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ADD 3

Subject : Proposal for a Directive of the European Parliament and of the Council on
procedural safeguards for children suspected or accused in criminal proceedings
- Outcome of proceedings of the meetings of the DROIPEN Working Party on
20 January and 3 February, and follow-up

Introduction

1. On 20 January and 3 February 2014, the Working Party on Substantive Criminal Law (DROIPEN) examined for the first time the proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings. This proposal is the fourth measure in application of the Roadmap of the Council of 30 November 2009 for strengthening procedural rights of suspects and accused persons in criminal proceedings ('Roadmap').¹

¹ OJ C 295, 4.12.2009, p. 1.

2. The Commission presented the proposal. It recalled that the proposal forms part of a package of three legislative proposals² submitted on the basis of the Roadmap and the Stockholm program, and that the proposal was accompanied by a Commission recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.³ The latter, however, was already adopted and final, and was not subject of discussion in the Council.
3. The Commission underlined that the proposal builds further on the three Directives⁴ that have already been adopted on the basis of the Roadmap, and indicated that in the elaboration of the proposal, European and international standards had been taken into account.
4. Finally, the Commission stressed that the proposal only contained minimum, basic measures. The Commission had decided to refrain from any measure which could be considered to be disproportionate or "over the top", such as the obligation to install specialised courts to deal with criminal offences allegedly committed by children, or the harmonisation of the age of criminal responsibility.

² The package consists of the following legislative proposals: a proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (17621/13 + ADD 1 + ADD 2 + ADD 3); a proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings (17633/13 + ADD 1 + ADD 2 + ADD 3); and a proposal for a Directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings (17635/13 + ADD 1 + ADD 2 + ADD 3).

³ 17642/13.

⁴ The three Directives that have already been adopted on the basis of the Roadmap are: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1), Directive 2012/13/EU on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p. 1) and 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 on the right of access to a lawyer in criminal proceedings (OJ L 294, 6.11.2013, p. 1).

General comments

5. Following the introduction by the Commission, the Member States had a general exchange of views of the proposal. The choice of the Greek Presidency to start working on this specific proposal was applauded, and Member States generally expressed support for the proposed Directive.
6. Some general comments were made. The suggestion was made to operate a distinction, as regards the application of the rights foreseen in the Directive, between the investigation phase and the phase of the proceedings before a court. The Member States also indicated some particular areas in which improvements might be beneficial. These specific comments are indicated below, in the Article-by-Article section.
7. Some Member States put general or specific scrutiny reserves. These have not yet been noted.

Specific comments Article-by-Article

8. Subsequently to the presentation by the Commission and the general exchange of views by the Member States, the Working Party proceeded to the first examination of the proposed Directive Article-by-Article.

Article 1 : Subject matter

9. The question was raised as to how the notion of "criminal proceedings" has to be understood; does it also include the phase of execution of a judgment? The suggestion was made to provide a definition of criminal proceedings in the Directive.

Article 2 : Scope

10. On a general level, it was observed that it should be made clear in the operative text that the Directive does not apply to alternative means of dealing with child offenders which are designed to keep them out of the criminal justice system. The suggestion was made to incorporate point 16 of the explanatory memorandum in Article 2.⁵ It was also asked to further clarify that the Directive should not apply to the phase of enforcement.
11. **Paragraph 1:** It was observed that the text on this point differs from the texts in Directive 2010/64/EU on the right to interpretation and translation, Directive 2012/13/EU on the right to information, and Directive 2013/48/EU on the right of access to a lawyer, where it is said that the Directives apply when the persons are "made aware (by official notification or otherwise)" that they are "suspected or accused". Various delegations expressed a preference for keeping that terminology, which would be more precise than the current wording ("become suspected or accused") for defining the kick-off point as regards the application of the Directive.
12. The Commission observed that the wording had been chosen in order to make the text simpler and more protective.⁶ It would also avoid discussions about the meaning of "official notification".

⁵ Suggested text for a new paragraph in Article 2:
'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 whose aim is not to hold the child criminally responsible but to ensure his proper conduct, bring about favorable changes in the child's personality and behavior, and to help him to integrate with the society, and which may lead to the imposition of certain restrictive measures (for instance protection measures, correction measures, education measures). Such proceedings do not fall within the scope of this Directive.'

⁶ The Commission observed that this text is in line with Article 32(3) of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office.

13. Some Member States requested making a general exception for minor offences; recitals 17 and 18 would not suffice. The Commission observed that there is no general exclusion for minor offences, but a "tailor-made approach" depending on the safeguard:
- with regard to the right to information of children the same exclusion for minor offences would apply as foreseen by Directive 2012/13/EU, see Article 2(2);
 - with regard to the right to mandatory access to a lawyer the same exclusion for minor offences would apply as foreseen by Directive 2013/48/EU (with the exception of cases dealt with by public prosecutors), see Article 2(4);
 - as regards other provisions of the proposed Directive, no exclusion for minor offences is foreseen as they are either of general nature (e.g. training) or apply only in case of deprivation of liberty (e.g. right to medical examination) or foresee already the possibility for derogations by Member States (e.g. individual assessment).
14. **Paragraph 2:** The question was raised if it would really be necessary to apply the Directive to EAW proceedings. The Commission observed that the proposed Directive needs to apply to EAW proceedings in order to enhance mutual trust and mutual recognition of decisions. This is also in line with Directive 2010/64/EU, Directive 2012/13/EU, and Directive 2013/48/EU.
15. **Paragraph 3:** The Commission observed that this provision aims at addressing a situation which is common in all Member States, namely where the criminal offence is committed when the suspect or accused person is below the age of 18, while the criminal proceedings continue after the person has reached that age. The Commission noted the following 4 situations:
- Situation A: criminal offence has been committed when the person is < 18 and the proceedings started and terminated when he was < 18 --- Directive applies

- Situation B: criminal offence has been committed when the person is < 18 but he becomes only a suspect or accused person at 18 or above < 18 --- Directive does not apply
- Situation C: criminal offence has been committed when the person is < 18 and the proceedings started when he was < 18, but continue afterwards --- Directive applies
- Situation D: criminal offence has been committed when the person is 18 or above --- Directive does not apply (but see recital 10)

16. Many Member States noted that Article 2(3) is too categorical, in particular in situation C as described above: it was underlined that the situation for suspected or accused children changes when they become of age (18), in that they are not anymore subject to parental oversight. Various rights should not be applicable anymore as from the age of 18, such as the rights foreseen in Art. 16, and possibly also 6, 7, 8, 9 and 12. There would be a need for differentiation; it was suggested to have a look at the Victims Directive.⁷ Some delegations suggested to delete Article 2(3) in its entirety.
17. **Paragraph 4:** The Commission indicated that this provision was meant to reflect the Brusco case law.⁸ Reference was made to the identical provision in Directive 2013/48/EU.

Article 3 : Definition

18. No comments were made.

⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ L 315, 14.11.2012, p. 57).

⁸ ECtHR, Brusco v. France, case 1466/07, judgement of 14 October 2010.

Article 4 : Right to information of children

19. On a general level, the structure of this Article was felt to be confusing. Was it necessary to restate the application of Directive 2012/13/EU? The meaning of the term “*within the same scope as*” was felt to be unclear. The Commission observed that this provision complements the rights foreseen in accordance with Directive 2012/13/EU. The term "within the same scope" refers to the exception for minor offences as foreseen by Directive 2012/13/EU which would apply also to the Directive on children.
20. **Paragraph 1:** Various Member States felt that providing all the information foreseen in this paragraph would be disproportional and not in the interest of the child. The suggestion was made to concentrate on points 1, 2, 4 and 9, and to delete points 3, 5, 6, 7 and 8. The observation was also made that some rights could better be given to parents than to children.
21. Particular observations:
- the right to medical examination is only available when the child is deprived of liberty; why is it put in paragraph 1?;
 - the right to legal aid (9) would not be in line with Directive 2013/48/EU. It was suggested to put "*the right to legal aid, as provided for in national law*". See also comments under Article 18.
22. **Paragraph 2:** The question was raised if children could understand a letter of rights. The question was also put why in this paragraph different wording was used than that in Article 4 of Directive 2012/13/EU: the words "deprived of liberty" would be wider than "arrested or detained".
23. It was suggested that it would be clearer to turn this provision in one that amends Directive 2012/13/EU. The Commission observed that the interplay with Directive 2012/13/EU was difficult to regulate. The letter of rights would not apply to individuals who are not deprived of liberty. Certain clarifications could possibly be introduced into a recital.

Article 5 : Right of the child to have the holder of parental responsibility informed

24. Member States stated that this provision should be clarified:

- It should be made clear that it is the authorities that can decide who should be informed, not the child;
- It should be made clear when the information should be provided;
- A definition of "appropriate adult" should be provided, and how this person is chosen (procedure).

25. The Commission observed that the concept of "appropriate adult" was not a new one but introduced by Directive 2013/48/EU (see Article 5(2)). However, no definition had been provided in that context. In the current proposal for a Directive, the Commission had provided certain examples in the explanatory memorandum (pt. 25).

26. In any event, according to the Commission, an appropriate adult should be decided on a case-by-case basis. It should be for the authorities to decide, not for the child. The Commission also noted that Article 5 of the proposed Directive does not require the presence of parents but only to provide them information. Article 5 should be read together with Article 5(3) of Directive 2013/48/EU.

Article 6 : Right to a mandatory access of a lawyer

27. In general, questions were put as regards the application of this Article. To what extent would it go further than Directive 2013/48/EU? In which cases and in which stages of the proceedings would it apply? What about costs? The combination of Article 6 with Article 18 could lead to very far reaching financial implications. Hence, Article 6 should be made more proportional. Some Member States observed that the right of access to a lawyer should not apply in minor cases (e.g. lipstick stolen). This should be put in the operative part of the text; recitals 17/18 would not be sufficient.

28. **Paragraph 1:** Many Member States asked for clarification why the wording in the current proposal for a Directive is different from that in measure C. It was suggested to replace the words "are assisted by a lawyer" by "have the right of access to a lawyer", in order to align the wording with Directive 2013/48. Also, it seems inconsistent to say that Directive 2013/48 should apply (with the possibility to waive), but then state that the right of access to a lawyer cannot be waived.
29. **Paragraph 2:** The question was asked what is to be understood by "final dismissal of a case".
30. The Commission underlined the importance of this provision as being the core measure of the proposed Directive. It noted that the discussions in the context of this Directive should not lead to undermining Directive 2013/48/EU, which provides access to a lawyer for all children suspected or accused. The proposed Directive only derogates from the possibility to waive that right for children, thus ensuring effective assistance by a lawyer.

Article 7 : Right to an individual assessment

31. The question was asked what this Article precisely requests Member States to do, and whether this Article would not put a severe burden on Member States. Various Member States observed that this provision should be made more flexible, possibly using wording such as "depending on the case".
32. **Paragraph 2:** The words "economic and social background" raised some concerns; it was suggested to choose other wording, such as "parental or family background".
33. **Paragraph 3:** It was suggested to make the timing more flexible. The words "in any event" could be replaced by "at the latest". It was also suggested to make the assessment as close as possible to the court's decision.

34. The Commission underlined that this provision foresees already a lot of flexibility and the possibility for Member States to derogate (in particular paragraphs 4 and 7). As regards the timing, drafting suggestions could be discussed.

Article 8 : Right to a medical examination

35. In general, some Member States asked for clarification of the meaning of this Article and of the medical examination. Would this examination in reality not be an expertise on the fitness for questioning? It was also suggested that this Article would be disproportionate, since not every child would need such medical examination. It would go too far to foresee this right in respect of each and every child. There would also be an inconsistency with Directive 2012/13/EU, which speaks in Article 4(2)(c) of the right of access to *urgent* medical assistance. Finally, the question was asked if the right could be waived.
36. **Paragraph 1:** The drafting of this paragraph raised some concerns. The criterion used would be too vague. It should also be possible to make the examination "ex officio". And would the term "in case of deprivation of liberty" not be too broad?
37. **Paragraph 2:** Objections were raised to the child's lawyer being able to ask for the examination (see point c).
38. The Commission underlined that the medical examination would not be obligatory, only in case of deprivation of liberty and upon request. In certain cases, the lawyer could be the best placed to note that the child is in need of a medical examination. No precise timing is foreseen, this should be considered on a case-by-case basis.

Article 9 : Questioning of children

39. In general this provision was criticized for not being proportionate (in particular paragraph 2). The obligation of audio visual recording of *any* questioning could be very costly - not all police stations have such equipment - and lead to substantial delays. It was suggested to tailor-made this Article for the different stages of the proceedings, insert a possibility of making derogations, or at least exclude initial questioning on the street. The suggestion was also made to limit the application of this Article to children deprived of liberty.
40. **Paragraph 1:** It was suggested to add further conditions for the application of this paragraph so as to make its application more specific to the various phases of the criminal proceedings. Inspiration could be drawn from the Victims Directive. Making a link with Article 14(3), the question was raised on the use of the tapes in court proceedings. A technical impossibility to make an audio visual recording should not prevent the questioning from taking place.
41. **Paragraph 2:** Various Member States suggested deleting this paragraph, or at least proceed to further clarification and limitation.
42. The Commission noted that the recording of interviews was an essential safeguard for suspects and avoided undue repetition or challenge of interrogations. A similar safeguard was introduced also in the Victims' Directive.⁹ Given that Member States have the obligation to provide for a framework to enable recordings in the context of the Victims' Directive, the additional costs for Member States should be limited. As regards the wording of paragraph 2, the Commission would be open for discussion.
43. **Paragraph 3:** It was observed that this provision was redundant in the light of recital 21.

⁹ See Article 24 – recording of interviews for child victims.

Article 10 : Right to liberty

44. In general, the question was asked what "deprivation of liberty" would entail in the context of this Article. Would it also mean holding in the street after shoplifting?
45. The Commission indicated that this was not the case as this provision refers to the *habeas corpus* principle. The Commission outlined that it had opted for not regulating the duration of police custody.
46. **Paragraph 1:** Several Member States felt that stating that children can only be deprived of liberty as a "measure of last resort" might not be suitable language for a directive. It was suggested to put alternative wording, using criteria of proportionality.
47. The Commission indicated that the expression "measure of last resort" comes from relevant international standards such as Article 37(b)¹⁰ of the *UN Convention on the Rights of the Child* and point 19 of the *Guidelines of the Council of Europe on child-friendly justice*,¹¹ and that it therefore would like to keep it.
48. **Paragraph 2:** The question was put what a "periodic review" would entail. Would it be a automatic review, or one at the request of the child or his lawyer? It was said that such review would not make much sense in respect of short periods of deprivation of liberty (some hours). Also, the request was made that not only courts, but also prosecutors or senior police officers could carry out the periodic review; hence, the suggestion was made to modify "court" in "judicial authority".

¹⁰ Article 37(b) of the UN Convention on the Rights of the Child reads as follows:
"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

¹¹ Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted 17 November 2010, point (IV) 19 reads as follows:
"Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time."

49. The Commission replied that Member States are free to organise the periodic review as they deem fit; so it could be an automatic review, or one that is only carried out following a request of the child or his lawyer. According to the Commission, the paragraph should not apply to short periods of deprivation of liberty, like a couple of hours. The Commission insisted however that the review should be carried out by a court, and not by a prosecutor, nor by a senior police officer; hence, "court" should not be modified in "judicial authority".

Article 11 : Alternative measures

50. In general, the question was put whether it would be appropriate to merge this Article with Article 10. It could simply be noted that, before depriving a child of his liberty, Member States should consider to have recourse to alternative measures.

51. **Paragraph 1:** It was felt that the words "*where the conditions for deprivation of liberty are fulfilled*" should be clarified.

52. **Paragraph 2:** Some Member States wondered whether this provision would oblige Member States to introduce the measures mentioned in this paragraph. It was observed that this paragraph could be moved to the recitals, since it only concerns examples. As regards point a), the suggestion was made to turn it around by putting something like "an interdiction for the child to visit certain places". As regards point d), it was underlined that the therapeutic treatment or treatment for addiction should only be possible in cases the child and the holder of the parental responsibility consents.

53. The Commission explained that the wording "where the conditions of deprivation of liberty are fulfilled" refers to situations where deprivation of liberty is legally possible and factually envisaged. The Commission outlined that the list in paragraph 2 is a non exhaustive list, and that Member States' legislation could provide for more or less measures as long as there are alternative measures.

Article 12 : Right to specific treatment in case of deprivation of liberty.

54. The Commission clarified that this Article applies to the entire duration of the criminal proceedings, including the phase of detention after the judgment has been rendered. The Commission agreed therefore that a modification could be envisaged in Article 2(1), according to which the Directive only applies "until the conclusion of the criminal proceedings".
55. The Commission explained that the Article has a proper legal basis in the Treaty. Referring to a previous legal opinion by its Legal Service (2011 Green Paper on detention), the Commission outlined that the proposed provisions are carefully pondered and covered by Article 82 TFEU. The Commission explained that the reference to "criminal matters" in Article 82(2)(b) TFEU relates to the whole process of investigating, prosecuting, sentencing, enforcing a sentence and registering the sentence in case of conviction and therefore clearly covers the post-trial phase.
56. Further to queries by some Member States regarding the legal basis of this Article, the Council Legal Service observed that it has not yet studied the matter in detail, but that it felt, *prima facie*, that although the rights that the Article lists are not of a procedural nature, the provision can have a legal basis in the Treaty to the extent that it pursues the objective of promoting mutual trust between judicial authorities, and such trust is essential for a proper functioning of mutual recognition of judicial decisions. However, as for the time period covered by paragraph 2, the Council Legal Service considered that it is not clear if it covers rights of individuals once a conviction has become firm and definitive, given that Article 82(2)(b) only provides for a legal basis to harmonise rights in criminal *procedure*.
57. **Paragraph 1:** Member States indicated that this paragraph should be made more flexible. The suggestion was made to construe it more as a recommendation than as an obligation.

58. **Paragraph 2:** It was observed that during short periods of detention, not all the measures set out in this paragraph could be made available. Hence, it was suggested to set certain limitations on the application of this paragraph; it was underlined that the criminal proceedings should not be jeopardised. Some Member States wondered also what the measures, such as right to education and training, should exactly entail. It was also suggested to make a specific provision for European Arrest Warrant proceedings.
59. The Commission stated that some flexibility could be shown regarding the application of this Article, but that the main objective should be maintained.

Article 13 : Timely and diligent treatment of cases

60. Several Member States felt that this Article would be difficult to transpose in national legal orders. The suggestion was made to move it to the recitals, at least its paragraph 2.
61. The Commission explained that this Article is based on the *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, in particular its point 50.¹² The Commission observed that for reasons of proportionality no more prescriptive wording had been chosen, hence giving leeway to the Member States.

Article 14 : Right to protection of privacy

62. **Paragraph 1:** The rule as proposed by the Commission is that criminal proceedings against children (in particular the trial/hearing before a court) are not open to the public, but that derogations can be made in exceptional circumstances. Various Member States stated that they could accept this rule, since they currently have the same or a similar rule in their national legal order, it being understood that in some Member States the sentence is always pronounced in public.

¹² This point reads as follows:
"50. *In all proceedings involving children, the urgency principle should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law.*"

63. Many Member States, however, stated that the principle of a public hearing should prevail. They referred in this context to Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*,¹³ and asked that the rule as proposed by the Commission be turned around: criminal proceedings against children should in principle be public, but exceptions can be made on a case-by-case basis. As a limitation it was suggested to explicitly apply the rule of public hearings only to the trial phase and the reading of the judgement.
64. The Commission motivated its choice for the rule set out in paragraph 1 by referring to the *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*,¹⁴ and by observing that the rule as proposed was the only one that would add to the protection of children. The Commission noted that flexibility was foreseen by the possibility to derogate, and that this rule would not prevent authorities from pronouncing a judgement in public if the name and image of the child were protected. The Commission made also clear that victims, as party to the proceedings, should have access to the hearing. Finally, the Commission noted that this provision does not regulate the role of media (contrary to the Victims' Directive).

¹³ Article 6(1) ECHR reads as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

¹⁴ Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, adopted 17 November 2010, point (IV) 9 reads as follows:

"9. Whenever children are being heard or giving evidence in judicial or non-judicial proceedings or other interventions, where appropriate, this should preferably take place in camera. As a rule, only those directly involved should be present, provided that they do not obstruct children in giving evidence."

65. **Paragraph 2:** The Commission explained that this provision is based on the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, in particular point (IV) 6.¹⁵
66. The question was raised whether this provision would prevent authorities from using video images in the context of the prosecution of a crime. It was suggested to allow exceptions to the rule in such cases.

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

67. Member States could in general accept the wording proposed by the Commission.

Article 16 : Right of children to appear in person at the trial

68. **Paragraph 1:** Many Member States indicated that the title of the paragraph is not in line with the text of the Article, since the first speaks about a *right* to be present at the trial, whereas the latter indicates that there is an *obligation* to be present. A clear majority of Member States felt that there should be a right, and not an obligation, to be present.
69. **Paragraph 2:** Various Member States felt that it would be disproportionate to grant children in each and every case when they are not present at the trial the possibility of participating in a new procedure allowing a fresh determination of the merits of the case. If the child simply doesn't want to appear at the trial in respect of which he has been properly convened, he should not automatically be given a second chance.

¹⁵ Point (IV) 6 of the Guidelines reads as follows:
"6. *The privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings and other interventions should be protected in accordance with national law. This generally implies that no information or personal data may be made available or published, particularly in the media, which could reveal or indirectly enable the disclosure of the child's identity, including image, detailed descriptions of the child or the child's family, names or addresses, audio and video records, etc.*"

Reference was made to the Council Framework Decision on "in absentia"¹⁶ and to the Commission Proposal on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.¹⁷

70. The Commission outlined that it deliberately opted for a reinforced obligation for educational reasons (the child's understanding of the conviction, selection of appropriate and meaningful sanctions, pedagogical aspects of the hearing).

Article 17 : European Arrest Warrant proceedings

71. Various Member States expressed fears that this Article could substantially delay EAW proceedings. The application of Articles 10 (right to liberty), 11 (alternative measures) and 15 (right of access to the trial of the holder of parental responsibility) of the Directive to EAW proceedings was considered to be problematic. Concerns were also raised regarding the application of Article 18 (legal aid); the question was raised why the latter should be included at all, given that there is a separate proposal on that issue.
72. A couple of delegations suggested to invite the COPEN Working Party to examine this Article. It was also suggested to introduce similar wording as used in Article 10(3) of Directive 2013/48/EU ("*mutatis mutandis*").
73. The Commission explained that the proposed wording of the text is the result of thorough reflection; especially the information of parents would be of vital importance.

¹⁶ Framework Decision 2009/299/JHA (OJ 81, 23.3.2009, p. 24).

¹⁷ Doc. 17621/13 + ADD 1 + ADD 2 + ADD 3. See in particular Article 8.

Article 18 : Right to legal aid

74. Various Member States wondered how this article should apply in practice and what Member States exactly have to do. Some Member States underlined that there should be a case-by-case approach. One Member State asked for the deletion of this Article.
75. The Commission underlined that this text is stronger than that in Article 11 of Directive 2013/48/EU since children need to be better protected. The Commission stressed that while Member States have some flexibility in applying this Article, they should not "empty" it and prevent reaching the objective of ensuring effective exercise of the right of access to a lawyer. The Commission advised Member States to read the Directive on this point in conjunction with the Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings,¹⁸ and the Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings.¹⁹

Article 19 : Training

76. **Paragraph 1:** Several Member States stated that they would like this paragraph to be more flexible.
77. **Paragraph 2:** Many Member States observed that lawyers are a free profession, and that they are responsible themselves for their training. Hence, Member States could not "ensure" that lawyers receive training, but they could "request" or "promote" such training to be given.

¹⁸ Doc. 17635/13 + ADD 1 + ADD 2 + ADD 3.

¹⁹ Doc. 17643/13.

78. The Commission, however, considers that it would not be appropriate to use more flexible wording.. Member States can adopt national legislation according to which Bar Associations foresee such training.

79. **Paragraph 3:** It was suggested to make this paragraph clearer.

Article 20 : Data collection

80. Many Member States consider that this Article is not proportionate and imposes a too great administrative burden on Member States. Hence, it was generally felt that this Article should be deleted. Alternatively, it was suggested putting "if such data are available".

81. The Commission observed that under the Lisbon Treaty it has the task of ensuring the application of the measures adopted by the institutions. According to the Commission, in order to be able to carry out that task in an effective manner, it needs to have relevant data. This provision has been inspired by Article 28 of the Victims' Directive, but being more precise on the data needed.

Article 21 : Costs

82. Questions were raised regarding medical costs, as they would normally fall under a medical insurance. Also, it was observed that some costs might have to be carried by the child or his parents, if their financial situation so permits and if the child has been found guilty.

Article 22 : Non-regression clause

83. No comments were made on this standard article.

Article 23 : Transposition

84. Several Member States stated that an implementation period of 24 months might too short; depending on the outcome of the negotiations it might be put at 36 months. Also, the request was made to delete the word "immediately" in the first paragraph.
85. The Commission observed that a discussion about the length of the transposition clause is – at this stage – premature. The wording of this provision (in particular "immediately") stems from Article 15 of Directive 2013/48/EU.

Conclusion

86. On the basis of the comments by Member States, the Presidency suggests making some changes in the text of the Directive. These are indicated by **bold** and ~~strikethrough~~ in the Annex.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on procedural safeguards for children suspected or accused in criminal proceedings

[recitals not reproduced]

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/JHA²⁰ (“European arrest warrant proceedings”).

Article 2

Scope

1. This Directive applies to children subject to criminal proceedings from the time when **they are made aware that they are** ~~become~~ suspected or accused of having committed an **criminal** offence ~~and until the conclusion of the criminal proceedings~~. **It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.**²¹

²⁰ 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).

²¹ See measures A, B and C.

- 1a. **As an exception to paragraph 1, Article 12 also applies during the phase of the execution of a sentence.**
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.²²
- [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.

[²³]

Article 3

Definition

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

²² Please note that the Presidency suggests submitting a question in respect of this provision to the March JHA Council.

²³ A text along the following line - compare point 16 of the explanatory memorandum - could be inserted in the recitals or in the operative part:

"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 whose aim is not to hold the child criminally responsible but to ensure his proper conduct, bring about favorable changes in the child's personality and behavior, and to help him to integrate with the society, and which may lead to the imposition of certain restrictive measures (for instance protection measures, correction measures, education measures). Such proceedings do not fall within the scope of this Directive."

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 **promptly** about the following rights within the same scope as Directive 2012/13/EU, **where these rights apply**:
 - (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) **(moved to paragraph 1a)** ;
 - (5) **(moved to paragraph 1a)** ;
 - (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.

- 1a. **When children are deprived of liberty, they shall also be informed promptly about the following rights within the same scope as Directive 2012/13/EU:**
 - (1) their right to a medical examination, as provided for in Article 8;
 - (2) their right to liberty and the right to specific treatment in detention, as provided for in Articles 10 and 12;

2. Member States shall ensure that, where children are **arrested or detained**, ~~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, **designated by the competent authority**, is provided with the information that the child receives in accordance with Article 4.

Article 6

Right to a mandatory access to a lawyer²⁴

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 **of** 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.

²⁴ This Article is subject to a question during the orientation debate at the March JHA Council.

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 **familial economic** and social background.
3. The individual assessment shall take place at an appropriate stage of the proceedings and in any event **at the latest on submission of the merits of the accusation before a court** ²⁵ ~~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 **in the past** ~~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 **in the past** ~~previously~~ come to the attention of Member State authorities in the context of criminal proceedings.

²⁵ See Article 6(3) of Directive 2012/13/EU.

Article 8

Access 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.~~²⁶
2. **The medical examination may be carried out *ex officio* by the competent authorities, or at the request of any of 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.

²⁶ It is suggested to delete this text (alternatively, it can be transferred to the recitals).

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 **submission of the merits of the accusation before a court indictment** is audio-visually recorded, unless it is not proportionate taking into account the **lack of** complexity of the case, the **lack of** 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. Such review **may be carried out *ex officio* by the competent authorities, or at the request of any of the persons mentioned in Article 8(2).**²⁷

²⁷ All practical arrangements are left to the Member States; this could be made clear in the recitals.

Article 11

Alternative measures

1. Member States shall ensure that, **wherever possible** ²⁸~~where the conditions for deprivation of liberty are fulfilled~~, the competent authorities have recourse to alternative measures **instead of deprivation of liberty**.

2. The alternative measures may include:
 - (a) an obligation for the child **not to be in certain places or 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, [**subject to the child's consent**];
 - (e) participation in educational measures.

²⁸ It is suggested to clarify in a recital that this Article does not apply to short-term deprivation of liberty.

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 liberty²⁹, 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~~ **child's** future integration into society.

²⁹

Accompanying recital (suggestion):

"When a child is deprived of liberty, Member States should take appropriate measures in order to promote the well-being of the child. Such measures could concern the health and physical development of the child, the education and training of a child, the child's family life and the future integration into society of child. The measures should be taken if and when appropriate, taking into account notably the expected period of deprivation of liberty of the child. When a child is deprived of liberty during only a short period of time, Member States should normally be obliged to take none or less measures than when a child is deprived of liberty during a long period of time."

Article 13

Timely and diligent treatment of cases

1. Member States shall **take appropriate measures to** 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.]~~³⁰

Article 14

Right to protection of privacy³¹

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, **[unless this is strictly necessary for conducting the criminal proceedings efficiently.]**
3. Member States shall ensure that the records referred to in Article 9(1) are not publicly disseminated.

³⁰ It is suggested to move this text to the recitals.

³¹ Please note that Article 14(1) is subject of a question at the orientation debate in the March JHA Council.

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 **have the right to be** ~~are~~ present at their trial. **Member States shall take appropriate measures³² to ensure that children are effectively present at their trial.**
2. Member States shall ensure that where children were not ~~present~~ **properly convened to a trial** ~~at a trial~~ resulting in a decision on their guilt, **or where they, although being properly convened, were not able to be present at such trial for reasons beyond their control**, 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.

³² It could be further explained in a recital what should be understood by "appropriate measures".

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] ³³ 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 of ~~to~~ access to a lawyer as referred to in Article 6.

³³ It has to be verified to what extent the rights of the Directive should apply in EAW proceedings.

Article 19

Training

1. **Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union**, Member States shall ensure that judicial and law enforcement authorities and ~~prison~~ **staff of detention facilities** 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 **request those responsible for the training** of lawyers that they also receive such training. ~~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 **available** data showing how the rights set out in this Directive have been implemented.³⁴
2. [³⁵]

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, **unless these costs are covered in any other way.**³⁶

³⁴ Compare Article 28 of the Victims Directive (2012/29/EU).

³⁵ It is suggested to move former paragraph 2 to the recitals, since it is an illustration of which data one could think about in this context. Paragraph 2 read as follows:

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.*

³⁶ In the recitals, the example can be given of medical insurance covering the costs of the medical examination foreseen in Article 8.

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 [24/36 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
