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NOTE

from: Presidency
to: Coreper/Council

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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
- Orientation debate

Introduction

1. On 28 November 2013, the Commission submitted to the European Parliament and to the Council a proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings. The proposal is based on Article 82(2)(b) TFEU.
2. The Working Party on Substantive Criminal Law (DROIPEN) discussed the proposal during three meetings (on 20 January and on 3 and 21 February). During these meetings, first steps were taken in order to reach a text that could be acceptable for all Member States, at least for a qualified majority of them.

3. Some issues have been identified in respect of which it would be useful to obtain guidance from the Council, it being understood that the work in the preparatory bodies has just started and that these bodies should be able to take account of new insights and developments. These issues are set out below.

Issues submitted to the Council

Question 1: Scope - Children ¹ becoming of age (Article 2.3)

4. Article 2, as proposed by the Commission, reads as follows:

Article 2 - Scope

1. *This Directive applies to children subject to criminal proceedings from the time when they become suspected or accused of having committed an offence and until the conclusion of the criminal proceedings.*
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.*
4. (...)
5. (...)

¹ According to Article 3, "child" means a person below the age of 18 years.

5. In accordance with paragraph 3,² the Directive applies to suspects and accused persons who are 18 years of age or older, if these persons were children (younger than 18) when they committed the criminal offence and the criminal proceedings started when they were children.
6. Several Member States observed that Article 2(3) is too categorical. 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 and are not anymore considered to be children. Therefore, it would not be appropriate that the full Directive would continue to apply when children become of age; some rights, such as concerning the information to parents (Article 5), the individual assessment (Article 7), the medical examination (Article 8), and the audio-visual recording of interviews (Article 9), should not anymore apply when the person has reached the age of 18 years. It was suggested to carefully examine the Directive and make a differentiation in the application of the rights in respect of children who become of age; it was suggested to have a look in this context at the Victims Directive.³ The entire deletion of Article 2(3) was also suggested.

² As regards paragraph 1 of Article 2, it was observed that the words "*when they become suspected or accused*" should be modified into "*when they are made aware [, by official notification or otherwise,] that they are suspected or accused*", in order to have a clearer cut-off point, and in order to put the text more in line with 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.

As regards the same paragraph, it was also stated that the words "*until the conclusion of the criminal proceedings*" should be modified in the light of Article 12, since that Article, if it is kept in its current form, gives children the right to specific treatment in case of deprivation of liberty, including notably during detention in the phase of the execution of a judgment. These two issues will be examined further in the Council preparatory bodies; they are not submitted for consideration to the Council.

³ Directive 2012/29/EU, OJ L 315, 14.11.2012, p. 57.

7. **In the light of the above, and subject to further examination and drafting by the preparatory bodies, the Presidency invites the Council to give guidance by indicating, in respect of suspects or accused persons who were children when they committed the (alleged) criminal offence and who are subject to criminal proceedings that started when they were children, but who subsequently become of age, whether:**
- a) **the entire Directive should continue to apply; or**
 - b) **only certain rights, to be determined by the preparatory bodies, should continue to apply;⁴ or**
 - c) **the entire Directive should not apply anymore.**

Question 2 - Right of access to a lawyer (Article 6)

8. Article 6, as proposed by the Commission, reads as follows:

Article 6 - Right to a mandatory access to a lawyer

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 to 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.*

⁴ The Directive setting minimum standards, Member States could always provide more rights.

9. This Article is the core of the proposal. During the meetings of the Working Party, the Commission explained that the aim of this Article 6(1) is to ensure that children, whether deprived of liberty or not, are always assisted by a lawyer,⁵ except in certain minor cases.
10. The Commission noted in this context that Directive 2013/48/EU on the right of access to a lawyer, which also applies to children, envisages an exception for minor offences in its Article 2(4). This exception applies also to the proposed Directive on children; the exception is not only stated in recitals 17 and 18 of the Commission proposal, but it is also set out in the operative part, by reference, in Article 6(1), to the words "*in accordance with Directive 2013/48/EU*".
11. The Presidency notes that the fact that the exception for minor cases, as contained in Directive 2013/48/EU, also applies to the current proposal for a Directive, should be made clearer in the text. This could however be left to the Working Party.
12. The Commission further recalled that the proposal for a Directive provides more protection to children than that foreseen in Directive 2013/48/EU, in that Article 6(2) also gives the right of access to a lawyer in proceedings that are dealt with by public prosecutors who may impose penalties.

⁵ See also recital 16, where it is said that in criminal proceedings "*the presence or assistance of a lawyer should be mandatory for children*".

The Presidency considers that in the system of Directive 2013/48/EU, the mere exclusion of the possibility to waive the right of access to a lawyer does not lead to an automatic assistance by a lawyer. The Presidency observes in this respect that the concept of "right of access to a lawyer" in Directive 2013/48/EU does not mean that Member States are obliged, in each and every case, to make the necessary arrangements to ensure that suspects or accused persons are in a position to exercise effectively their right of access to a lawyer. In fact, it is only when the suspect or accused person is deprived of liberty that Member States have such obligation (see Article 3(4), second indent, and recital 28); when the suspect or accused person is not deprived of liberty ("at large"), it suffices that the Member States endeavour to make general information available to facilitate the obtaining of a lawyer by the suspect or accused person (see Article 3(4), first indent, and recital 27). Therefore, without any further guarantees, such as regarding legal aid, it appears that the exclusion for children of the possibility to waive their right of access to a lawyer does not lead to automatic assistance by a lawyer, at least not in the case when the children are at large (not deprived of liberty).

13. Several Member States observed that this Article, read together with Article 18 on the right to legal aid,⁶ could entail far-reaching financial consequences for the Member States. The suggestion was made to make the provision more proportional, by excluding certain other minor cases, introducing a proportionality test, and/or by excluding the situation where children are not deprived of liberty.
14. **In this light, and subject to further examination and drafting by the preparatory bodies, the Presidency invites the Council to give guidance by replying to the following questions:**
- a) **Does the Council confirm that children should not have the possibility to waive the right of access to a lawyer, as set out in Article 6 of the Commission proposal?**
 - b) **Is the Council of the opinion that children should in principle always be assisted by a lawyer (mandatory presence of a lawyer)? Does the reply to this question differ if the child is deprived of liberty or not?**
 - c) **Should there be exceptions for minor cases?**

⁶ Article 18 of the Commission proposal reads as follows: "*Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to access to a lawyer as referred to in Article 6.*"

Question 3 - Right to protection of privacy (Article 14.1)

15. Article 14, as proposed by the Commission, reads as follows:

Article 14 - Right to protection of privacy

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. (...)
3. (...)

16. Hence, 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. During the meetings of the Working Party, the Commission motivated this choice by referring to the *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*,⁷ and by observing that the rule as proposed was the only one that would add to the protection of children.

17. Some Member States stated that they could accept the rule as proposed by the Commission, 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).

⁷ 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.*"

18. Other 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)*,⁸ 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.

19. **In the light of the above, and subject to further examination and drafting by the preparatory bodies, the Council is invited to reply to the following question:**

- Does the Council agree with the principle set out in the proposed Directive that trials against children should normally be held without presence of the public, with flexibility to allow exceptions on a case-by-case basis? (option A)

or

- Should the principle be that trials against children are normally held in public, with flexibility to allow exceptions on a case-by-case basis? (option B)

or

- Should the Directive not contain any principle, but state that Member States should ensure the privacy of children, taking the interests of children duly into account? (option C)

⁸ 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.

NB: this last set of questions does not regard the issue whether the *sentence* should be pronounced in public or not. Ministers can either indicate one of the three options A, B or C, or express a preference for option A or B, while indicating that they could also support option C.

Conclusion

20. The Council is invited to give guidance on the questions set out in points 7, 14 and 19 above, with a view to allowing the preparatory bodies to continue the work on the proposal.
 21. The Presidency intends to return with this issue to the Council in June 2014, if possible with a view to reaching a general approach.
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