



## Joint paper 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

*“In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give a way to rehabilitation and restorative justice objectives in dealing with child offenders. This can be done in concert with attention to effective public safety.”*

(United Nations Committee on the Rights of the Child, General Comment 10)

## INTRODUCTION

- **The need for EU standards**

Amnesty International and Save the Children welcome the European Commission's proposal on procedural safeguards for children suspected or accused in criminal proceedings<sup>1</sup> (hereafter the "proposed Directive"), which is a key component of the Council's Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings.<sup>2</sup>

The proposed Directive aims at protecting children rights in criminal proceedings. It is a much needed development as judicial systems in Europe are still not adapted to the vulnerabilities and specific needs of children despite the increasing number of children in contact with the law. According to statistics released by the European Commission, roughly 1.086.000 children face criminal justice proceedings every year in the European Union (EU), representing 12% of the total European population facing criminal justice. As highlighted in the Commission impact assessment,<sup>3</sup> the development of robust EU standards is further needed as the international standards are "*very general and relate only to a limited extent to criminal proceedings*" and "*are rarely directly applicable*". Moreover, it points out that "*censures of Member States by international monitoring bodies [...] have not been able to change their practice.*" We believe that improving juvenile justice is all the more important since child rights' protection is regularly frustrated in practice by the failure of justice systems to account for children's vulnerability. Indeed, legal proceedings too often serve more as a source of fear and additional trauma for children rather than offering positive solutions to distressing situations.

The proposed Directive includes key principles that are the backbone of a rights-based juvenile justice system. It is inspired by international and European standards such as the United Nations Convention for the Rights of the Child, the recommendations of the United Nations Committee on the Rights of the Child (CRC) as well as the Guidelines of the Committee of the Ministers of the Council of Europe on child-friendly justice (thereafter the Council of Europe Guidelines),<sup>4</sup> and other UN bodies as well as the relevant case law of the European Court of Human Rights (ECtHR).

International and European human rights bodies have identified the following core principles of juvenile justice:

- Treatment consistent with the child's sense of dignity and worth;<sup>5</sup>
- Treatment that takes into account the child's age and promotes the child's reintegration and the child's adoption of a constructive role in society;<sup>6</sup>
- Prohibition and prevention of all forms of violence.<sup>7</sup>

- **Human Rights compliance during the Council drafting process**

Despite a number of positive elements included in the proposed Directive, our organisations are concerned by the outcome of initial discussions at the Council (thereafter the "General Approach" adopted) which might result into downgrading the level of procedural guarantees for children suspected or accused in criminal proceedings. The adoption of high quality procedural standards in relation to children in contact with the law is an opportunity to foster trust and respect for the judicial system and should be seen in the light of social re-integration of the young offenders.

Moreover, the Council must ensure that it respects its "*commitment to guarantee that fundamental rights are respected throughout its own internal decision-making procedures, especially in the context of legislative drafting*".<sup>8</sup>

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<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013)822 final.

<sup>2</sup> OJ C 295 4.12.2009.

<sup>3</sup> Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings, SWD(2013) 480 final.

<sup>4</sup> Adopted by the Committee of Ministers on 17 November 2010 at the 1098<sup>th</sup> meeting of Ministers' Deputies.

<sup>5</sup> Human Rights Council Resolution 10/2, para 7.

<sup>6</sup> HRC General Comment 32 para 42; UNGA resolution 65/230 and 65/213; CoE Recommendation n° R (87) 20.

<sup>7</sup> UN Study on Violence against Children, UN doc. A/61//299 (2006).

As highlighted below, some of the Council amendments could lead to downgrading the level of the protection provided by the Proposed Directive below the minimum standard enunciated in Recital 35<sup>9</sup> and in the non-regression clause under Article 22. We therefore urge the Council to make use of its *Guidelines on Methodological steps to be taken to check Fundamental Rights compatibility of its amendments*<sup>10</sup> in order to ensure respect of all relevant European and international human rights standards relating to juvenile justice.

- **Highlights of the key concerns**

The present document highlights some key concerns and recommendations on the text as proposed by the Commission and amended by the Council.<sup>11</sup> It does not propose exhaustive comments but seeks to provide a bird's eye view of Member States practice and key international standards in order to guide to the forthcoming negotiations on the final text.<sup>12</sup>

Our organisations have general concerns relating *inter alia* to:

- The personal scope of the directive, which is narrowly defined based on the age of the suspects or accused persons at the *time of the criminal proceedings* rather than at the time of the *commission of the alleged offence*;
- The lack of adequate standards with regard to the age assessment determination;
- The limited scope of the individual assessment of the vulnerability of a child;
- The lack of provisions with regard to the conduct of the questioning and the trial proceedings;
- The lack of provision on remedies.

We have specific concerns with regard to some amendments proposed by the Council in its General Approach, notably:

- The Council's exceptions to the right to access to a lawyer;
- The Council's restrictions to the right to a medical examination for a child in detention
- The Council's proposal to allow for the detention of children alongside young adults
- The Council's proposal to request the recovery of the costs resulting from the application of the Directive from the child in certain circumstances

The position of our organisations echoes the concerns and recommendations put forward respectively by Fair Trials International and Children Rights Alliance for England, as well as the joint position paper published by the International Commission of Jurists, the Dutch section of the International Commission of Jurists and JUSTICE.<sup>13</sup>

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<sup>8</sup> Council of the European Union, conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, 24 and 25 February 2011, para. 6.

<sup>9</sup> 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.

<sup>10</sup> Council of the European Union, *Guidelines on Methodological steps to be taken to check Fundamental Rights compatibility at the Council's Preparatory Bodies*, 10 May 2011, 9009/1/11 REV 1

<sup>11</sup> Cited above, footnote 9.

<sup>12</sup> The document is based on Save the Children, *Minor Rights Access to Justice for children at risk of social exclusion*, 2012; CRIN Legal assistance toolkit, updated 2013; Amnesty International, [Fair Trials Manual](#), (April 2014).

<sup>13</sup> Fair Trials International – Children's Rights Alliance for England, *Joint position paper on the proposed directive on procedural safeguards for children suspected or accused in criminal proceedings*, September 2014, available at: <http://www.fairtrials.org/wp-content/uploads/Joint-Policy-Paper-FTI-and-CRAE-Childrens-Directive.pdf>  
International Commission of Jurists, JUSTICE and NJCM, *Briefing on the Proposal for a Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings COM (2013) 822 final*, September 2014, available at: <http://www.justice.org.uk/data/files/resources/380/Read-the-briefing-19-Sep-2014.pdf>

*Unless otherwise specified, the articles and recitals refer to the text of the General Approach adopted by Council in June 2014.*<sup>14</sup>

## SCOPE OF APPLICATION OF THE DIRECTIVE (ARTICLE 2)

- Children subject to criminal proceedings (Article 2.1, 2.3 and 2.4 )

Article 2 provides that the safeguards of the directive will apply to persons suspected or accused persons who were children when the criminal *proceedings commenced*. Article 2.3 provides that they also apply to children who come of age in the course of the proceedings. These provisions are at variance with the United Nations Committee on the Rights of the Child General Comment 10 that has stressed that, under the Convention [on the Rights of the Child], “*every person under the age of 18 year at the time of the alleged commission of an offence must be treated in accordance with the rules of juvenile justice.*”<sup>15</sup>

The text of the directive should be amended to ensure that the material scope of the directive extends to all persons under the age of 18 *at the time of the alleged commission of an offence*.

- Exclusion of minor offences (Article 2.5a)

Another matter of concern is the amendment of the Council in its General Approach (Article 2.5a, read together with Recitals 11a to 11d) to introduce exceptions in relation to certain “minor offences”. Neither the international standards setting out fair trial rights nor the European Court of Human Rights case law make a distinction between the types of offences which attract procedural safeguards.<sup>16</sup> An insertion of this concept in the directive is worrying as it does not take into account the vulnerability of the child and the fact that *any* proceedings may have a profoundly detrimental impact. It goes against the central principle of the best interests of the child which must govern juvenile justice policy.

We believe that every child suspected or accused of a crime should enjoy the same degree of protection under the directive and that there should be no distinction with regard to the rights granted to children based on the seriousness of the alleged offence. It is also noteworthy that the examples of what are “minor offences” (offences in relation to general municipal regulations and minor public order offences) in the General approach would typically cover offences committed by children. Denying them the procedural safeguards that the directive seeks to guarantee in those cases would therefore significantly undermine the purpose of the directive in practice.

We recommend deleting the Council amendment on minor offences (Article 2.5a).

## AGE ASSESSMENT DETERMINATION (Recital 11 and Article 3)

Recital 11 states that “*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 medical examination*”.

Bearing in mind the subsidiarity principle,<sup>17</sup> we believe that the text of the directive could still be improved by including an explicit reference to the principle of the benefit of the doubt. International standards call for the youth to be given the benefit of the doubt and granted protection of the juvenile justice system when the age is not known and cannot be established.<sup>18</sup>

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<sup>14</sup> Cited above, note 9.

<sup>15</sup> CRC, General Comment 10, para. 37 – emphasis added.

<sup>16</sup> Amnesty International expressed concerns that the concept of “minor offences” introduced by the Access to a lawyer Directive is not in line with the European Convention on Human Rights as interpreted by the ECtHR in: Amnesty International Observations on the Commission’s proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, September 2011, available at:

[http://www.amnesty.eu/content/assets/Doc2011/AI\\_observations\\_on\\_the\\_draft\\_directive\\_Sept2011Final.pdf](http://www.amnesty.eu/content/assets/Doc2011/AI_observations_on_the_draft_directive_Sept2011Final.pdf)

<sup>17</sup> Commission Staff Working Document, p.19, cited above, note 4.

<sup>18</sup> CRC, General Comment 10, paras. 35, 39 and 72.

Safeguards could also be strengthened with regard to forensic examination which should be used as a measure of last resort, in full respect of the child physical integrity and with the consent of the child. Decision-makers should pay due consideration to recommendations developed by key stakeholders, such as the European Asylum Support Office, in relation to age assessment determination.<sup>19</sup>

#### **RIGHT TO INFORMATION (Article 4)**

- **Scope of the right to information**

Article 4 spells out detailed provisions on the information to be provided to children about their basic rights and entitlements in accordance with Directive 2012/13/EU on the right to information in criminal proceedings.

We are concerned that Recital 12 states that the right to information does not apply in cases of “minor offences” as provided under Article 2.2 of the Directive 2012/13/EU. As already expressed under our comments on Article 2, we believe that the exclusion of minor offences is not appropriate. Given the particular importance of the right to information for suspected or accused children, Article 4 should not be subject to an exception for certain minor offences.

- **Provision of Information**

The provisions contained in Article 4 are to be welcomed as there seems to be a critical lack of adequate information in current Member State practice. As mentioned by the Fundamental Rights Agency: “*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 stage of the proceedings and by whom*”.<sup>20</sup>

We insist that the Article 4 in its entirety should be read in conjunction with Article 3.2 of the Directive 2012/13/EU on the right to information in criminal proceedings, which provides that “*the information should be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons*”.

Furthermore, Article 4 could be strengthened in order to further “operationalise” the child right to information. As stated in Recital (27a): “*Children should be treated in a manner appropriate to their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulty they may have*”. We recommend that this guidance is duly reflected in Article 4 to ensure that all information is conveyed in a child friendly format, using child friendly material. As regard the Letter of Rights (Article 4.2) in particular, we insist that providing a child with an official document is often not enough and that an oral explanation in a language accessible to the child may often be necessary to guarantee his/her right to information.<sup>21</sup>

We also recommend that the directive should explicitly mention the right to an interpreter especially as the Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings does not foresee any specific safeguards for vulnerable suspects. As recommended by the Committee on the Rights of the Child, these include: the right to get free assistance of an interpreter if a child cannot understand or speak the language used. This assistance should be available at all stages of the proceedings. It is also important that the interpreter has been trained to work with children, because the use and understanding of their mother tongue might be different from that of adults. The Committee further draws attention to children with speech impairment or other disabilities and recommends that states ensure that children with speech impairment or other disabilities are provided with adequate and affective assistance by well-trained professionals, e.g. in sign language.<sup>22</sup>

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<sup>19</sup> EASO, Age assessment practice in Europe, December 2013; United Nations High Commissioner for Refugees (UNHCR), Guidelines on Policies and Procedures dealing with Unaccompanied Children Seeking Asylum, 2007; Separated Children in Europe Programme (SCEP), Statement of Good Practice, 4<sup>th</sup> Revised Edition 2009.

<sup>20</sup> FRA, Non-paper, Summary of the intervention at the DROIEN Working Party on 21 February 2014, document 7047/14.

<sup>21</sup> CRC, General Comment 10, paras. 47-48.

<sup>22</sup> CRC, General Comment 10, paras. 62-63.

Finally, we would like to echo the position of Fair Trials International which recommends that in addition to the rights listed in Article 4, child suspects should also be informed of their rights to have adaptations to the way court proceedings are conducted to access appropriate support services, and how to complain about their treatment during criminal proceedings.<sup>23</sup> (See also below on the conduct of the trial).

## RIGHT TO ACCESS A LAWYER (Articles 6 and 6a)

The right to access to a lawyer is central to the fulfillment of children's procedural rights. We are concerned that the numerous limitations introduced by the Council in Articles 6, 6a.1 and 6a.2 of the General Approach would unduly and severely restrict the right of children.

- **Mandatory Access to a Lawyer**

In addition to deleting the crucial guarantee of the right to a *mandatory* access to a lawyer, without any possibility for the child to waive his/her right,<sup>24</sup> the amendments of the Council in Article 6a allow to derogate from the right to access a lawyer when:

- The right of access to a lawyer during questioning by the police, other law enforcement or judicial authorities, including during the trial, would be *disproportionate* due to the complexity of the case, the seriousness of the alleged offence, the potential maximum penalty
- The deprivation of liberty is only likely to last a short period of time;
- When there are compelling reasons to proceed with the questioning due to an urgent need to avert serious adverse consequences for life, liberty or physical integrity of a person; or to prevent substantial jeopardy to the criminal proceedings.

We consider that *all* these amendments are at variance with international and European standards.

The most recent international and regional standards have made clear that any child suspected of a crime, whether detained or not, has the right to the assistance of a lawyer, including: the African Charter on the Rights of the Child, Art. 17.2.c.iii; the African Youth Charter Article 18.2.f; the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principles 3.20 and 3.22 and Guidelines 10.b and 10.c. In its recommendations to Austria in 2010, the UN Committee against Torture (CAT) has condemned the interrogation of children without a lawyer present and called on the state to "*guarantee that minors are always heard in the presence of a legal representative*".<sup>25</sup>

The European Committee for the Prevention of Torture (CPT) has also repeatedly deplored that young people are questioned or made to sign statements in the absence of a lawyer in a number of EU countries. This practice has been denounced in CPT visits reports with respect to several EU member states, such as Estonia,<sup>26</sup> Lithuania,<sup>27</sup> Sweden,<sup>28</sup> and just recently on Slovakia.<sup>29</sup> In the 2014 visit report on Estonia for instance, one reads the following unequivocal recommendations:

- *The Committee regrets that the presence of a lawyer is still not mandatory during police questioning of juveniles detained on suspicion of having committed a misdemeanor. The CPT reiterates its recommendation that the Estonian authorities take measures to ensure that such a presence is obligatory* (paragraph 22) (emphasis added);
- *The CPT understands that prior to the presentation of a detained person to a police investigator, the police officers (e.g. patrol staff) who carried out the apprehension may themselves question the person concerned.*

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<sup>23</sup> Council of Europe Guidelines, Guidelines 75, 77 and 81, *supra* note 5. See also, Fair Trials International - CRAE, Joint briefing paper, para. 18, *supra* note 15.

<sup>24</sup> See Article 6.1 of the Commission's proposal on the right to a mandatory access to a lawyer which provides that "*the right to access to a lawyer cannot be waived.*", cited above, note 2.

<sup>25</sup> See CAT/C/AUT/CO/4-5 at para. 10 (emphasis added). Similarly, in 2009, the CAT had recommended that Belgium "*should continue its efforts to ensure that minors have a lawyer and a trusted adult present at every phase of a proceeding, including during questioning by a police officer, whether or not the minor has been deprived of liberty*" see CAT/C/BEL/CO/2 at para. 16.

<sup>26</sup> Estonia – CPT/inf (2014)1, para. 22 and 23.

<sup>27</sup> Lithuania – CPT/Inf (2014)18, para. 20.

<sup>28</sup> Sweden – CPT/inf (2009)34, para. 34.

<sup>29</sup> Slovakia – CPT/Inf (2014)29, para. 27.

*The Committee wishes to make clear that the right of access to a lawyer must also apply during any such period of initial police questioning (paragraph 23)*

The ECtHR has also repeatedly ruled that police questioning of a child without the presence of a lawyer was a breach of Article 6 ECHR.<sup>30</sup>

By amending Article 6 of the proposed directive, the Council clearly undermines the right to a mandatory access to a lawyer built up over the years by the body of international and European standards on juvenile justice.

- **Derogations to the Right of Access to a Lawyer**

**Article 6a.1** - By proposing explicit derogations to the right of access to a lawyer in a new article 6a, the Council further deviates from international and European standards on fair trial rights, including the Directive 2013/48/EU on the right of access to a lawyer and to communicate upon arrest. This directly contradicts Recital 16, which states that: *“in no way this Directive can limit the rights provided for in the [Access to a Lawyer] Directive”*.

In particular, none of the derogations suggested in Article 6a.1 (a) feature in the Directive on the right of access to a lawyer. As explained above in relation to minor offences, the “proportionality” exception under Article 6a.1 (a) blatantly ignores the vulnerability of the child and the fact that any proceedings may have a profoundly detrimental impact. Taken together with the Council’s proposal to exclude certain minor offences from the scope of the directive, it dramatically limits the protection offered by the directive in practice.

The introduction of an exception in cases of deprivation of liberty (Article 6a.1 (b)) is extremely worrying and against all international and European standards. It must be recalled that much damage can be done to someone in the first hours of police custody and that the right of access to lawyer plays as a fundamental safeguard against torture and other ill-treatment while in police custody.

**Article 6a.2** - Article 6a.2 is also very concerning. It actually leaves open the possibility for member states to deny complete access to any lawyer for an *undefined period* of time.<sup>31</sup> As stated clearly by the CPT: *“The CPT fully recognises that it may exceptionally be necessary to delay for a certain period a detained person’s access to a lawyer of his choice. However, this should not result in the right of access to a lawyer being totally denied during the period in question. In such cases, access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation should be organised. It is perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society”*.<sup>32</sup> If in fact a person is deprived of all access to any lawyer for a limited period of time for any reason, no questioning should be permitted to take place during that period of delay. The directive must not allow derogations for investigative purposes to provide an excuse to deliberately prevent legal representation during questioning.<sup>33</sup>

We recommend that all the Council amendments to Article 6 of the proposed directive be strongly resisted. As stressed also by other organisations, the directive should if anything insist on the positive obligation of member states to put in place schemes to ensure the prompt arrival of suitably qualified and trained lawyers to assist children in conflict with the law.<sup>34</sup>

- **Right to free legal assistance (Article 18 in relation to Article 6)**

We recall that in accordance to the UN Principles and Guidelines on Legal Aid special measures should be taken to ensure meaningful access to legal aid for children.<sup>35</sup> Legal aid provided to children should be

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<sup>30</sup> ECtHR, *Panovits v. Cyprus*, application no. 4268/04; ECtHR, *Adamkiewicz v. Poland*, application no. 54729/00.

<sup>31</sup> In contrast, the Directive on the right of access to a lawyer at least provides that states may only “temporarily” derogate from the application of the right to legal assistance.

<sup>32</sup> CPT Standards, CPT/Inf/E (2002) 1 - Rev. 2011, p. 11, para 41.

<sup>33</sup> See NGO, Joint briefing on the Directive on the right of access to a lawyer in criminal proceedings and the right to inform a third party upon deprivation of liberty, 15 April 2013, available at:

[http://www.ecba.org/extdocserv/20130415\\_jointNGObriefingMeasureC.pdf](http://www.ecba.org/extdocserv/20130415_jointNGObriefingMeasureC.pdf)

<sup>34</sup> Cited above note 15, see also below on Article 19.

<sup>35</sup> Principle 10, para. 32 of the UN Principles and Guidelines on Legal Aid.

accessible, age-appropriate, effective and responsive to the specific legal and social needs of children. Children should receive priority for legal aid and they should always be exempt from means test.<sup>36</sup>

We recommend that Article 18 of the proposed Directive is further strengthened so to reflect the principles identified above.

We also note that Recital 18 of the Commission proposal for a directive on legal aid provides that the Directive [on legal aid] aims to uphold the rights of the child but there are no specific provisions with regard to access to legal aid for children in the operative part of the text.

We are concerned that instead of upholding/strengthening children's right to legal aid, the Council redrafted the provision and referred to already existing instruments under national and European human rights law. However, the Commission acknowledged the need for common standards and noted that "*national rules and practices on legal aid in criminal proceedings still display such divergences so that there are considerable shortcomings in the protection of the right to legal aid*".<sup>37</sup>

### **INDIVIDUAL ASSESSMENT (Article 7)**

The procedures for assessing the individual circumstances of a child suspect are a core aspect of the right to a fair trial, as interpreted by the ECtHR under article 6 European Convention on Human Rights (ECHR). When assessing a potential breach of Article 6 of the ECHR with regard to a child, the ECtHR looks at whether the child was able to "effectively participate" in their trial i.e. whether there has been full consideration for the age, level of maturity, as well as intellectual and emotional abilities of the person.<sup>38</sup>

While the purposes of the individual assessment are well articulated in Recital 19, we support the view expressed by other organisations that Article 7 could provide further detail on the actual conduct of the individual assessment and how it is used throughout the proceedings.<sup>39</sup>

We are also concerned that the amendments of the Council in the General Approach in Article 7 paragraph 3 clearly envisage that the competent court would take into account the individual circumstances of the child suspect *only* at the sentencing stage. This is in contradiction with consistent case law of the ECtHR – mirrored under Recital 19 - which has clearly stipulated that the individual circumstances should be taken into consideration throughout *all* the stages of the proceedings. The suggested Council amendments significantly undermine the added value of the provision as currently only two Member States (the Netherlands and Latvia) foresee a systematic and regular assessment mechanism conducted on all children at all stages whilst others only provide for a one-off screening on a case by case basis, usually at the beginning of the proceedings (e.g. Belgium, Cyprus, Spain, the Slovak Republic).<sup>40</sup>

Finally, we are very concerned by the derogation provided by the proposed Directive and further extended by the Council amendment to Article 7 paragraph 7. These derogations undermine the right to an individual assessment and defy the whole purpose of these assessments as defined in Recital 19. Moreover, the reason put forward to justify a possible derogation, i.e. "*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 offence (...)*" is already explicitly foreseen as a parameter to take into account when defining the extent and detail of the individual assessment (See Article 7 paragraph 4). That provision should by all means be enough to address any proportionality concerns.

We recommend strengthening the right to an individual assessment throughout the proceedings and deleting any reference to possible derogations.

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<sup>36</sup> Ibid, Principle 11, para. 35, Guideline 1, para. 45.

<sup>37</sup> European Commission, Impact Assessment accompanying the proposal for measures on legal aid for suspects or accused persons in criminal proceedings, page 6.

<sup>38</sup> ECtHR, SC. v. United Kingdom, application no. 60958/00, paras. 28-29.

<sup>39</sup> Fair Trials International - CRAE, Joint briefing paper, para. 34, *supra* note 15.

<sup>40</sup> Commission Staff Working Document, cited above, note 4.

## MEDICAL EXAMINATION (Article 8)

- **General principle**

The right to be examined by a doctor in detention is an essential safeguard against ill-treatment. It is an integral part of the duty of the authorities to respect the right to health and ensure respect for dignity.<sup>41</sup> As stated in the committee on the Rights of the Child General Comment 10, “ *every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community*”.<sup>42</sup>

According to the proposed directive, the primary aim of the medical examination is “[...] *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*”. Whilst the general principle of a right to access medical examination remains in the General Approach, we deplore that the above mentioned paragraph has been deleted. As a result, the medical examination seems now to be as a purely formal requirement without a clear protective aim.

It is also of concern that the General Approach no longer requires Member States to record the conclusion of the medical examination nor to repeat the medical examination where the circumstances so require. The new draft is at variance with the Principles 25 and 26 of the UN Body of Principles for the Protection of all Persons under any Forms of Detention or Imprisonment which clearly state a right for detainees to access their medical record and to request a second medical opinion.<sup>43</sup>

We believe that the amendments introduced by the General Approach should be resisted as they may in practice impact negatively on the child’s ability to effectively participate to the trial, as defined by the case law of the ECtHR.<sup>44</sup>

In line with other organisations, we recommend amending article 8 in order to ensure that:

- *Member States shall ensure prompt access to medical examination*<sup>45</sup>;
- *The best interests of the child should always be taken into consideration when determining whether to conduct a medical examination, particularly where the child is resisting such examination*<sup>46</sup>.

- **Abusive request**

We are concerned with the restriction introduced by the Council that a request for a medical examination may be refused if “*it is obvious that such request has been made for the sole purpose of delaying the criminal proceedings*”. The General Approach does not include any safeguards in relation to the determination of the abusive nature of the request, nor does it provide clear procedural safeguards including a right to appeal against a negative decision. The text is at variance with the recommendations of the CPT which state that “*persons in police custody should have a formally recognised right of access to a doctor. In other words, a doctor should always be called without delay if a person requests a medical examination; police officers should not seek to filter such requests*”.<sup>47</sup>

We recommend that the amendment of the Council is deleted.

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<sup>41</sup> See CPT Standards, para 37, cited above note 34; see also Human Rights Committee General Comment 20, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), paragraph 11.

<sup>42</sup> CRC, General Comment 10, para 89, emphasis added.

<sup>43</sup> UN Body of Principles on Principles for the Protection of all Persons under any Forms of Detention or Imprisonment, A/RES/43/173 76<sup>th</sup> Plenary Meeting.

<sup>44</sup> ECtHR, SC v. The United Kingdom, para. 36, cited above note 40.

<sup>45</sup> International Commission of Jurists, JUSTICE and NJCM, p. 13, cited above, note 15.

<sup>46</sup> Fair Trial International – CRAE, para 39, cited above note 15.

<sup>47</sup> CPT Standards, at para. 42, cited above note 34.

## QUESTIONING OF CHILDREN (Article 9)

- **Audio-visual recording**

**Article 9.2** -Article 9 of the proposed directive introduces safeguards in relation to police questioning. In particular, it provides for the use of audio and video-recording of all questioning of children carried out before the indictment.

Yet, we are concerned that Article 9.2 the General Approach severely undermines the use of audio and video recording by introducing a proportionality test even when the child is deprived of liberty. The proportionality test should be based on the following factors:

- the complexity of the case;
- the seriousness of the alleged offence; and
- the maximum penalty that can be imposed or that can reasonably be expected to be imposed.

We believe that such proportionality test leaves a wide margin of appreciation to Member States and this could potentially lead to an overly restrictive practice.

**Article 9.2a** - We are particularly concerned about the insertion of a new Article 9.2a that allows Member State to decide not to proceed to an audio-visual recording when the questioning takes place in the presence of a lawyer. Considering the principle of mandatory access to a lawyer for children, such a provision potentially invalidates the whole provision.<sup>48</sup>

**Article 9.3** - Under a new Article 9.3 introduced by the General Approach, the child deprived of liberty may be questioned by law enforcement authorities without video-recording of the interview in the case where the audio-visual recording is impossible due to “*unforeseeable technical problem*” and if there is an urgent need to “*advert serious adverse consequences for the life of a person*” or “to prevent substantial jeopardy to criminal proceedings”. This new derogation seems far too broad and may lead to serious abuses in practice. Taking together with the derogation contemplated by the General Approach with regards to the right of access to a lawyer, this would lead to situations where the child is deprived of essential guarantees during the questioning.<sup>49</sup>

Derogations foreseen under Articles 9.2, 9.2.a and 9.3 should not be adopted as they run counter to the recommendations of a range of international human rights bodies and mechanisms. According to the CPT,<sup>50</sup> the recording of police interviews is a significant element to protect children against ill-treatment in addition to other safeguards such as access to a lawyer and assistance by parents. It provides a complete and authentic record of the interview process, thereby also greatly facilitating the investigation of any potential allegations of ill-treatment. Moreover, the requirement for audio-visual recording is in line with the State’s duty to take particular care to ensure respect for children’s right to be free from compulsion to confess guilt or to incriminate themselves. As stated by the Committee on the Rights of the Child: independent scrutiny of the methods of interrogation is essential to ensure that the evidence is voluntary and not coerced, given the totality of the circumstances, and is reliable.<sup>51</sup> (See also below on questioning)

Strong EU standards are all the more needed that according to data included in the Impact Assessment Study, Member State practice greatly varies across the EU. Currently, only eight Member States (i.e. Belgium, Finland, France, Italy, Ireland, Latvia, the Netherlands and the UK) have legally binding standards to systematically audio or video record police interviews.

We recommend removing the Council proposed amendments on audio-visual recording.

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<sup>48</sup> On the need for the two safeguards to reinforce each other rather than exclude on another, see CAT/C/BEL/CO/2 at para. 16: “The Committee recommends that the State party implement the pilot project for the audio- and videotaping of the questioning of minors, but stresses that this initiative cannot replace the presence of a third party during hearings of minors (...).”

<sup>49</sup> See above comments on Article 6.

<sup>50</sup> Poland - CPT/Inf (2006) 11, para. 28.

<sup>51</sup> CRC, General Comment 10, para. 58.

- **Questioning**

EU standards on questioning should include more specific provisions relating to child-friendly interview techniques in order to ensure respect for children's right to be free from compulsion to confess guilt or to incriminate themselves. The prohibition against coercion and compulsion should be interpreted broadly. It is not limited to the prohibition of physical force as there are many others less violent ways to coerce or to lead the child to a confession or self-incriminatory testimony. Children may be led to confess or incriminate themselves because of their age and state of development, deprivation of liberty, the length of interrogation, their lack of understanding, the fear of unknown consequences or of imprisonment, or the promise of lighter sanctions or release.<sup>52</sup>

As mentioned under Recital 23 of the preamble, "*questioning should be carried out in a manner that takes into account the age and the level of maturity of the children concerned*".

We believe that this requirement for the manner of questioning to be tailored to the particular needs of the child should be included as an operative provision in Article 9 rather than in the Recitals. The final text of the directive should mirror the Guidelines of the Council of Europe on child friendly justice which state that: "*the police should respect the personal rights and dignity of all children and have regard to the vulnerability, that is, take account of their age and maturity and any special needs of those who may be under a physical or a mental disability or have communication difficulties*<sup>53</sup>". As recommended by the Committee on the Rights of the Child: "*police officers and other investigating authorities should be well-trained to avoid interrogation techniques and practices that result in coerced or unreliable confessions and testimonies*".<sup>54</sup>

Further, additional safeguards should be included in the body of Article 9 in relation to the right of the parents or the guardian to be present during the questioning, except if this is contrary to the best interests of the child.<sup>55</sup>

## **DETENTION**

- **Detention (Article 10)**

We welcome that in line with international standards, Article 10 of the Proposed Directive states that detention shall only be a measure of last resort and for the shortest appropriate period of time. It also provides for judicial periodic review of the detention.

The General Approach has further developed the provision on periodic review under article 10(2) which now states that: "*such review shall be carried out either ex officio by the court, or at the request of the child, of the child's lawyer, or of a judicial authority who is not a court.*"

However, we still believe that this provision lacks sufficient safeguards to guarantee an effective right to challenge the lawfulness of detention.

As per international law standards, everyone deprived of their liberty has the right to take proceedings to challenge the lawfulness of their detention before a court and to review the lawfulness of the detention at reasonable intervals. The review procedures must be simple and expeditious. Such procedures must apply throughout the period of detention. The Committee on the Rights of the Child stipulates that the initial judicial review should take place within 24 hours from deprivation of liberty and pre-trial detention should be reviewed every two weeks. In such review proceedings the authorities have the burden of proving that detention is still necessary and proportionate and that they are conducting the investigation with special diligence.<sup>56</sup>

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<sup>52</sup> CRC, General Comment 10, paras. 56 and 57.

<sup>53</sup> Council of Europe Guidelines on child-friendly justice, cited above, note 5.

<sup>54</sup> CRC, General Comment 10, para. 58.

<sup>55</sup> CRC, General Comment 10, para. 53-54.

<sup>56</sup> ECtHR, *Principe v. Monaco*, application no. 43376/06, at para. 74; ECtHR, *Labita v. Italy*, application no. 26772/95, at para. 135.

- **Prohibition of detention with adults (Article 12)**

In line with international human rights law, Article 12 of the proposed Directive requires Member States to ensure that children are detained separately from adults, unless it is considered in the child's best interest not to do so.

Amendments suggested by the General Approach are of particular concern. While Article 12.1a of the General Approach reaffirms this principle, Article 12.1b [read in conjunction with Recital 26(a)] introduces the possibility for Member States to derogate from this principle and "*allow children to be detained with young adults unless these persons are not suited for joint accommodation with children*".

This derogation is at variance with international standards, and in particular with Article 37 UN Convention on the Rights of the Child that prohibits detention of children with adults. The Human Rights Committee has consistently upheld the rule that "*children deprived of their liberty must be held separately from adults at all times, whether following arrest, awaiting trial or serving sentence, unless exceptionally this is counter to the child's best interests*"<sup>57</sup>. As the Committee on the Rights of the Child notes, "*the placement of children in adult prisons or jails compromises their basic safety, well-being and the future ability to remain free of crime and to reintegrate*"<sup>58</sup>. The CPT has observed that "*to accommodate juveniles and unrelated adults together inevitably brings with it the possibility of domination and exploitation*"<sup>59</sup>. It should be stressed that it has expressed concern about this practice on a number of occasions (See for instance 2013 reports on Portugal<sup>60</sup> and Slovenia<sup>61</sup>).

It is to be emphasised that the Committee on the Rights of the Child has recommended that any exception to the general principle – if it is considered in the child's best interests - should be narrowly interpreted and "*the child's best interests does not mean for the convenience of States parties*".<sup>62</sup> In this regards, it is particularly worrying that the derogation introduced by the Council does not provide any standards in relation to the concept of "suitable"/ "non-suitable" young adults. It provides no standards with regards to a possible pre-existing relationship between the child and the young adult, nor any benchmarks to assess the background of the young adults. The only recommendation that can be found on this topic relates to the age of the young adults: Recital 26a recommends that these young adults may not be older than 24.

We recommend that the Council amendments as proposed in of Article 12(1)(b) and Recital 26(a) of the General Approach are deleted.

### **TIMELY AND DILIGENT TREATMENT OF CASES (Article 13)**

In line with international human rights law standards, Article 13 of the General Approach provides that children facing criminal proceedings are entitled to be brought to trial as speedily as possible.<sup>63</sup> However, the provision does not stipulate a time frame. The Committee on the Rights of the Child calls for a final decision on charges not later than six months after they have been presented.<sup>64</sup> This recommendation should be included as a benchmark in the final text of the directive.

Article 13.2 of the proposed Directive requires Member States to treat children in a manner appropriate to their individual needs. We are concerned that the Council in its General Approach has moved this provision from the operative articles to the Recitals (new Recital 27a). Article 13.2 is a concrete expression of the principle of the best interests of the child-and must be retained in the operative part of the text. Moreover, we agree with the position expressed by other organisations<sup>65</sup> that deletion of that provision would further weaken Article 7 since there would be no mechanism to give effect to the individual assessment.

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<sup>57</sup> HRC General Comment 17, at para 2.

<sup>58</sup> CRC, General comment 10, para. 85.

<sup>59</sup> CPT 9<sup>th</sup> General Report, CPT/inf (99) 12, para 5.

<sup>60</sup> Portugal – CPT/Inf(2013)35 para. 24.

<sup>61</sup> Slovenia– CPT/Inf(2013) 6, para. 33-34.

<sup>62</sup> CRC, General Comments 10, para. 85.

<sup>63</sup> Article 40(2)(b)(iii) of the Convention on the Rights of the Child, Article 10(2)(b) of the International Covenant on Civil and Political Rights (ICCPR).

<sup>64</sup> CRC, General Comment 10, paragraph 83 *in fine*.

<sup>65</sup> See above, note 15.

Moreover, it is regrettable that the proposed Directive is silent on the conduct of juvenile proceedings. International standards have highlighted that the setting and the conduct of proceedings must allow the child to participate freely. The Committee on the Rights of the Child has stated that a child cannot participate in the proceedings and effectively exercise the right to be heard where the environment is intimidating, hostile, insensitive or age-inappropriate. It recommends that “particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of courtrooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.”<sup>66</sup>

We recommend adding specific provisions relating to the conduct of juvenile proceeding in line with the recommendations of the Committee on the Rights of the Child.

## **RIGHT TO PRIVACY (Article 14)**

- **Scope (Article 14.1)**

Article 14.1 of the proposed Directive reflects the principle that children have the right to have their privacy fully respected at all stages of criminal proceedings.<sup>67</sup> To that effect proceedings should be held in closed doors and any exception should be set out in law.<sup>68</sup>

We are concerned however, that the Council proposed amendments to Article 14.1 considerably weaken the protection they offer and are in conflict with the international standards referred to above. It removes the obligation for Member States to hold proceedings in closed doors in contravention with the clear recommendation of the Committee on the Rights of the Child. We recommend resisting the Council amendment.

- **Confidential data (Article 14.2)**

We believe that the provisions of Article 14.2 could be strengthened by adding the following elements in the final directive in order to ensure its full compliance with the recommendation of the Council of Europe and the Committee on the Rights of the Child<sup>69</sup>:

- The privacy and personal data of a child involved in judicial or non-judicial proceedings and other interventions should be protected at all stages of the proceedings, and such protection should be guaranteed by law;
- The records of juvenile offenders should be kept confidential. Juvenile records should not be used in adult proceedings in subsequent cases involving the same offender and should not be used to enhance sentencing in any such adult proceedings.
- Member States shall introduce rules which would allow for an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after last conviction).

- **Dissemination of information – Identification of the Child (Article 14.3)**

We are particularly concerned by the new Article 14.3 which would allow competent authorities to publicly disseminate information that can lead to the identification of a child when this is strictly necessary in the interest of the criminal proceedings. This provision is at variance with international standards. The Committee on the Rights of the Child has underscored that the right to privacy requires all professionals involved in the implementation of measures taken by the court or other competent authorities “to keep all information that may result in the identification of a child confidential in all of their external contacts”<sup>70</sup> in order to avoid stigmatization.

We recommend deleting Article 14.3.

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<sup>66</sup> See CRC, General Comment 12, para.34; Ibid, paras. 42-43, 132-34.

<sup>67</sup>Article 40(2)(b)(vii) Convention on the Rights of the Child, ECtHR, T. v. UK, application no. 24724/94, at para. 74.

<sup>68</sup> CRC, General Comment 10, para. 66.

<sup>69</sup> Council of Europe Guidelines on Child friendly justice, paras. 6-10; see also CRC, General Comment 10, paras 66- 67.

<sup>70</sup> CRC, General Comment 10, para. 66; See also HRC, General Comment 17, para. 2.

## RIGHT TO BE HEARD (Article 16)

Article 16 of the proposed Directive requires Member States to guarantee the right of the child to be present at the trial. However, we remain concerned that neither the proposed Directive nor the General Approach provide for any safeguards for the right of the child to be heard which is fundamental for a fair trial<sup>71</sup> and complementary to the principle of the best interest of the child.<sup>72</sup>

Children have the right to express their views freely on all matters that affect them and to be heard, either directly or through a representative, throughout every stage of any judicial or administrative proceedings.<sup>73</sup> Children must be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing them and by their parents or guardians so that they can exercise this right effectively.

Lawyers and other representatives should inform children of their right to examine, or have examined, witnesses. Children should be allowed to express their views on the presence and examination of witnesses<sup>74</sup>. Children's views are to be given due weight in accordance with their age and maturity.<sup>75</sup> Since the appropriate weight to give to a child's views is not determined by age alone, it must be assessed on a case-by-case basis. As the Committee on the Rights of the Child notes: "information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view".<sup>76</sup>

We recommend that Article 16 is complemented so to guarantee the right of the child to be heard and to participate effectively in the proceedings. It should also make reference to the findings of the individual assessment in Article 7.

## TRAINING (Article 19.1)

An effective juvenile justice system requires specialized training for police, prosecutors, legal representatives, judges and others who work with children in conflict with the law.<sup>77</sup> The training should take place in a systematic manner. Specialists and staff working with children should be trained to act in a way that is consistent with the child's dignity and worth with the view to facilitate the child's reintegration in society.<sup>78</sup> The training should include special focus on the most vulnerable children such as children with disabilities, displaced children, refugee and asylum-seeking children, and children belonging to racial, ethnic, religious, linguistic or other minorities. **Such training should include a special focus on the particular needs of girls, including the impact of prior abuse and awareness of health needs.**<sup>79</sup>

The Council amendments under Article 19.1 would have the effect to limit training only to police and prison staff and only to a "*level appropriate to their contact with children*" which would significantly diminish its effectiveness.

We therefore recommend that the Council amendments to Article 19.1 should be resisted.

## RECOVERY OF COSTS (Article 21)

Under international human rights law, Member States have the obligation to protect the rights of the child in criminal proceedings irrespective of costs and outcome of the proceedings. Thus, the Council proposed requirement (Article 21. 2 of the General Approach) to reimburse costs in case of conviction of the child goes against international standards urging States to remove all obstacles – including cost - hampering effective access to court.<sup>80</sup>

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<sup>71</sup> CRC, General Comment 10, para. 46, see also ECHR, *S.C. v the United Kingdom*, at para. 29, cited above note 40.

<sup>72</sup> Every Child Right to be Heard, A resource guide on the UN Committee on the Rights of the Child General Comment 12, p. 32.

<sup>73</sup> Article 12 of the Convention on the Rights of the Child.

<sup>74</sup> CRC, General Comment 12, para 25.

<sup>75</sup> *Ibid*, para. 28.

<sup>76</sup> CRC, General Comment 12, para 29.

<sup>77</sup> CRC, General Comment 10, para. 40.

<sup>78</sup> *Ibid*, *in fine*.

<sup>79</sup> *Ibid*, para. 40.

<sup>80</sup> See in particular Council of Europe Guidelines on Child friendly justice, para. 98, cited above, note 5.

The Council amendments to Article 21 of the proposed Directive must be strongly resisted. Moreover, we echo the position of other organisations<sup>81</sup> that similarly to other Directives on procedural rights,<sup>82</sup> the final text of the directive should provide that Member States shall meet the costs resulting from the application of the directive irrespective of the outcome of the proceedings.

## REMEDIES

We regret that both, the proposed Directive and the General Approach have failed to provide for the right to an effective remedy in instances where the rights that this instrument seek to guarantee are breached.

The lack of such a provision may render the proposed Directive inapt to address the shortcomings in the protection of children as identified by the Commission in its Impact Assessment.

Moreover, this is inconsistent with the Directives on procedural rights of suspects and accused persons in criminal proceedings.

## CONCLUSION

Children accused of infringing the law whose cases are dealt with in the criminal justice system are entitled to all of the fair trial guarantees that apply to adults. In addition, international and European standards recognise that children accused of infringing the criminal law require further special care and protection. In the administration of juvenile justice, states must systematically ensure respect for the best interests of the child, the child's rights to life, survival and development, to dignity, to be heard and to be free from discrimination.

As negotiations are about to start between the Council and the European Parliament, we call on all the parties, including the European Commission who drafted the initial proposal, to ensure that the final text of the Directive on procedural safeguards for children suspected or accused in criminal proceedings fully respects and indeed promotes the highest standards for the protection of children.

December 2014

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<sup>81</sup> Fair Trials International - CRAE, Joint briefing paper, para. 68, cited above, note 15.

<sup>82</sup> 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.