‘For borderless crime, a borderless response is necessary.’
A vision of a Europe-wide sex offender registry

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I. Introductory remarks

Historically, child sexual abuse was committed by individuals with direct physical access to victims. Later on, with the invention of photography it gradually expanded, and the images and videos were distributed in hard-copy formats. The arrival of the Internet has dramatically transformed the production, distribution of and access to child sexual abuse material (hereinafter CSAM) and child sexual exploitation material (hereinafter CSEM), *inter alia* because perpetrators may become able to reach materials anonymously.[1] The COVID-19 pandemic gave the phenomenon a twist by moving the world into cyberspace. National governments passed laws ordering people to stay at home, but 'at home and online are not always safe places, and myriad pandemic factors have left some of the most vulnerable children at an increased risk of exploitation and abuse'.[2] Addressing the problem of child sexual abuse is timely because technological revolution combined with the impact of the pandemic multiplied the threats the vast majority of children using the Internet have to face.

In the present paper we are going to outline the most recent elements of child exploitation, sexual abuse and present an overview of the relevant international and European legal framework. We argue that in order to effectively combat these types of crimes, different national legislators need to adapt their laws to the rapidly changing digital environment, paying particular attention to investigation matters. We highlight a few aspects of jurisdiction and cross-border investigation demonstrating the need for international cooperation. Beyond reviewing the related theoretical aspects and the already elaborated case law, we propose a common European solution by evaluating its advantages and disadvantages. A common EU registry of sex offenders for all Member States could serve not only to keep records of online facilitated sexual crimes, but also to contain the similarly serious traditional offences of child sexual abuse.

II. Theoretical overview

Sexual abuse and other forms of sexual offences evolved side by side with the development of civilization. Apart from traditional crimes of a sexual nature, in recent years new kinds of sexual assaults have emerged, due to the explosive technological revolution.

[1] LECLERC, CALE, HOLT and DREW, Child sexual abuse material online: The perspective of online investigators on training and support, *Policing: A Journal of Policy and Practice*, (2022), at 1., available at https://doi.org/10.1093/police/paac017

[2] HANEY, *Addressing the Increase of Online Child Sexual Abuse in the Pandemi*c, 7 December 2021, available at https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2021/november-december/addressing-increase-online-child-sexual-abuse-pandemic/

Within offences concerning the sexual exploitation of children, we can establish two main categories. The first one is *content-related offences* (i.e. the forms of child pornography), while the second is *offences against the person* (i.e. grooming, cyberstalking and voyeurism).[3] The new phenomena have brought along a forceful urge to redefine methods of combatting such crimes. The rapid expansion of digitalization and our increasing reliance on information and communication technology (hereinafter: ICT) renders digital networks as reachable, convenient platforms to commit crimes. Alongside the vital importance of the Internet in various areas of everyday life, the magnitude of harm resulting from the interconnectedness makes it Janus-faced. 'Cybercrime, like crime, consists of engaging in conduct that has been outlawed by a society because it threatens social order',[4] and differs from other forms of crime primarily in the way it is committed, as perpetrators act mainly in cyberspace. In parallel with the constant proliferation of ways to commit cybercrime, the investigation of such offences also requires a continuously renewed approach, giving crucial importance to investigative collaboration within the European Union.

III. Substantive law

1. International and European legal framework

For the protection of children on a global level, a set of international instruments have been introduced under the auspices of the United Nations. From all UN instruments that cover the protection of children, we highlight those that must be viewed in close connection with online child sexual abuse: initially, the United Nations Convention on the Rights of the Child (hereinafter: CRC) and its Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography (hereinafter: OPSC).

With regard to online-facilitated crimes of a sexual nature against children, the Council of Europe Convention on Cybercrime (hereinafter: the Budapest Convention) uses the term *minor* in Article 9 stating that 'it includes all persons under 18 years of age'.[5] Article 3(a) of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse (hereinafter: Lanzarote Convention) establishes that a *child* is 'any person under

[3] J. CLOUGH, *Principles of Cybercrime* (2010), at 24.
[4] S. W. BRENNER, *Cybercrime and the Law: Challenges, Issues and Outcomes* (2012), at 6.
[5] ECPAT International, *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse* (2016) at 5., available at https://ecpat.org/wp-content/uploads/2021/05/Terminology-guidelines-396922-EN-1.pdf

the age of 18 years'.[6] In order to be consistent and in line with the international legal framework, we refer to the term *child* as any person who is under the age of 18 years.

For the purpose of ensuring a common European level of understanding regarding issues like age of consent and the identification of emerging criminal activities in the light of the development of the ICT environment, it became necessary to adopt a common legal framework for combatting the sexual abuse of children. Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combatting the sexual abuse and sexual exploitation of children and child pornography (hereinafter: 2011/93/EU Directive) works in tandem with the aforementioned Lanzarote Convention.

2. Categories of sexual offences

Both the concept of CSAM and CSEM discussed above refer to a sexualized image of a child. CSEM is the 'broader category that encompasses both material depicting child sexual abuse and other sexualised content depicting children',[7] while the abbreviation of CSAM indicates a terminology switch. The latter has been used to replace *child pornography* as it stands for a subset of CSEM 'where there is actual abuse or a concentration on the anal or genital region of the child',[8] including the 'offences of producing, preparing, consuming, sharing, spreading, disseminating, or possessing such material.'[9] These two additional concepts encompass materials documenting children engaging in sexual activities irrespective of whether the material has ICT origins or has been created in person and then shared online, referred in the international outlook as online-facilitated child sexual exploitation (OCSE).[10]

Regarding the two main categories of sexual offences against children, we have established the definition of content-related offences by describing the elements of child pornography and CSAM. The category of offences against persons is more complex. A non-exhaustive list includes grooming, generally described as crimes of 'offenders who seek to win the trust of a child as a first step towards the future sexual abuse'.[11] Also, cyber-harassment (or cyber-stalking) includes 'keeping the victim under surveillance by repeated and harassing phone calls or other communications'[12] or violence against the victim or someone known to them. Another typical criminal behaviour is cyberflashing, encompassing 'a spectrum of

[6] *Ibid.*, at 5.
[7] *Ibid*., at 38.
[8] *Ibid*., at 39.
[9] *Ibid.*, at 36.
[10] *Ibid*., at 23.
[11] CLOUGH, *supra* note 3, at 343.
[12] *Ibid.*, at 366.

practices, all of which involve the sending of an unsolicited genital image to another, and most commonly involves men sending pictures of their penises to other individuals without their prior agreement or consent'.[13] This group of offences also encompasses voyeurism meaning 'a person surreptitiously observing, and in some cases recording, another person in what would generally be regarded as a private place'.[14] Sextortion has a resemblance to blackmail but in some cases offenders force victims to create sex videos or to give them money by threatening to reveal information.[15]

3. Towards procedural realization

The legal framework of substantive rules regarding such crimes does not seem sufficient by itself to address CSAM, CSEM and their online facilitated versions. The European Court of Human Rights (hereinafter: ECtHR) noted in its judgment of K.U. v. Finland that 'the existence of an offence has limited deterrent effects if there is no means to identify the actual offender and to bring him to justice'.[16] In this case the applicant was a 12-year-old child whose personal data (name, phone number, link to his personal webpage with a picture of him, year of birth and physical characteristics) was posted on an online dating site with a message stating that 'he was looking for an intimate relationship with a boy of his age or older to show him the way'.[17] Despite the request of the police, the Helsinki District Court refused to order the service provider of the relevant website to disclose the identity of the user who placed the advertisement, referring to breach of professional secrecy. The District Court argued that based on the relevant Finnish telecommunications and coercive measures acts, the police had the right to obtain such information concerning certain offences, but not in the instance of 'malicious misrepresentation' of the case concerned. The ECtHR held that even though a child was the subject of an advertisement of a sexual nature on an Internet dating site, the identity of the person who put the advertisement on the webpage could not be obtained because of the Finnish legislation that was in effect at the material time. Although the ECtHR underlined the importance of respecting guarantees and due process of crime prevention and investigation, it

[13] JOHNSON and MCGLYNN, Criminalising Cyberflashing: Options for Law Reform, 85(3) *The Journal of Criminal Law* (2021) 171, at 172.
[14] J. CLOUGH, *supra* note 3, at 388.
However, in recent years, voyeurism has expanded and new criminal conducts led to offences like upskirting, broadcasting the picture or video of someone's breasts or up their skirt for example on public transport.
[15] W. BRENNER, *supra* note 4, at 84.
[16] ECtHR, *K.U. v. Finland*, Appl. no. 2872/02, Judgment of 2 December 2008. All ECtHR decisions are available at https://hudoc.echr.coe.int/
[17] *Ibid*., at 1.

emphasized that achieving 'practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator'.[18]

IV. International cooperation

Identifying the perpetrators of OCSE is only one step towards the conclusion of a successful investigation. These crimes require different approaches and specific expertise in ICT and digital forensics as the traditional police methods may be challenged by some offenders who use encryption technologies, anonymity tools, or alternative payment methods for example pay-as-you-go streaming solutions.[19] Furthermore, law enforcement typically has a national character and it could suffer from shortcomings concerning international information sharing.[20] Expertise, institutional capacity and resources are considerably different across countries, and most national agencies work with limited resources facing the increasing volume of OCSE.[21] OCSE crimes are typically borderless, and oftentimes the perpetrators may not even be in the same country as their victims. This indicates that perpetrators can benefit from crossing borders as they can move their operations in order to evade investigation, or to find legal contexts that suit their criminal intent. Therefore, the specialization against OCSE is crucial and a more holistic approach should be adopted.

1. Jurisdiction

Due to the globalized nature of the Internet, crimes can be committed across numerous jurisdictions. Perpetrators can hide their identities and traces with no apparent effort, and even if they leave any evidence behind, it is difficult to collect it, since the data can be removed, altered or hidden very easily.[22] International investigative coordination provides for more efficient operational activities.[23] Police units can join forces to enhance identifying and rescuing more victims as well as arresting more offenders across multiple jurisdictions. Such coordination helps by reducing the duplication of efforts. For example, if the sexual offender is already arrested in a country, the police can notify the other state to cease the investigation

[18] *Ibid.*, at 14.
[19] ECPAT International, *Summary Paper on Online Child Sexual Exploitation* (2020), at 12., available at https://ecpat.org/wp-content/uploads/2021/05/ECPAT-Summary-paper-on-Online-Child-Sexual-Exploitation-2020.pdf
[20] *Ibid.*, at 13.
[21] *Ibid.*, at 12.
[22] K. WITTING, Transnational by default: Online child sexual abuse respects no borders, *The International Journal of Children's rights* 29, (2021), 731, at 733., available at https://brill.com/view/journals/chil/29/3/article-p731_731.xml?language=en&ebody=pdf-49903
[23] ECPAT International, *Online Child Sexual Exploitation, supra* note 19, at 13.

with respect to the perpetrator's location.[24] Although it sounds very promising, the cooperation across jurisdictions can face several practical challenges due to different legal frameworks, operational procedures, discrepancies in available resources, inconsistent definitions of OCSE, and lack of capacity across law enforcement agencies, not to mention the linguistic and cultural obstacles.[25] Therefore, it is necessary that countries take the adequate steps to facilitate cross-jurisdictional investigations.[26]

Such investigations cover extraterritorial jurisdiction and extradition mechanisms that have played essential roles in combatting sexual exploitation of children for a long time. Despite the worthy progress, these legal frameworks still face practical obstacles that often result in impunity for transnational offenders. For example, there are offenders who intentionally select children in a particular country as their victims due to more lenient laws or legal loopholes in order to avoid prosecution. Others may choose to target children who are not citizens of a specific country, such as irregular migrant children and refugee children assuming that they are less protected by laws.[27]

'The term jurisdiction generally refers to the power or right of a State to exercise legal authority over a particular individual or matter'.[28] In most cases jurisdiction requires a link that connects the offence to the investigating country. The most common connection is the territoriality principle, according to which a state can prosecute crimes committed in its territory. However, this principle might be insufficient when the state where the crime is committed is unwilling or unable to prosecute. Additionally, more and more crimes include a transnational dimension[29] where extraterritorial jurisdiction may entail the possibility of prosecuting an offence committed abroad the same way as an offence committed within the given state's borders.[30] Therefore, according to the active personality principle a state can prosecute offences of sexual exploitation of children based on the nationality of the offender, or according to the passive personality principle based on the nationality of the victim. Relevant international instruments, such as the Lanzarote Convention and the 2011/93/EU Directive also

[24] ECPAT International, *Online Child Sexual Exploitation, supra* note 19, at 13.
[25] ECPAT International, *Online Child Sexual Exploitation, supra* note 19, at 13.
[26] ECPAT International, *Online Child Sexual Exploitation, supra* note 19, at 13.
[27] ECPAT International, *Extraterritorial Jurisdiction and Extradition Legislation as Tools to Fight the Sexual Exploitation of Children*, (2022), at 2., available at https://ecpat.org/wp-content/uploads/2022/02/IssuePaper_Extraterritoriality_2022FEB.pdf
[28] *Ibid.*, at 2.
[29] *Ibid.*, at 3.
[30] ECPAT International, Summary Paper on Sexual Exploitation of Children in Travel and Tourism, (2020), at 16., available at https://ecpat.org/wp-content/uploads/2021/05/ECPAT-Summary-paper-on-Sexual-Exploitation-of-Children-in-Travel-and-Tourism-2020.pdf

include rules that states should prescribe jurisdiction under the principles of active and passive personality. There are offences which are so abhorrent by nature, for instance war crimes or crimes against humanity, that the requirement of a direct link between the state and the offence is not even necessary to justify prosecution (universality principle).[31] Universality principle, however, does not categorize sexual crimes against children as heinous offences that would allow states to prosecute without a direct link.[32]

The question arises, how does extraterritorial jurisdiction work in practice? There are practical obstacles, not to mention that the application of extraterritorial jurisdiction is based on many other conditions, such as double criminality. This means that the offence must be considered a crime not only in the state exercising the extraterritorial jurisdiction or in case of extradition in the requesting state, but also in the state where the offence was committed or in case of extradition in the requested state.[33] Double criminality concerning sexual exploitation of children renders extraterritoriality and extradition inapplicable if the offences are not criminalised in both countries, if either the qualification or the age limit based on which the states consider someone a child differs in the relevant countries.[34] Compared to this complex and lengthy process, the European Arrest Warrant is considered to be an easier cooperation mechanism, since it does not require double criminality regarding selected serious crimes, including many offences related to sexual exploitation of children.[35]

2. International and European mechanisms

Another important element contributing to a successful cross-border investigation apart from the previously discussed jurisdictional rules are international and European cooperations. Being the only global law enforcement agency, Interpol operates the International Child Sexual Exploitation database (ICSE). The ICSE database is an intelligence and investigative tool, which permits competent authorities to share information and data with colleagues across the world in order to identify and locate victims and offenders of OCSE. By using image and video comparing software, law enforcement can make connections and comparison of CSAM/ CSEM. The database is only available to trained and certified law enforcement agents or accredited non-law enforcement analysts. The authorized personnel can organize their

[31] ECPAT International, *Extraterritorial Jurisdiction*, *supra* note 27, at 3.
[32] ECPAT International, *Extraterritorial Jurisdiction*, *supra* note 27, at 3.
[33] ECPAT International, *Extraterritorial Jurisdiction*, *supra* note 27, at 6.
[34] GRIFFITH and HARRIS, *Recent Developments in the Law of Extradition*, Melbourne Journal of International Law, (2005) available at: http://classic.austlii.edu.au/au/journals/MelbJIL/2005/2.html
[35] Council Framework Decision, 13 June 2002, OJ L 190, 18/07/2002 P. 0001 - 0020

submission to the ICSE database by grouping them by series of images or by investigations.[36] Interpol also provides an IWOL list (Interpol worst-of list) which enumerates known domains containing very severe CSAM/CSEM to be shared with Internet service providers who may reduce the availability of this kind of material on their platforms.[37]

Within the EU, the investigation of online child abuse cases requires the cooperation of the Member States, primarily carried out by Europol.[38] Pursuant to Article 4 of EU Regulation 2016/794 listing Europol's tasks, its broad mandate is what has allowed it to become the centre of combatting cybercrime, including online child sexual abuse.[39] Apart from the investigating work conducted alongside the national law enforcement agencies, Europol implements specific campaigns and activities aimed at inhibiting OCSE, such as the Stop Child Abuse - Trace an Object campaign, which provides an opportunity for the public to view objects portrayed in CSAM so that they can give hints about their possible location and origin.[40]

The general mandate to fight cybercrime was further developed with the establishment of the European Cybercrime Centre in January 2013 which is entrusted to act including but not limited to cybercrimes, which cause serious harm to the victim such as online child sexual exploitation. By promoting the cooperation between the Member States, it provides highly specialized technical and digital forensic support capabilities to operations and investigations, important strategic analysis enabling informed decision making, while also producing thematic threat assessments.[41] Another milestone in the battle against online child sexual exploitation at the European level is Eurojust,[42] contributing by enhancing prosecution and judicial cooperation activities among EU Member States.

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[36] ECPAT International and INTERPOL, *Towards a global indicator on unidentified victims of child sexual exploitation–Technical Report*, (2018), at 6., available at https://ecpat.org/wp-content/uploads/2021/05/Technical-Report-TOWARDS-A-GLOBAL-INDICATOR-ON-UNIDENTIFIED-VICTIMS-IN-CHILD-SEXUAL-EXPLOITATION-MATERIAL.pdf

[37] ECPAT International, *Online Child Sexual Exploitation*, *supra* note 19, at 13.
The relevant information on how the worst of list functions is available at https://www.interpol.int/en/Crimes/Crimes-against-children/Blocking-and-categorizing-content

[38] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016

[39] Directorate General for internal policies, Policy Department C: Citizen's rights and constitutional affairs, Civil liberties, justice and home affairs: Combatting child sexual abuse online, (2015) at 32., available at https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536481/IPOL_STU(2015)536481_EN.pdf

[40] Stop child abuse - trace an object, (2021) available at https://www.europol.europa.eu/stopchildabuse

[41] Directorate General, *supra* note 39, at 33.

[42] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, OJ L 295, 21.11.2018

V. Solution: a Europe-wide sex offender registry?

After discussing the difficulties and the many proliferating ways Member States could cooperate and deal with OCSE, we propose a tool that has the potential to enhance effective interaction, namely a European sex offender registry. Although being a controversial subject, we argue that it is worth looking at the advantages and disadvantages of having such a registry. After discussing the case law of the ECtHR examining the subject in several judgments, we present our view on whether or not the European Union should develop such a registry.

The Parliamentary Assembly of the Council of Europe emphasizes that measures preventing sexual offences must be based on laws that fully respect human rights and fundamental freedoms.[43] However, laws governing this subject interfere with many rights protected by the European Convention on Human Rights (hereinafter: ECHR), such as the rights to privacy, to family and home, to freedom of movement and liberty. These rights are not absolute: they can be restricted pursuant to Article 8 of the ECHR on the grounds of 'national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' The ECtHR has firmly declared that the gravity of the harm that may be caused to the victims of sexual violence places states under an obligation to take measures to protect people from such harm.[44]

The protection of children from sexual abuse is a legitimate public interest that could serve as a basis for invasion of private life. Combatting sexual exploitation by protecting communities from recidivist sex offenders is considered to be an objective that outweighs an individual's human rights.[45]

1. An overview of the European Court of Human Rights case law

The concept of sex offender registries derives from the United States where highly publicized sex crimes have maintained public focus on sexual crimes and led to milestones in legislations.[46] In the United States of America the general public has access to personal information of convicted sexual perpetrators. Contrary to the American model – even though

[43] K. NEWBURN (ed.), *The prospects of an international sex offender registry: Why an international system modeled after United States Sex Offender Laws is not an effective solution to stop child sexual abuse?*, (2011) at 574.
[44] ECtHR, *Stubbings and Others v. The United Kingdom,* Appl. no. 22083/93; 22095/93 Judgment of 22 October 1996
[45] ORECCHIO and A. TEBBETT, Sex Offender Registration: Community Safety or Invasion of Privacy?, 13 *Journal of Civil Rights and Economic Development*, (1999) 675, at 676.
[46] DUGAN, Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England, 23 *Loyola of Los Angeles International and Comparative Law Review*, (2001) 617, at 633.

it served as an example for the international community[47] – the immense majority of countries that have created their own sex offender registries do not allow public access to these records.[48] In Europe, the United Kingdom and France were among the first to establish such registries that shortly posed the question of conformity with the ECHR.

The United Kingdom first adopted sex offender legislation in 1997.[49] Eight years later, the French legislative body followed its counterpart and established its sex offender registry in 2005. Both acts require the perpetrators to notify the relevant authority if their circumstances changed, and in both cases, the period during which the perpetrators' data had to be stored was in line with the gravity of the committed felony or misdemeanor.[50]

1.1. United Kingdom

The following judgments have been delivered by the ECtHR in connection with the system of the United Kingdom. In the case of *Adamson v. the United Kingdom*,[51] Adamson had committed a single offence of indecent assault and was sentenced to five years imprisonment. In the case of *Ibbotson v. United Kingdom*,[52] Ibbotson was convicted on six charges of possession of obscene and indecent material. In the context of both applicants, the Sex Offenders Act - as soon as it entered into force - required them to register with the police for an indefinite period of time following their release from prison.

Both applicants complained about the breach of Article 7 of the ECHR, claiming that the provisions of the Act constituted a heavier penalty than the sanction applicable at the time the criminal offence was committed. Moreover, Adamson invoked Article 8, stating that the requirement to register constituted an unjustified interference with his private life. He also complained under Article 3 that the registration requirement stigmatized him as a sex offender for life.

Although the ECtHR accepted that the applicants in both cases may have perceived the requirements of the Sex Offenders Act as 'punitive', in the view of the ECtHR these kind of requirements were rather considered preventive. According to the ECtHR, the fact that a person

[47] THOMAS, European Developments in Sex Offender Registration and Monitoring, 18 *European Journal of Crime, Criminal Law and Criminal Justice* (2010) 403, at 404.
[48] HYNES, The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification, and Civil Commitment Laws in the United States and the United Kingdom, 2 P*enn State Journal of Law & International Affairs*, (2013) 351, at 352.
[49] NEWBURN, *supra* note 43, at. 560.
[50] THOMAS, *supra* note 47, at 405-408.
[51] ECtHR, *Adamson v. The United Kingdom,* Appl. no. 42293/98, Judgment of 26 January 1999.
[52] ECtHR, *Ibbotson v. The United Kingdom*, Appl. no. 40146/98, Judgment of 21 October 1998

could be registered by the police due to certain sexual crimes specified by the legislator could dissuade the potential perpetrator from committing further offences.

The ECtHR considered that the requirement to provide certain information to the police interfered with the applicant's private life, however, it was found that the disputed measures pursued legitimate aims. Such aims are for instance prevention of crime and the protection of rights and freedoms of others. Since the ECtHR stated that the measures were rather preventive than an additional penalty under Article 7, the controversial criteria did not meet the minimum level of severity required for a breach of Article 3.

1.2. France

Regarding the French registry, the ECtHR delivered judgments in the case of *M.B. v. France,*[53] *Gardel v. France,*[54] and *B.B. v. France.*[55] All three applicants were sentenced to terms of imprisonment for rape of 15-year-old children committed as persons in a position of authority. On 9 March 2004, Law No. 2004-204 created a national judicial database of sex offenders, and all three applicants were included in the database.

They complained that their inclusion in the registry breached their rights under Articles 7 and 8. The applicants complained against their placement on the Sex Offenders Register which imposed more stringent obligations on them than those existing at the time of their conviction.

The ECtHR observed that the national judicial database constituted a public-order measure rather than a sanction and it was designed to prevent convicted persons from reoffending and to guarantee that they could be identified and traced. In that aspect, the ECtHR accepted the argument that a convicted perpetrator's address known by the police and the judicial authorities based on their inclusion in the Sex Offenders Register has a deterrent effect.

Considering the potential breach of Article 8, the ECtHR had to choose between two competing interests – private and public – and decide whether or not the state overstepped the acceptable margin of appreciation in connection with the storage of the sexual perpetrators' data. Sexual abuse is unquestionably an abhorrent type of wrongdoing, with long-term harmful psychological effects on its victims. Children and other vulnerable individuals are entitled to the protection of the state, which justifies such data storage. For storing the information, maximum periods were determined depending on the seriousness of the relevant crime. In

[53] ECtHR, *M.B. v. France*, Appl. no. 22115/06, Judgment of 17 December 2009
[54] ECtHR, *Gardel v. France*, Appl. no. 16428/05, Judgment of 17 December 2009
[55] ECtHR, *B.B. v. France*, Appl. no. 5335/06, Judgment of 17 December 2009

conclusion, the ECtHR stated that the system of inclusion in the database of sex offenders had struck a fair balance between the competing private and public interests at stake, and therefore there was no violation of Article 8.

2. Hungarian regulatory framework

As it was presented above, the ECtHR established that the registries of the United Kingdom or France that have been enacted in order to identify and trace sexual offenders – with respect to the essential substance of the relevant fundamental rights – conform to the ECHR. In Europe – besides the United Kingdom and France – Austria, Germany, Ireland, Malta, Poland, Portugal, Spain and most recently Hungary have adopted laws governing sex offender registration. In the followings we outline the relevant provisions of the newly adopted Hungarian Act[56] establishing a database of sex offenders that entered into force on the 1st of February 2022. The database is available on a platform operated by the Ministry of Interior and contains data of convicted offenders of sexual crimes against children. Data retrieval from the registry requires a statement from the user regarding the purpose of the query. Any user, in order to reach information on the offenders, has an obligation to indicate that they need the information as a relative of a child, or because they are taking care of a child. After reading a mandatory warning about the obligation of respecting personal data, the user needs to specify their motivation for searching someone's criminal background. The list of intents contains options like gaining information on a particular person is – according to the opinion of the user – 'presumably necessary' for the protection of children or checking if someone in the child's environment endangers their safety. Once the ground for retrieving data is established, searching for a specific name, the platform discloses the portrait, the location, year of birth of the perpetrator and basic information about the committed crime.

3. Let’s not waste more time!

These new kind of measures to protect children from sexual offenders are becoming more and more common. The 2011/93 EU Directive also declared that the Member States may consider adopting additional administrative measures, such as the inclusion of perpetrators in national sex offender registries. These circumstances resulted in the rapid spread of such databases in the European Union, and it also brings along the question if a Europe-wide sex offender registry should be introduced by the European legislators.

[56] See Act XLVII of 2009

Every two minutes a sex crime is reported in the EU. Europol emphasized the fact that women and children suffer the most at the hands of these kinds of violent criminal acts.[57]

In 2007 the Parliamentary Assembly of the Council of Europe (hereinafter: the Assembly) passed a Resolution calling for a Europe-wide sex offender's registry.[58] The matter was referred for a more detailed investigation which resulted in a report (hereinafter: the Report) on the basis of which the Assembly did not support a Europe-wide sex offender registry.[59]

In 2016, the European Commission (hereinafter: the Commission) had to deliberate on the registration of pedophiles in Europe initiated by Petition No. 2147/2014.[60] However, the Commission highlighted that it shared the general concerns about convicted sex offenders potentially becoming recidivists, but it did not intend to table proposals in order to set up registries on child sexual abusers neither at national nor at EU level. Most recently, a motion for a resolution has been submitted to the European Parliament on an EU-wide registry of convicted sex offenders.[61]

'By the time you've finished reading this, at least one violent sex offence will most likely have already been reported somewhere in the EU. Let's not waste more time!' stated Europol in its article.[62] We reiterate that after multiple scandalous child abduction cases such as the Madeleine McCann (2007) case were reported, the subject of sex offenders' registry has appeared from time to time on the agenda of the Council of Europe and the Commission. This results in deliberations on the requirement of the Europe-wide registry, particularly regarding employment screening for childcare workers since they are internationally mobile.[63]

4. Balancing the competing arguments

It is a common false assumption that all sexual offenders are pedophiles. 'Pedophilia is a mental defect where an individual seeks sexual gratification from children. In itself it does

[57] Some of Europe's most dangerous sex offenders in the spotlight (2020) available at https://www.europol.europa.eu/media-press/newsroom/news/some-of-europe%E2%80%99s-most-dangerous-sex-offenders-in-spotlight

[58] Parliamentary Assembly, Committee on Legal Affairs and Human Rights, For a Europe-wide sex offenders register, Introductory Memorandum (2008), at 1., available at http://assembly.coe.int/CommitteeDocs/2010/20081104_ajdoc51.pdf

[59] *Ibid*., at 1.

[60] Notice to Members available at https://www.europarl.europa.eu/doceo/document/PETI-CM-576744_EN.pdf?redirect

[61] Motion for a Resolution available at https://www.europarl.europa.eu/doceo/document/B-9-2021-0301_EN.html

[62] *supra* note 57.

[63] THOMAS, *supra* note 47, at 414.

not give rise to criminal liability, only acting on it does'.[64] Labelling the perpetrators of sexual offences as pedohpiles is not accurate, it would only increase the stigmatizing effect an offender has to face. Hereby we would like to emphasize that since not all sexual offenders are considered pedophiles, the registry we envision would only be limited to convicted sexual perpetrators. Even though the registry would include all sexual offenders not just child abusers, we will highlight the arguments concerning perpetrators who committed crimes against children.

Taking a closer look at the relationship between victims and offenders, sexual abuse between intimate partners and family members seems to be quite frequent. Statistics[65] show that 64% of children were abused by someone known to them, 11% were abused by someone in their nuclear family and 16% by someone in their extended family. Some critics say that registry laws discourage victims to report their relatives as abusers, since they might not want the 'permanent stigmatization'.[66]

Our position is that a Europe-wide registry could work as a deterrent factor for the potential perpetrators since the inclusion on the registry would render their reintegration into society significantly more difficult. Therefore, the establishment of such a registry could not only pursue general but also special prevention aims.

As it was presented above, some countries run national sex offender registries, while others have no such arrangements. Consequently, the already existing national systems can stand as an example with all their advantages and failures. As a matter of fact, the practical issues of organizing a Europe-wide registry have always constituted a barrier. Firstly, the differences in terminology make it difficult to compare legislations of the Member States. Some Member States give specific definitions of the term 'sex offender', while others have specific sections on offences involving sexual assault on children, even where such acts lack violence or threats.[67] Secondly, the rules not only differ concerning the age limit under which a person is considered as a child, but also the age of consent regarding sexual activities vary greatly among the Member States. This renders the establishment of a coherent Europe-wide registry rather complex because it requires the harmonization of the laws of all Member States. However, it should not deter the European legislator from introducing such a registry, because

[64] Cornell Law School, Legal Information Institute available at https://www.law.cornell.edu/wex/pedophilia?fbclid=IwAR3gWhEKOokaIaLv2T52NaKl9QhJ8ycYDQz89yKAqVNihyeOmZ8ozrIeja0

[65] ECPAT International and INTERPOL, Technical report, *supra* note 36, at 22.

[66] Why the sex offender registry isn't the right way to punish rapists (2016) available at https://www.vox.com/2016/7/5/11883784/sex-offender-registry

[67] *supra* note 58, at 2.

harmonization has so far proven to be successful in countless areas of legislation, for instance crimes of terror or drug trafficking.[68] "Harmonization" does not mean a single European system or identical national rules, but rather "compatibility" for the purposes of practical cooperation between authorities'.[69] We believe that for instance a comprehensive term unification could contribute to reducing differences between the legislations of the Member States.

Another argument against such a registry is the aforementioned stigmatizing effect overshadowing the prevention aims, however the ECtHR already established in its case law that national registries are rather considered to be preventive measures and not additional punishments. Our position is that we can draw a comparison between these national registries and their potential European counterparts. Concerning the punitive or preventive nature of the registry an additional argument could be the breach of the principle of *nulla poena sine lege*. The principle means that 'no heavier penalty is imposed than the one available under the written or unwritten law applicable at the time the crime was committed'.[70] Based on the decision of the ECtHR, the registry is considered to be a preventive measure and not a sanction. If the perpetrators were convicted before the establishment of a sex-offender registry, but later on their personal data would be included in the registry, the breach of the principle of *nulla poena sine lege* could be ruled out on the basis that the inclusion is not an additional punishment.

The opponents also criticize that using such registries can result in harassment against the listed perpetrators.[71] Inclusion in such a registry definitely has certain repercussions on sex offenders' privacy and reintegration into society. However, it can be avoided if the data concerning the sexual offenders are accessible only to the relevant European authority responsible for the update and supervision of the registry. Henceforth, the introduction of the Europe-wide sex offenders registry would comply with the principle of proportionality.[72] Hereby we highlight that the Europe-wide sex offender registry that we envisioned can be considered a tremendous progress compared to the American model due to the fact that by limiting access for the relevant authorities and requiring a specified purpose for the query, the misuse of data could be avoided.

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[68] ROSMUS, TOPA, WALCZAK, Harmonisation of criminal law in the EU legislation- the current status and the impact of the Treaty of Lisbon available at https://www.ejtn.eu/Documents/Themis/THEMIS%20written%20paper%20-%20Poland%201.pdf

[69] *supra* note 58, at 10.

[70] KREß, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, (2010), at 8., available at https://www.legal-tools.org/doc/f9b453/pdf/

[71] *supra* note 66.

[72] *supra* note 58, at 2.

The reliability of such a registry requires regular updates to ensure that it contains accurate information.[73] By keeping more precise data it would assist police investigations should there be any further offences in a certain area.[74] In our view, even though it would place an administrative burden on national authorities, updating the European registry with the information provided by the Member States would be optimal.

Effectiveness of the registry is a key factor. It does not only encompass the easier cooperation mechanism, but also underlines the importance of time efficiency. The latter could be enhanced by establishing a supplementary 'alert system' creating the opportunity for authorities to take measures as quickly as possible when children go missing.[75]

The Report also laid down that by traveling across jurisdictions in order to avoid conviction underlines the need for an increased cooperation between European countries. The Report mentioned Interpol's international sex offender database into which all countries could deposit and retrieve information of known perpetrators, and emphasized that countries should make better use of it. So far 'states seemed reluctant to share information on sex offenders'.[76] This means that if the database operated by Interpol cannot take on the role as the main channel of communication, then better direct exchanges of information on sex offenders between European countries have to be encouraged.[77]

The main reason for introducing a Europe-wide sex offenders registry would be to provide the public with greater protection against sexual assaults with regard to the issue of the traveling sex offenders who appear to be able to cross borders and to reoffend. It was reported by the Child Exploitation and Online Protection Centre that the vast majority of missing sex offenders are believed to be abroad.[78]

In Hungary, in case of sexual offences committed against children, banning the perpetrator from exercising any profession involving the responsibility for providing education, care, custody or medical treatment to children is a compulsory measure. Although the prohibition is permanent, which might seem to be a severe sanction, after a period of ten years the possibility of revision becomes available.[79]

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[73] *supra* note 58, at 2.
[74] THOMAS, *supra* note 47, at 403.
[75] *supra* note 58, at 9.
[76] Parliamentary Assembly, Report, Reinforcing measures against sex offenders, (2010), at 13., available at https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=12426&lang=en
[77] THOMAS, *supra* note 47, at 413-414.
[78] *supra* note 76, at 9.
[79] Article 53 of Act C of 2012 (Hungarian Penal Code)

Once the perpetrator under prohibition enters a foreign country, what are the guarantees that the imposed provisions shall be respected? What if the criminal record of the sexual offender is inaccessible for an employer, for instance in the case of a school headmaster.
We illustrate this issue by presenting the case of Michel Fourniret, a French citizen. Fourniret was an employee in a Belgian school despite having served a custodial sentence for offences against children in France. He continued to commit offences at his workplace,[80] standing as a suitable example when a sex perpetrator is only seeking certain employment possibilities to gain access to children.[81]

The 2011/93/EU Directive stated that the Member States shall take the necessary measures to ensure that employers recruiting a person for professions involving direct and regular contacts with children are entitled to request information on the existence of criminal convictions or on the existence of any disqualification concerning sexual offences against children. We also greet the endeavor that Member States have to take the necessary measures in order to make information circulation more effective[82] concerning convictions and disqualifications for such abhorrent crimes against minors. Our position is that by introducing a Europe-wide sex offenders registry information sharing between the Member States can be more efficient. As we stated above, only relevant authorities could have access to such a registry. Moreover, we underline that it is crucial to limit the possibility of data requests to employers running childcare and education institutions.

We reiterate that the concept of a cross-border registry is not a new phenomenon, since Interpol already operates one, however, it serves different aims compared to what we envisage. Our view is that a European registry would be more useful, since the Member States share similar cultural and legal backgrounds.

VI. Conclusion

In the European Union protecting children is a highly prioritized interest therefore it is particularly important to step up against the various forms of child abuse. The COVID-19 pandemic shed light on the relevance of the already established legal framework promoting collective action, however, it also pointed out the necessity of further development of the

[80] How Fourniret slipped through the net, (2004), available at http://news.bbc.co.uk/2/hi/europe/3875987.stm
[81] THOMAS, *supra* note 47, at 412.
[82] DIRECTIVE (EU) 2019/884 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA

cooperation amongst Member States. We argue that combatting child abuse and its online facilitated versions require international and European cooperation in order to conduct successful investigations and keep the frequency of sexual offences against children as low as possible. Based on our assessments a Europe-wide sex offender registry would promote transnational crime prevention. In this sphere we examined the ECtHR case law. From the relevant European legal practice, we deduced that a registry of sexual offenders would be an effective tool not only in national legislations, but also on a European level. After elaborating all the arguments for and against the European-wide sex offender registry we concluded that the advantages significantly outweigh the reasonable doubts and difficulties concerning the data protection and administrative burden.

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