Verantwortung für Jugend
DVJJ
Deutsche Vereinigung für Jugendgerichte
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Comments regarding the proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings
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The German Juvenile Court Association (DVJJ: Deutsche Vereinigung fuer Jugendgerichte und Jugendgerichtshilfen; founded 1917, the only multidisciplinary professional association of practitioners and scientists in the field of juvenile criminal justice in Germany with about 1800 members) fully shares the intention of the proposed directive to effectively secure procedural safeguards for children involved in criminal proceedings.

A few points deserve particular support:

- Recital 10 encouraging to extend the procedural safeguards to young suspects under the age of 21. It is widely accepted that the particular challenges children face as a result of their immaturity also apply to young adults up until their mid-twenties. German law therefore allows for juvenile criminal law to be applied until the age of 20 under certain circumstances. Many experts think this extension should be a general one.
- The fact that Article 2 (1) stresses that procedural safeguards are crucial from the very beginning of criminal proceedings when the child becomes suspected or accused, namely the first questioning by the police. The situation of the first questioning is particularly important for the rest of the procedure, at the same time suspects are especially vulnerable at this point in time: they may not understand what is going on, what exactly the role of the persons involved is, and be unaware about the consequences of what they say or do not say at this point.
- The provisions stressing the importance of involving the holders of parental responsibility during proceedings (regardless of the fact that in practice – by their own will – their participation in pro-

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ceedings often is very limited or non-existent) (Articles 5, 15). It may be considered that the family situation of juveniles coming into contact with the juvenile justice system with serious offences is likely to be difficult. Therefore irrespective of the rights of the holders of parental responsibility it may be important to guarantee that the child has the right to seek the assistance of a person he or she trusts or that the child is assisted by trained members of child care authorities or organisations.

- Article 19 stipulating that all professionals responsible for criminal cases involving children must be specialized in dealing with such cases. Special interdisciplinary training and sufficient experience are of absolutely central importance for safeguarding the rights of children in criminal proceedings. Especially children with difficult biographies who tend to be the majority of children committing more and/or more serious offences cannot at all be adequately understood and dealt with without special competences. But also reacting appropriately to minor offences requires special knowledge which cannot be just learned on the job.

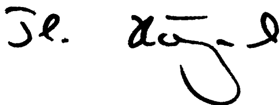
There are only very few proposed provisions which raise questions:

- Article 6 compels Member States to ensure "mandatory access" to a lawyer throughout the entire proceedings including cases leading to final dismissal by the prosecutor (diversion cases). Two important aspects of this right seem not entirely clear: the question of minor offences and the question of who is supposed to cover the cost for the lawyer.
    - The explanatory memorandum states that the obligation does not apply to minor offences such as minor public order offences. This leaves open what exactly is meant by "minor offence". In Germany, for example, using public transportation without a ticket is a criminal offence as is manipulating a moped so it will run faster than the speed allowed for the type of moped or shoplifting regardless of the value of the goods stolen. These offences will typically lead to dismissal by the prosecutor without any conditions at least at the first incident, sometimes more than once (in Germany about 70% of all penal proceedings against juveniles end without formal sentencing). For these petty criminal offences it is on the one hand true, that even a dismissal or a very mild reaction does touch the rights of children (particularly if they reoffend and reactions e.g. get harder because of previous interventions) and it is quite possible that they do not fully understand their rights, for example when confessing an offence. On the other hand diversion, the informalisation of dealing with minor crime, has, in the context of the debate on child friendly justice, rightly been seen as being in the best interest of children. Involving a lawyer in every criminal case is clearly at the risk of blowing up petty cases in terms of time, formality and adversarial nature and may therefore be against the interest of children. We therefore doubt whether a directive requesting the involvement of a lawyer without exception would be in the interest of children. As mentioned above, we consider special training, if implemented seriously (!), as a key issue and would tend to trust well trained professionals of the criminal justice system to deal adequately with petty cases without the involvement of a lawyer in every case.

- As for the cost for the lawyer the proposed Article 6 (1):..“ensure that children are assisted by a lawyer” seems to suggest that this has to occur without cost for the child in all cases. The heading “mandatory access” (German: “Zugang”) on the other hand suggests that there only has to be a right to consult a lawyer at any time (which in German law is guaranteed) without any obligation for the state to cover the cost. Article 18 states that legal aid should be provided for so that it effectively guarantees the exercise of the right to access to a lawyer. This regulation (and Article 20 (2)) only makes sense if Article 6 is interpreted such that it does not mean that a lawyer always has to be made available without any cost. If legal aid does not mean that the cost always has to be covered by the state, criteria have to be found for granting legal aid. These can relate to the person or to the nature of the case: there are systems referring to the financial means of the person concerned, systems based on the severity and/or difficulty of the case or combinations of personal and case criteria. Under German law every child regardless of his or her financial means is provided with a lawyer free of charge in more severe cases or if the assistance of a lawyer is indicated by certain other circumstances (§§ 68 JGG, 140 StPO). The present situation seems too restrictive since not every case that could end with deprivation of liberty qualifies for the state-paid lawyer. However extending full cost coverage for all cases seems difficult to imagine. For that reason and the above considerations on lawyers in petty cases it seems preferable to find a regulation which effectively guarantees that a lawyer at no charge for the child is involved in each case of pre-trial detention or if (including follow-up proceedings e.g. during probation) deprivation of liberty is a possible outcome of sentencing.

- Article 9 states that Member States have to 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 this would not be proportionate. From a German perspective it seems surprising that according to the explanatory memorandum the recording apparently is not seen also as an infringement upon the child’s rights but solely as a protective measure. Video recording is – rightly so – seen by German constitutional law as infringing upon the rights of the person whose pictures are taken. To have an interview on possibly very personal issues in an uncomfortable situation audio-visually recorded can be very intimidating for children and keep them from providing the information necessary for a decision taking adequate account of their personal situation. Making the fact that the interview is recorded less perceivable using small technology to make it less intimidating is problematic in terms of fairness that requires that the child is clearly aware of the fact that the interview is being recorded. Audio-visual recording may be able to prevent the violation of rights while the recording is running. Professionals wanting to, for example, exert pressure on a child to admit an offence have many occasions before and after the interview to pressure the child. Here again, thorough training, specialised departments, involvement of the holders of parental responsibility, access to a person of trust seem to be (more) promising measures to secure childrens’ rights in the context of police questionings. Article 9 therefore should be withdrawn.

- The proposed Article 7 contains a right to an individual assessment in order to ensure that all individual circumstances are taken into account in the decisions. German law requires for investigations in juvenile criminal cases to always consider the individual social background of the child and of the offence. A representative of the youth welfare system, usually a social worker, is part of proceedings. The German translation of individual assessment, “Begutachtung”, evokes the idea of formal psychiatric/psychological assessment; furthermore, specific data concerning the assessment as required in Art. 20 only make sense if the individual assessment is not a normal part of all proceedings concerning children. In our view it is important to stress that a formal psychiatric/psychological assessment is neither necessary nor desirable in the interest of the child unless there are signs of mental health issues. In the German translation it would therefore be preferable to replace the term “Begutachtung” by “Beurteilung” or, in general, to clarify that the assessment does not need to be carried out by a professional expert in psycho sciences or the like.



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