



Presentation at the European Parliament hearing on 29 September 2010 (LIBE committee: Civil Liberties, Justice and Home Affairs)

Sir Francis Jacobs, KCMG, QC, President of Missing Children Europe

Madam Chairman

It is a privilege for me to address this meeting. After many years as Advocate General at the European Court of Justice, dealing with many issues of EU law, I have been honoured to be President of Missing Children Europe, the European Federation for Missing and Sexually Exploited Children. Our members are the national organisations in the Member States: we currently have 24 organisations in 16 Member States, and Switzerland. We have substantial experience with the issues of sexual abuse of children and we have, for example, taken an active part in the European Financial Coalition, mentioned by several speakers.

Our national bodies are active on the front line: and we seek to help them at the level of the European Union; to intervene on cross-border problems which are increasing as borders in Europe come down; and to represent their common interests before the European Parliament and the European Commission. We have consulted with our national bodies on the issues arising in this consultation. Although they are not totally unanimous, we can speak with a European voice.

We welcome the proposed Directive, intended to replace the framework decision - on which we were consulted by the European Commission. We welcome the important new role of the European Parliament in the legislative process, effected by the Lisbon Treaty. We welcome this opportunity to comment.

In the time available, I must concentrate on just a few points. They are mainly issues of law, but they all raise important issues of principle. And to make the most of the time available, I will not refer to those points where we agree with the views of the other NGO's, but will focus on those areas which have not been so much emphasised by others, and those where, in discussions among the NGOs, MCE's views may differ.

Let me start by stressing, as the Commission did in the Explanatory Memorandum, how important it is that both the Council and the European Parliament, as the co-legislators in this important field of law, constantly keep in mind that the best interests of the child must be a primary consideration in all actions relating to children. This principle is formulated in Article 24 (2) of the Charter of Fundamental Rights of the European Union. Article 24 reads in part as follows:

“1. Children shall have the right to such protection and care as is necessary for their well-being. ...

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.”

The European Court of Human Rights very clearly and unambiguously formulated the rule that the protection of rights is not limited to a negative principle of non-interference. It also includes “a positive obligation to criminalise offences against the person including attempts”. The Court added:

“Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives”. (ECtHR, 2.12.2008, application n°2872/02, K.U. v. Finland.) I urge you to read the judgment. It gives a clear view of how the Court balances freedom of expression and protection of the rights of the child = the rights of the child being paramount.

Turning now to the proposed Directive, I would first emphasise that we fully support the Commission's view that the Directive complies with the principles of subsidiarity and proportionality. As to subsidiarity, the Commission's arguments in its explanatory memorandum are wholly convincing. Indeed, so far as the Internet is concerned - the area where subsidiarity has occasionally been invoked as an objection - it would be difficult to think of a more appropriate area for action at the level of the EU, since the Internet is by its very nature a transnational phenomenon. As to proportionality, we think it almost self-evident that the measures proposed in the Directive are urgent and necessary to achieve its objectives. Indeed here there seems little argument to the contrary.

Next, we would highlight the need to ensure consistency with the Lanzarote Convention of the Council of Europe. The Convention is the most advanced international text on the subject. It is already binding on some EU Member States, which are required to alter their legislation to conform to it. In our view it would clearly be desirable for the Directive to be consistent with the Convention unless there are powerful reasons for adopting a different solution on a particular point. There are many advantages in such consistency: it avoids the risk of States being subject to different and possibly incompatible obligations on the same subject; it reduces uncertainty and complexity in an area - that of criminal law - where certainty, clarity and as far as possible simplicity are particularly important. It avoids the development of two different standards in Europe - one for the 27 members of the EU, another for the other 20 members of the Council of Europe. It should make easier the adoption of the Directive. And above all, there are areas where the Convention

may be preferable to the current text of the Directive, and to some of the proposed amendments.

There are several issues on the Directive where we, and others, consider that it would be preferable to follow the Lanzarote solution, rather than the proposed Directive or some of the proposals made by the shadow Rapporteurs. There is no time for me to mention them all, but I do want to stress the wider point of principle that consistency with the Convention is a desirable aim in itself. That in no way undermines the added value of the Directive - not least that a Directive has the advantage that it will, merely by virtue of being adopted by the Parliament and the Council, be legally binding on all Member States; that it may be subject to enforcement action by the Commission where necessary; and that it will be subject to interpretation by the European Court of Justice on references by national courts to ensure the correct and uniform interpretation of its provisions throughout the European Union.

As pointed out by the representative of the Council of Europe yesterday, the Directive should not go beyond the level of the Council of Europe Convention. That should indeed be the minimum standard. And the Directive should have no opt-outs: it should lay down a truly uniform standard.

Next, I should like to comment briefly on some particular substantive issues.

First, there is the issue of minimum sentences: the Directive provides at certain points for minimum *maximum* sentences: e.g. the maximum penalty shall be not less than 10 years. This is valuable as signalling the seriousness of the offence. Should the Directive also specify a minimum sentence, which is quite a different concept, e.g. not less than 2 years imprisonment? We think not. A minimum sentence is unknown in the criminal law of several Member States, which consider it important that the court should have a discretion so as to adjust the sentence in the light of all the circumstances which the court is best placed to assess. (A minimum *maximum* sentence does not affect that discretion.) Even for sex offences, which are exceptionally serious, a minimum sentence fixed by law might be wrong: for example, there might be certain exceptional circumstances in which any term of imprisonment would not be an appropriate response, and where some form of treatment outside prison would be better. Indeed there might be fundamental objections of principle in the Member States to a minimum sentence.

We also consider that it is right to include provisions extending, where necessary, the time limits within which prosecutions for child sexual abuse can be brought. That is also in line with the Lanzarote Convention, which provides that the limitation period continues to run for a sufficient period of time to allow prosecutions to be effectively initiated after the child has reached the age of majority. It is known that many child victims of sexual abuse are unable, for various reasons, to report the offences perpetrated against them before reaching the age of majority. It is therefore essential, in the case of the more serious offences, that the child has sufficient time, on becoming adult, to file a complaint; and that the prosecution authorities are then able to bring prosecutions for the offences concerned.

A further important issue, which has proved especially controversial in this hearing, is the blocking of images of sexual abuse. We support the requirement for the blocking of

images of abuse, as a temporary measure pending their removal and deletion. As I have already suggested, the blocking of such images is entirely consistent with the principle of subsidiarity. There may be objections to blocking, as we heard yesterday, in terms of data protection etc.; but the Directive itself contains adequate safeguards in Article 27(2). And it is unacceptable to suggest that to block such images as we are dealing with is an unjustified restriction on freedom of expression. It is also unacceptable to suggest that blocking might lead to similar action to protect copyright in music and the like. There is no parallel between protecting such commercial interests and blocking images of child abuse, which, for every moment that they are not blocked, can be stored, or forwarded, or reproduced.

I have mentioned several points of principle. There are other matters, perhaps no less important, for which we have no time this morning: they include such matters as:

- the "age of consent", where we would prefer reference to the Lanzarote formulation of "legal age for sexual activities";

- the need for broader provisions on screening for employment, especially in view of freedom of movement within the EU, which again highlights the need for legislation on the EU level;

- the need to sanction legal persons - corporations and companies - and the need to provide for confiscation of the proceeds of crime as a sanction for such legal persons;

- and the need to ensure the speedy conduct of investigations.

We hope that our contribution is found helpful; we hope that we shall have further opportunities to contribute to the work of the European Parliament on this Directive; and we thank you for your attention.