

White Paper on the EU Directive 2016/800

on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

Key aspects, priorities and challenges for implementation in the EU Member States.



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[1] INTRODUCTION

In May 2016 the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings (hereinafter Directive on procedural safeguards for children or the Directive) has been adopted by the European parliament and the Council of the European Union¹. The Directive is legally binding for EU Member States and it should be implemented in national laws and regulations by June 2019². The Directive is part of the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings³ and it is one of six directives coming into force. The aim of the Directive is to ensure effective protection of children in conflict with the law of their rights, throughout the EU. Mutual recognition of children's (procedural) rights and safeguards and trust among Member States in ensuring these rights are important underpinnings of the Directive. Moreover, the Directive builds upon existing international and European legal instruments, such as the UN Convention on the Rights of the Child (UNCRC)⁴, the Charter of Fundamental Rights of the European Union⁵, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the European Rules for juvenile offenders subject to sanctions or measures⁶ and the Guidelines on Child-friendly Justice⁷.

In this White Paper, the Directive will be analysed in order to identify key issues for its effective implementation. This paper is drafted on the basis of the discussions that took place at the 5th Meeting of the European Council for Juvenile Justice (ECJJ) that took place in February 2017 in Valencia⁸. At this meeting experts of the Council were consulted on the implementation of the Directive in national laws and practice. In paragraph 2, the context of EU law will be sketched out, with a particular focus on children's rights. In paragraph 3, the development of the Directive and its drafting process will be touched upon, before turning to the content of the Directive. In paragraph 4, four key issues are identified and analysed in more detail in order to come to a better understanding on how to implement these particular rights in practice.

1 EUROPEAN UNION. Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. *Official Journal of the European Union*, L 132, 21.5.2016, p. 1-20.

2 With the exception of the UK, Ireland and Denmark which are not taking part in the adoption of the Directive and are not bound by it or subject to its application. See in that regard (Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 69-70).

3 EUROPEAN UNION. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (2009/C 295/01). *Official Journal of the European Union*, C 295, 4.12.2009, p. 1-3.

4 UN GENERAL ASSEMBLY. *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

5 EUROPEAN UNION. Charter of Fundamental Rights of the European Union. *Official Journal of the European Union*, C 326, 26.10.2012, p. 391-407.

6 COUNCIL OF EUROPE, COMMITTEE OF MINISTERS. *Recommendation CM/Rec (2008)11 of the Committee of Ministers to Member States on the European Rules for juvenile offenders subject to sanctions or measures*, 5 November 2008. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d2716

7 COUNCIL OF EUROPE. *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* [online]. Strasbourg: Council of Europe Publishing, 2011. ISBN 978-92-871-7274-7. Available at: <https://rm.coe.int/16804b2cf3>

8 2017-2019 The Child-Friendly Justice Momentum in Europe: Effective child participation in the context of the implementation of the new Directive on procedural safeguards for children suspected or accused in criminal proceedings. In the *5th Meeting of the European Council for Juvenile Justice*. Valencia, Spain: 15-17 February, 2017.

[2] CHILDREN'S RIGHTS IN THE CONTEXT OF EU LAW

Before turning to a substantive discussion of the Directive, in this part the context in which the Directive must be regarded is addressed, namely the context of the European Union and its legislative powers. The development of children's rights at EU level in general and the implementation of children's rights in the legislative and policy initiatives of the EU is discussed.

Since recently, children's rights are addressed structurally and in a coordinated fashion⁹ in EU legislation and policymaking, whereas in the past it took place in a piecemeal fashion. The first important step the EU took in embracing children's rights is the introduction of the Charter of Fundamental Rights of the European Union [EU Charter] in 2000¹⁰. The Charter contains specific provisions addressing children's rights, most notably article 24. This provision grants children the right to specific protection and care as is necessary for their well-being, the right to express their views freely (art. 24(1)), the right to have their best interests taken as a primary consideration (art. 24(2)) and the right to maintain a personal relationship and direct contact with parents (art. 24(3)). Other provisions relating to children include the right to receive free compulsory education (art. 14(2)), a prohibition of discrimination on the basis of age (art. 21) and a prohibition of exploitative child labour (art. 32). It can be noted that these provisions are heavily inspired by the UNCRC (see articles 2, 3, 9, 12, 28 and 32) and the ECHR¹¹.

Article 24 – The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Initially, the Charter was merely a declaration of fundamental rights and principles and did not have binding force. The Lisbon Treaty¹² addressed this limitation by ensuring that the

9 EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA). *Handbook on European law relating to the rights of the child*. Luxembourg: Publications Office of the European Union, 2015.

10 Charter of Fundamental Rights of the European Union was proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission. EUROPEAN UNION, C 326, 26 October 2012, *op. cit.*

11 STALFORD, H. *Children and the European Union: Rights, Welfare and Accountability*. Oxford: Hart Publishing, 2012.

12 The Treaty of Lisbon made institutional, procedural and constitutional changes to the EU by amending the Treaty of the European

rights, freedoms and principles set out in the Charter shall have the same legal value as the Treaties (art. 6(1) Treaty on European Union [TEU]). As a consequence, the children's rights provisions in the Charter became more visible and legally binding for the EU and its Member States. When failing to comply with the standards of the Charter, including those referring to children's rights, Member States and EU institutions can directly be held accountable¹³.

Both before and after the entry into force of the Lisbon Treaty on a policy level several initiatives have been taken by the EU to strengthen its children's rights approach. In 2006, the European Commission adopted its first action plan on children's rights in the Communication *Towards an EU Strategy on the Rights of the Child*¹⁴. In 2007, the Council of the European Union adopted the *EU Guidelines for the promotion and protection of the rights of the Child*¹⁵ and in 2008 another Communication was adopted by the European Commission: *A special place for children in EU external action*¹⁶. In 2011, the EU Agenda for the rights of the child was adopted by the European Commission, which sets out key priorities for the development and implementation of children's rights law and policy across EU Member States¹⁷. These documents are not legally binding, however, 'they establish the blueprint for the EU's normative and methodological approach to children's rights law – a blueprint that is firmly associated with the UNCRC'¹⁸. In the 2011 Agenda for the rights of the child it is stated that the UNCRC's provisions and principles must guide EU policies and actions relating to children and their rights¹⁹.

Following these developments several EU directives have been adopted, incorporating provisions relating to children. For example, the EU Victims Directive²⁰ establishes minimum standards for the protection of vulnerable victims involved in various justice processes,

Union and the Treaty on the Functioning of the European Union (formerly the European Community Treaty). See: EUROPEAN UNION. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community. *Official Journal of the European Union*, C 306, 17.12.2007, p. 1-271.

13 STALFORD, H. Journeys to European Justice: (How) Can the EU Enable Children to Enforce their Rights? In: Ingi IUSMEN & Helen STALFORD (eds.). *The EU as a Children's Rights Actor. Law, Policy and Structural Dimension*. Oplade-Berlin-Toronto: Barbara Budrich Publishers, 2016, 19-47. p. 32. ISBN 978-3-8474-0193-3; STALFORD, H., & SCHUURMAN, M. Are We There Yet? The Impact of the Lisbon Treaty on the EU Children's Rights Agenda. *The International Journal of Children's Rights*, 2011, 19, 3, 381-403. p. 397. ISSN 0927-5568.

14 EUROPEAN COMMISSION. *Communication from the Commission, Towards an EU Strategy on the Rights of the Child*, COM(2006) 367 final, 4.7.2006, 1-10.

15 *EU Guidelines for the Promotion and Protection of the Rights of the Child*, approved by the Council on 10 December 2007 (not published in the Official Journal).

16 EUROPEAN COMMISSION. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Special Place for Children in EU External Action*, COM(2008) 55 final, 5.2.2008, 1-8.

17 FRA, 2015, *op. cit.*; STALFORD, 2016, *op. cit.*

18 FRA, 2015, *op. cit.*, p. 22.

19 EUROPEAN COMMISSION. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An EU Agenda for the Rights of the Child*, COM(2011) 60 final, 15.2.2011, 1-14, p. 3.

20 EUROPEAN UNION. Directive 2012/29/UE of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victim of crime, and replacing Council Framework Decision 2001/220/JHA. *Official Journal of the European Union*, L315, 14.11.2012, p. 57- 73.

including children. Both the EU Trafficking Directive²¹ and the EU Sexual Exploitation Directive²² aim to harmonise definitions (respectively of trafficking and sexual offences) and ensure that legal assistance and support are guaranteed for children throughout the justice process²³.

[3] KEY ASPECTS OF THE DIRECTIVE

The children's rights' agenda has yielded several legal obligations pertaining to the rights, support and protection of children. The Directive on procedural safeguards for children is one of the latest EU laws that specifically targets children and their rights. This Directive can be seen as part of the area of cooperation in criminal matters, in which the EU has extensive legislative powers²⁴. In this paragraph, the development of this Directive will be discussed, having regard for the drafting process and the content of the Directive.

[3.1] DRAFTING PROCESS

Under the Swedish Presidency of the Council of the European Union in 2009, the Stockholm Programme was prepared. This programme put a strong focus on the strengthening of the rights of individuals in criminal proceedings²⁵. On 30 November 2009, the European Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings²⁶. A month later, the European Council welcomed the Roadmap and made it part of the Stockholm programme. The Roadmap provides a step-by-step approach towards a complete package of procedural rights that suspected or accused persons have in criminal proceedings.

The aim of the Roadmap is to harmonise standards for procedural rights across the EU, which are necessary in the context of judicial cooperation, and to strengthen the trust amongst Member States in each other's criminal justice systems and, thus, to improve

21 EUROPEAN UNION. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. *Official Journal of the European Union*, L101, 15.4.2011, p. 1-11.

22 EUROPEAN UNION. Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. *Official Journal of the European Union*, L26, 28.1.2012, p. 1-21.

23 STALFORD, 2016, *op. cit.*, p. 29-30.

24 FRA, 2015, *op. cit.*, p. 22.

25 In the aftermath of the 9/11 terror attacks in 2001, the EU Member States committed to increase judicial cooperation between each other to ensure that they were tackling cross-border crime effectively. Therefore, the European Council adopted inter alia the European Arrest Warrant. This measure allows Member States to extradite wanted persons arrested in another Member State. However, very little attention was spent on the fundamental rights of persons who had been extradited. This resulted in many cases where the European Arrest Warrant was erroneously applied. As a result, the Stockholm programme was developed to commit Member States to restoring a proper balance between security and fundamental rights.

26 Resolution of the Council 2009/C 295/01, 30 November 2009, *op. cit.*

mutual recognition of decisions in criminal matters²⁷. Besides, common minimum rules should also remove obstacles to the free movement of citizens throughout the territory of Member States²⁸. Moreover, according to the Commission the right to fair trial of children and other vulnerable persons was not sufficiently guaranteed in the EU, because of the lack of overall protection²⁹.

To substantiate its proposal, the Commission carried out an Impact Assessment³⁰. This Assessment essentially sets out the institutional thought process which led to the proposal of the Directive in 2013. According to the Commission, there were shortcomings with regard to the manner in which the principles and minimum standards stemming from the EU Charter, the European Convention on Human Rights and other international legal instruments had been applied. This may undermine mutual trust between judicial authorities. As a consequence, mutual recognition of judgements, judicial decisions and police and judicial cooperation in criminal matters may be affected³¹. In this Impact Assessment, three general problems and three specific problems were identified of which it was hoped that a directive could address. The general problems that were identified are the 1) insufficient protection of fair trial rights of children and vulnerable adults; 2) the absence of an overarching protection of children and vulnerable adults by the measures already adopted according to the Stockholm Programme; and 3) insufficient protection of children and vulnerable adults affecting mutual trust and hampering the smooth functioning of mutual recognition³². The specific problems that were identified are: 1) the vulnerability of suspected or accused persons is not sufficiently assessed from the very beginning of criminal proceedings; 2) vulnerable persons, in particular children, are not sufficiently assisted throughout the criminal proceedings and their access to a lawyer is not ensured; and 3) vulnerable persons, in particular children, lack particular safeguards taking into account their special needs at the various stages of the proceedings.

In recent years, on the basis of the Roadmap, all five proposed directives have been consecutively adopted. These concern the Directive on the right to interpretation and translation in criminal proceedings³³, the Directive on the right to information in criminal proceedings³⁴, the Directive on the right of access to a lawyer in criminal proceedings and

27 KEMPEN, M.A.H., & UIT BEIJERSE, J. De EU-Richtlijn procedurele waarborgen minderjarige verdachten en het Nederlandse jeugdstrafprocesrecht. *Nederlands tijdschrift voor Europees Recht*, 2016, 7, 230-236. See also Resolution of the Council 2009/C 295/01, 30 November 2009, *op. cit.*

28 Resolution of the Council 2009/C 295/01, 30 November 2009, *op. cit.*

29 KEMPEN& UIT BEIJERSE, 2016, *op. cit.*

30 EUROPEAN COMMISSION. *Commission staff working document of the impact assessment Accompanying 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, 27.11.2013, p.1-144.

31 *Idem.*

32 *Idem.*

33 EUROPEAN COMMISSION. 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. *Official Journal of the European Union*, L 280, 26.10.2010, p.1-7.

34 EUROPEAN COMMISSION. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. *Official Journal of the European Union*, L 142, 1.6.2012, p.1-10.

European arrest warrant proceedings³⁵ and the Directive of the right to be present at the trial in criminal proceedings³⁶.

On 27 November 2013, the European Commission submitted the Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings. This proposal was generally welcomed by major stakeholders³⁷. Although the text was subjected to certain adjustments, almost all Member States in the Council expressed positive reactions³⁸. In June 2014 the Council reached a general agreement on the text³⁹. The negotiations between the European Parliament and the Council on the Directive started in February 2015⁴⁰. The Commission assisted as a 'mediator' in these negotiations. The negotiations were not straightforward: first less controversial issues, such as the right to information, individual assessment and medical examination, were negotiated⁴¹. The right to access to a lawyer was the most difficult issue to negotiate. Some Member States were concerned that this right might encompass some risks⁴². Member States wanted to be sure that the provisions on the right to access to a lawyer would be fully agreeable before showing flexibility on the other issues. One article after the other was negotiated in order to make progress. After the legal-linguistic examination of the text, the final directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings was adopted in May 2016. By 11 June 2019 Member States will have implemented the Directive into their legal orders⁴³.

The Council underlined that the Roadmap is designed to operate as a whole and that only when all its components are implemented will the benefits be experienced in full⁴⁴. The present Directive promotes the rights of children suspected or accused of a criminal offence, taking into account the Guidelines on Child-friendly Justice of the Council of

35 EUROPEAN COMMISSION. 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 liberty. *Official Journal of the European Union*, L 294, 6.11.2013, p.1-12.

36 EUROPEAN COMMISSION. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. *Official Journal of the European Union*, L 65, 11.3.2016. p. 1-11.

37 CRAS, E. The Directive on Procedural Safeguards for Children who Are Suspects or Accused Persons in Criminal Proceedings. Genesis and Descriptive Comments Relating to Selected Articles. In U. SIEBER. *Eucrim 2016/2*. Germany: Max Planck Society for the Advancement of Science, 2016, 109-120.

38 *Idem*.

39 *Idem*. See also: CHILDREN'S RIGHTS ALLIANCE FOR ENGLAND. *State of Children's Rights in England. Review of Government action on United Nations' recommendations for strengthening children's rights in the UK*. London: CRAE, 2014. Available at: http://www.crae.org.uk/media/75135/SOCR_2014_REPORT_WEB.pdf.

40 In application of Art. 294 TFEU. EUROPEAN UNION. Treaty on the Functioning of the European Union. *Official Journal of the European Union*, C 326, 26.10.2012, p.47-390; see also CRAS, 2016, *op. cit.*

41 CRAS, 2016, *op. cit.*

42 *Idem*.

43 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 21.

44 *Idem*.

Europe⁴⁵. The Directive also forms part of the above mentioned *2011 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 contributed⁴⁶. Making justice systems in Europe more child-friendly is defined in the Agenda as a key priority of the European Commission⁴⁷.

[3.2] OBJECTIVES OF THE DIRECTIVE

The Commission pursued two goals with the proposed Directive⁴⁸. One goal was aimed at ensuring a more homogeneous protection of children's rights within the EU in view of the improvement of mutual recognition and judicial cooperation. The second goal was to promote greater protection of the rights of children in criminal proceedings, especially during the phases where children are more exposed to risks of harm, undue suffering or harmful consequences of the outcome of their case⁴⁹. The Directive should ensure that children understand their criminal proceedings and that they can exercise their right to a fair trial.

The Directive aims to promote the rights of children, to promote the social integration of children and to strengthen trust between EU Member States in relation to their criminal justice systems⁵⁰. Although children already benefit from the international and European human rights guarantees available to adults, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States⁵¹. Moreover, children require special assistance and additional safeguards to address their particular vulnerabilities and needs⁵².

The Directive does provide herein by covering some of the most significant rights of children in conflict with the law and it includes provisions concerning the sensitive initial stages in the criminal proceedings, in which children are particularly vulnerable. In the proposal for the Directive it is explained that the Directive was intended to build on the rights set out in the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted in the case law

45 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 7.

46 *Idem.*

47 COM(2011) 60 final, 15 February 2011, *op. cit.* See also COUNCIL OF EUROPE, 2011, *op. cit.*

48 *Idem.*

49 DE VOCHT et al. Procedural Safeguards for Juvenile Suspects in Interrogations: A Look at the Commission's Proposal in Light of an EU Comparative Study. *New Journal of European Criminal Law*, 2014, 5 (4), p.480-506.

50 KEMPEN & UIT BEIJERSE, 2016, *op. cit.*

51 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 3.

52 See art. 40 CRC, in particular paras. 1, 2 and 4.

of the Court of Justice of the European Union and the European Court of Human Rights⁵³. The level of protection should never fall below these standards. This overarching objective can be seen as being to ensure that children are able to understand the minimum stakes of the procedure and have the ability to participate and effectively exercise their rights⁵⁴.

[3.3] SCOPE OF THE DIRECTIVE

The scope of the Directive encompasses children who are suspects or accused persons in criminal proceedings, children who are requested persons from the time of their arrest in the executing Member State, and children who were not initially suspected or accused persons, but become suspected or accused persons in the course of questioning by the police or by another law enforcement authority⁵⁵. A child is defined in the Directive as a person below the age of 18. The Directive also applies to persons who have subsequently reached the age of 18 during the proceedings and to whom the application of the Directive or certain provisions thereof, in the light of all circumstances of the case, is appropriate⁵⁶. When the person concerned has reached the age of 21, Member States may decide not to apply the Directive. The Directive does not influence the national rules determining the age of criminal responsibility⁵⁷.

The Directive fully applies where the child – irrespective of the stage of the criminal proceeding – is deprived of liberty (such as police custody and detention)⁵⁸. In respect of minor offences, the application of the Directive is restricted⁵⁹. The Directive shall only apply to the proceedings before courts with jurisdiction in criminal matters, and in any event when there is a possibility of the imposition of a measure involving deprivation of liberty. For minor offences, the situation is more complex and will depend on national regulations of each Member State. The Directive shall always be applicable for minor offences when the competent judicial authority is a criminal court. On the contrary, it shall not be applicable if the competent authority for certain minor offences does not have jurisdiction in the criminal field. However, if the judgment taken by said courts is appealed, and the competent authorities in charge of the appeal are criminal courts (or have jurisdiction in the criminal field), the Directive shall be applicable from the moment the case is in the jurisdiction of such criminal courts.

53 EUROPEAN COMMISSION. *Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*, COM(2013) 822 final- 2013/0408 (COD), 27.11.2013, par. 35; MCVEIGH, L. EU Directive on procedural safeguards for children. In *the 5th Meeting of the European Council for Juvenile Justice*. Valencia, Spain: 15-17 February, 2017.

54 MCVEIGH, L., 2017, *op. cit.*

55 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 2 (1-2).

56 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 2 (3).

57 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 2 (5).

58 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 53.

59 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 2 (6) (a-b).

The Directive is composed of 27 articles containing procedural safeguards for suspect or accused children. Among others, the following rights are provided for: the right to receive information (art. 4), to have their parents informed (art. 5), the right to legal assistance (art. 6), the right to individual assessment (art. 7), the right to medical examination (art. 8), the right to an audio-visual recording of the questioning (art. 9), the right to limitation of deprivation of liberty (art. 10), the right to have parents present during proceedings (art. 15), the right to appear in person and participate in the trial (art. 16) and the right to legal aid (art. 18). The Directive is a binding instrument and EU Member States are to bring it into force in national laws and regulations by June 2019. In paragraph 4, a number of these rights will be further analysed.

[3.4] SUBSIDIARITY AND PROPORTIONALITY

In order to understand the implications of the Directive for Member States, the principles of subsidiarity and proportionality, as laid down in article 5 TEU, must be outlined.

The principle of subsidiarity implies that the EU can only intervene in national law when it can do so more effectively compared to individual Member States at the national or local level. The principle of proportionality is one of the oldest constitutional principles of the EU's legal order⁶⁰. The article states: 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. This implies that the EU intervention must be proportionate to the goal one pursues with the intervention. The prohibition against the use of excessive public powers is essentially developed in the context of European fundamental law and the principle of institutional proportionality evolved from this⁶¹. Therefore, Member States should examine whether the restrictions of a fundamental right correspond to objectives of general interests pursued by the European Community⁶². Each restriction of a fundamental right must be 'proportionate' in relation to the public interest pursued⁶³.

Three criteria are used to assess both principles in relation to the development of EU law, namely: 1) can transnational aspects of the action be dealt with through the legislation, which cannot be dealt with by the individual Member States? 2) would the intervention by one Member State or non-intervention be in contradiction with the Treaty? and 3) does the intervention provide for noticeable advantages at EU level?⁶⁴ When these questions are answered positively putting into place a law is both proportionate and in accordance with the subsidiarity principle.

60 SCHÜTZE, R. EU Competences: Existence and Exercise. In D. Chalmers & A. Arnulf, *The Oxford Handbook of European Union Law*. Oxford: Oxford University Press, 2015, p. 75-102.. See also EUROPEAN COMMISSION. Consolidated version of the Treaty on European Union. *Official Journal of the European Union*, C 326, 26.10.2012. p. 13-45, article 5(4).

61 SCHÜTZE, 2015, *op. cit.*

62 Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*. Judgment of the Court of 13 December 1979. *European Court Reports* 1979-3727, para 23. See also SCHÜTZE, 2015, *op. cit.*

63 SCHÜTZE, 2015, *op. cit.*

64 EUROPEAN UNION. Protocol (No 2) on the application of the principles of subsidiarity and proportionality. *Official Journal of the European Union*, C 115, 9.5.2008, p. 206-209.

According to the Commission, the proposed Directive complied with the subsidiarity principle since the aim of the proposal is to promote mutual trust between Member States and it is therefore important to agree on common minimum standards on procedural safeguards for children suspected or accused in criminal proceedings across the EU⁶⁵. Because the Directive does not go beyond the minimum required in order to achieve the stated objective at the European level and what is necessary for that purpose, the Directive also complies with the proportionality principle⁶⁶. Therefore, the Directive is not a measure that would lead to substantial changes of criminal justice systems in Member States. It does not propose a comprehensive set of rules for children in criminal proceedings, taking into account the principle of proportionality in EU action⁶⁷. The Directive only establishes 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 cooperation⁶⁸.

Besides the operation of the proportionality principle on the institutional level, in the development of EU law, it is also explicitly noticeable in the provisions of the present Directive. These proportionality clauses are partly brought in as a result of the negotiations by the Member States⁶⁹. One reference that is of particular concern is the proportionality requirement related to assistance by a lawyer⁷⁰. This requirement entails that Member States may derogate from this right when assistance by a lawyer is not proportionate in light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence⁷¹. These assessments, which are very complex, are made by a police officer or public prosecutor that may not be sufficiently trained in doing so, or in considering the particular needs and interests of children in such situations. Moreover, this concerns issues relating to intensity and complexity of the case and this can change throughout the course of the proceedings (see further below)⁷². Another proportionality assessment can be made with regard to the requirement of audio-visual recording. This means that audio-visual recording does not need to be carried out when it is not proportionate according to the circumstances of the case⁷³. The Directive suggests, for example, that audio-visual recording is not proportionate when a lawyer is present (see further below)⁷⁴. Another example is the specific treatment that should be given to children

65 COM(2013) 822 final, 27 November 20, *op. cit.*, Recital 72, 73; Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 67.

66 *Idem.*

67 *Idem.*

68 *Idem.*

69 MCVEIGH, 2017, *op. cit.*

70 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 6.

71 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 6(6).

72 MCVEIGH, 2017, *op. cit.*

73 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 9(1).

74 *Idem.* See further MCVEIGH, 2017, *op. cit.*

in case they are deprived of liberty. This treatment is only required when it is proportionate to do so in light of the duration of the detention⁷⁵.

[4] KEY PRIORITIES AND CHALLENGES

International and European human rights standards recognise children as an inherently vulnerable group in the context of juvenile justice. Due to their age and maturity, children require special measures of protection and safeguards to ensure their rights under the UNCRC, and to ensure their right to a fair trial. This requires that all components of access to justice – including the right to information, to be heard, to have legal assistance, and to be represented – apply to children, are adapted to their needs, and consider their evolving capacities⁷⁶. This paragraph will identify key issues anchored in the Directive, present their scope and level of protection and reflect on issues relating to their full implementation in practice. These issues concern the right to legal assistance and legal aid, the role of parents, the right to individual assessment and medical examination, and the right to participation.

[4.1] RIGHT TO LEGAL ASSISTANCE AND LEGAL AID

The right to legal assistance is one of the most important procedural elements of the right to a fair trial for both adults and children, and can be considered as a fundamental human right⁷⁷. Due to children's vulnerability and special needs, their right to legal assistance carries particular significance. Thus, the lawyer is tasked to explain the charges, proceedings, and possible outcomes of the criminal procedure to the child, enable the child to follow and participate in his or her defence, and represent the child professionally and effectively. Access to a lawyer is meant to safeguard the rights and interests of children throughout all parts of the criminal proceedings, and is viewed as a prerequisite of child-friendly justice⁷⁸.

The right to legal assistance is anchored in various international instruments. For example, the International Covenant on Civil and Political Rights anchors the right of the person to defend himself or herself in person or through legal assistance⁷⁹, and the United

75 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 12(5). However, no specification of the duration of detention is provided.

76 COUNCIL OF EUROPE, 2011, *op. cit.*, the preamble and par II(c).

77 LIEFAARD, T., RAP, S., & BOLSCHER, A. *Can anyone hear me? Participation of children in juvenile justice: A manual on how to make European juvenile justice systems child-friendly*. Belgium: International Juvenile Justice Observatory, 2016, p. 47; See: EUROPEAN COURT OF HUMAN RIGHTS. Case of *Salduz v. Turkey*, application no. 36391/02. Judgment 27 November 2008; EUROPEAN COURT OF HUMAN RIGHTS. Case of *Panovits v. Cyprus*, application no. 4268 /04. Judgment 11 December 2008.

78 EUROPEAN COURT OF HUMAN RIGHTS. Case of *Güveç v. Turkey*, application 70337/01. Judgment 20 January 2009, par 31. See also EUROPEAN COURT OF HUMAN RIGHTS. Case of *S.C. v. United Kingdom*, application no. 60958/00. Judgment 15 Jun 2004, in which ECtHR considers that the shortcomings, including in particular the lack of legal assistance for most of the proceedings, worsened the consequences of the applicant's inability to participate effectively in his trial and infringed his right to due process. On the role of the lawyer in various stages of the proceedings. See also LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.* p. 47, 49-52.

79 UN GENERAL ASSEMBLY. International Covenant on Civil and Political Rights. *United Nations – Treaty Series*, 16 December 1966, 999, p.171-282, Article 14(d).

Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') specifically note the rights of children to be represented by a legal advisor throughout the proceedings⁸⁰. The UNCRC provides children a right to 'legal or other appropriate assistance'. Such assistance should be appropriate according to the circumstances of the case and the needs of the child⁸¹.

In the European context, the European Convention on Human Rights provides every person with the right to fair trial and to legal assistance⁸². The ECtHR has also specifically underscored the importance of this right for children and found that it should be applied from the outset of the proceedings. Thus, in the case of *Salduz v. Turkey* the ECtHR held that 'in order for the right to a fair trial under Article 6, paragraph 1, to remain sufficiently 'practical and effective [...], access to a lawyer should be provided, as a rule, from the first interrogation of a suspect by the police [...]'⁸³. In *Panovits v. Cyprus*, the ECtHR further held that states have a positive obligation to inform child suspects they can access a lawyer, free of charge if necessary, and ensure that they understand this right⁸⁴. The right to a lawyer has also been established in EU Directive 2013/48 ('Lawyer Directive')⁸⁵, which ensures the right of suspects and accused persons to access, meet and communicate with a lawyer from the outset of the proceedings⁸⁶. The Lawyer Directive does not refer explicitly to children, but it notes in its recital that it 'promotes the rights of children' and takes into account the Guidelines on child-friendly justice⁸⁷. In addition, the Lawyer Directive requires that the particular needs of vulnerable suspects are taken into account in its application⁸⁸, and this provision can be applied to children.

The Directive on procedural safeguards for children provides children with the right to access a lawyer in accordance with the Lawyer Directive, and requires Member States to enable such access, and ensure children are able to exercise their right to defence effectively⁸⁹. Under the Directive, access to a lawyer must be provided without undue delay, and from the earliest stages of the proceedings; before questioning by police or other competent judicial authority, upon carrying out investigation or evidence gathering act, after deprivation of liberty, or where children are summoned before court in criminal

80 UN GENERAL ASSEMBLY. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules): resolution / adopted by the General Assembly, 29 November 1985, A/RES/40/33, Article 15.1.*

81 UN GENERAL ASSEMBLY, 1989, *op. cit.*, Article 40(2)(b)(ii); UN COMMITTEE ON THE RIGHTS OF THE CHILD (CRC). *General comment No. 10 (2007): Children's rights in juvenile justice*, 25 April 2007, CRC/C/GC/10, par 49-50.

82 COUNCIL OF EUROPE. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Article 6(3)(c); EUROPEAN UNION, 2012, C 326, 26 October 2012, *op. cit.*, Articles 47-48

83 EUROPEAN COURT OF HUMAN RIGHTS, Judgment 27 November 2008, *op. cit.*, par 55, 60.

84 EUROPEAN COURT OF HUMAN RIGHTS, Judgment 11 March 2009, *op. cit.*, par 72.

85 Directive 2013/48/EU, 22 October 2013, *op. cit.*

86 Directive 2013/48/EU, 22 October 2013, *op. cit.*, Article 3(1-2).

87 Directive 2013/48/EU, 22 October 2013, *op. cit.*, Recital 55; LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*, p. 50.

88 Directive 2013/48/EU, 22 October 2013, *op. cit.*, Article 13.

89 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article. 6(1-2) and Recital 25.

matters; in due time before they appear⁹⁰. Assistance by a lawyer shall include the right to meet in private and communicate with the lawyer, even before interrogation by the police, and requires that the lawyer is able to assist and participate effectively. The Directive also requires, at a minimum, that children are assisted during particular evidence gathering or investigative acts; identity parade, confrontation and reconstruction of the scene of the crime⁹¹. It can be argued that these acts constitute a critical point in the investigation process, in which additional safeguards and assistance are required.

In addition, the Directive requires that Member States provide effective legal aid in national law. The right to legal aid is 'inextricably linked' with the right to access a lawyer, but as the subject of legal aid is established in a separate EU Directive, the provision is minimal in scope⁹². The EU Directive on legal aid ensures that suspects who lack sufficient resources to pay for assistance of lawyer shall have the right to legal aid 'when the interests of justice so require', and holds that Member States consider the needs of vulnerable suspects (a term that should include children)⁹³. Yet, establishing free legal assistance in this Directive could have strengthened the right of children to access a lawyer⁹⁴.

Challenges for implementation

Implementation considerations relating to the application of the Directive can be identified. First, the scope of the Directive is limited and it allows for derogation of the right to a lawyer. This is particularly relevant in comparison to the 2013 Proposal of the Directive, which required 'mandatory access to a lawyer' for child suspects or accused, and did not allow children to waive this right⁹⁵. However, in its final version, the Directive only mandates a lawyer in situations when a decision is taken to deprive the child of liberty and during detention, it otherwise enables children to waive the right according to the conditions set in the Lawyer Directive (i.e., informed voluntary and unequivocal waiver)⁹⁶. This is despite the fact that the ability to waive the right to a lawyer can be harmful to children's interests and might result in extra pressures from law enforcement agencies on children and/or their parents⁹⁷.

90 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article. 6(3) (a-d).

91 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article. 6(4) (a-c) and Article 6(5).

92 DE VOCHT et al., 2014, *op. cit.*, p. 499.

93 EUROPEAN UNION. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings. *Official Journal of the European Union*, L 297, 4.11.2016, p.1-8, Article 4(1-2) and Article 9; See also DE VOCHT et al., 2014, *op. cit.*, p. 499.

94 See also LIEFAARD, T. Child-Friendly justice: protection and participation of children in the justice systems. *Temple Law Review*, 2016, 88(4), p. 905-927.

95 COM(2013) 822 final, 27 November 2013, *op. cit.*, Article. 6(1).

96 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 6(6); Directive 2013/48/EU, 22 October 2013, *op. cit.*, Art. 9; DE VOCHT et al., 2014, *op. cit.*, p. 496.

97 See also LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*, p. 50; LIEFAARD, T., & VAN DEN BRINK, Y.N. 'Juveniles' right to counsel during police interrogations: An interdisciplinary analysis of a youth-specific approach, with a particular focus on the Netherlands. *Erasmus Law Review*, 2014, 7, p. 206-218.

Second, the Directive does not apply in respect of minor offences that are not considered criminal (e.g. traffic offences)⁹⁸. These procedures, however, can result in significant sanctions on children and their right to a lawyer should be better augmented.

Third, the Directive derogates the right on the basis of proportionality. For example, Article 6(6) of the Directive enables Member States to derogate from the right if assistance by a lawyer 'is not proportionate in light of the circumstances of the case', taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that can be taken, with the best interests of the child as primary consideration⁹⁹. Other derogations can also be found in Article 6(8) where in exceptional circumstances and only in the pre-trial stage, states may temporarily derogate the right, to allow interrogation or investigative acts if there is an urgent need, or if an immediate action is required¹⁰⁰. Also, the Directive does not apply in certain evidence gathering acts, such as identifying the child, checking whether he or she has weapons, conducting body-checks or collecting finger prints¹⁰¹, despite that these acts can have a significant impact on the criminal procedure. While the provisions covering the derogations are limited in terms (e.g. 'exceptional circumstances') and require that the best interests of the child are taken into account, the criteria are not clearly formulated, and allow for a significant derogation of the right to a lawyer¹⁰². The proportionality assessment also applies in relation to Article 9 of the Directive which requires audio-visual recording of police questioning, where this is proportionate in the circumstances of the case, taking into account, among others, 'whether a lawyer is present or not'¹⁰³. Audio-visual recordings are an objective and increasingly affordable measure that can enable courts to evaluate the child's statements, confirm the interrogation was conducted in a child-friendly language, and ensure no improper measures were taken by law enforcement. Yet, this proportionality assessment can result in fewer recordings of interrogations, and it has been argued that it introduces a wide scope of discretion, and needlessly weakens this protection¹⁰⁴. For this reason, the use of audio-visual recordings requires clear guidance that address the proportionality element, as well as other important elements, such as data collection and storage, privacy concerns and professional training in relation to the interpretation and use of the recordings¹⁰⁵.

Fourth, there are practical issue that can impact the implementation of the Directive. For example, Article 6(7) requires that questioning or other investigative or evidence-gathering acts will be postponed 'for a reasonable period of time' until the lawyer arrives

98 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 2(6) and Recital 14-16; DE VOCHT et al., 2014, *op. cit.* p. 499.

99 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 6(6).

100 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 6(8).

101 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 12(5) and Recital 28.

102 See EDELMAN, M. W. Standing up for Children? The Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings. *EU Law Analysis*, 22.12.2015. Available at <http://eulawanalysis.blogspot.nl/2015/12/standing-up-for-children-directive-on.html> (last accessed, 5.4.2017).

103 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 9(1) and Recital 42.

104 EDELMAN, 2015, *op. cit.*

105 Reflections from the 5th Meeting of the European Council for Juvenile Justice, *op. cit.*

or is arranged¹⁰⁶. As locating a lawyer can take time, this provision might result in children being detained for longer periods of time. This requires practical organisation on a national level that ensures lawyers are available on-call and that clear time-limits are set¹⁰⁷.

[4.2] THE ROLE OF PARENTS

The holders of parental authority (hereinafter parents) have a critical role in providing emotional support, guidance and practical assistance to children within the juvenile justice system. International legal instruments recognise the family as the fundamental group of society and the UNCRC holds that parents have the 'primary responsibility' for the upbringing and development of the child. Parents are to be guided by the best interests of the child, and are tasked with assisting the child to exercise his or her rights, taking into account his or her evolving capacities and competences¹⁰⁸. In that sense, parental involvement has both a protective and an empowering element for children¹⁰⁹.

The role of parents is of particular importance in the context of juvenile justice. The UNCRC holds that parents can assist children and they play a role in informing the child on the charges¹¹⁰. The UNCRC Committee also recognised that parents can provide psychological and emotional assistance to the child, and has recommended states to enable 'maximum possible involvement' of parents in the legal proceedings¹¹¹. Other international standards also recognise parents as key actors in all stages of the criminal proceedings. This includes their involvement in prevention policies, right to be present in the investigation stages, right to accompany the child in court proceedings, and their role in relation to detention and disposition stages¹¹². Thus, parental assistance can be regarded as a 'fundamental right of juveniles who are in conflict with the law'¹¹³.

The Directive defines 'holder of parental responsibility' as any person having parental responsibility over a child, meaning the rights and duties which are given to a natural or legal person by judgement, operation of law, or legal agreement, including the rights of custody and access¹¹⁴. The Directive grants the holders of parental responsibility three main rights: to receive information, to accompany the child in criminal procedures and to request a medical examination.

106 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 6(7).

107 Reflections from the 5th Meeting of the European Council for Juvenile Justice, *op. cit.*

108 UN GENERAL ASSEMBLY, CRC, 20 November 1989, *op. cit.*, Preamble and Articles 5, 18(1).

109 See also RAP, S.E. *The participation of juvenile defendants in the youth court. A comparative study of juvenile justice procedures in Europe*. Amsterdam: Pallas Publications, 2013.

110 UN GENERAL ASSEMBLY, CRC, 20 November 1989, *op. cit.*, Article 40(2)(b)(ii).

111 UNCRC, GC 10, 25 April 2007, *op. cit.*, par 53-54; LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*, p. 53.

112 See UN GENERAL ASSEMBLY, Beijing Rules, 29 November 1985, *op. cit.*, Article 7.1, 15.1, 15.2; UNCRC, GC 10, 25 April 2007, *op. cit.*, par 18-19, 53-54, 58; UN GENERAL ASSEMBLY. *United nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)*, 14 December 1990, A/RES/45/112, Article 16. For overview see LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*, p. 54-56.

113 LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*, p. 53.

114 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 3(2-3).

First, the Directive requires Member States to provide parents with the same information that the child has the right to receive under the Directive (e.g., right to assistance by lawyer, right to medical examination, etc.)¹¹⁵. The right of parents to receive information is also anchored in international standards, but should not be viewed as an alternative to communicating information to the child directly¹¹⁶. According to the Directive, the information shall be provided to another appropriate adult, who is nominated by the child, and accepted by the competent authority, in case providing the information to the parent would be contrary to the best interests of the child, if the parent is unknown or cannot be reached, or if informing the parent can 'on the basis of objective and factual circumstances', substantially jeopardise the criminal proceedings (e.g., destroying evidence, interference in the proceedings)¹¹⁷. This clause enables the child to choose an appropriate adult to support and assist him or her throughout the criminal proceedings and recognises that in certain situations parents might also have a negative effect on children's participation and sense of well-being¹¹⁸. Where the adult nominated by the child was not acceptable to the competent authority, it can inform another person, as well as the welfare or child protection authorities¹¹⁹. If and when these circumstances cease to exist, the parent should be notified and informed accordingly¹²⁰.

Second, the Directive awards children the right to be accompanied by their parents during the stages of the criminal proceedings. This is a 'traditional' youth-specific safeguard in juvenile justice¹²¹. It is a right of the child, based on the presumption that parents are generally best placed to support the child, enhance his or her participation, and contribute to his or her right to a fair trial¹²². The Directive ensures children the right to be accompanied by parents to court hearings in which they are involved, as well as to other stages of proceedings (e.g., police interrogation) where the child is present and the competent authority considers that it is in the child's best interests to be accompanied by the parent, and their presence will not jeopardise the criminal proceedings¹²³. Similarly to the provision regarding the right to information of the parent; the Directive guarantees the right of the child to be accompanied by another appropriate adult that the child nominates and is accepted by the competent authority where the presence of the parent would be contrary to the child's best interests, is not possible because the parent is unknown or cannot be reached, or where there are objective and factual circumstances to suggest that the presence of the parent substantially jeopardises the criminal proceedings. When

115 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 5(1).

116 UNCRC, GC 10, 25 April 2007, *op. cit.*, par 10, 48; COUNCIL OF EUROPE, 2011, *op. cit.*, par IV(A)(1), (3), (5).

117 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 5(2) (a-c) and Recital 23.

118 See in that regard LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*, p. 53.

119 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 5(2) and Recital 23.

120 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 5(3) and Recital 24.

121 DE VOCHT et al., 2014, *op. cit.*, p. 494

122 LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*, p. 53; see also UNCRC, GC 10, 25 April 2007, *op. cit.*, part 40, 53-54, 58.

123 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 15(1), 15(4), Recital 57, and Recital 59.

such circumstances cease to exist, the child shall have the right to be accompanied by the parent¹²⁴.

Third, children who are deprived of their liberty have a right to medical examination to assess their general mental and physical condition¹²⁵. The Directive enables parents (along with the child and the child's lawyer) to request such medical examination to be performed by a physician or another qualified professional¹²⁶. In that regard, it should be noted that the Directive also requires Member States to ensure children deprived of their liberty can meet with parents as soon as possible, where such a meeting is compatible with investigative and operational requirements¹²⁷.

Challenges for implementation

The implementation of the Directive in relation to the role of parents raises some practical challenges. For example, the definition of 'competent authority' is not clear, and may vary between different national contexts. Therefore, specific guidance is required at the national level to define the 'competent authority' and its powers¹²⁸. In addition, Article 5 of the Directive requires that parents receive information 'as soon as possible', and this period of time should be clearly determined in legislation. In addition, implementing the Directive requires Member States to establish criteria in relation to exercising the right of the child to be accompanied by their parents in proceedings; what information should parents receive in that regard? Under which conditions can parents be temporarily or permanently excluded from proceedings?¹²⁹ Also, Member States should develop 'friendly' information for parents as well, to explain their role, rights and responsibilities in the proceedings¹³⁰.

[4.3] INDIVIDUAL ASSESSMENT AND MEDICAL EXAMINATION

Given that children are considered to be vulnerable, when suspected or accused, the provisions containing the right to individual assessment (art. 7) and the right to medical examination (art. 8) are of special importance. The origin of these rights can be found in several international children's rights instruments, most notably the UNCRC, the Beijing Rules and the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules)¹³¹.

124 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 15(2-3) and Recital 58.

125 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 8(1).

126 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Art. 8(3)(b) and Recital 41; See also DE VOCHT et al., 2014, *op. cit.* p. 494-496.

127 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 12(6).

128 Reflections from the 5th Meeting of the European Council for Juvenile Justice, *op. cit.*

129 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 57.

130 Reflections from the 5th Meeting of the European Council for Juvenile Justice, *op. cit.*

131 UN GENERAL ASSEMBLY. *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Havana Rules)*, 2 April 1991, A/RES/45/113, Rule 50.

The objective of the right to individual assessment is first of all to 'ensure that the specific needs of children concerning protection, education, training and social integration are taken into account'¹³². This can be seen as in accordance with article 40(1) UNCRC, in which it is stated that the reintegration into society of the child in conflict with the law should be promoted. In order to do so, the specific needs of children should be assessed first. Moreover, individual assessment of the child should take place in order to guide the competent authority in making a decision concerning a specific beneficial measure, a precautionary measure (e.g. pre-trial detention or alternative measures) and in case of sentencing¹³³. Not only should the appropriateness of a particular measure or sentence be determined, but also the extent to which the child needs special measures or practical assistance during the criminal proceedings and the extent to which the child can be held criminally responsible for the alleged offence. The obligations attached to the EU directive regarding individual assessment stretch further compared to the provisions laid down in international instruments and guidelines. For example, in the Beijing Rules it is recommended that 'the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed' should be investigated before sentencing¹³⁴. The UNCRC Committee only notes in this regard that the assessment of the maturity of the child, in relation to criminal responsibility, is often left to the discretion of the judge, without involving a psychology expert¹³⁵.

The individual assessment of the child should take into account the child's personality and maturity, the child's economic, social and family background, including living environment and any specific vulnerabilities of the child, such as learning disabilities or communication difficulties¹³⁶. Moreover, the seriousness of the alleged offence and the measures that could be taken if the child is found guilty of such an offence should be taken into account in the assessment¹³⁷. The individual assessment should take place at the earliest appropriate stage of the proceedings and in any event before the court hearings.¹³⁸ However, preliminary measures can nevertheless be taken before an individual assessment has been carried out and the appropriateness of the measures can be re-assessed once the child's assessment is available¹³⁹. The indictment can also be presented in absence of an individual assessment, when in the best interests of the child¹⁴⁰. In the recital of the Directive it is explained that this might be the case when 'a child is in pre-trial detention and waiting for the individual

132 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 7(1).

133 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 7(3).

134 UN GENERAL ASSEMBLY, Beijing Rules, 29 November 1985, *op. cit.*, Rule 16 (1).

135 UNCRC, GC 10, 25 April 2007, *op. cit.*, para. 30.

136 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 7(2) and Recital 36.

137 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 37.

138 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 7(5-6).

139 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 38.

140 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 7(6).

assessment to become available would risk unnecessarily prolonging such detention¹⁴¹.

It is also important that the individual assessment should be carried out with the close involvement of the child and that a holder of parental responsibility should be involved as well. Moreover, a multidisciplinary approach should be followed and specialised professionals should carry out the assessment. The involvement of the child is in accordance with the wider principle of the right to participation¹⁴² and specifically the right to be heard¹⁴³. A multidisciplinary approach is specifically advocated in the Guidelines on child-friendly justice¹⁴⁴.

Medical examination

The right to medical examination applies to children deprived of their liberty. The aim of the examination is to assess the child's general mental and physical condition¹⁴⁵ and to determine his or her capacity to be subject to questioning, other investigative acts or any other measure taken or envisaged against the child¹⁴⁶. The medical examination must be conducted without undue delay¹⁴⁷ and can be initiated by the authorities or at the request of the child, his or her lawyer or parents.¹⁴⁸ It must be carried out by a physician or another qualified professional¹⁴⁹ and its conclusions should be recorded in writing¹⁵⁰. In the recital of the Directive it is argued that medical examination is an important part of 'fair administration of justice' for children who find themselves in a vulnerable position (i.e. deprived of their liberty). The personal integrity of the child is ensured by this right¹⁵¹. In the Havana Rules the right to medical care and examination of children deprived of liberty is specifically framed in the context of identifying any prior ill-treatment and any physical or mental condition requiring medical attention¹⁵², which can be seen as a more concrete and practical interpretation of the term 'personal integrity'.

Challenges for implementation

Regarding the right to individual assessment, two issues arise. First, the possibility for

141 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 39.

142 See LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*.

143 UN GENERAL ASSEMBLY, CRC, 20 November 1989, *op. cit.*, Art. 12.

144 COUNCIL OF EUROPE, 2011, *op. cit.*, par. IV(D)(3), (71-72).

145 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 8(1).

146 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 8(2).

147 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 8(1).

148 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 8(3).

149 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 8(1).

150 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 8(4).

151 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 41.

152 UN GENERAL ASSEMBLY, Havana Rules, 2 April 1990, *op. cit.*, Rule 50.

authorities to derogate from this right is built in, as it is in other provisions (see para. 4.1). In article 7(9) it is stated that 'Member States may derogate from the obligation to carry out an individual assessment where such a derogation is warranted in the circumstances of the case, provided that it is compatible with the child's best interests'. In the recital of the Directive it is explained that the seriousness of the alleged offence and the measures that could be taken if the child were to be found guilty should be taken into account when making the decision that an individual assessment is not carried out¹⁵³. This implies that in the case of less serious offences, or when the possible measures have less invasive qualities, an individual assessment should not necessarily take place, on the basis of proportionality grounds, if it is in the best interests of the child. Moreover, it should be taken into consideration whether an assessment has taken place in the past or whether the case can be diverted (i.e. without an indictment)¹⁵⁴.

The second issue that needs to be taken into account relates to the time at which the individual assessment should be carried out. In article 7(5) it is stated that the assessment should take place at the earliest appropriate stage of the proceedings. However, it should at least be available before court hearings commence¹⁵⁵. This means that the individual assessment can in some cases be postponed beyond indictment, without any clarity being given as to which circumstances will permit such postponement.

Concerning the right to medical examination it is stated that it should take place 'without undue delay', but without further specifying this notion. Since children who are deprived of their liberty find themselves in a particularly vulnerable position¹⁵⁶ it is recommended to provide for a medical examination immediately upon admission to a detention facility¹⁵⁷. Moreover, in the recital of the Directive it is recommended that practical arrangements should be made concerning the child's access to medical examination and the specific situation in which two or more requests for medical examinations are made in respect of the same child in a short period of time¹⁵⁸.

[4.4] RIGHT TO PARTICIPATION

According to article 12 of the UNCRC, children have the right to be heard in all matters affecting them. Naturally, this provision applies to children suspected or accused of committing a criminal offence. The right to be heard can be seen as an important participatory right emanating from the UNCRC, and it lays at the basis of the right to participation and a fair trial. The right to participation, in turn, is seen as an important part

153 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 40.

154 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 40.

155 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 7(6).

156 UN GENERAL ASSEMBLY, HUMAN RIGHTS COUNCIL. *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*. 5 March 2015, A/HRC/28/68.

157 See UN GENERAL ASSEMBLY, Havana Rules, 2 April 1990, *op. cit.*, Rule 50.

158 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 41.

of child-friendly justice procedures¹⁵⁹. Recently, in Europe, several developments have taken place to increase child-friendly justice procedures and practices. This development was strengthened by the adoption of the *2010 Guidelines on Child-friendly Justice*. The Guidelines give detailed recommendations with regard to adapting juvenile justice proceedings to the age and the developmental level of children in conflict with the law. The *2011 EU Agenda for the Rights of the Child* identified making the justice systems in Europe more child-friendly as a key priority of the European Commission (see para. 2.1). The EU Directive on procedural safeguards for children can potentially contribute to enhancing the implementation of the right to participation for children suspected or accused of a criminal offence. In this section, two related rights – the right to information and the right to be present and to participate – will be discussed.

Right to information

The UNCRC Committee has stated that ‘the child’s right to information (...) is, to a large degree, a prerequisite for the effective realisation of the right to express views’¹⁶⁰. The Guidelines on Child-friendly Justice consider ‘information and advice’ as general elements of child-friendly justice¹⁶¹. In juvenile justice proceedings, it is important in order for the young person to be able to participate effectively, that he or she is informed about the procedures in which he or she is involved in and that he or she understands what will be expected from him or her during the proceedings.

In article 4 of the Directive the right to information for children in conflict with the law is laid down. When children are informed about the fact that they are suspected or accused of a criminal offence, they should be informed about their rights in accordance with the Right to information Directive¹⁶². At this stage they should be specifically informed about:

- the right to have the holder of parental responsibility informed (article 5);
- the right to be assisted by a lawyer (article 6);
- the right to protection of privacy (article 14);
- the right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings (article 15(4));
- the right to legal aid (article 18) (art. 4(1)(a)(i-v)).

Moreover, children should be provided with information about general aspects of the conduct of the proceedings¹⁶³. In particular, they should be given a brief explanation about the next procedural steps in the proceedings and about the role of the authorities and different actors involved. However, in the recital of the Directive it is stated that the

159 See LIEFAARD, RAP, & BOLSCHER, 2016, *op. cit.*

160 UN COMMITTEE ON THE RIGHTS OF THE CHILD (CRC). *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para. 82.

161 COUNCIL OF EUROPE, 2011, *op. cit.*, par. IV(A)(50-56).

162 Directive 2012/13/EU, 22 May 2012, *op. cit.*

163 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 4(1).

information to be given should depend on the circumstances of the case and the interest of the criminal proceedings¹⁶⁴.

At the earliest appropriate stage of the proceedings the child should be informed about:

- the right to an individual assessment (article 7);
- the right to a medical examination, including the right to medical assistance (article 8);
- the right to limitation of deprivation of liberty and to the use of alternative measures, including the right to periodic review of detention (articles 10 and 11);
- the right to be accompanied by the holder of parental responsibility during court hearings (article 15(1));
- the right to appear in person at trial (article 16);
- the right to effective remedies (article 19) ((art. 4(1)(b)(i-vi)).

When the child is deprived of his or her liberty he or she should be informed about his or her right to specific treatment while deprived of liberty (art. 12) ((art. 4(1)(c)).

The information, as set out above, should be provided in writing, orally or both and in a simple and accessible language¹⁶⁵. It is possible to do this by means of a Letter of Rights (as is provided for in the Right to information Directive), however, the rights as set forth in the Directive on procedural safeguards for children should be included in this letter, and explained in a child-friendly language¹⁶⁶.

Right to be present and to participate

On the basis of article 16(1) of the Directive, children have the right to be present at their trial and shall take all necessary measures to enable them to participate effectively in the trial, including by giving them the opportunity to be heard and to express their views. This right is based on the right to a fair trial as provided for in article 47 of the Charter and in Article 6 ECHR. In the recital of the Directive it is stated that incentives should be provided for children to attend their trial, for example by summoning them in person and by sending a copy of the summons to the parents. Moreover, practical arrangements should be made regarding the presence of a child at the trial. Those arrangements could include provisions concerning the conditions under which a child can be temporarily excluded from the trial¹⁶⁷. In article 16(2) it is provided that children who were not present at their trial have the right to a new trial or to another legal remedy.

164 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 19.

165 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 4(2).

166 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article. 4(3).

167 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 60.

Challenges for implementation

It can be noted that the information that should be provided to children suspected or accused on their rights is spelled out quite extensively. However, the implication of this provision can be that the child is only provided with a list (orally or in writing) of his rights, without any further explanations, or an opportunity to ask questions. In order to exercise the right to participation, it is not only necessary that the child knows his or her rights, but that he or she also understands his rights¹⁶⁸. No obligation exists, however, to provide the child with oral explanations of his rights. So, in order to fulfil this right, it is of importance that children are provided with explanations and support to be able to understand the implications of their rights (or waiving these rights).

Regarding article 16 of the Directive it can be noted that the right to participation is exclusively framed in the context of the trial and not in relation to other phases of the criminal proceedings. Children suspected or accused should have the opportunity to express their views at every stage of the proceedings¹⁶⁹. Although sometimes implicitly, the involvement and effective participation of the child is acknowledged in several other provisions, for example in relation to the child's choice of an 'appropriate adult'¹⁷⁰, the child's contribution to the individual assessment (art. 7(7)), the child's ability to request a medical examination (art. 8(3)(a)) and the protection of his or her privacy during court hearings (art. 14(2)). It is striking that the right to participation is not acknowledged to a greater extent by the drafters of the Directive. However, there are several provisions that cater to the participation of children and that can be used by Member States to make their juvenile justice system more child-friendly. Crucial in this regard is the training and specialisation of professionals working with children suspected or accused in criminal proceedings. Article 20 of the Directive states that staff of law enforcement authorities and of detention facilities, judges, prosecutors and lawyers should have effective access to specific training, in particular with regard to children's rights, appropriate questioning techniques, child psychology and communication in a language adapted to children¹⁷¹. Of further importance is the fact that professionals should have specific competence in the field of juvenile justice and it is recommended that professionals regularly update their knowledge and skills through trainings.

168 BUSS, E. What Stands in the Way of Children's Exercise of their Criminal Procedural Rights in the United States? Our Evolving and Incomplete Interdisciplinary Understanding. In M.D. RUCK, M. PETERSON-BADALI, & M. FREEMAN (eds.), *Handbook of Children's Rights. Global and Multidisciplinary perspectives*. New York, London: Routledge, 2017, p.278-295.

169 UNCRC, GC 12, 20 July 2009, *op. cit.*, para. 57.

170 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Article 15(2).

171 Directive (EU) 2016/800, 11 May 2016, *op. cit.*, Recital 63.

[5] CONCLUSIONS

This White Paper aims to provide clarity on the content and the implementation of the Directive on procedural safeguards for children. The Directive is an important tool in strengthening the legal position of children suspected or accused in criminal proceedings, because it provides for binding legislation in the EU¹⁷². Moreover, principles enshrined in non-binding instruments, such as the Guidelines on child-friendly justice, can be identified in the present Directive.

One of the key features of the Directive as a whole is the emphasis on protecting rights at the earliest stages of proceedings when suspected and accused children are most vulnerable. However, two main challenges with regard to the implementation of the Directive have been identified. First, Member States have the possibility to derogate from certain obligations as set forth in the Directive, on the basis of the circumstances of the case (e.g. the seriousness of the alleged offence, the complexity of the case and the measures that could be taken if the child is found guilty). This possibility exists in particular for the right to assistance by a lawyer and the right to individual assessment, which implies that these rights do not have to be applied in specific situations for children suspected or accused in criminal proceedings. Second, this also applies to certain rights which are made contingent upon the proportionality clause that is built in the Directive. For example, audio-visual recording of question of children by the police is made dependent upon the presence of a lawyer and whether the child is deprived of liberty. However, it can be argued that in more serious cases – in which a lawyer is present – the recording of the case is desirable, because of the more serious consequences of the case for the child. The right to assistance by a lawyer itself is also dependent upon the circumstances of the case, taking into account the seriousness of the alleged offence, the complexity of the case and the measures that could be taken against the child. This means that the right to a lawyer – as a minimum standard – is not guaranteed for all children suspected or accused in criminal proceedings.

It must be noted, though, that the Directive provides minimum standards and that Member States are free to provide higher levels of protection to children. In this regard, it is recommendable to at least provide children with mandatory access to a lawyer, to support and ensure the effective exercise of their rights and protections while being in a particular vulnerable position. Civil society and legal organisations can play an important role in advocating for extended legal assistance for children in conflict with the law. The importance of a rigorous best interests assessment in case the provision of legal assistance is dependent upon a proportionality assessment should be advocated for in juvenile justice practice.

172 DE VOCHT et al., 2014, *op. cit.*

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ACRONYMS

Beijing Rules

United Nations Standard Minimum Rules for the Administration of Juvenile Justice

ECHR

European Convention on Human Rights

ECtHR

European Court of Human Rights

EU

European Union

FRA

European Union Agency for Fundamental Rights

Havana Rules

United Nations Rules for the Protection of Juveniles Deprived of Their Liberty

Riyadh Guidelines

United Nations Guidelines for the Prevention of Juvenile Delinquency

TEU

Treaty on European Union

UN

United Nations

UNCRC

Convention on the Rights of the Child

UNCRC Committee

UN Committee on the Rights of the Child

UNICEF

United Nations Children's Fund

