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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on procedural safeguards for children suspected or accused in criminal proceedings

{SWD(2013) 480 final}

{SWD(2013) 481 final}

{SWD(2013) 492 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1. This proposal for a Directive of the European Parliament and the Council aims to set common minimum standards throughout the European Union on the rights of children who are suspected or accused in criminal proceedings and of children subject to proceedings pursuant to Framework Decision 2002/584/JHA ("European arrest warrant proceedings").
2. The Stockholm Programme¹ put a strong focus on the strengthening of the rights of individuals in criminal proceedings. In its point 2.4, the European Council invited the Commission to put forward proposals setting out a step by step approach to strengthening the rights of suspects and accused persons by setting common minimum standards on fair trial rights. This measure forms also part of the EU Agenda for the Rights of the Child to which the European Parliament, the Committee of the Regions, the Economic and Social Committee and the Council of Europe as well as key stakeholders such as UNICEF, the Ombudspersons for Children in the Member States, and civil society have contributed².
3. Three measures have already been adopted: a Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings³ in October 2010 and Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings in May 2012⁴ and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty⁵. Measures on the right to provisional legal aid for suspects or accused persons while deprived of liberty are presented as a package with the present initiative together with a Directive on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.
4. This proposal for a Directive sets out specific minimum rules concerning the rights of suspects or accused who are children in criminal proceedings. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 24, 47 and 48, relying on Articles 3, 5, 6 and 8 of the ECHR, as interpreted by the European Court of Human Rights, which, in its case-law sets standards on special safeguards for vulnerable persons, in particular children. This case-law provides *inter alia* that the fairness of proceedings and the right to a fair trial require a person's ability to understand the minimum stakes of the procedure and have the ability to participate and effectively exercise his rights and benefit from the protection of privacy. Under

¹ OJ C 115, 4.5.2010, p. 1.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 15.2.2011, COM(2011) 60 final

³ Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

⁴ Directive 2012/13/EU on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1).

⁵ Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, (OJ L 294, 6.11. 2013, p.1).

these conditions, the strengthening of procedural safeguards of children should be explicitly provided for in this Directive.

5. These measures should be implemented taking into account the best interests of the child as set out in Article 24 of the Charter of Fundamental Rights.
6. Suspects or accused who are children are recognised and treated with respect, dignity, professionalism, in a personal and non-discriminatory manner, whenever they are in contact with the competent authority acting in the framework of criminal proceedings. This should also facilitate the reintegration of children into society after they were confronted with the criminal justice system. The rights set out in this Directive apply to children suspected or accused in a non-discriminatory manner, including with regard to their residential status.
7. This measure is presented together with a Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings and vulnerable persons subject to European arrest warrant proceedings.
8. The proposal is based on Article 82(2) of the Treaty on the Functioning of the European Union (TFEU).
9. The right to an effective remedy, to a fair trial and a right of defence are provided for in the Charter of Fundamental Rights of the European Union (the "Charter"), Articles 47 and 48, and in Article 6 of the European Convention of Fundamental Rights (the "ECHR"). The ability to effectively exercise these rights largely depends on the ability of the suspect or accused person to follow and fully participate in the procedure, which may be limited due to age, lack of maturity or disabilities. This means that for children and vulnerable adults special measures need to be taken to ensure that they can effectively participate in the proceedings and benefit from their fair trial rights to the same extent as other suspects or accused persons.⁶
10. Due to the lack of a common definition of vulnerable adult persons and with a view to considerations linked to the principles of subsidiarity and proportionality the Commission has refrained at this stage from extending the scope of this Directive to vulnerable adult persons. Instead, the Commission will adopt a Recommendation calling upon Member States to put in place a number of safeguards for vulnerable persons.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

11. On 23 September 2011, 26 April 2012 and 11 December 2012 three meetings with experts were held. Representatives of Member States as well as a panel of experts from the Council of Europe, International Association of Youth and Family Judges and Magistrates, the United Nations, medical and legal practitioners specialising in children cases discussed measures that could be taken at EU-level to increase the protection of children and vulnerable adults in criminal proceedings.
12. The Commission carried out an Impact Assessment to underpin its proposal. The report on the impact assessment is available at <http://ec.europa.eu/governance>.

⁶ The guiding principle of the European Court of Human Rights when assessing a potential breach of Article 6 ECHR with regard to suspects or accused persons who may be said to be vulnerable has been to focus on whether or not the person was able to "effectively participate" in their trial.

3. LEGAL ELEMENTS OF THE PROPOSAL

Article 1 – Subject matter

13. The subject matter of the Directive is to lay down minimum rules concerning the rights of suspects or accused persons in criminal proceedings who are children and of children subject to "European arrest warrant proceedings."

Article 2 – Scope

14. The Directive applies to children meaning persons under the age of 18 at the time when they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings.
15. National rules on the age of criminal responsibility for children will not be affected by this Directive. This is the age when a child becomes criminally responsible for his or her actions.
16. In certain Member States children who have committed an act qualified as an offence are not subject to criminal proceedings according to national law but other forms of proceedings which may lead to the imposition of certain restrictive measures (for instance protection measures, education measures). Such proceedings do not fall within the scope of this Directive.

Article 3 – Definition

17. In accordance with international law instruments⁷, any individual below the age of 18 will be considered as a child.

Article 4 – Right to information of children

18. The child should be informed promptly of the rights under this Directive, complementing the rights foreseen in Articles 3 to 7 of Directive 2012/13/EU with the exception of minor offences as provided for by Article 2(2) of Directive 2012/13/EU.
19. If the child is deprived of liberty, the Letter of Rights which shall be provided to the child in accordance with Article 6 of Directive 2012/13/EU shall contain also reference to the rights provided by this Directive.
20. This Directive should be implemented in accordance with the standards set out in Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.

Article 5 – Right to information of the holder of parental responsibility

21. This Directive provides further complementary safeguards with regard to the information of the holder of parental responsibility or an appropriate adult in order to take into account the specific needs of children provided that this does not prejudice the due course of the criminal proceedings against the person concerned and any other criminal proceedings.
22. The term "holder of parental responsibility" means any person or institution having parental responsibility over a child as defined by Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

⁷ Article 1 UN Convention of the Rights of the Child ("UN CRC").

23. The role of the holder of parental responsibility is important to ensure moral and psychological support and adequate guidance to the child. The holder of parental responsibility is well placed to enhance the protection of the rights of defence of the suspected child (e.g. to appoint a lawyer or to decide to appeal a decision). Moreover, the parents are also legally responsible and can be held civilly liable for the behaviour of the child.
24. This provision reflects international rules, such as the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, the Beijing Rules and the 2007 UN CRC General Comment N°10 on Children's rights in juvenile justice.
25. If the information of the holder of parental responsibility would be contrary to the best interests of the child, this right should not be applied. This could be the case, for example, if the holder of parental responsibility has been involved in the same offence as the child and there is a conflict of interest. In this case, another appropriate adult shall be informed and asked to be present. The term "another appropriate adult" refers to a relative or a person (other than the holder of parental responsibility) with a social relationship with the child who is likely to interact with the authorities and to enable the child to exercise his or her procedural rights.

Article 6 – Right to a lawyer

26. This Article ensures mandatory access to a lawyer for children who are suspected or accused in criminal proceedings.
27. Article 6 (3) lit.c) ECHR and Articles 47 and 48 of the Charter guarantee the right of an individual to have access to a lawyer. The Directive 2013/48/EU lays down general rules on such a right for all suspects or accused persons in criminal proceedings. However, it allows suspects or accused persons to waive their right to be assisted by a lawyer. This Directive foresees as an additional safeguard that children may not waive this right.
28. The ECtHR has repeatedly underlined the importance of assistance by a lawyer for children from the outset of the proceedings and during police questioning thereby suggesting that a waiver can represent significant risks for them. The importance of access to a lawyer for children is also recognised by all relevant international rules, such as the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice⁸, the Beijing Rules⁹ and the 2007 UN CRC 2007 General Comment N°10 on Children's rights in juvenile justice¹⁰.
29. However, with regard to certain minor offences, mandatory access to a lawyer would be disproportionate. This concerns in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, which are considered to be criminal offences in some Member States. For such offences, the competent authorities other than a public prosecutor or a court having jurisdiction in criminal matters do not need to ensure the right of mandatory access to a lawyer granted under this Directive.

Article 7 – Right to an individual assessment

30. This Article ensures that a child has the right to an individual assessment. Such an individual assessment is needed in order to identify the child's specific needs in terms

⁸ Points 37 (to 43).

⁹ Point 15.1.

¹⁰ Point 49.

of protection, education, training and re-integration into society, to determine if and to what extent he or she would need special measures during the criminal proceedings. The personal characteristics of a child, his or her maturity and economic and social background may vary significantly.

31. The individual assessment should be carried out at an appropriate stage of the proceedings and at the latest before the indictment. It should be recorded in accordance with national law.
32. Without prejudice to Article 8 of Directive 2011/36/EU, in the course of an individual assessment particular attention should be given to children involved in criminal activities which they have been compelled to commit as victims of trafficking in human beings.
33. The extent and detail of such an assessment may be adapted according to the seriousness of the offence and the penalty imposed if the child is found guilty of the alleged offence. For example, it is envisaged that a more in-depth assessment may be warranted in the case of a serious offence such as robbery or murder.
34. The individual assessment should be updated throughout the criminal proceedings and individual assessments that have been previously carried out with regard to the child may be used, if they are updated.
35. Member States may derogate from this obligation when it is not proportionate to carry out in an individual assessment taking into account the circumstances of the case and whether or not the child has previously come to the attention of Member State authorities in the context of criminal proceedings. In such cases, an authority for the protection or welfare of children should be informed that an individual assessment is not carried out.

Article 8 – Right to medical examination

36. Access to medical examination by a physician and adequate medical care throughout a child's stay in detention is recommended by international legal instruments, such as the 2007 UN General Comment N°10 on the children's rights in juvenile justice. Children, due to their young age and physical and mental immaturity, are more strongly exposed to ill-treatment and health problems than other suspects or accused persons. Often they may not even be able to properly express their health problems. Particular care is needed to ensure their integrity, in particular in detention.
37. If the child is deprived of liberty, the child should have the right to medical examination upon request by the holder of parental responsibility, the appropriate adult or the child's lawyer. Such a medical examination should be carried out by a medical expert.
38. In case of prolongation of deprivation of liberty or extension of measures taken against the child, a medical examination may also be repeated.
39. If the medical examination of a child leads to the conclusion that the envisaged measures during the criminal proceedings against the child (e.g. questioning of the child, detention) are incompatible with the general mental and physical condition of the child, the competent authorities should take appropriate measures in accordance with national law (e.g. postponement of questioning, medical treatment of the child). Due account should be taken of the best interests of the child.

Article 9 – Questioning of children

40. The questioning of children is a potentially risky situation where their procedural rights and dignity may not always be respected and their vulnerability may not be duly taken into account.
41. In order to ensure sufficient protection of children who are not always able to understand the content of interviews they are subject to, including during any questioning by the police, interviews should be audio-visually recorded. However, it would not be proportionate to require that the competent authorities should ensure the audio-visual recording in all cases. Due account should be taken of the complexity of the case, the seriousness of the alleged offence and the potential sanction that can be incurred. However, if a child is deprived of liberty, questioning should always be recorded.
42. Such records must be accessible only to the judicial authorities and the parties of the proceedings to ensure their content and context. Any public dissemination of the records should be prevented. Moreover, the length, style and pace of interviews should be adapted to the age and maturity of the child questioned.

Article 10 – Right to liberty

43. The right to liberty and security of a person is enshrined in Article 5 (1) ECHR and Article 6 of the Charter.
44. In accordance with international rules, such as Article 37 UN CRC, 2007 UN General Comment N°10 on Children's rights in juvenile justice, point 79 and the Recommendation of the Committee of Ministers of the Council of Europe¹¹, any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time¹².
45. Taking into account these international standards, this Directive sets minimum rules as regards detention. This is notwithstanding the compliance by Member States with these international standards as regards detention, in particular the separation of children from adults and access to educative measures, beyond conviction.

Article 11 – Alternative measures

46. In order to avoid deprivation of liberty for children, all measures alternative to deprivation of liberty should be taken by the competent authorities whenever this is in the best interests of the child. Such measures should include for instance reporting obligations to the competent authorities, restrictions on contacts with specific persons or participation in therapeutic treatment or educational measures¹³.

Article 12 - Right to specific treatment in case of deprivation of liberty

47. In certain cases deprivation of liberty might be necessary, for example to avoid the risk of tampering with evidence, influencing witnesses, when there is a risk of

¹¹ Recommendation of the Committee of Ministers (2008), 11, on European rules for Juvenile Offenders, point 59.1; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, point 19.

¹² See Green Paper on "Strengthening mutual trust in the European judicial area", Chapter 5 on children, COM(2011) 327 final, 14.6.2011.

¹³ See Article 8 of the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ L 294, 11.11.2009, p.20).

collusion or flight etc. In such cases, particular attention should be paid to the way detained children are treated.

48. Moreover, given the vulnerability of children deprived of liberty, the importance of family ties and promoting the reintegration into society, competent authorities should respect and actively support the fulfilment of the rights of the child as set out in international and European instruments. In addition to other rights, children in particular should have the right to:
- (a) maintain regular and meaningful contact with parents, family and friends. Restrictions on this right should never be used as a punishment;
 - (b) receive appropriate education, guidance and training,
 - (c) receive medical care.
49. In accordance with international standards¹⁴ children should be kept separately from adults in order to take into account their needs and vulnerability. When a detained child reaches the age of 18, the person should have the possibility to continue the separate detention. For that purpose, the individual circumstances of the case should be taken into account. The measures foreseen by this Directive do not require, however, the creation of separate detention facilities or prisons for children.

Article 13 – Timely and diligent treatment of cases

50. In proceedings involving children, the urgency principle should be applied to provide a rapid response and protect the best interests of the child. Courts should exercise particular diligence to avoid any risk of adverse consequences on the family and social relations of the child.

Article 14 – Right to protection of privacy

51. The requirement to protect the privacy of children suspected or accused in criminal proceedings is arising from international standards¹⁵. The involvement in criminal proceedings stigmatises the individuals concerned and may have in particular for children a detrimental impact on their chances for reintegration into society and their future professional and social life. The protection of privacy of children involved in criminal proceedings is a critical component of the youth rehabilitation.
52. Children should be judged in the absence of public. In exceptional cases the court may decide that a hearing is held publicly after it has taken due account of the best interests of the child.
53. Moreover, with regard to the best interests of the child and the family, authorities should prevent that information that could lead to their identification is publicly disseminated (e.g. name and the image of the child and family members)

Article 15 – Right of access to court hearings of the holder of parental responsibility

54. In order to ensure proper assistance and support of the child during court hearings, the holder of parental responsibility or another appropriate adult as referred to in Article 5 should be present.

¹⁴ Article 37 UN CRC, Article 13.4 of Beijing Rules, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, point IV.A.6.20.

¹⁵ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, point IV.A.2.6.

Article 16 - Right of children to appear in person at the trial aiming at assessing the question of their guilt

55. If children are not present during the trial, their rights of defence are at stake. The defendants are in such case neither able to give their version of the facts to the Court, nor are they able to present evidence accordingly. They might therefore be found guilty without having had the opportunity to rebut the grounds for such a conviction.
56. The right to be present at trial, or being able to waive such right after having been informed of it, is indispensable for the exercise of the rights of defence.
57. Article 16 provides that Member States must ensure that the right to be present applies to any trial aiming at assessing the question of the guilt of the accused person (both conviction and acquittal decisions) in line with ECHR case-law. The presence of the child at this moment in the criminal proceedings is of particular importance given the consequences that moment could have.

Article 17 –European arrest warrant proceedings

58. This Directive applies to children subject to proceedings pursuant to Framework Decision 2002/584/JHA from the time they are arrested in the executing State. Improving the EAW system is a central tenet of the Commission's third report on implementation of the Council Framework Decision on the EAW¹⁶.
59. The competent authorities in the executing Member States shall apply the rights as foreseen by the current Directive. This will promote mutual trust and mutual recognition by providing a minimum level of protection to children in the executing Member State as exists in the issuing Member State.
60. Proceedings for the execution of the EAW will not be delayed since this Article is without prejudice to the time-limits set out in the Framework decision.
61. With regard to the best interests of the child and in accordance with international rules that any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time (*see above, Article 10*), the competent authorities shall take all measures to limit the duration of the deprivation of liberty of children covered by such a EAW.

Article 18 – Right to legal aid

62. Although this Directive does not seek to regulate the issue of legal aid, it requires Member States to ensure that their domestic legal aid regimes guarantee the effective exercise of the right of access to a lawyer.
63. The right of suspected or accused children to have provisional legal aid when deprived of liberty or when subject to European arrest warrant proceedings will be covered by the [proposal for a] Directive on the right to provisional legal aid for suspects or accused persons in criminal proceedings that are deprived of liberty and for requested persons in European arrest warrant proceedings and by the [proposal for a] Commission Recommendation on the right to legal aid for suspects and accused persons in criminal proceedings. In the latter, the situation of children is specifically referred to as regards the 'means test' and the 'merits test'¹⁷.

¹⁶ Report from the Commission on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – COM(2011) 175, 11.4.2011.

¹⁷ See points 6 and 12.

Article 19 – Training

64. Judicial authorities, law enforcement authorities and prison staff dealing with cases involving children should be aware of the particular needs of children of different age groups and should take care that the proceedings are adapted to them. For that purpose they need appropriate training with regard to children's legal rights and the need of children of different age groups, child development and child psychology, pedagogical skills, communicating with children at all ages and stages of development and on children in situations of particular vulnerability.¹⁸ Also defense lawyers specialising in children's cases should benefit from such training.
65. Those providing children with support or restorative justice services should also be trained to an appropriate level to ensure that children are treated in a respectful, impartial and professional manner.

Article 20 – Data collection

66. In order to monitor and evaluate the effectiveness and efficiency of this Directive, there is a need for collection of data by the Member States with regard to the exercise of the rights set out in this Directive. Relevant data include data recorded by the judicial authorities and by law enforcement authorities and, as far as possible, administrative data compiled by healthcare and social welfare services.

Article 21 – Costs

67. The costs resulting from the application of this Directive with regard to the assessment of the child, the medical examination and audio-visual recording are to be met by Member States, even in the event of conviction of the suspected or accused child.

Article 22 – Non-regression clause

68. This Article ensures that setting common minimum standards in accordance with this Directive does not have the effect of lowering standards in certain Member States and that the standards set in the Charter and in the ECHR are maintained. Since this Directive provides for minimum rules, Member States remain free to set standards higher than those agreed in this Directive.

Article 23 – Transposition

69. Member States must implement the Directive [24 months after its publication] and, by the same date, transmit the text of the provisions transposing it into national law to the Commission.
70. Member States should notify their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments.

Article 24 – Entry into force

71. This Article provides that the Directive will enter into force on the twentieth day following its publication in the *Official Journal of the European Union*.

¹⁸ This flows also from international standards such as Article 40(1) and (3) UNCRC; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, point 63.

4. SUBSIDIARITY PRINCIPLE

72. The objective of the proposal cannot be sufficiently achieved by Member States alone, since the aim of the proposal is to promote mutual trust between them and it is therefore important to agree on common minimum standards on procedural safeguards for children suspected or accused in criminal proceedings across the European Union. The need for EU action and explanations on why the EU is better placed to take action on special safeguards for children confronted to criminal proceedings is further developed in the Impact Assessment accompanying the proposal for a Directive.

5. PROPORTIONALITY PRINCIPLE

73. The proposal complies with the proportionality principle in that it does not go beyond the minimum required in order to achieve the stated objective at European level and what is necessary for that purpose. Measures aimed at achieving more harmonisation of standards were discarded, such as the age of criminal responsibility, establishment of youth courts, rules on diversion from justice systems, which would have led to substantial changes of criminal justice systems in Member States. For reasons of proportionality of EU action, the Directive does not therefore propose a comprehensive set of rules for children in criminal proceedings. It only sets up minimum rules that are considered indispensable to meet the objective of achieving an effective standard of protection for children and to enhance mutual trust and judicial cooperation.

6. BUDGETARY IMPLICATIONS

74. This proposal has no budgetary implications for the budget of the EU.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on procedural safeguards for children suspected or accused in criminal proceedings

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 82(2)(b) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee¹⁹,

Having regard to the opinion of the Committee of the Regions²⁰,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The purpose of this Directive is to establish procedural safeguards to ensure that children who are suspected or accused in criminal proceedings are able to understand and follow those proceedings, to enable such children to exercise their right to a fair trial and to prevent re-offending by children and foster their social integration.
- (2) By establishing minimum rules on the protection of procedural rights of suspects or accused persons, this Directive should strengthen the trust of Member States in the criminal justice systems of other Member States and can thus help improve mutual recognition of decisions in criminal matters. Such common minimum rules should also remove obstacles to the free movement of citizens throughout the territory of the Member States.
- (3) Although the Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.
- (4) The Stockholm Programme²¹ put a strong focus on the strengthening of the rights of individuals in criminal proceedings. In its point 2.4, the European Council invited the Commission to put forward proposals setting out a step by step approach²² to strengthening the rights of suspects or accused persons.

¹⁹ OJ C , , p. .

²⁰ OJ C , , p. .

²¹ OJ C 115, 4.5.2010, p.1.

²² OJ C 291, 4.12.2009, p.1.

- (5) Three measures have been adopted to date, namely Directive 2010/64/EU of the European Parliament and of the Council²³, Directive 2012/13/EU of the European Parliament and of the Council²⁴ and Directive 2013/48/EU of the European Parliament and the Council²⁵.
- (6) This Directive promotes the rights of the child, taking into account the Guidelines of the Council of Europe on child-friendly justice.
- (7) Children who are suspects or accused in criminal cases should be given special attention in order to preserve their potential for development and reintegration into society.
- (8) This Directive should apply to children meaning persons under the age of 18 at the time when they become suspected or accused of having committed an offence, regardless of their age during the criminal proceedings until the final judgment.
- (9) This Directive should also apply in respect of offences which have been committed after the age of 18 years by the same suspect or accused person and which are jointly investigated and prosecuted as they are inextricably linked to offences where criminal proceedings started against that person before the age of 18.
- (10) When, at the time a person becomes a suspect or accused person in criminal proceedings, that person is above the age of 18, Member States are encouraged to apply the procedural safeguards foreseen by this Directive until this person reaches the age of 21.
- (11) Member States should determine the age of children on the basis of the children's own statements, checks of their civil status, documentary research, other evidence and, if such evidence is unavailable or inconclusive, on the basis of a medical examination.
- (12) This Directive should be implemented taking into account the provisions of Directive 2012/13/EU and Directive 2013/48/EU. Information with regard to minor offences should be provided under the same conditions as provided for by Article 2(2) of Directive 2012/13/EU. However, this Directive provides further complementary safeguards with regard to information to be provided to the holder of parental responsibility and mandatory access to a lawyer in order to take into account the specific needs of children.
- (13) If a child is deprived of liberty, the Letter of Rights provided to the child pursuant to Article 4 of Directive 2012/13/EU should include clear information on the child's rights under this Directive.
- (14) The term "holder of parental responsibility" means any person having parental responsibility over a child as defined in Council Regulation (EC) 2201/2003²⁶. Parental responsibility means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of

²³ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p.1).

²⁴ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p.1).

²⁵ Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty, and to communicate with third persons and with consular authorities (OJ L 294, 6.11.2013, p. 1).

²⁶ Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OJ L 338, 23.12.2003, p. 1).

law or by an agreement having legal effect, including rights of custody and rights of access.

- (15) Children should have the right to have the holder of parental responsibility informed about applicable procedural rights, either orally or in writing. This information should be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of defence of the child. Where it would be contrary to the best interests of the child to inform the holder of parental responsibility of those rights, another appropriate adult should be informed.
- (16) Children should not be able to waive their right of access to a lawyer because they are not able to fully understand and follow criminal proceedings. Therefore, the presence or assistance of a lawyer should be mandatory for children.
- (17) In some Member States an authority other than a public prosecutor and a court having jurisdiction in criminal matters has competence for imposing penalties other than deprivation of liberty in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require the competent authorities to ensure mandatory access to a lawyer. Where the law of a Member State provides for the imposition of a penalty regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, mandatory access to a lawyer should therefore apply only to the proceedings before that court following such an appeal or referral. In some Member States proceedings involving children may be dealt with by public prosecutors who may impose penalties. In such proceedings children should have mandatory access to a lawyer.
- (18) In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. It would be disproportionate to require the competent authorities to ensure mandatory access to a lawyer in respect of such minor offences. Where the law of a Member State provides that deprivation of liberty cannot be imposed as a penalty in respect of minor offences, the right to mandatory access to a lawyer should therefore apply only to proceedings before a court having jurisdiction in criminal matters.
- (19) Children who are suspected or accused in criminal proceedings should have the right to an individual assessment to identify their specific needs in terms of protection, education, formation and social integration, to determine if and to what extent they would need special measures during the criminal proceedings and to determine the extent of their criminal responsibility and the adequacy of a penalty or educative measure for them.
- (20) In order to ensure the personal integrity of a child who is arrested or detained, the child should have access to a medical examination. The medical examination should be carried out by a physician.
- (21) In order to ensure sufficient protection of children who are not always able to understand the content of interviews to which they are subject, to avoid any challenge of the content of an interview and thereby undue repetition of questioning, questioning of children should be audio-visually recorded. This does not include questioning necessary to identify the child.

- (22) However, it would be disproportionate to require the competent authorities to ensure audio-visual recording in all circumstances. Due account should be taken of the complexity of the case, the seriousness of the alleged offence and the potential penalty that can be incurred. If a child is deprived of liberty before conviction, any questioning of the child should be audio-visually recorded.
- (23) Such audio-visual records should be accessible only to the judicial authorities and the parties to the proceedings. Moreover, the questioning of children should be carried out in a manner that takes into account their age and level of maturity.
- (24) When deciding the issue of legal aid, Member States should aim at having rules which guarantee the effective exercise of the right to access to a lawyer for children.
- (25) Children are in a particularly vulnerable position in relation to detention. Special efforts should be undertaken to avoid deprivation of liberty of children given the inherent risks for their physical, mental and social development. The competent authorities should consider alternative measures and impose such measures whenever this is in the best interests of the child. This may include the obligation to report to a competent authority, a restriction on contact with specific persons, a requirement to undergo therapeutic treatment or treatment for addiction and participation in educational measures.
- (26) When deprivation of liberty is imposed on children, they should benefit from special protection measures. In particular they should be held separately from adults unless it is considered in the child's best interest not to do so, in accordance with Article 37(c) of the United Nations Convention of the Rights of the Child. When a detained child reaches the age of 18 years, there should be the possibility to continue the separate detention where warranted, taking into account the individual circumstances of the case. Particular attention should be paid to the way detained children are treated given their inherent vulnerability. Children should have access to educational facilities according to their needs.
- (27) Professionals in direct contact with children should take into account the particular needs of children of different age groups and should take care that the proceedings are adapted to them. For that purpose, they should be specially trained in dealing with children.
- (28) Children should be judged in the absence of the public in order to protect their privacy and to facilitate their re-integration into society. In exceptional cases the court may decide that a hearing should be held publicly after it has taken due account of the best interests of the child.
- (29) In order to ensure appropriate assistance and support of children, the holder of parental responsibility or another appropriate adult should have access to the court hearings involving the suspected or accused child.
- (30) The right of an accused person to appear in person at the trial is based on the right to a fair trial provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights.
- (31) The rights provided for by this Directive should apply to children subject to European arrest warrant proceedings from the time they are arrested in the executing Member State.

- (32) Any individual assessment, medical examination and audio-visual recording provided for by this Directive should be carried out free of charge for the child.
- (33) In order to monitor and evaluate the effectiveness of this Directive, there is a need for collection of data by the Member States with regard to the implementation of the rights set out in this Directive. Relevant data include data recorded by the judicial authorities and by law enforcement authorities and, as far as possible, administrative data compiled by healthcare and social welfare services as regards the rights set out in this Directive, in particular in relation to the number of children given access to a lawyer, the number of individual assessments carried out, the number of interviews audio-visually recorded and the number of children deprived of liberty.
- (34) This Directive upholds the fundamental rights and principles as recognised by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of defence. This Directive should be implemented in accordance with those rights and principles.
- (35) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter of Fundamental Rights of the European Union or the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted in the case law of the Court of Justice of the European Union and the European Court of Human Rights.
- (36) Since the objectives of this Directive, namely setting common minimum standards on procedural safeguards for children suspected or accused in criminal proceedings, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve these objectives.
- (37) [In accordance with Articles 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to participate in the adoption and application of this Directive] OR [In accordance with Articles 1 and 2 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application]²⁷;

²⁷ The final wording of this recital in the Directive will depend on the position of the United Kingdom and Ireland taken in accordance with the provisions of Protocol No 21.

- (38) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application.
- (39) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents²⁸, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

²⁸ OJ C 369, 17.12.2011, p. 14.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive lays down minimum rules concerning certain rights of suspects or accused persons in criminal proceedings who are children and of children subject to a surrender procedure pursuant to Council Framework Decision 2002/584/JHA²⁹ (“European arrest warrant proceedings”).

Article 2

Scope

1. This Directive applies to children subject to criminal proceedings from the time when they become suspected or accused of having committed an offence and until the conclusion of the criminal proceedings.
2. This Directive applies to children subject to European arrest warrant proceedings from the time of their arrest in the executing Member State.
3. This Directive applies to suspects or accused persons subject to criminal proceedings referred to in paragraph 1, and to persons subject to European arrest warrant proceedings referred to in paragraph 2, who are no longer children in the course of those proceedings, which started when they were children.
4. This Directive also applies to children other than suspected or accused who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons.
5. This Directive does not affect national rules determining the age of criminal responsibility.

Article 3

Definition

For the purposes of this Directive the term "child" means a person below the age of 18 years.

Article 4

Right to information of children

1. Member States shall ensure that children are informed promptly about their rights in accordance with Directive 2012/13/EU. They shall also be informed about the following rights within the same scope as Directive 2012/13/EU:

²⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p.1).

- (1) their right to have the holders of parental responsibility informed as provided for in Article 5;
 - (2) their right to a lawyer, as provided for in Article 6;
 - (3) their right to an individual assessment, as provided for in Article 7;
 - (4) their right to a medical examination, as provided for in Article 8;
 - (5) their right to liberty and the right to specific treatment in detention, as provided for in Articles 10 and 12;
 - (6) their right to protection of privacy, as provided for in Article 14;
 - (7) their right that the holders of parental responsibility have access to the court hearings, as provided for in Article 15;
 - (8) their right to appear in person at the trial, as provided for in Article 16;
 - (9) their right to legal aid, as provided for in Article 18.
2. Member States shall ensure that, where children are deprived of liberty the Letter of Rights given to them pursuant to Directive 2012/13/EU includes their rights under this Directive.

Article 5

Right of the child to have the holder of parental responsibility informed

Member States shall ensure that the holder of parental responsibility of the child or, where that would be contrary to the best interests of the child, another appropriate adult, is provided with the information that the child receives in accordance with Article 4.

Article 6

Right to a mandatory access to a lawyer

1. Member States shall ensure that children are assisted by a lawyer throughout the criminal proceedings in accordance with Directive 2013/48/EU. The right to access to a lawyer cannot be waived.
2. The right to access to a lawyer shall also apply to criminal proceedings that may lead to the final dismissal of the case by the prosecutor after the child has complied with certain conditions.

Article 7

Right to an individual assessment

1. Member States shall ensure that the specific needs of children concerning protection, education, training and social integration are taken into account.
2. For that purpose children shall be individually assessed. The assessment shall take particular account of the personality and maturity of the child and their economic and social background.

3. The individual assessment shall take place at an appropriate stage of the proceedings and in any event before indictment.
4. The extent and detail of the individual assessment may vary depending on the circumstances of the case, the seriousness of the alleged offence and the penalty which will be imposed if the child is found guilty of the alleged offence, whether or not the child has previously come to the attention of competent authorities in the context of criminal proceedings.
5. Individual assessments shall be carried out with the close involvement of the child.
6. If the elements that form the basis of the individual assessment change significantly, Member States shall ensure that the individual assessment is updated throughout the criminal proceedings.
7. Member States may derogate from the obligation in paragraph 1 when it is not proportionate to carry out an individual assessment taking into account the circumstances of the case and whether or not the child has previously come to the attention of Member State authorities in the context of criminal proceedings.

Article 8

Right to medical examination

1. In case of deprivation of liberty of a child, Member States shall ensure that the child has access to a medical examination with a view, in particular, to assessing the general mental and physical condition of the child with the aim to determine the capacity of the child to face questioning or other investigative or evidence gathering acts or any measures taken or envisaged against the child.
2. The following persons shall have the right to ask for a medical examination:
 - (a) the child,
 - (b) the holder of the parental responsibility or the appropriate adult referred to in Article 5;
 - (c) the child's lawyer.
3. The conclusion of the medical examination shall be recorded in writing.
4. Member States shall ensure that the medical examination is repeated where the circumstances so require.

Article 9

Questioning of children

1. Member States shall ensure that any questioning of children by police or other law enforcement or judicial authority carried out prior to the indictment is audio-visually recorded, unless it is not proportionate taking into account the complexity of the case, the seriousness of the alleged offence and the potential penalty that can be incurred.
2. In any event, the questioning of children shall be audio-visually recorded where the child is deprived of liberty, irrespective of the stage of the criminal proceedings.

3. Paragraph 1 is without prejudice to the possibility to ask questions for the purpose of personal identification of the child without such audio-visual recording.

Article 10

Right to liberty

1. Member States shall ensure that children are deprived of liberty before their conviction only as a measure of last resort and for the shortest appropriate period of time. Due account shall be taken of the age and individual situation of the child.
2. Member States shall ensure that any deprivation of liberty of children before their conviction is subject to a periodic review by a court.

Article 11

Alternative measures

1. Member States shall ensure that, where the conditions for deprivation of liberty are fulfilled, the competent authorities have recourse to alternative measures, wherever possible.
2. The alternative measures may include:
 - (a) an obligation for the child to reside in a specific place,
 - (b) restrictions of contact with specific persons,
 - (c) reporting obligations to the competent authorities,
 - (d) undergoing of therapeutic treatment or treatment for addiction,
 - (e) participation in educational measures.

Article 12

Right to specific treatment in case of deprivation of liberty

1. Member States shall ensure that children are detained separately from adults, unless it is considered in the child's best interest not to do so. When a detained child reaches the age of 18 years, Member States shall provide the possibility to continue the separate detention where warranted, taking into account the individual circumstances of the detained person.
2. Member States shall, during the period of deprivation of liberty, take all appropriate measures to:
 - (a) ensure and preserve the health and physical development of the child,
 - (b) ensure the right to education and training of the child,
 - (c) ensure effective and regular exercise of the right to family life including the maintenance of family ties,
 - (d) foster the development of the child and its future integration into society.

Article 13

Timely and diligent treatment of cases

1. Member States shall ensure that criminal proceedings involving children are treated as a matter of urgency and with due diligence.
2. Member States shall ensure that children are treated in a manner appropriate to their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have.

Article 14

Right to protection of privacy

1. Member States shall ensure that criminal proceedings involving children take place in the absence of the public, unless, after due consideration of the best interest of the child, exceptional circumstances justify a derogation.
2. Member States shall ensure that the competent authorities take appropriate measures in criminal proceedings to protect the privacy of the child and family members, including their names and images. Member States shall ensure that the competent authorities do not publicly disseminate information that could lead to the identification of the child.
3. Member States shall ensure that the records referred to in Article 9(1) are not publicly disseminated.

Article 15

Right of access to court hearings of the holder of parental responsibility

Member States shall ensure that the holder of parental responsibility or another appropriate adult as referred to in Article 5 have access to the court hearings involving the child.

Article 16

Right of children to appear in person at the trial aiming at assessing the question of their guilt

1. Member States shall ensure that children are present at the trial.
2. Member States shall ensure that where children were not present at the trial resulting in a decision on their guilt, they shall have the right to a procedure in which they have the right to participate and which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision to be reversed.

Article 17

European Arrest Warrant proceedings

1. Member States shall ensure that a requested child has the rights referred to in Articles 4, 5, 6, 8, 10, 11, 12, 14, 15 and 18 in the executing Member State upon arrest pursuant to European arrest warrant proceedings.
2. Without prejudice to Article 12 of the Framework Decision 2002/584/JHA, the executing authorities shall take all measures to limit the duration of the deprivation of liberty of children subject to European arrest warrant proceedings.

Article 18

Right to legal aid

Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to access to a lawyer as referred to in Article 6.

Article 19

Training

1. Member States shall ensure that judicial and law enforcement authorities and prison staff who deal with cases involving children are professionals specialising in the field of criminal proceedings involving children. They shall receive particular training with regard to children's legal rights, appropriate interviewing techniques, child psychology, communication in a language adapted to the child and pedagogical skills.
2. Member States shall ensure that lawyers defending children also receive such training.
3. Through their public services or by funding child support organisations, Member States shall encourage initiatives enabling those providing children with support and restorative justice services to receive adequate training to a level appropriate to their contact with children and observe professional standards to ensure such services are provided in an impartial, respectful and professional manner.

Article 20

Data collection

1. Member States shall, by [...] and every three years thereafter, send to the Commission data showing how the rights set out in this Directive have been implemented.
2. Such data shall include in particular the number of children given access to a lawyer, the number of individual assessments carried out, the number of interviews audio-visually recorded and the number of children deprived of liberty.

Article 21

Costs

Member States shall meet the costs resulting from the application of Articles 7, 8 and 9 irrespective of the outcome of the proceedings.

Article 22

Non-regression clause

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law, in particular the UN Convention on the Rights of the Child, or the law of any Member State which provides a higher level of protection.

Article 23

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after its publication]. They shall immediately inform the Commission thereof
2. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.
3. Member States shall communicate to the Commission the text of the measures of national law which they adopt in the field covered by this Directive.

Article 24

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 25

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President