

Resolution: Procedural safeguards for children suspected or accused in criminal proceedings

Consultations are currently underway in Brussels on the Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings (a child being defined as a person below 18 years). The Directive is to be adopted as soon as possible and would then be required to be enacted in national law.

The negotiations relate to three versions of the proposal text: that of the Commission (Council Document 17633/13; a DVJJ position paper on this proposal is available here > link), that of the Council (Council Document 10065/14 > link) and that of the responsible European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) (A8-0020/2015 > link).

The Directive's objective of ensuring certain minimum rights for children who are suspected or accused in criminal proceedings is to be endorsed.

However, many of the stipulations proposed in the Commission and LIBE Committee texts must be viewed highly critically, most notably with regard to the best interests of the child. This relates firstly to the scope of the basic safeguards that in the understanding of the LIBE Committee¹ are to apply not only to criminal proceedings, but to **all** (judicial) proceedings which result from actions classified as (criminal) offences or which might entail restrictive measures, i.e. including proceedings for regulatory offences and possibly even family court proceedings. Problems are also raised by the proposed stipulations on individual assessment

¹The Council text proposal therefore provides for restrictions as follows:

Article 2(5a): "Without prejudice to the right to a fair trial, in respect of minor offences:

a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or

b) where deprivation of liberty cannot be imposed as a sanction, this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters.

In any event, this Directive shall fully apply where the child is deprived of liberty, irrespective of the stage of the criminal proceedings."

Article 2(6): "This Directive does not apply to proceedings in relation to children who have committed an act qualified as an offence, where these proceedings may not lead to the imposition of any criminal sanction, but which may lead to the imposition of restrictive measures on children."

of the accused child² and on the audio-visual recording of questioning³: These stipulations provide that questioning of accused children should normally be audio-visually recorded and that no indictment can take place before completion of an individual assessment that meets certain requirements. Whether or not an indictment ensues is something that not infrequently only emerges in the course of proceedings, and in such cases there must be stipulations to ensure that any – possibly upsetting and ultimately unnecessary – assessment is done very early in line with the urgency principle (for which see merely Article 13 of the Directive).

A further critical point would appear to be the very narrow stipulation on holding children in detention separately from adults.⁴ According to this, children in provisional detention, and according to the Commission and the LIBE text convicted children, must be held separately from young people who had already reached the age of 19 when detained.

Another point that raises particular problems is the specific wording with regard to the right to access to and assistance by a lawyer. In the broadest version of Article 6, Member States must ensure “that children are assisted by a lawyer at every stage in the proceedings.” The right to be assisted by a lawyer cannot be waived.” Binding adoption of the stipulation in the LIBE text (and to that extent the Commission text) would result in mandatory assistance by a lawyer **without exception**. A lawyer would have to be appointed for children in **all proceedings and at every stage in the proceedings**. Such an outcome would run contrary in particular to criminological findings that juvenile crime as a rule tends to be a minor and temporary episode in young people’s development. An effective response to juvenile crime

² Article 7(3) of the LIBE text: “The individual assessment shall take place at the earliest appropriate stage in the proceedings and in any event before indictment or the ordering of measures involving deprivation of liberty, except where this is impossible.”

Article 7(3) of the Commission text: “The individual assessment shall take place at an appropriate stage of the proceedings and in any event before indictment.”

³ Article 9(1) of the LIBE text: “Member States shall ensure that any questioning of children by police or other law enforcement or judicial authority carried out is audio-visually recorded, unless it is not in the best interests of the child.”

Article 9(1) of the Commission text: “Member States shall ensure that any questioning of children by police or other law enforcement or judicial authority carried out prior to the indictment is audio-visually recorded, unless it is not proportionate taking into account the complexity of the case, the seriousness of the alleged offence and the potential penalty that can be incurred.”

⁴ Article 12(1) of the LIBE text: “Member States shall ensure that children are detained separately from adults and may, when they reach the age of 18 years, continue to be detained separately from adults unless it is considered to be in their best interests or in the best interests of other detained children not to do so.”

Article 12(1) of the Commission text: “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.”

of this kind has proven to consist of alternative measures combined with a stay of formal criminal proceedings ('diversion'). Some 70% of juvenile crime proceedings in Germany end with a stay of proceedings, in most cases without the services of a lawyer being needed.

The examples of proposed stipulations cited here run a severe risk of being counterproductive in terms of the proposed directive's objective – that of providing effective safeguards for accused children. They would make criminal proceedings involving children unnecessary prolonged, formalised and involved, and that would be anything other than in the best interests of the child.

We therefore advocate urging in the consultations for adoption of a text that largely corresponds to the Council text of the proposed Directive.

The Council text represents an acceptable compromise in that, for example, the right to the assistance of a lawyer is made dependent on the complexity of the case, the seriousness of the offence and the expected penalty and/or whether liberty is deprived other than for a short period of time, and in that it is to be ensured that any questioning of children prior to the submission of the merits of the accusation before a court *may* be audio-visually recorded and where children are deprived of liberty such questioning *must* be so recorded if proportionate.

The DVJJ Executive Board and the Board of Speakers of the DVJJ National Judiciary and Lawyers Working Group