



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 February 2014

7047/14

**Interinstitutional File:
2013/0408 (COD)**

**DROIPEN 33
COPEN 74
CODEC 591**

NOTE

from :	Presidency
to :	Delegations
No. Prev. doc. :	6384/14 DROIPEN 18 COPEN 49 CODEC 369
No. Cion prop. :	17633/13 DROIPEN 159 COPEN 236 CODEC 2930 + ADD 1 + ADD 2 + 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 meeting of the DROIPEN Working Party on 21 February, and follow-up

1. On 21 February, the DROIPEN Working Party held its third meeting on the proposal.
2. At the start of the meeting, the Fundamental Rights Agency (FRA) presented its views on Articles 4, 5, 9, 14 and 19 of the proposed Directive. A summary of the findings of the FRA is set out in Annex II to this note.
3. Following the presentation by the FRA, the Commission and Member States posed questions to the Agency, which resulted in a lively debate. Several Member States pointed out that the situation of children who are victims - the main basis of the research carried out by the FRA - should be distinguished from the situation where children are suspected or accused of having committed a criminal offence.

4. After an examination of the draft paper for Coreper/Council (see doc 6403/14), the Working Party examined Articles 4, 5, 7, 8, 9, 10, 11 and 12 of the draft Directive on the basis of the Annex to document 6384/14. Member States generally showed satisfaction with the changes that the Presidency had introduced in the text (except as regards Article 9, audio-visual recording).
5. The Working Party also discussed the scope of the Directive (Article 2 in conjunction with Article 12). Several Member States expressed doubts with regard to the possible extension of the scope of the Directive to the phase of the execution of the judgment. According to the Member States, Article 82(2)(b) TFEU, which refers to "rights of individuals in *criminal procedure*", would not provide a sufficient legal basis for such wide scope. The Council Legal Service was invited to produce a written opinion on this issue, preferably in due time before the meeting on 19 and 20 March 2014.
6. On the basis of the comments made by the Member States during the meeting, the Presidency suggests making some further changes in the text of the Directive, see the text in Annex I.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on procedural safeguards for children suspected or accused in criminal proceedings

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas: ³

- (1) The purpose of this Directive is to establish procedural safeguards to ensure that children who are suspected or accused in criminal proceedings are able to understand and follow those proceedings, to enable such children to exercise their right to a fair trial and to prevent re-offending by children and foster their social integration.
- (2) By establishing minimum rules on the protection of procedural rights of suspects or accused persons, this Directive should strengthen the trust of Member States in the criminal justice systems of other Member States and can thus help improve mutual recognition of decisions in criminal matters. Such common minimum rules should also remove obstacles to the free movement of citizens throughout the territory of the Member States.

¹ OJ C , , p. .

² OJ C , , p. .

³ The recitals have not yet been discussed. New text in bold are Presidency suggestions.

- (3) Although the Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.
- (4) **On 30 November 2009, the Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings ('the Roadmap').⁴ Taking a step-by-step approach, the Roadmap calls for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special safeguards for suspects or accused persons who are vulnerable (measure E). The Roadmap emphasises that the order of the rights is only indicative and thus implies that it may be changed in accordance with priorities. The Roadmap is designed to operate as a whole; only when all its components are implemented will its benefits be felt in full. (...) ⁵**
- (4a) **On 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme — An open and secure Europe serving and protecting citizens (point 2.4).⁶ The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspects and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.**

⁴ OJ C 295, 4.12.2009, p. 1.

⁵ Recitals 4 and 4a contain standard language coming from Measures A, B and C.

⁶ OJ C 115, 4.5.2010, p.1.

- (5) Three measures have been adopted to date, namely Directive 2010/64/EU of the European Parliament and of the Council ⁷, Directive 2012/13/EU of the European Parliament and of the Council ⁸ and Directive 2013/48/EU of the European Parliament and the Council ⁹.
- (6) This Directive promotes the rights of the child, taking into account the Guidelines of the Council of Europe on child-friendly justice.
- (7) Children who are suspects or accused in criminal cases should be given special attention in order to preserve their potential for development and reintegration into society.
- (8) This Directive should apply to children meaning persons under the age of 18 at the time when they become suspected or accused of having committed an offence, regardless of their age during the criminal proceedings until the final judgment.
- (9) This Directive should also apply in respect of offences which have been committed after the age of 18 years by the same suspect or accused person and which are jointly investigated and prosecuted as they are inextricably linked to offences where criminal proceedings started against that person before the age of 18.
- (10) When, at the time a person becomes a suspect or accused person in criminal proceedings, that person is above the age of 18, Member States are encouraged to apply the procedural safeguards foreseen by this Directive until this person reaches the age of 21.

⁷ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p.1).

⁸ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142, 1.6.2012, p.1).

⁹ Directive 2013/48/EU of the European Parliament and the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings and on the right to have a third party informed upon deprivation of liberty, and to communicate with third persons and with consular authorities (OJ L 294, 6.11.2013, p. 1).

- (11) Member States should determine the age of children on the basis of the children's own statements, checks of their civil status, documentary research, other evidence and, if such evidence is unavailable or inconclusive, on the basis of a medical examination.
- (12) This Directive should be implemented taking into account the provisions of Directive 2012/13/EU and Directive 2013/48/EU. Information with regard to minor offences should be provided under the same conditions as provided for by Article 2(2) of Directive 2012/13/EU. However, this Directive provides further complementary safeguards with regard to information to be provided to the holder of parental responsibility and mandatory access to a lawyer in order to take into account the specific needs of children.
- (13) If a child is deprived of liberty, the Letter of Rights provided to the child pursuant to Article 4 of Directive 2012/13/EU should include clear information on the child's rights under this Directive.
- (14) The term "holder of parental responsibility" means any person having parental responsibility over a child as defined in Council Regulation (EC) 2201/2003¹⁰. Parental responsibility means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect, including rights of custody and rights of access.
- (15) Children should have the right to have the holder of parental responsibility informed about applicable procedural rights, either orally or in writing. This information should be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of defence of the child. Where it would be contrary to the best interests of the child to inform the holder of parental responsibility of those rights, another appropriate adult should be informed.

¹⁰ Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OJ L 338, 23.12.2003, p. 1).

- (16) Children should not be able to waive their right of access to a lawyer because they are not able to fully understand and follow criminal proceedings. Therefore, the presence or assistance of a lawyer should be mandatory for children.
- (17) In some Member States an authority other than a public prosecutor and a court having jurisdiction in criminal matters has competence for imposing penalties other than deprivation of liberty in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require the competent authorities to ensure mandatory access to a lawyer. Where the law of a Member State provides for the imposition of a penalty regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, mandatory access to a lawyer should therefore apply only to the proceedings before that court following such an appeal or referral. In some Member States proceedings involving children may be dealt with by public prosecutors who may impose penalties. In such proceedings children should have mandatory access to a lawyer.
- (18) In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. It would be disproportionate to require the competent authorities to ensure mandatory access to a lawyer in respect of such minor offences. Where the law of a Member State provides that deprivation of liberty cannot be imposed as a penalty in respect of minor offences, the right to mandatory access to a lawyer should therefore apply only to proceedings before a court having jurisdiction in criminal matters.
- (19) Children who are suspected or accused in criminal proceedings should have the right to an individual assessment to identify their specific needs in terms of protection, education, formation and social integration, to determine if and to what extent they would need special measures during the criminal proceedings and to determine the extent of their criminal responsibility and the adequacy of a penalty or educative measure for them.

- (20) In order to ensure the personal integrity of a child who is arrested or detained, the child should have access to a medical examination. **Such medical examination** should be carried out by a physician, **either on an initiative *ex officio* of the competent authorities, or following a request of the child, the holder of the parental responsibility, or the child's lawyer, unless it is obvious that such request has been made with the sole purpose of delaying the criminal proceedings.**
- (21) In order to ensure sufficient protection of children who are not always able to understand the content of interviews to which they are subject, to avoid any challenge of the content of an interview and thereby undue repetition of questioning, questioning of children should be audio-visually recorded. This does not include questioning necessary to identify the child.
- (22) However, it would be disproportionate to require the competent authorities to ensure audio-visual recording in all circumstances. Due account should be taken of the complexity of the case, the seriousness of the alleged offence and the potential penalty that can be incurred. If a child is deprived of liberty before conviction, any questioning of the child should be audio-visually recorded.¹¹
- (23) Such audio-visual records should be accessible only to the judicial authorities and the parties to the proceedings. Moreover, the questioning of children should be carried out in a manner that takes into account their age and level of maturity.
- (24) When deciding the issue of legal aid, Member States should aim at having rules which guarantee the effective exercise of the right to access to a lawyer for children.

¹¹ Recital to be revised in the light of the final text of Article 9.

- (25) Children are in a particularly vulnerable position in relation to detention. Special efforts should be undertaken to avoid deprivation of liberty of children given the inherent risks for their physical, mental and social development. The competent authorities should consider alternative measures, **in particular if the deprivation of liberty could last longer than a couple of hours,**¹² and impose such measures whenever this is in the best interests of the child. **Such alternative measures could include an obligation for the child not to be in certain places or an obligation for the child to reside in a specific place, restrictions of contact with specific persons, reporting obligations to the competent authorities, undergoing of therapeutic treatment or treatment for addiction subject to the child's consent, and participation in educational measures.**
- (26) When deprivation of liberty is imposed on children, they should benefit from special protection measures. In particular they should be held separately from adults unless it is considered in the child's best interest not to do so, in accordance with Article 37(c) of the United Nations Convention of the Rights of the Child. When a detained child reaches the age of 18 years, there should be the possibility to continue the separate detention where warranted, taking into account the individual circumstances of the case.¹³ Particular attention should be paid to the way detained children are treated given their inherent vulnerability. Children should have access to educational facilities according to their needs.
- (26a) Deprivation of liberty of children before their conviction should be subject to a periodic review by a court, which could also be a single judge.**
- (27) Professionals in direct contact with children should take into account the particular needs of children of different age groups and should take care that the proceedings are adapted to them. For that purpose, they should be specially trained in dealing with children.

¹² Alternatively, these words in bold could be replaced by inserting the following words at the beginning of the sentence: "**Except in cases where only a very short period of deprivation of liberty is envisaged, ...**"

¹³ Text to be aligned with the final text of Article 12(1).

- (28) Children should be judged in the absence of the public in order to protect their privacy and to facilitate their re-integration into society. In exceptional cases the court may decide that a hearing should be held publicly after it has taken due account of the best interests of the child.
- (29) In order to ensure appropriate assistance and support of children, the holder of parental responsibility or another appropriate adult should have access to the court hearings involving the suspected or accused child.
- (30) The right of an accused person to appear in person at the trial is based on the right to a fair trial provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights.
- (31) The rights provided for by this Directive should apply to children subject to European arrest warrant proceedings from the time they are arrested in the executing Member State.
- (32) Any individual assessment, medical examination and audio-visual recording provided for by this Directive should be carried out free of charge for the child.
- (33) In order to monitor and evaluate the effectiveness of this Directive, there is a need for collection of data by the Member States with regard to the implementation of the rights set out in this Directive. Relevant data include data recorded by the judicial authorities and by law enforcement authorities and, as far as possible, administrative data compiled by healthcare and social welfare services as regards the rights set out in this Directive, in particular in relation to the number of children given access to a lawyer, the number of individual assessments carried out, the number of interviews audio-visually recorded and the number of children deprived of liberty.

- (34) This Directive upholds the fundamental rights and principles as recognised by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, including the prohibition of torture and inhuman and degrading treatment, the right to liberty and security, respect for private and family life, the right to the integrity of the person, the rights of the child, integration of persons with disabilities, the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of defence. This Directive should be implemented in accordance with those rights and principles.
- (35) This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter of Fundamental Rights of the European Union or the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted in the case law of the Court of Justice of the European Union and the European Court of Human Rights.
- (36) Since the objectives of this Directive, namely setting common minimum standards on procedural safeguards for children suspected or accused in criminal proceedings, cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve these objectives.

- (37) [In accordance with Articles 3 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to participate in the adoption and application of this Directive] OR [In accordance with Articles 1 and 2 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application]¹⁴;
- (38) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive, and is not bound by it or subject to its application.
- (39) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents¹⁵, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

¹⁴ The final wording of this recital in the Directive will depend on the position of the United Kingdom and Ireland taken in accordance with the provisions of Protocol No 21.

¹⁵ OJ C 369, 17.12.2011, p. 14.

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/JHA¹⁶ (“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 by the competent authorities of a Member State 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.**¹⁷

[1a. As an exception to paragraph 1, Article 12 also applies during the phase of the execution of a sentence.]¹⁸

2. This Directive applies to children subject to European arrest warrant proceedings from the time of their arrest in the executing Member State.

¹⁶ 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).

¹⁷ See measures A, B and C.

¹⁸ This text - which, if maintained in principle, will certainly need to be redrafted - depends on the outcome of the request for a written legal opinion to the Council Legal Service on the question of "scope" (see cover note, point 5).

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.¹⁹
- [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.
- [²⁰]

Article 3

Definition

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

¹⁹ This provision is subject to a question at the March JHA Council (see doc 6403/14). Subsequently to this discussion, the Presidency will present a drafting suggestion for this provision, if appropriate.

²⁰ 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) **their right to liberty, as provided for in Article 10;**
 - (5) their right to protection of privacy, as provided for in Article 14;
 - (6) their right that the holders of parental responsibility have access to the court hearings, as provided for in Article 15;
 - (7) their right to appear in person at the trial, as provided for in Article 16;
 - (8) their right to legal aid, **in accordance with national law** ~~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 specific treatment in detention, as provided for in Article 12;]²¹

2. Member States shall ensure that, where children are **deprived of liberty**,²² the Letter of Rights given to them pursuant to Directive 2012/13/EU includes their rights under this Directive.

²¹ This point depends on the outcome of the request for a written legal opinion to the Council Legal Service on the question of "scope" (see cover note, point 5).

²² On request by delegations, the language of paragraphs 1a and 2 has been aligned. It seems appropriate to apply slightly higher standards in respect of children, hence "deprived of liberty" has been put instead of "arrested or detained".

Article 5

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

1. 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 **promptly** with the information that the child receives in accordance with Article 4.
2. **When the child is deprived of liberty, Member States may temporarily derogate from the application of the paragraph 1 on the basis of one of the compelling reasons set out in Article 5(3) of Directive 2013/48/EU, and under the conditions set out in Article 5(4) of that Directive.**

Article 6

Right to a mandatory access to a lawyer²³

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 **of** 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.

²³ This Article is subject to a question during the orientation debate at the March JHA Council. Subsequently to the discussion in Council, the Presidency will present a drafting suggestion for this Article, if appropriate.

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** (...) and social background.
3. The individual assessment shall take place at the **earliest** appropriate stage of the proceedings and, **at the latest, in due time for it to be taken into account by the court when sentencing.** (...)
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** (...) 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, **including the lack of seriousness of the alleged offence**, and whether or not the child has **in the past** (...) come to the attention of Member State authorities in the context of criminal proceedings.

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 (...).
2. **The medical examination may be carried out *ex officio* by the competent authorities, or at the request of any of the following persons (...):**
 - (a) the child,
 - (b) the holder of the parental responsibility or the appropriate adult referred to in Article 5;
 - (c) the child's lawyer.²⁴
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.

²⁴ See recital 20, where language has been inserted stating that a request which has been made with the sole purpose of delaying the criminal proceedings does not need to be followed up. The Presidency in this way tries to respond to calls from Member States that there should be "indications" for a need to make a medical examination.

Article 9

Questioning of children

1. Member States shall ensure that questioning of children by police or other law enforcement ~~or judicial~~ authorities carried out prior to the **submission of the merits of the accusation before a court may be** audio-visually recorded.
 - 1a. **In any event**, the questioning of children **as referred to in paragraph 1** shall be audio-visually recorded where the child is deprived of liberty.
 - 1b. **Member States may derogate from paragraph 1a if making an audio-visual recording is not proportionate for any of the following reasons :**
 - a) **[the lack of complexity of the case;]** ²⁵
 - b) **when an unforeseen technical problem makes it impossible to proceed to audio-visual recording, and it is imperative to question the child because of an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person.**
2. [deleted]
3. **This Article** is without prejudice to the possibility to ask questions for the purpose of personal identification of the child without such audio-visual recording.

²⁵ If maintained, this ground for making derogations may be further explained in a recital.

Article 10

Right to liberty and alternative measures

1. Member States shall ensure that children are deprived of liberty before their conviction only as a measure of last resort ²⁶ 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. ²⁷ Such review **may be carried out ex officio by the court, following a request by the competent authorities, or at the request of the child or the child's lawyer.**
3. Member States shall ensure that, **wherever possible** ²⁸ (...), the competent authorities have recourse to alternative measures **instead of deprivation of liberty**.

Article 11

Alternative measures

[deleted]

1. [renumbered as paragraph 3 in Article 10]
2. [...] ²⁹

²⁶ Some Member States stated that "measure of last resort" is not suitable language for a directive. The Commission indicated that the expression "measure of last resort" comes from relevant international standards such as Article 37(b) 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, and stated that it therefore would like to keep it.

²⁷ It has been clarified in recital 26a that a court can also be a single judge.

²⁸ It is clarified in recital 25 that short-term deprivation of liberty is not envisaged by this Article.

²⁹ The examples formerly set out in Article 11(2) have been transferred to recital 25.

Article 12

Right to specific treatment in case of deprivation of liberty³⁰

- [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 [**endeavour to**] 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 liberty³¹, 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.]

³⁰ The scope and consequent drafting of this Article depends on the outcome of the request for a written legal opinion of the Council Legal Service, see the cover note, point 5.

³¹ 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.]~~³²

Article 14

Right to protection of privacy³³

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.

³² It is suggested to move this text to the recitals.

³³ Please note that Article 14(1) is subject to a question at the orientation debate in the March JHA Council. Subsequently to the discussion in Council, the Presidency will present a drafting suggestion for this Article, if appropriate.

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 measures** ³⁴ **to ensure that children are effectively present at their trial.**
2. Member States shall ensure that where children were not ~~present~~ **or not 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.

³⁴ 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] ³⁵ 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 ³⁶

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.

³⁵ It has to be verified to what extent the rights of the Directive should apply in EAW proceedings.

³⁶ The advisability of this Article needs further examination, in the light also of the 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).

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.³⁷
2. [³⁸]

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.**³⁹

³⁷ Compare Article 28 of the Victims Directive (2012/29/EU).

³⁸ 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.*

³⁹ 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

Non-paper by the Fundamental Rights Agency (FRA)
summarising its intervention at the DROIPEN Working Party on 21 February 2014

Background

This paper presents some preliminary findings from FRA's research on the treatment of children in judicial proceedings, which relate directly to articles of the proposed Directive on procedural safeguards for children suspected or accused in criminal proceedings, specifically Articles 4, 5, 9, 14 and 19.

The FRA research aims to identify how children are treated in criminal and civil judiciary proceedings and to assess how the Council of Europe (CoE) Guidelines on child-friendly justice⁴⁰ are applied. The findings are based on interview-based research conducted by FRA in 2012 and 2013 with 574 professionals (including judges, prosecutors and psychologists), who work with children as victims, witnesses or parties to criminal and civil judicial proceedings. The research covered 10 EU Member States (Bulgaria, Croatia, Estonia, Finland, France, Germany, Poland, Romania, Spain and the United Kingdom). The work is conducted in close cooperation with the European Commission study on the involvement of children in administrative, civil and criminal judicial proceedings in the EU.

The FRA research did not look specifically into the situation of children suspected or accused in criminal proceedings. Its findings can, nevertheless, provide relevant input to the discussion on the proposed directive, because the judicial professionals interviewed reported on practices and procedures that apply to all children involved in judicial proceedings. The findings further show how children are treated when legal requirements are missing, or are not specific for children, or are lacking in detail.

⁴⁰ Council of Europe, Committee of Ministers (2010), Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 November 2010.

General findings

The main findings point to very different practices of how children are treated in judicial proceedings, not only between but also within EU Member States. This depends on the severity and type of cases, as well as the approach adopted by individual judges or other professionals involved in the case. In some Member States, children's participation in judicial proceedings is more formalised, standardised and adapted to children's needs than in others. Many professionals are not aware of the CoE guidelines and rely mainly on national regulation and, if not available, on their own understanding and judgement.

Input to specific proposed articles

The following section presents some of the FRA research findings as they relate to Articles 4, 5, 9 14 and 19 of the proposed Directive.

Article 4 - Right to information of children

Article 4 of the proposal requires that the child shall be informed promptly of the rights under the directive. Information is crucial for the fulfilment of other children's rights. In this regard, FRA's research shows that there is a lack of clear and specific national provisions and guidelines with respect to how children should be informed, on what issues, at what state of the proceedings and by whom. As a result, children are generally not informed about the proceedings or do not receive adequate information. Moreover, professionals tend to pass the responsibility of informing the child from one to another assuming that children have been properly informed. Parents become, thus, the main actors in charge of informing the child with nobody else checking on the child's understanding. Another issue that arises is the lack of child-friendly informative material whose provision depends merely on initiatives by individuals and NGOs, rarely institutionalised.

“One just has to try to explain that appropriately to the age but this is not predetermined, [it occurs] somehow intuitively. And one looks whether they understood it. I make it that way that I let them explain it to me again, in [their] own words, [checking] whether they actually can repeat it or not.”

Germany, Police officer (Female)

All these aspects have a serious impact on the rights of the child and could be improved. Professionals believe that if children are appropriately informed, they are less scared and traumatised, as well as better prepared to face the difficulties involved in the proceedings. What is even more important is that children can make informed decisions and their statements can be used as better evidence.

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

The right to information of the holder of parental responsibility is acknowledged within Article 5 of the Proposal. This right is instrumental to ensure that the child receives adequate support and guidance throughout the proceedings. The importance of the role of the holder of parental responsibility in providing information to the child emerges also from FRA's research. Many children refer to the fact that they received information mainly through their parents. This happens despite the fact that there is no guidance on how to inform children, neither for parents nor for professionals, and that there is no assessment of the parents' ability to understand and convey information. Moreover, the potential conflicts of interests between the child and his/her parents, as well as the possibility that the views of parents may be biased, are not taken into account.

“Parents think that we are here to protect their interests. They are so obsessed with their negative emotions and thoughts that they forget about the child.”

Bulgaria, Social worker (Female)

Professionals, therefore, agree on the importance of properly informing parents and the need for a contact/support person in charge of informing both the child and the holders of parental responsibility throughout the proceedings. FRA's research indicates that when guidelines and child-friendly material show how to inform children, the provision of information is deemed to be more comprehensive and appropriate.

Article 9 - Questioning of children

Article 9 of the Proposal establishes important safeguards that protect the child when he/she is questioned. These include the audio-recording of the interview, the length, style and pace of interviews adapted to the age and maturity of the child.

The same issue emerges as highly important in FRA research. Who hears the child and how are important factors to ensure that the child is questioned in a child-friendly manner.

In most EU Member States, judges play a key role in hearing children. Besides the judge, the existence of specific figures and involvement of different social professionals in criminal proceedings is considered a good practice in promoting child friendly procedures. In relation to hearing techniques, the questioning of children is not always adapted to the specific needs, age and maturity of the child, due to the lack of clear criteria.

Member States vary in their use of video-recording, TV-links and screens. This depends on factors such as availability of technology, access to locations with recording equipment, and professionals' personal preference. The location of the hearing/interview is also important to ensure that the questioning of children is child-friendly. In connection with this, the procedures for the use of these rooms are not always clear. Problems often lie in availability. In some Member States, child-friendly rooms are not available to all children and/or are only available for pre-trial investigations. Another major concern, reported by the respondents, is the sometimes lengthy and repetitive hearings. Various factors influence the length of hearings such as the age of the child, the responsiveness of the child to questions and the skill of the interviewer.

“The child will get another trauma when he or she has to go to a hearing again. Usually the child is already overcoming the situation and trauma, time has passed, and then the case gets finally to court and all starts over again. This is horribly complicated”.

Estonia, Victim Support officer (Female)

Despite these challenges, there are examples from all Member States on how professionals try to make hearings more child-friendly or use different measures to facilitate hearings. These measures include: pre-trial visits for children, removal of wigs and gowns, testimony provided at adequate times, meeting the judge in an informal way, non-use of legal terminology, using drawing materials and children's books. The importance of having clear standards in this area is essential. In fact, when clear guidelines on how to hear the child are in place, professional behaviour is assessed to be better.

Article 14 - Right to protection of privacy

According to the proposed directive, the protection of privacy is a fundamental aspect of youth reintegration into society. To avoid the stigmatisation of children involved in judicial proceedings, the child should not be judged in the presence of the public and information which identifies the child should not be publicly disseminated.

FRA's research shows that privacy in the researched Member States is generally respected regarding media coverage. More problematic, according to the respondents, is the question of whether court sessions are closed or open to the public and who is present at the hearing. The decision whether to exclude the public is taken on a case-by-case basis in some Member States, whereas in others hearings are generally open to the public. Moreover, when closed sessions are allowed, this is not for the entire length of the proceedings or for the time the child is heard and does not exclude all persons.

"...there was a kid there, and she began to cry because she ran into him...so to speak. They told me I wouldn't run into him, but when I saw they were taking all the accused to the room, I said to myself: I will end up running into him, even in here... and so I did"

Spain, 15 year-old boy victim of sexual abuse, involved in criminal proceedings

The presence of the defendant in the same room where the child is heard is avoided in almost all researched EU Member States. It still happens, however, that the defendant and/or his/her family meet with the child in the waiting room or in the corridors. The privacy of the child is thus endangered by the lack of systematic protection measures.

Article 19 - Training

Article 19 of the Proposal focuses on the need for professionals involved in judicial proceedings to be adequately trained. Training enables professionals to increase their awareness of the child's needs and to treat them with respect and impartiality.

FRA's research shows that training does not take place in all EU Member States and in all areas. It appears that two third of interviewed professionals have participated in some form of training with social professionals (such as psychologists and social workers) receiving more training than legal professionals (such as judges, lawyers, and prosecutors). The focus of training activities is more on methods and procedures and less on social/psychological issues, particularly for legal professionals. The type of child-related issues covered by training also differs greatly among Member States.

Despite these gaps, the importance of training is widely recognised by interviewees. This covers different aspects of when and how children should be informed, prepared, heard and looked after. The need for multi-disciplinary cooperation is also acknowledged. Some Member States have established specialised units in hospitals to be used in criminal proceedings. These units gather in one location child hearings, medical and psychological examinations, and often connect families and children with victim support organisations.

“Another thing is that I, as a judge was never trained how to talk with children, so I can only use my private knowledge. That is a dangerous zone in my opinion.”

Croatia, Judge (Female)

Research findings indicate that if training and cooperation are provided effectively, professional behaviour improves at all stages of the proceedings. It is also important to note that eight Member States have specialised courts dealing with children victims and witnesses, as well as those accused of crimes. The training of professionals working in these specialised courts would thus benefit all children independently of the type of role they have in the proceeding.

Outlook

The collection of data is essential to ensure justice systems in Europe are child-friendly. Article 20 of the proposal asks Member States to collect data with regard to the rights enshrined in the directive. This important exercise can be facilitated if Member States make use of the indicators which the European Commission is developing as part of its research on children and justice. The United Nations has also developed some useful tools to collect data regarding children accused or suspected in criminal proceedings.⁴¹

The FRA will publish the results of its research with professionals around July 2014 and continues the work interviewing about 400 children involved in judicial proceedings in the 10 Member States covered.

⁴¹ UNICEF/UNODC, *Manual for the Measurement of juvenile justice indicators*, New York, 2006