware of the potential consequences of a refusal". However, both personal consent and refusal should be free from State intervention. The involvement of Member States in this connection should be envisaged just with regard to the provision of information and counseling based on the will of the person convicted, so that he/she can be in a position to take informed decisions. Furthermore, in establishing 'Intervention programmes and measures' victim protection should be the leading consideration, and mechanisms to this effect take the lead over 'intervention programmes or measures' independently considered, which can impinge upon the enjoyment of the fundamental rights of the convicted persons.

Regarding the protection of child victims in criminal investigations and proceedings, Article 19, paragraph 1 envisages the appointment of a special representative for the child victim. This appointment should not be made only when the child is "unaccompanied" by family members, but also when the child is "separated from his/her parents or primary care giver". In paragraph 3 of Article 19 it is unclear whether the wording suggests that State discretion relates to the need to conduct the interview, or whether it relates to the determination that interviews should take place in premises adapted for children.

Finally, Article 21 deals with the blocking of access to websites containing child pornography. The need not to differentiate between Internet and other types of material support for child pornography as it comes to the need to immediately block access, easily flows from earlier references to the need not to distinguish between various forms of material support for 'content which violates the rights and freedoms of others'. However, it is necessary to ensure that any blocking of access to websites is kept to a minimum in order to protect the right of Internet users to freedom of expression. Accordingly, paragraph 1 of Article 21 could benefit from a more precise wording, for example, by replacing the need "to ensure that the blocking is limited to 'what is necessary'" by the need to ensure that blocking "is limited to 'child pornography' material" – thereby guaranteeing that only child pornography content is affected by such blocking. Furthermore, content providers should not just be "informed of the possibility of challenging 'blocking' as far as possible", but should, in an unqualified manner, be 'enabled' to challenge blocking, for example through the development and implementation of substantive and procedural guarantees required for this purpose, which could be outlined in the Proposal.

I would like to conclude re-emphasizing that the Proposal is an important instrument not only for the improvement of relevant criminal law, but also, crucially, for fundamental rights protection. The FRA hence very much looks forward to its adoption. Furthermore, we think it would be important to periodically monitor and evaluate the implementation of the Directive, in order to ensure that it does not have any negative consequences for the enjoyment of fundamental rights. Within the framework of its mandate, the Agency will follow-up the implementation of the Directive "on the ground" in close co-operation with other EU Institutions. The FRA remains at the disposal of the European Parliament for providing any assistance deemed necessary in this context.

Thank you very much for your attention.