

# Children's rights and child participation in criminal proceedings

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## Introduction

This contribution reviews the nature of participatory governance in *criminal proceedings*. The choice was made to further narrow the focus of the contribution to *child participation* in criminal proceedings, in light of the specific needs children have and the impact this should have on shaping participation. In doing so, the chapter aims to contribute to the debate on the legitimacy and effectiveness of the EU as a children's rights actor. Having had only sporadic interest in advancing children's rights, in recent decades the EU expressly sought to extend its embrace of human rights norms to children, drawing from the UN Convention on the Rights of the Child as a source of inspiration.<sup>1</sup> Ensuring child friendly justice throughout the EU was one of the 'key action items' identified in the Agenda for the Rights of the Child.<sup>2</sup> Additionally, a specific chapter was devoted to the requirement to provide children the chance to voice their opinions and participate in the making of decisions that affect them.<sup>3</sup>

Traditionally, the right to participate to criminal proceedings is developed first and foremost for *suspects and accused persons*. The participation rights of this first group are linked to their fundamental right to a fair trial, which is generally accepted and widely enshrined.<sup>4</sup> In light thereof effective participation is of utmost importance. Participation of children is particularly challenging as the default position often renders children vulnerable<sup>5</sup>, at times incompetent and therefore unable to participate. The question arises to what extent children should be allowed to participate themselves either or not accompanied or represented by their parents or another appropriate adult. A full-fledged right to autonomously participate might not always be in their best interest. Finding the right balance is both crucial and challenging. Children's right to participation is further complicated by questions relating to the effectiveness of their participation and the adaptations needed to make procedures as 'child friendly' as possible.

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<sup>1</sup> Ingi Iusmen and Helen Stalford, [2016] *The EU as a children's rights actor. Law, Policy and Structural Dimensions*, Barbara Budrich Publishers.

<sup>2</sup> European Commission, 'Agenda for the Rights of the Child', COM(2011) 60 final, 6

<sup>3</sup> European Commission, 'Agenda for the Rights of the Child', COM(2011) 60 final, 13

<sup>4</sup> See e.g. Art 6 European Convention of Human Rights and Art 24, 47 and 49 Charter of Fundamental Rights. It must be noted, however, that regardless of the fact that Charter of Fundamental Rights does not contain any child-specific related provision, Member States must always observe the EU Charter when implementing the provisions of any of the directives.

<sup>5</sup> See e.g. the qualification of children as vulnerable in the EU Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ 15.01.2001, C12/10.

In addition to the participation of this first group, questions arise as to the participation rights of a second group, namely *children who have fallen victim to a crime*. The extent to which victims – in general – are allowed to participate, varies significantly between EU Member States. To some it may seem that only the group of suspects and accused persons is relevant. This is due to the fact that criminal proceedings have a predominantly public character, meaning that criminal proceedings are a matter between states and perpetrators, settling the intrusion of public safety and order following a criminal offence. Nevertheless, two arguments are used to shape the rights of this second group. Firstly, it is argued that victim participation is needed to achieve efficient criminal proceedings. Victims can provide information that is highly valuable to the work of criminal justice actors. In this sense, victim participation is brought back to judicial efficiency.<sup>6</sup> Secondly, it is argued that victim participation is needed to restore and/or maintain societal trust in the criminal justice system. It is believed that victims who are allowed to participate, get psychological advantages out of it – feeling recognised in their victimhood<sup>7</sup> – and are more inclined to have faith in the correct outcome of criminal proceedings. In this sense, victim participation is brought back to judicial trust and credibility. Given that in the 2011 Children’s Rights Agenda the European Commission recognised that children may be involved in criminal procedures as either witnesses or victims,<sup>8</sup> the question arises whether these arguments should also be used to shape the rights of child victims and to what extent further development of the right is needed to take full account of the specific needs of children.<sup>9</sup>

When it comes to analysing participatory governance in relation to criminal proceedings, analyses are usually limited to looking into these two groups: on the one hand suspects/accused persons and on the other hand victims. With this contribution however, the authors wish to extend the debate and include a third group into the equation. The third group consists of children for which it could be argued that they are ***affected by criminal proceedings***. It goes without saying that children whose parents (i.e. their caregivers) are prosecuted and sentenced, are affected by (the outcome of) the criminal proceedings. Regardless of whether these children are victims of the crimes subject to the criminal

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<sup>6</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315, Clause 34 Preamble (Hereafter: Directive 2012/29/EU on victims of crime): “Justice cannot be effectively achieved unless victims can properly explain the circumstances of the crime and provide their evidence in a manner understandable to the competent authorities.”

<sup>7</sup> Directive 2012/29/EU on victims of crime, Clause 9 Preamble: “Crime is a wrong against society as well as a violation of the individual rights of victims. As such, victims of crime should be recognised.”

<sup>8</sup> European Commission, ‘Agenda for the Rights of the Child’, COM(2011) 60 final, 7.

<sup>9</sup> Suzanne van der Aa, ‘Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law’ [2016] 7/1 New Journal of European Criminal Law 39.

proceedings (in which case they would also belong to the second group), children can become ‘victim to the criminal proceeding’, as they may be confronted with harsh consequences of a conviction following a crime they have not committed. Reference can be made to children placed in foster care following an incarceration of a parent. Recently the debate on their rights has taken a new turn, arguing that internationally binding provisions<sup>10</sup> require further conceptualisation of their right to participate in criminal proceedings. Although it is clear that children’s rights should be a primary consideration in the context of any decision affecting children, the impact thereof in terms of their participation to a criminal procedure is underexplored.

Whilst the participation in criminal proceedings of the children in all three of these groups has some anchoring in national and international legal instruments, the landscape is extremely fragmented and incomplete.

The United Nations Convention on the Rights of the Child (CRC)<sup>11</sup>, which celebrated its 30<sup>th</sup> anniversary in November 2019 has achieved nearly universal ratification,<sup>12</sup> and guarantees the child’s right to be heard in its Article 12:

*“1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”*

The UN Committee on the Rights of the Child oversees the implementation of the CRC at the domestic level and has clarified the scope and meaning of the right of the child to be heard (Article 12) in its non-binding General Comment No. 12.<sup>13</sup> The right to participation is wider than just the right to be heard, however. In addition to this core right, the CRC contains a

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<sup>10</sup> Predominantly Art. 3 Convention on the Rights of the Child, the way it is elaborated on by UN Committee on the Rights of the Child, *General Comment No. 14 ‘The right of the child to have his or her best interests taken as a primary consideration’*, 29 May 2013, CRC/C/GC/14, paras 28-29.

<sup>11</sup> Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989.

<sup>12</sup> For this publication it is most relevant to note that all EU Member States have signed and ratified the CRC.

<sup>13</sup> UN Committee on the Rights of the Child, *General Comment No. 12 ‘The right of the child to be heard’*, 20 July 2009, CRC/C/GC/12.

‘cluster of rights’ which – together with the child’s right to be heard – form the child’s right to participation, the right to freedom of expression (Article 13), the right to freedom of thought, conscience and religion (Article 14), the right to freedom of association and peaceful assembly (Article 15), ‘the evolving capacities as legitimate limitation ground for parental guidance’ (Article 5), and the right to information (Article 17). The child’s right to participation was furthermore stressed in a number of content-specific provisions of the CRC. Situations in which the CRC explicitly mentions the child’s right to participate are proceedings involving separation of the child from his or her parents (Article 9(2)), adoption (Article 21(a), in which ‘informed consent’ of the child is required) and in criminal proceedings (Article 40).

At Council of Europe level, Article 6 of the European Convention on Human Rights (ECHR), and the European Court of Human Rights jurisprudence are of relevance in the interpretation of the scope and meaning of participation rights in criminal proceedings. Additionally, the Council of Europe has launched its guidelines on child friendly justice (GCFJ)<sup>14</sup>, which – despite the non-binding character thereof – immediately got a high moral value.

The rights of the child have been anchored at the European Union level as well. Article 3(3) of the Treaty on European Union establishes more generally the objective for the EU to promote protection of the rights of the child. Article 24 of the Charter of Fundamental Rights of the European Union guarantees a number key principles in children’s rights law, including the right to express their views freely in accordance with their age and maturity (Article 24(1)). Additionally, the EU has adopted several directives relating to the participation of children in criminal proceedings, implementing these core rights.

This growth in hard and soft law texts has led to a fragmented picture regarding the protection of children’s rights in criminal proceedings. The lines of argumentation developed are incomplete in that there is no clear legal basis for children to participate in all three capacities described above. Participation is particularly developed for children in the first group, to a far lesser extent for children belonging to the second group and the least or not at all for children belonging to the third group.

With a view to evaluating the EU’s legal framework governing the participation of children in criminal proceedings, this contribution will first disentangle the legal framework shaped by

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<sup>14</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe of 17 November 2010 on child-friendly justice.

instruments adopted at United Nations, Council of Europe of European Union level and describe the embedded participation rights. Second, it will review these rights in light of the theoretical and empirical insights relating to children who are confronted with criminal proceedings, in either of the three capacities described above and will critically evaluate the added value of the EUs legal instruments, referring amongst others to the EUs omission to stipulate what the effect of a violation of rights should be.<sup>15</sup> It will evaluate the extent to which the EU has succeeded in bringing together and further building upon the *acquis* found in legal instruments adopted at other cooperation levels.

## **1 Children suspected or accused of having committed a crime**

The first group of children for which the right to participation in a criminal proceeding will be analysed, is the group of children suspected or accused of having committed a crime.

### ***1.1 Evaluation criteria deduced from the legal context***

The right to participate to a criminal proceeding in which one is a suspect or an accused person, is enshrined in various international legal instruments. It can be found for example in the European Convention on Human Rights (ECHR),<sup>16</sup> in the International Covenant on Civil and Political Rights (ICCPR)<sup>17</sup> and specifically with respect to children accused or suspected of having committed a crime, the right to participation is reiterated in the Convention on the Rights of the Child (CRC).<sup>18</sup> Additionally, the Council of Europe has launched its guidelines on child friendly justice (GCFJ),<sup>19</sup> which – despite the non-binding character thereof – immediately got a high moral value.

From the more detailed analysis below, it will become apparent that this body of legal instruments comprises four criteria against which the EU legal instruments may be evaluated: (1) whether the provisions scoping the legal instruments ensure a sufficiently wide applicability, (2) whether the requirements related to the organisation of the criminal procedure are detailed enough to ensure effective participation, (3) whether children are

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<sup>15</sup> André Klip, ‘Violations of Defence Rights’ Directives’ [2018] 26 European Journal of Crime, Criminal Law and Criminal Justice 271.

<sup>16</sup> Article 6 ECHR as a whole is to be read as safeguarding the right of a suspect or accused to participate effectively in a criminal trial. See e.g. ECtHR, *Murtazaliyeva v Russia* App no 36658/05, para 91.

<sup>17</sup> International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

<sup>18</sup> Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

<sup>19</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe of 17 November 2010 on child-friendly justice.

adequately informed about the procedure and (4) whether children have the right to inform and be accompanied by an appropriate adult.

In the 2009 Roadmap on Procedural Safeguards, it was stipulated that EU level initiatives needed to be set up, not only to recognise the importance of the existing standards, but also to use the opportunity to raise the bar and demonstrate the ambition to maintain a high standard when it comes to administering justice.<sup>20</sup> Notwithstanding the wide recognition of the rights of children suspected or accused of having committed a crime, the existing international acquis was not deemed enough to provide the trust needed to cooperate effectively between EU Member States.

At EU level the initiative was taken to draft a directive on procedural safeguards for suspected or accused children (Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings).<sup>21</sup>

## ***1.2 Scope of the EU directive***

The first evaluation criterion relates to the scope of the directive and thus the applicability of the provisions included therein.

It is commendable that the instrument is not only applicable to children labelled as suspected or accused according to the law of the executing member state, but also to children who are labelled as requested persons following the receipt of a European Arrest Warrant.<sup>22</sup> In doing so, the directive ensures that children would not fall outside its scope, simply for not qualifying as suspects or accused in the executing state. After all, being subject to an EAW-procedure warrants the applicability of the directive. It is unfortunate however, that the effect of the rights attributed to children is not extended to also cover the execution phase. The political choice to limit the scope of the instrument where it was originally intended to also cover the execution phase,<sup>23</sup> lacks a solid foundation.

More fundamentally, questions arise regarding the conceptualisation of ‘criminal proceedings’ used to shape the applicability and scope of the Directive. From the reading of

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<sup>20</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009], OJ C 295/1.

<sup>21</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132/1 (hereafter Directive (EU) 2016/800 on procedural safeguards for children).

<sup>22</sup> Directive (EU) 2016/800 on procedural safeguards for children, Art 1(b).

<sup>23</sup> Proposal for a Directive of the European Parliament and of the Council of 30 April 2014 on procedural safeguards for children suspected or accused in criminal proceeding – Revised text [2014] Doc 9335/14: “*In view of the comments provided by delegations, the Presidency suggests that this Directive will not apply to the phase of the execution of a judgment*”.

the instrument's provisions itself, it is not clear-cut whether or not 'criminal proceedings' should also encompass the 'criminal-law-like procedures' which have been specifically designed for children in some Member States.<sup>24</sup>

The sensitivity of qualifying juvenile justice systems as either or not criminal in nature, becomes apparent from the formulation of 17<sup>th</sup> clause of the preamble. Although these clauses are not legally binding,<sup>25</sup> it does clarify that the Directive should apply *only to criminal proceedings*, further detailing that it *should not apply to other types of proceedings, in particular proceedings which are specially designed for children and which could lead to protective, corrective or educative measures*. It is unclear however who is to decide whether a 'proceeding designed for children' either or not qualifies as criminal, using which criteria.

A suggestion found in the context of this instrument seems to point to the discretion of the national legislator. In the course of the debates leading up to the adoption of the instrument, the European Commission argued that in some Member States children who have committed an act qualified as an offence are not subject to criminal proceedings *according to national law*.<sup>26</sup> This reference to the discretion of the national legislator can also be found in the refusal grounds listed in the Framework Decision on the European Arrest Warrant, where reference is made to a person who "may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based *under the law of the executing State*". Up until now, there has been no binding court ruling on how to interpret that phrasing.

This suggestion on how to qualify juvenile justice systems as either or not criminal in nature, would make the scope of the directive completely dependent on the qualification of juvenile justice systems by each individual Member State. Not only is this completely opposite to the current CJEU case law which – albeit in other contexts – clearly stipulates that these kinds of EU concepts should be interpreted autonomously<sup>27</sup> and should not be left to national interpretation<sup>28</sup>. It is also completely opposite to the current ECHR case law arguing that the

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<sup>24</sup> See for a general overview: Ido Weijers and Frank Imkamp, *Jeugdstrafrecht in internationaal perspectief* [2008] Den Haag, Boom Juridische Uitgevers and Frieder Dinkel, Joanna Grzywa, Philip Horsfield and Ineke Pruin (eds), *Juvenile Justice Systems in Europe: Current Situation and Reform Developments* [2010] Godesberg: Forum Verlag.

<sup>25</sup> Case C-162/97 Nilsson [1998] ECR I-7477, para 54 and Dorris de Vocht, Michele Panzavolta, Miet Vanderhallen and Marc Van Oosterhout, 'Procedural Safeguards for Juvenile Suspects in Interrogations: A Look at the Commission's Proposal in Light of an EU Comparative Study' [2014] 5 (4) *New Journal of European Criminal Law*, 484-486 at 480.

<sup>26</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, para 16

<sup>27</sup> See e.g. on the concept of a *judicial authority*: CJEU 10 November 2016, nrs. C-477/16, Ruslanas Kovalkosas, C-452/16, Krzysztof M. Poltorak en C-453/16, Halil Ibrahim Özçelik; HvJ 14 November 2013, C-60/12, Marián Baláž.

<sup>28</sup> The court argued that it should not be left to the Member States to determine the scope of EU instruments. CJEU 10 November 2016, nrs. C-477/16, Ruslanas Kovalkosas § 32; CJEU 17 July 2008, C-66/08, Kozłowski, § 43; CJEU 16 November 2010, C-261/09, Mantello, § 38.

applicability of criminal law procedural safeguards should not be left to the discretion of individual law makers and upholding that European criteria should be used to define the either or not criminal nature of national legal systems.<sup>29</sup>

To ensure a consistent and effective application of the Directive and to avoid that Member States would undermine the functioning thereof by unjustly refusing to qualify their national juvenile justice systems as criminal procedures, clear guidance on the intended scope of the directive is needed. The EU missed the opportunity to explicitly link the EUs interpretation of ‘criminal procedure’ to the ECtHRs interpretation.

### ***1.3 The right to effective participation to the proceedings***

The second evaluation criterion relates to the requirements regarding the organisation of the criminal procedure and whether they are detailed enough to ensure effective participation of the child involved. This criterion may be linked to the 2011 Children’s Rights Agenda in which the European Commission argued that effective access to justice and participation in administrative and court proceedings are basic requirements to ensure a high level of protection of children’s legal interests.<sup>30</sup>

The EU level formulation and protection of the rights of children suspected or accused of having committed a crime, should be evaluated in light of the *Strasbourg case law* that provides criteria to shape the effectiveness of the right to fair trial. At EU level, the standards should as a minimum codify the Strasbourg acquis or raise the standard to a higher level as part of the shared sense of justice. The Strasbourg court has established in its case law that Article 6 ECHR as a whole is to be read as safeguarding the right of a suspect or accused to participate effectively in a criminal trial.<sup>31</sup> That right should entail the right to be *present*, to *hear* and *follow* the proceedings.<sup>32</sup> To further ensure the effectiveness of the right to participate, it is established that criminal proceedings must be *organised* as to respect the *best interest* of the child. This means that remodelling the proceedings should take account of the age, maturity, intellectual and emotional capacity of the child. Steps need to be taken to promote the ability to understand and participate in the proceedings.<sup>33</sup>

Considering those standards put forward by the Strasbourg court, the original version of the provisions regarding the right to participate was disappointing. Reference was only made to

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<sup>29</sup> ECtHR *Öztürk v Germany* App no 8544/79 para 50 and ECHR *Engel v The Netherlands* App no 1978/223 para 82-83.

<sup>30</sup> European Commission, ‘Agenda for the Rights of the Child’, COM(2011) 60 final, 6

<sup>31</sup> See e.g. ECtHR, *Murtazaliyeva v Russia* App no 36658/05, para 91.

<sup>32</sup> ECtHR, *Stanford v United Kingdom* App no 16757/90, para 26.

<sup>33</sup> ECtHR, *V v United Kingdom* App no 24888/94, paras 85-86.

the fact that Member States are to ensure that children are present at the trial.<sup>34</sup> In the explanatory memorandum to the proposal, it was argued that *“If children are not present during the trial, their rights of defence are at stake”*.<sup>35</sup> Furthermore, it was not formulated as a right, but as a requirement, even though from the explanatory memorandum, it does become clear that the provision was intended to be read as a right. *“The right to be present at trial, or being able to waive such right after having been informed of it, is indispensable for the exercise of the rights of defence”*.<sup>36</sup>

Despite attempts of Council members to make a link with the requirement to ensure effective participation rather than mere presence, suggestions done to reformulate the provision never got airborne. It was suggested for example to add that Member States were to take all appropriate measures to ensure *“that children are effectively present at their trial”*.<sup>37</sup> However, in the general approach reached at Council level, no reference was made to elements aimed at improving the effectiveness of procedural rights related to being present at the trial.<sup>38</sup>

It really is the merit of the amendments made by the members of the European Parliament, that introduced the need to ensure the effectiveness of the participation.<sup>39</sup> Following their efforts, the finally adopted version of Article 16 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, stipulates that Member States are to ensure that children have the right to be **present** at their trial and are to take all necessary measures to enable them to **participate effectively** in the trial, including by giving them the opportunity to be **heard** and to **express** their views. It does remain a missed opportunity for the EU to take a position as to what necessary measures

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<sup>34</sup> Original version: *“Member States shall ensure that children are present at the trial”*

<sup>35</sup> Proposal for a Directive of the European Parliament and of the Council of 27 November 2013 on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013)822, para 55.

<sup>36</sup> Proposal for a Directive of the European Parliament and of the Council of 27 November 2013 on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013)822, para 56.

<sup>37</sup> In the text version of 17.2.14 it was stipulated that Member States shall take appropriate measures to ensure that children are effectively present at their trial. The reference to effectiveness was no longer included in the text version of 27.2.14.

The new text was inspired by the text set out in Articles 8 and 9 of the proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (17621/13 + ADD 1 + ADD 2 + ADD 3).

<sup>38</sup> Proposal for a Directive of the European Parliament and of the Council of 22 May 2014 on procedural safeguards for children suspected or accused in criminal proceedings - General approach [2014] Doc 10065/14: *“Member States shall ensure that children have the right to be present at the trial aiming at assessing the question of their guilt. Member States shall take appropriate measures to promote that children are present at their trial”*.

<sup>39</sup> Report prepared by Caterina Chinnici of 12 February 2015 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 [2015] COM(2013)0822 – C7-0428/2013 – 2013/0408(COD), 29; Report prepared by Caterina Chinnici of 12 February 2015 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 [2015] COM(2013)0822 – C7-0428/2013 – 2013/0408(COD), 37-38.

might be required to ensure effective participation. *No guidance* is provided for the actors in the Member States applying that provision.

Furthermore, Member States are to ensure that children who were not present at their trial have the right to a *new trial* or to another legal remedy, in accordance with, and under the conditions set out in, Directive (EU) 2016/343 on children's rights in criminal proceedings. It is clear that the provision should be read together with provisions of another EU instruments namely the EU instrument on the *presumption of innocence* and the right to appear in court (Directive (EU) 2016/343 on children's rights in criminal proceedings). In that latter instrument, reference too is made to the specific vulnerability of children. The adopted version of the preamble reads that “(43) *Children are vulnerable and should be given a specific degree of protection. Therefore, in respect of some of the rights provided for in this Directive, specific procedural safeguards should be established.*”<sup>40</sup> However, it is striking that no attempts have been made to make those additional procedural safeguards more tangible. Whereas during the preparatory work, the preamble read “(27a) *Children are vulnerable and should be given a specific degree of protection. Therefore, in respect of some of the rights foreseen in this Directive, additional procedural safeguards are set out in Directive [...] on procedural safeguards for children suspected or accused in criminal proceedings*”, the ambition to set out additional safeguards was not lived up to.

However, mere presence itself does not guarantee the ability to effectively participate. Following the Strasbourg requirements put forward in *V v United Kingdom*,<sup>41</sup> the criminal procedure should be organised in such a way as to respect the rights of the child. To that end, full account should be taken of the age, maturity, intellectual and emotional capacity of the child. At the time of preparing the proposal, the European Commission was fully aware of the fact that personal characteristics of a child, his or her maturity and economic and social background may vary significantly.<sup>42</sup> In the impact assessment it was stated that “*in addition to their age, a significant proportion of children in conflict with criminal law may face vulnerabilities such as mental disorders or multiple addictions. Studies demonstrate that a high proportion of children entering the criminal justice system have mental health problems,*

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<sup>40</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1, Clause 43.

<sup>41</sup> ECtHR, *V v United Kingdom* App no 24888/94, paras 85-86

<sup>42</sup> Proposal for a Directive of the European Parliament and of the Council of 27 November 2013 on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013)822, para 30.

*learning disabilities and communication difficulties*<sup>43</sup> The European Commission noted from the comparative analysis it had conducted that despite the prevalence of multiple vulnerability among suspected or accused children, in many Member States the vulnerability of children on grounds other than their age were not systematically identified. It found that at the time of the comparative analysis certain Member States did not foresee any specific assessment mechanisms, others only provided for a one-off screening on a case-by-case basis, usually at the beginning of the proceedings. At that time only few Member States foresaw a systematic assessment mechanism conducted on all children. It was argued that the absence of any systematic and regular assessment mechanism or procedure in a large majority of Member States bears the risk that the detection of potential vulnerabilities of children remains random.<sup>44</sup>

In light thereof, pursuant to Article 7 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Member States are to ensure that the specific needs of children concerning protection, education, training and social integration are taken into account. For that purpose children who are suspects or accused persons in criminal proceedings shall be *individually assessed*. The individual assessment shall, in particular, take into account the child's personality and maturity, the child's economic, social and family background, and any specific vulnerabilities that the child may have. It is to serve to establish and to note, in accordance with the recording procedure in the Member State concerned, such information about the individual characteristics and circumstances of the child as might be of use to the competent authorities when e.g. determining whether any specific measure to the benefit of the child is to be taken.

Pursuant to Article 9 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Member States are to ensure that questioning of children by police or other law enforcement authorities during the criminal proceedings is audio-visually recorded where this is proportionate in the circumstances of the case, taking into account, inter alia, whether a lawyer is present or not and whether the child is deprived of liberty or not, provided that the child's best interests are always a primary

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<sup>43</sup> Impact Assessment accompanying the Proposal for a directive of the European Parliament and of the Council of 27 November 2013 on procedural safeguards for children suspected or accused in criminal proceedings [2013] SWD(2013)480, 19.

<sup>44</sup> Impact Assessment accompanying the Proposal for a directive of the European Parliament and of the Council of 27 November 2013 on procedural safeguards for children suspected or accused in criminal proceedings [2013] SWD(2013)480, 19.

consideration. In the absence of audio-visual recording, questioning shall be recorded in another appropriate manner, such as by written minutes which are duly verified

Although it is commendable that the European Commission had taken the initiative to explicitly include the right to adaptation and the right to an individual assessment in the directive, it could have been more ambitious about the changes that would need to be made to the procedure, beyond audio-visual recording.

#### ***1.4 The right to have a broad understanding of the proceedings***

The third evaluation criterion relates to whether children are adequately informed about the procedure. This criterion may be linked to the 2011 Children's Rights Agenda in which the European Commission argued that the right to a fair trial for children who are subject to criminal proceedings implies the right to be informed about the proceedings in a way which is adapted to the child's age and maturity. Furthermore, the Commission announced the ambition to have special attention for suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings.<sup>45</sup>

Pursuant to Article 4.1 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Member States are to ensure that when children are made aware that they are suspects or accused persons in criminal proceedings, they are ***informed promptly about their rights*** in accordance with Directive 2012/13/EU on the right to information in criminal proceedings and about ***general aspects of the conduct*** of the proceedings. The right to information is often described as the most important right to ensure effective participation.<sup>46</sup>

That provision is clearly construed as an add-on to Directive 2012/13/EU on the right to information in criminal proceedings. Two add-ons are included namely, the first add-on being explanation about 'general aspects of the conduct of the proceedings', the second add-on being information about the additional child-tailored rights included in this directive. The first add-on may be brought back to the so-called Blokhin requirements included in the Strasbourg case law. The Strasbourg court requires that children have a broad understanding of the

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<sup>45</sup> European Commission, 'Agenda for the Rights of the Child', COM(2011) 60 final, 7.

<sup>46</sup> Ivana Radić, 'Right of the child to information according to the directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings' in Dunja Duić and Tunjica Petrašević (eds), *EU and comparative law issues and challenges series (2)* (Faculty of Law, Josip Juraj Strossmayer University of Osijek 2018) 468.

procedure.<sup>47</sup> It is unfortunate that the Member States did not go for a more concrete translation of that right in the main articles of the instrument. The requirement to explain some general aspects of the proceeding is extremely vague. In the preamble of the directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings though, some more guidance can be found. There it is stipulated that “(19) Children should receive information about general aspects of the conduct of the proceedings. To that end, they should, in particular, be given a brief explanation about *the next procedural steps* in the proceedings in so far as this is possible in the light of the interest of the criminal proceedings, and *about the role of the authorities involved*. The information to be given should depend on the circumstances of the case”. It is a missed opportunity to take a clear EU position in this regard and be more precise about the required explanation in Article 4. In doing so, the EU would have really translated the above mentioned Strasbourg Blokhin requirements into a binding legal instrument.

The second add-on seems self-evident: information must be provided regarding the rights included in this directive. However, the EU could have been more ambitious and stipulate 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 as is put forward as a requirement in *V v United Kingdom*<sup>48</sup> or information on how to *complain* about their treatment during criminal proceedings.<sup>49</sup>

Pursuant to Article 4.2 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings Member States are to ensure that the information referred to in 4.1 is given in writing, orally, or both, in simple and accessible language, and that the information given is noted, using the recording procedure in accordance with national law. Two requirements about the modalities of providing the information are included: the first modality being the format, i.e. in writing and/or orally. The second modality being the language used, i.e. simple and accessible. The first required modality, leaves the door open for information to be provided only in an oral fashion. It is unfortunate, that the opportunity of setting standards of EU level procedural safeguards, was

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<sup>47</sup> ECtHR, *Blokhin v Russia* App no 47152/06, para 195: “Ensure a broad understanding of the procedure including the significance of being punished, the right to defence and the right to remain silent”.

<sup>48</sup> ECtHR, *V v United Kingdom* App no 24888/94, paras 85-86: “Criminal proceedings must be organised as to respect the best interest of the child”.

<sup>49</sup> Children’s Rights Alliance for England, Fair Trials International & Legal Experts Advisory Panel, ‘Joint position paper on the proposed directive on procedural safeguards for children suspected or accused in criminal proceedings’ (2014) <[www.fairtrials.org/wp-content/uploads/Joint-Policy-Paper-FTandCRAE\\_Updated.pdf](http://www.fairtrials.org/wp-content/uploads/Joint-Policy-Paper-FTandCRAE_Updated.pdf)> accessed 8 July 2019, para 18.

not used to raise the bar and require that information regarding the proceedings and rights therein is to be given in writing and explained orally.

The second required modality, namely to have the information provided in *simple and accessible language* was not included in the original proposal for the directive. In their joint opinion, the Children’s Rights Alliance for England, Fair Trials International & Legal Experts Advisory Panel argued that a lack thereof would not be in line with international standards.<sup>50</sup> Rightly so, reference was made to the UN Committee on Children’s Rights which has made it very clear. “*A child should be informed in a language he/she understands. This may require a presentation of the information in a foreign language but also a “translation” of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand*”.<sup>51</sup> Along the same line of argumentation, the Committee of Ministers of the Council of Europe provided in its Guidelines on child friendly justice that “*information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture- sensitive*”.<sup>52</sup> The latter formulation raises the question whether a third modality should have been introduced into the EU instrument; whether reference should also have been made to the need of being gender and culturally sensitive. The amendment proposed by Nathalie Griesbeck to that end,<sup>53</sup> was not accepted by the other members of the European Parliament.<sup>54</sup>

### ***1.5 The right to inform and be accompanied by an appropriate adult***

The fourth and final evaluation criterion relates to the rules and modalities governing the execution of the right to inform and be accompanied by an adult. The involvement of an appropriate adult was not among the key points raised by the European Commission when setting their agenda for the rights of the child and elaborating on the requirements to achieve a child friendly justice.<sup>55</sup>

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<sup>50</sup> Children’s Rights Alliance for England, Fair Trials International & Legal Experts Advisory Panel, ‘Joint position paper on the proposed directive on procedural safeguards for children suspected or accused in criminal proceedings’ (2014) <[www.fairtrials.org/wp-content/uploads/Joint-Policy-Paper-FTandCRAE\\_Updated.pdf](http://www.fairtrials.org/wp-content/uploads/Joint-Policy-Paper-FTandCRAE_Updated.pdf)> accessed 8 July 2019, para 18.

<sup>51</sup> UN Committee on the Rights of the Child, *General Comment No. 10 ‘Children’s rights in juvenile justice’*, 25 April 2007, CRC/C/GC/10.

<sup>52</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe of 17 November 2010 on child-friendly justice, 21.

<sup>53</sup> Report prepared by Caterina Chinnici of 12 February 2015 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 [2015] COM(2013)0822 – C7-0428/2013 – 2013/0408(COD), 24-25, Amendment 48-178.

<sup>54</sup> Report prepared by Caterina Chinnici of 12 February 2015 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 [2015] COM(2013)0822 – C7-0428/2013 – 2013/0408(COD), 18.

<sup>55</sup> European Commission, ‘Agenda for the Rights of the Child’, COM(2011) 60 final.

When children are involved in criminal proceedings, a new ‘actor’ comes into play. Reference is made to the holder of parental responsibility or another appropriate adult. The actor is relevant both regarding the receipt of information, as well as during court hearings and even beyond that. The two applicable provisions are constructed in the same way: the holder of parental responsibility is automatically brought to the stage, unless there are concerns related to the suitability of that person, in which case another appropriate adult needs to be appointed.

Pursuant to Article 5 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings Member States are to ensure that ***the holder of parental responsibility*** is provided, as soon as possible, with the ***information*** that the child has a right to receive in accordance with Article 4. The information referred to in paragraph 1 shall be provided to ***another appropriate adult*** who is nominated by the child and accepted as such by the competent authority where providing that information to the holder of parental responsibility: (a) would be ***contrary to the child's best interests***; (b) is ***not possible*** because, after reasonable efforts have been made, no holder of parental responsibility can be reached or his or her identity is unknown; or (c) could, on the basis of objective and factual circumstances, substantially ***jeopardise the criminal proceedings***. Where the child has not nominated another appropriate adult, or where the adult that has been nominated by the child is not acceptable to the competent authority, the competent authority shall, taking into account the child's best interests, designate, and provide the information to, another person. That person may also be the representative of an authority or of another institution responsible for the protection or welfare of children

Pursuant to Article 15 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings Member States are to ensure that children have the right to be ***accompanied*** by the ***holder of parental responsibility*** during court hearings in which they are involved. A child shall have the right to be accompanied by ***another appropriate adult*** who is nominated by the child and accepted as such by the competent authority where the presence of the holder of parental responsibility accompanying the child during court hearings: (a) would be ***contrary to the child's best interests***; (b) is ***not possible*** because, after reasonable efforts have been made, no holder of parental responsibility can be reached or his or her identity is unknown; or (c) would, on the basis of objective and factual circumstances, substantially ***jeopardise the criminal proceedings***. Here to, it is regulated that where the child has not nominated another appropriate adult, or where the adult that has been nominated by the child is not acceptable to the competent authority, the

competent authority shall, taking the child's best interests into account, designate another person to accompany the child. That person may also be the representative of an authority or of another institution responsible for the protection or welfare of children.

Interestingly, the automatic involvement of the holder of parental responsibility – largely owing to mirroring civil liability principles – was not questioned. Despite the upcoming importance of children's rights to privacy and the discussion on the extent children should also have a right to privacy in relation to their parents, the position of the holder of parental responsibility in information sharing and accompanying the child was not questioned. Reading all provisions together demonstrates that Article 14 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings is construed as to mean that the right to privacy is conceptualised to be applicable to the public at large. It does not include a right to privacy in relation to their parents. In light of the international discussions in this respect, it is a missed opportunity to at least discuss the extent to which the right to privacy can/could/should be constructed in such a way that it would apply to anyone who is not explicitly identified by the child as a person who is allowed to be informed. Such a debate is worth having, especially since we fail to see how leaving out the holders of parental responsibility would harm the best interest of the child. Especially since any child has the right to legal representation, we fail to see how giving the child the right to determine who is informed about his status and legal position could be detrimental to the best interest of the child. Quite the opposite. If you want to ensure the best interest of the child to be taken into account, it may even be advised not to introduce such an automatic information sharing to the holders of parental responsibility. The provision, and the way the provision is construed, fails to take account of the fact that the holder of parental responsibility might not be the most appropriate adult to support the child during the criminal proceedings. It fails to take account of the fact that empirical studies into the social background of young offenders, reveals a high prevalence of disturbed and disturbing relations between children and parents, up to the point where it might be considered even inappropriate to use, as a starting point, the appropriateness of the holders of parental responsibility in this regard.

Fully in line with the tendency to gradually recognise the competence of children, the competence of the child should be maximized in this context. In light thereof, it is commendable that it is not defined who can qualify as an appropriate adult. It allows

maximum appreciation by the child. Indeed, during the lead up to the adoption of this provision, the European Commission had observed that the concept of "appropriate adult" was not a new one but was introduced by Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.<sup>56</sup> However, no definition had been provided in that context. In relation to the proposal for a Directive, the Commission had provided certain examples in the explanatory memorandum.<sup>57</sup> *"The term "another appropriate adult" refers to a relative or a person (other than the holder of parental responsibility) with a social relationship with the child who is likely to interact with the authorities and to enable the child to exercise his or her procedural rights".*<sup>58</sup> It would have been an option to include such suggestions into the preamble.

In conclusion of it all, the way the right of the child to be effectively supported by an appropriate adult of his choosing is construed, cannot be supported. The option should be open even though there are no legal counter-indications regarding the holders of parental responsibility and should not entail a *per se* negative choice against the parents. It should be construed as a positive choice for a specific person the child trusts. Moreover, it is considered problematic that the option to choose an appropriate adult beyond the holders of parental responsibility is to be interpreted as something to be determined by the authorities. According to the European Commission, an appropriate adult should be decided on a case-by-case basis. In their view, it should be for the authorities to decide, not for the child,<sup>59</sup> which fails to recognise any child competence in this matter.

Pursuant to Article 15.4 Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings the presence of the appropriate adult is not unlimited. As a starting point, the adult should be present during court procedures. Beyond that Member States are to ensure that children have the right to be accompanied by an

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<sup>56</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1.

<sup>57</sup> Proposal for a Directive of the European Parliament and of the Council of 17 February 2014 on procedural safeguards for children suspected or accused in criminal proceedings - Outcome of proceedings of the meetings of the DROIPEN Working Party on 20 January and 3 February, and follow-up [2014] DOC 6384/14, para 25.

<sup>58</sup> Proposal for a Directive of the European Parliament and of the Council of 27 November 2013 on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013)822, para 25.

<sup>59</sup> Proposal for a Directive of the European Parliament and of the Council of 17 February 2014 on procedural safeguards for children suspected or accused in criminal proceedings - Outcome of proceedings of the meetings of the DROIPEN Working Party on 20 January and 3 February, and follow-up [2014] DOC 6384/14, para 26.

adult, during stages of the proceedings other than court hearings at which the child is present where the competent authority considers that: (a) it is in *the child's best interests* to be accompanied by that person; and (b) the presence of that person *will not prejudice* the criminal proceedings.

No argumentation is provided for this limitation nor guidance for its application in practice. It is unclear why the presence of the adult is not aligned with the presence of the lawyer as provided for in Article 6.4 (C) Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. According to that provision, Member States are to ensure that children are, as a minimum, assisted by a lawyer during the listed investigative or evidence-gathering acts, where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned: (i) identity parades; (ii) confrontations; (iii) reconstructions of the scene of a crime. It is unclear why, as a starting point, it would not be possible to allow the adult in those situations.

Finally, it is unclear why the right of a child suspected or accused of having committed a crime is defined in a more limited way when compared to the rights of a child who has fallen victim to a crime. In addition to being represented by their parents, child victims maintain the right to be accompanied by a person of their own choice during criminal investigations. No such right is awarded for child suspects and accused persons. The Directive 2012/29/EU on victims of crime introduces a general and far reaching right to support during criminal investigations.<sup>60</sup>

## **2 Children who have fallen victim to a crime**

The second group of children for which the right to participation in a criminal proceeding will be analysed, is the group of children who have fallen victim to a crime.

### ***2.1 Evaluation criteria deduced from the legal context***

The right to participate in the criminal procedure that deals with ‘the offence a person has fallen victim to’, is also enshrined in various international legal instruments, be it far less

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<sup>60</sup> Directive 2012/29/EU on victims of crime, Art. 20 (c).

elaborate when compared to the rights of suspects or accused persons. Fortunately, they are no longer the forgotten party in criminal proceedings.<sup>61</sup>

The victims' right to participate can be found both binding and non-binding international instruments, such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>62</sup> and the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.<sup>63</sup> Most importantly, the Council of Europe has launched its guidelines on child friendly justice (GCFJ),<sup>64</sup> which also includes guidelines regarding child victims or witnesses to a crime.

It is noteworthy that the Convention on the Rights of the Child (CRC) makes no explicit mention of the rights of child victims to participate to criminal proceedings. Article 40 CRC only relates to children who are suspected or accused of having committed a crime. It could be argued though that the right to participate can be derived of the more general right to be heard and have their views taken into account as enshrined in Article 12 CRC.<sup>65</sup>

From the more detailed analysis below, it will become apparent that this body of legal instruments comprises four criteria against which the EU legal instruments may be evaluated: (1) whether the provisions scoping the legislative framework and thus applicability of the provisions included therein, sufficiently takes account of the possible vulnerabilities of child victims, (2) whether the modalities and rules governing the right to make a complaint are sufficiently developed, (3) whether children have the right to be accompanied by a persons of their choice and (4) whether children have the right to legal assistance and be represented in the procedures.

The instrument under evaluation will be the Directive 2012/29/EU on victims of crime. Clause 14 of its preamble clarifies that *'applying this Directive, children's best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child adopted on 20 November 1989. Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise those rights in a manner that takes*

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<sup>61</sup> Suzanne van der Aa, 'Post-Trial Victims' Rights in the EU: Do Law Enforcement Motives Still Reign Supreme?' [2014] 21/1 European Law Journal 239.

<sup>62</sup> General Assembly Resolution 40/34, adopted on 29 November 1985.

<sup>63</sup> General Assembly Resolution 2005/20, adopted on 25 May 2005.

<sup>64</sup> Committee of Ministers of the Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe of 17 November 2010 on child-friendly justice.

<sup>65</sup> Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

*into account their capacity to form their own views*'. This instrument was not the first in its kind to be adopted. It was aptly concluded that the entry into force of the 2001 Framework Decision on the standing of victims in criminal proceedings, qualifies as an important milestone in the history of victims' rights in the EU.<sup>66</sup> Interestingly, Article 5 of that Framework Decision required Member States to give victims with the status of witnesses or parties measures to minimise communication difficulties hampering their understanding of the proceedings. These measures should be provided to an extent 'comparable with the measures of this type which it takes in respect of defendants'. For that reason, the evaluation assessment will look into the similarities and differences comparing the legal framework governing child suspects with the legal framework governing child victims.

## **2.2 Scope of the directive**

The first evaluation criterion relates to the scope of the directive and thus the applicability of the provisions included therein.

In general, the role of victims in the criminal justice system and whether they can participate actively in criminal proceedings varies across Member States. Their role is determined by one or more of the following criteria: (i) whether the national system provides for a legal status as a party to criminal proceedings; (ii) whether the victim is under a legal requirement or is requested to participate actively in criminal proceedings, for example as a witness; and/or (iii) whether the victim has a legal entitlement under national law to participate actively in criminal proceedings and is seeking to do so, where the national system does not provide that victims have the legal status of a party to the criminal proceedings. Member States should determine which of those criteria apply to determine the scope of rights set out in the Directive 2012/29/EU on victims of crime where there are references to the role of the victim in the relevant criminal justice system.<sup>67</sup> It is noteworthy that the scope of the Directive and thus the victims that would be granted participation rights, is made dependent of a decision by each individual Member State.

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<sup>66</sup> Suzanne van der Aa, 'Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law' [2016] 7/1 New Journal of European Criminal Law 39

<sup>67</sup> Directive 2012/29/EU on victims of crime, Clause 20 Preamble.

To the extent Member States have award participation rights to victims, the Directive clearly stipulates that the right of child victims to be heard in criminal proceedings should not be precluded solely on the basis that the victim is a child or on the basis of that victim's age.<sup>68</sup> Where a child victim is to be heard, due account shall be taken of the child's age and maturity.<sup>69</sup>

The question does arise what the impact of a child's vulnerabilities should be. It is commendable that where an individual assessment of victims is required to identify specific protection needs, it is stipulated that child victims shall be '*presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation*'<sup>70</sup> To determine whether and to what extent they would benefit from special measures as provided for under Articles 23 child victims shall always be subject to an individual assessment. Furthermore, additional child specific protection rights are included in Article 24 to improve the effectiveness of their participation rights.

Where the age of a victim is uncertain and there are reasons to believe that the victim is a child, the victim shall, for the purposes of this Directive, be presumed to be a child.<sup>71</sup>

### **2.3 The right to make a complaint**

The second evaluation criterion relates to the modalities and rules governing the right to make a complaint. This evaluation criterion may be linked to the position taken by the European Commission in their 2011 Agenda on the Rights of the Child, arguing that child victims should be given the opportunity to play an active part in criminal proceedings so as to have their testimony taken into account.<sup>72</sup>

Pursuant to Article 5 Directive 2012/29/EU on victims of crime, Member States are to ensure that victims receive written acknowledgement of their formal complaint made by them to the competent authority of a Member State, stating the basic elements of the criminal offence concerned. It is unfortunate that the EU has not used this opportunity to raise the bar with respect to the right of children. Especially for children, it is difficult to remember what has been stated, and whether it is either or not opportune to add other elements to the statement in a later phase, should they have remembered something new, that might be of interest to the authorities. Therefore, especially with respect to children, with a view to ensuring their

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<sup>68</sup> Directive 2012/29/EU on victims of crime, Clause 42 Preamble.

<sup>69</sup> Article 10, Directive 2012/29/EU on victims of crime.

<sup>70</sup> Article 22, Directive 2012/29/EU on victims of crime.

<sup>71</sup> Article 24, Directive 2012/29/EU on victims of crime.

<sup>72</sup> European Commission, 'Agenda for the Rights of the Child', COM(2011) 60 final, 7.

effective participation as victims to the proceedings, it could have been considered to extend the requirement beyond a mere written acknowledgement of their formal complaint, with basic elements of the crime. It should be extended to a copy of their full statement, recorded in detail.

Furthermore, questions arise as to the time constraints applicable to making a complaint. Besides the statement in the preamble, no references are made to time limitations. In the preamble it is stipulated that, without prejudice to rules relating to limitation periods, the delayed reporting of a criminal offence due to fear of retaliation, humiliation or stigmatisation should not result in refusing acknowledgement of the victim's complaint.<sup>73</sup> It is a missed opportunity to take a position on the functioning of statutory limitations in a national context, arguing that – with respect to child victims of crime – the time for the statutory limitation should only start running as from the age of maturity. In doing so, the EU would have put a strong mark on ensuring the effective participation of child victims to the prosecution and conviction of offenders.

#### ***2.4 The right to be accompanied by a person of your choice***

The third evaluation criterion relates to the modalities and rules governing the execution of the right to be accompanied by a persons of their choice.

Under the umbrella of the right to understand and be understood, pursuant to Article 3.3 Directive 2012/29/EU on victims of crime, unless contrary to the interests of the victim or unless the course of proceedings would be prejudiced, Member States are to allow victims to be accompanied by a *person of their choice* in the first contact with a competent authority where, due to the impact of the crime, the victim requires assistance to understand or to be understood.

Along the same line of argumentation, Article 20 Directive 2012/29/EU on victims of crime stipulates that during criminal investigations, and without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States are to ensure that victims may be accompanied by their legal representative and *a person of their choice*, unless a reasoned decision has been made to the contrary.

Firstly, the age of the victim, is not a decisive element in the legal provision. Rather, the appreciation as to whether or not the victim requires assistance to understand or to be

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<sup>73</sup> Directive 2012/29/EU on victims of crime, Clause 25 Preamble.

understood, is decisive. It would have been better to have made explicit, that children always have that right, and it is not acceptable to deprive them of that right should the authority in question be of the opinion that no such assistance is required. Furthermore, it is not clear from the provision, who should make the assessment and whether it is possible for a victim to have the decision on the requirement re-evaluated.

Secondly, different from the provisions in the Directive EU 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, no reference is made to an appropriate adult, but to a person of the victims choice. It is not clear whether in relation to a child, this should be interpreted as an appropriate adult or not. Could it be a best friend? It should be considered to make a distinction between the person of choice in relation to the rights they are supposed to support. For example, pursuant to Article 4 Directive 2012/13/EU on the right to information in criminal proceedings, child victims have the right to receive information from the first contact with a competent authority. In the context of a child suspect / accused, it is viewed as in the best interest of the child to have the information automatically shared with an appropriate adult (be it or not the holder of parental responsibility), whereas for a child victim, no such information sharing is foreseen. This is particularly interesting, given that the right to legal aid is limited in light of the status that is nationally attributed to victims.

## ***2.5 The right to be represented***

The fourth and final evaluation criterion relates to the rules and modalities governing the execution of the right to be represented.

The right to be represented, is dependent on the role of victims in the relevant national criminal justice system. Automatically, child victims are represented by their parents, i.e. the holders of parental responsibility according to national law. However, the directive does foresee to appoint a special representative for the child victims, where, according to national law, the holders of parental responsibility are precluded from representing the child victim as a result of a conflict of interest between them and the child victim.<sup>74</sup> It is unfortunate that it is not reiterated that the child should have the right to participate in the appointment of that representative, taking account of his age and maturity, as provided for in Article 12 CRC.

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<sup>74</sup> Directive 2012/29/EU on victims of crime, Art. 24 (b).

### 3 Children directly affected by a criminal proceeding

The third group of children for which the right to participation in a criminal proceeding is analysed, is the group of children who are directly affected by a criminal proceeding, for that proceedings relate to their parents or primary caregivers.

With a few exceptions, European member states have not (yet) developed a children's rights approach in sentencing decisions. In those countries where criminal courts should now already consider this impact, it is shown that magistrates are often still hesitant to do so. The best interests consideration in sentencing decisions remains rather controversial. It is often expected to be discriminatory towards accused persons without children, and would also prevent sentencing goals from being realised.<sup>75</sup> Research shows, however, that such a holistic approach in sentencing would benefit rather than obstruct the realisation of sentencing goals.<sup>76</sup> Furthermore, the potentially far-reaching negative consequences for the children involved, justify such a differential treatment.<sup>77</sup>

There are convincing legal and moral arguments as to why this third group of children should receive more attention in criminal justice legislation and policy. More specifically, the authors argue that the best interest of children should be considered when sentencing a parent offender.<sup>78</sup> Several studies indicate that children would suffer emotionally, psychologically and financially from the consequences of parental imprisonment.<sup>79</sup> Even though alternative

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<sup>75</sup> Dan Markel, Jennifer M. Collins, and Ethan J. Leib, *Privilege or punish. Criminal justice and the challenge of family ties* (OUP 2009); Shona Minson and Rachel Condry, 'The visibility of children whose mothers are being sentenced for criminal offences in the courts of England and Wales' (2015) 32 *Law Context: A Socio-Legal J.* 28.

<sup>76</sup> Lauren Feig, 'Breaking the cycle: a family-focused approach to criminal sentencing in Illinois' [2015] *Advocate's Forum* 13, 17.

<sup>77</sup> Christine Piper, 'Should impact constitute mitigation?: Structured discretion versus mercy' (2007) *The Criminal Law Review* 141; Tamar Lerer, 'Sentencing the family: recognizing the needs of dependent children in the administration of the criminal justice system' (2013) 9 *Northwestern Journal of Law and Social Policy*, 24; Doret de Ruyter, Sanne Hissel and Catrien Bijleveld, 'Children, mothers and the criminal justice system' (2013) 5, *Review of European Studies* 43.

<sup>78</sup> Other decisions made within the criminal justice system regarding parents, such as decisions regarding the pre-trial detention and the execution of the sentence, also affect the children involved. This contribution focuses on the sentencing decision only, while keeping in mind that this decision cannot be regarded in isolation. Decision at these different stages (pre-trial, trial and sentence execution) may have an influence on the outcomes of the other phases of the procedures. For instance, judges may consider the prison sentence less harmful when they know that in the sentence execution phase, it can be decided that a prison sentence can be executed in weekends only.

<sup>79</sup> It has not been established, however, to what extent these consequences follow from the parental imprisonment, rather than from the criminal justice proceedings, the involvement of the parent in criminal activities, or even the socially disadvantaged background in which the children grow up. In this regard, it has been argued by some that parental imprisonment would rather heighten the pre-existing vulnerabilities of the children involved.

See: Danielle H. Dallaire, 'Incarcerated mothers and fathers: A comparison of risks for children and families' (2007) 56 *Family Relations*, 440; John Hagan and Ronit Dinovitzer, 'Collateral consequences of imprisonment for children, communities, and prisoners' (1999) 26 *Crime and Justice* 121; Sanne Hissel, Catrien Bijleveld and Candace Kruttschnitt, 'The well-being of children of incarcerated mothers: an exploratory study for the Netherlands' (2011) 8 *European Journal of Criminology* 346; Joseph Murray and David P. Farrington, 'Parental imprisonment: Long-lasting effects on boys' internalizing problems through the life course' (2008) 20 *Development and Psychopathology* 273.

sentences (including electronic monitoring or house arrest, community service, probation, financial fines and forfeiture) are often preferred over the prison sentence, their impact on the children of the offender should not be neglected either. Financial sanctions, like fines and forfeiture, can have a large impact on the financial capacity of the family as well. Similarly, the reduction in time to spend with the family following a community service should not be underestimated. Residential therapy imposed on a parent as a probation measure may also lead to the separation of parent and child. These examples show that even alternative sentences may impact the lives of the children concerned.<sup>80</sup> Furthermore, there may be situations where children would actually benefit from being separated from their parent, for example in the situation where a parent with a drug dependency behaved aggressively towards his or her partner and children.<sup>81</sup>

At the international, regional and domestic level, legislative, jurisprudential and policy changes have led to increased attention for this topic, demanding criminal courts to consider the best interests of the child in sentencing decisions.<sup>82</sup> Practice is often still lacking, and many differences between the European member states still exist. Despite its competence in this field, the European Union has not developed any legislation or policy on this issue. It should be argued that the European Union has a key role to realise a children's rights approach in sentencing decisions regarding parent offenders. A key element in a children's rights approach is effective participation by the children concerned, be it directly or indirectly.

### ***3.1 Evaluation criteria deduced from the legal context***

The Convention on the Rights of the Child recognizes the situation of children of detained parents in Article 9 (4). Pursuant to Article 9(4) CRC both parents and children should be informed about each other's whereabouts in case of parental detention. The Convention on the Rights of the Child does not entail any other provision addressing the plight of children whose parents are in conflict with the law specifically. However, several other provisions of the CRC are relevant in this situation, including the prohibition of discrimination (Article 2), the right

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<sup>80</sup> Oliver Robertson, 'Collateral Convicts: Children of incarcerated parents. Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011' (2011) Quaker United Nations Office <[www.quno.org/resource/2012/3/collateral-convicts-recommendations-and-good-practice-un-committee-rights-child-day](http://www.quno.org/resource/2012/3/collateral-convicts-recommendations-and-good-practice-un-committee-rights-child-day)> accessed 8 July 2019.

<sup>81</sup> Sanne Hissel, Catrien Bijleveld and Candace Kruttschnitt, 'The well-being of children of incarcerated mothers: an exploratory study for the Netherlands' (2011) 8 *European Journal of Criminology* 346.

<sup>82</sup> Hayli Millar and Yvon Dandurand, 'The impact of sentencing and other judicial decisions on the children of parents in conflict with the law: Implications for sentencing reform, An analysis submitted to the Department of Justice Canada', (2017) School of Criminology and Criminal Justice, University of the Fraser Valley and International Centre for Criminal Law Reform and Criminal Justice Policy <[https://cjr.ufv.ca/wp-content/uploads/2017/02/Millar-and-Dandurand-2017\\_Impact-of-Sentencing-on-Children-on-Parents\\_07\\_02\\_2017.pdf](https://cjr.ufv.ca/wp-content/uploads/2017/02/Millar-and-Dandurand-2017_Impact-of-Sentencing-on-Children-on-Parents_07_02_2017.pdf)> accessed 8 July 2019.

to development (Article 6), the right to family life (e.g. Article 9), the right to health (Article 24), the right to an adequate standard of living (Article 27) and, most notably, the child's right to have his or her best interests considered (Article 3).

The United Nations Committee on the Rights of the Child has interpreted this children's rights framework as including an obligation for criminal law actors to consider the best interests of the child when sentencing parent offenders and primary caregivers. Alternative sanctions should be preferred over imprisonment. The Committee first considered so in its Report and Recommendations following the 2011 General Day of Discussion on the topic: "*in sentencing parent(s) and primary caregivers, noncustodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)*".<sup>83</sup>

The Committee on the Rights of the Child confirmed this later in, for example, General Comment No. 14 concerning the right to have his or her interests taken into consideration,<sup>84</sup> and in more than 20 concluding observations made regarding state reports to the Committee.<sup>85</sup> The UN General Assembly<sup>86</sup> and the UN Human Rights Council<sup>87</sup> have issued several resolutions in which the principle of the best interests of the child is set forth in sentencing decisions.

Furthermore, on the regional level, the Council of Europe has addressed this issue in several resolutions and recommendations.<sup>88</sup> Most recently, in April 2018, the Council of Europe issued a Recommendation concerning the children of detained parents.<sup>89</sup> According to the recommendation, judicial authorities should examine the possibility of alternative sentences or measures when considering a custodial sentence for a parent offender (paragraphs 2 and 10). In relation to 'judicial orders and sentences', paragraph 2 states that: "*Without prejudice*

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<sup>83</sup> UN Committee on the Rights of the Child, *Report And Recommendations of the Day of General Discussion on 'Children of incarcerated parents'*, <[www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx](http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx)> accessed 8 July 2019, para 30.

<sup>84</sup> UN Committee on the Rights of the Child, *General Comment No. 14 'The right of the child to have his or her best interests taken as a primary consideration'*, 29 May 2013, CRC/C/GC/14, paras 28-29.

<sup>85</sup> All recommendations concerning parental detention are collected in the following database: <[www.crcip.com/all.php](http://www.crcip.com/all.php)>.

<sup>86</sup> See for example: UN General Assembly, *Resolution 'Rights of the child'*, 18 December 2009, A/RES/64/146, para 15.

<sup>87</sup> See for example: UN Human Rights Council, *Resolution on Rights of the Child 'Access to Justice'*, 5 March 2014, A/HRC/25/L.10, paras 6-7.

<sup>88</sup> See e.g.: Council of Europe Parliamentary Assembly, Recommendation 1469 (2000) of 20 June 2000 on Mothers and babies in prison; Council of Europe Parliamentary Assembly, Resolution 1663 (2009) of 28 April 2009 concerning Women in prison.

<sup>89</sup> Recommendation Committee of Ministers to the member states CM/Rec(2018)5 of 4 April 2018 concerning children of imprisoned parents [2018].

*to the independence of the judiciary, before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures.*<sup>90</sup> More specifically, in relation to the sentencing decision, paragraph 10 of the recommendation prescribes that “[w]hen a custodial sentence is being contemplated, the rights and best interests of any affected children shall be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver”.<sup>91</sup>

In a growing number of States, a children’s rights approach in sentencing decisions is set forth.

The direct application of the above-mentioned international treaties and soft law documents is still contested in many domestic contexts. The Recommendation of the Council of Europe is the most comprehensive document on this topic so far, but is also lacking the necessary enforcement measures. The European Union could fill this gap, and harmonise the way in which parent offenders are sentenced within the European Union member states, taking into consideration the best interests of the children involved. This would especially be necessary in cross-border scenario’s, where a parent is convicted in one member state, whereas his or her family resides in another.

Following policy and jurisprudential changes in domestic law, criminal courts in, amongst others, England & Wales,<sup>92</sup> Italy,<sup>93</sup> and the Czech Republic<sup>94</sup> are obliged or at least expressly encouraged to consider the children of the accused person at the sentencing stage. A number of States outside of Europe, including South Africa,<sup>95</sup> Australia<sup>96</sup> and some States within the United States of America,<sup>97</sup> have longer practice in considering the parental responsibilities of

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<sup>90</sup> Council of Europe, Recommendation Committee of Ministers to the member states CM/Rec(2018)5 of 4 April 2018 concerning children of imprisoned parents [2018] para 2.

<sup>91</sup> Council of Europe, Recommendation Committee of Ministers to the member states CM/Rec(2018)5 of 4 April 2018 concerning children of imprisoned parents [2018] para 10.

<sup>92</sup> See, for instance: R(on the application of P and Q) v Secretary of State for the Home Department [2001] EWCA Civ 1151 paras 78 and 87.

<sup>93</sup> Memorandum of Understanding between The Ministry of Justice, The National Ombudsman for childhood and Adolescence and Bambinisenzasbarre ONLUS, 2014.

<sup>94</sup> Constitutional Court of the Czech Republic, Brno, TZ 90/2017, 7 August 2017. It is asserted, however, that this decision is due to the exceptional circumstances of the case and does not create any precedent for future cases.

<sup>95</sup> S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) (Constitutional Court of South Africa).

<sup>96</sup> For instance, in New South Wales and Victoria, the children of the accused person may be considered in exceptional circumstances as a form of ‘mercy’: Tamara Walsh and Heather Douglas, ‘Sentencing parents: the consideration of dependent children’, (2016) 37 Adelaide Law Review 135, 143-144.

<sup>97</sup> Tamar Lerer, ‘Sentencing the family: recognizing the needs of dependent children in the administration of the criminal justice system’ (2013) 9 Northwestern Journal of Law and Social Policy, 24.

the accused<sup>98</sup> or the best interests of the child in sentencing decisions and may guide the development of policy and practice in Europe. In some countries, future legislation may lead to an inclusion of the children of the offender in sentencing decisions. In Scotland, attempts have been made to introduce Child and Family Impact Assessments at the sentencing stage, and the Sentencing Council debated in which way the rights of the child can be best realised.<sup>99</sup> In Belgium, the proposal for a new penal code also includes a consideration of the potential negative effects of criminal sanctions on the environment of the offender, thus including the children of the offender.<sup>100</sup>

The application of the child's best interests in sentencing decisions raises several questions, especially regarding the outcome of the sentencing process when considering the child's best interests. Following Article 3 CRC, the best interests of the child should be '*a primary*' consideration. A literal interpretation implies that it is neither '*the*' primary consideration, nor the '*paramount*' consideration. The UN Committee on the Rights of the Child clarified that, when the child's interests cannot be harmonized with the other interests at stake, the various interests have to be weighed against each other on the basis of the particular elements of the case. In this balancing exercise, 'a larger weight must be attached to what serves the child best'.<sup>101</sup> The writing of the various international soft law documents on this topic indicates that the child's best interests are indeed not absolute when sentencing primary caregivers and parents: non-custodial sentences should be issued '*wherever possible*',<sup>102</sup> and 'the rights and best interests of any affected children shall be taken into consideration and alternatives to detention be used *as far as possible and appropriate*'.<sup>103</sup> How much weight a criminal judge should attribute to the child's best interests is thus difficult if not impossible to determine in general, and will depend on the specific circumstances of the case, including the seriousness of the offence, and the sentencing goals aimed for in the sentencing decision.

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<sup>98</sup> In some of these jurisdictions, the rights and best interests of the children have not been acknowledged explicitly, but the potential impact of the sentence on the child involved may be considered to some extent.

<sup>99</sup> Nancy Loucks and Tânia Loureiro, 'Someone should have just asked me what was wrong' in Rachel Condry and Peter Scharff Smith (eds), *Prisons, punishment, and the family: towards a new sociology of punishment?* (OUP 2018).

<sup>100</sup> Joëlle Rozie and Damien Vandermeersch (Commissie voor de Hervorming van het Strafrecht), *Voorstel van voorontwerp van boek I van het strafwetboek* (Die Keure 2016). In August 2018, the two appointed experts resigned as the government wanted to make some fundamental changes to their proposal. After the Belgian federal elections in May 2019, the future of this proposal remains unclear.

<sup>101</sup> UN Committee on the Rights of the Child, *General Comment No. 14 'The right of the child to have his or her best interests taken as a primary consideration'*, 29 May 2013, CRC/C/GC/14, para 39.

<sup>102</sup> UN Committee on the Rights of the Child, *Report And Recommendations of the Day of General Discussion on 'Children of incarcerated parents'*, <[www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx](http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx)> accessed 8 July 2019, para 30.

<sup>103</sup> Council of Europe, Recommendation Committee of Ministers to the member states CM/Rec(2018)5 of 4 April 2018 concerning children of imprisoned parents [2018] para 10.

Based on that analysis, the question regarding the desirability of developing an EU legal instrument will be assessed in light of: (1) the scope of the right to participate as a child 'affected' by the criminal procedure and (2) the nature of the participation and the representation of the child in the criminal procedure.

### 3.2 *Scope of the right*

The first evaluation criterion relates to the scope of the right and whether at all legislative intervention is warranted.

The scope of the child's right to have his or her best interests considered in sentencing decisions, differs among the international soft law documents and domestic provisions. Whereas some soft law documents refer to both parents and primary caregivers,<sup>104</sup> others include only parents,<sup>105</sup> with some documents asking particular attention for those parents who are primary caregivers.<sup>106</sup> At the domestic level, differences exist as well. The Italian Memorandum of Understanding refers to parents more generally,<sup>107</sup> whereas in England and Wales, an assessment of the child's right to family life is limited to accused mothers,<sup>108</sup> and in South Africa, a consideration of the best interests of the child is only required when sentencing sole primary caregivers.<sup>109</sup> These limitations aim at preventing accused persons benefitting from a rule when they do not actually take on caregiving responsibilities towards their child, despite their biological or legal status as a parent.<sup>110</sup>

Limiting the assessment of the child's best interests to only accused mothers, (sole) primary caregivers, or parents, may be considered problematic, however. In determining the preferred scope of such provisions, one should depart from the rationale behind a best interests

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<sup>104</sup> UN Committee on the Rights of the Child, *Report And Recommendations of the Day of General Discussion on 'Children of incarcerated parents'*, <[www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx](http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx)> accessed 8 July 2019, para 30.

<sup>105</sup> Recommendation Committee of Ministers to the member states CM/Rec(2018)5 of 4 April 2018 concerning children of imprisoned parents [2018] para 2.

<sup>106</sup> Recommendation Committee of Ministers to the member states CM/Rec(2018)5 of 4 April 2018 concerning children of imprisoned parents [2018] para 10.

In this recommendation, 'caregiver' is defined as 'a person who looks after and takes responsibility for the child on a daily basis': Recommendation Committee of Ministers to the member states CM/Rec(2018)5 of 4 April 2018 concerning children of imprisoned parents [2018] 3.

<sup>107</sup> Memorandum of Understanding between The Ministry of Justice, The National Ombudsman for childhood and Adolescence and Bambinisenzasbarre ONLUS, 2014, Article 1(3).

<sup>108</sup> *R(on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151 paras 78 and 87; Shona Minson and Rachel Condry, 'The visibility of children whose mothers are being sentenced for criminal offences in the courts of England and Wales' (2015) 32 *Law Context: A Socio-Legal J.* 28.

<sup>109</sup> *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) (Constitutional Court of South Africa); *S v S* (Centre for Child Law as Amicus Curiae) 2011 (7) BCLR 740 (CC) (Constitutional Court of South Africa); Ann Skelton and Morgan Courtenay, 'The impact of children's rights on criminal justice' (2012) 25 *South African Journal of Criminal Justice* 180.

<sup>110</sup> These are arguments often given against a best interests consideration. See e.g.: Dan Markel, Jennifer M. Collins, and Ethan J. Leib, *Privilege or punish. Criminal justice and the challenge of family ties* (OUP 2009); Tamar Lerer, 'Sentencing the family: recognizing the needs of dependent children in the administration of the criminal justice system' (2013) 9 *Northwestern Journal of Law and Social Policy*, 24.

consideration, namely avoiding or mitigating the potential impact of a sentence on the child involved. The detention of the (male) breadwinner of the family may lead to financial burdens for the family and the child involved. The separation of parent and child, following detention, may still lead to emotional problems, even if this parent is not caring for the child on a daily basis, due to work or a co-parenting decision after divorce.<sup>111</sup> Furthermore, other persons than legal or biological parents may be taking up most caregiving responsibilities, such as a grandparent, a sibling or an aunt.

The broad scope proposed by the UN Committee on the Rights of the child ('parents and primary caregivers') would give more importance to the actual role of a person in a child's life than to the biological or legal status as a parent.<sup>112</sup> However, as such a broad scope allows judges' perceptions on families to determine whether or not the best interests of the child should be considered, a multi-disciplinary assessment of the role of the accused person in the child's life is warranted.<sup>113</sup>

A best interests consideration should not be limited in any way by the offences for which the parent or primary caregiver was accused. Whether or not the children were the victim of the offence committed, is also not a relevant question here. These questions are, however, important when assessing what exactly the best interests of the child are, and to what extent they may influence the sentencing decision, in light of the sentencing goals.

### ***3.3 Child participation and representation***

The second evaluation criterion relates to modalities and rules governing child participation and child representation. Traditionally, criminal trials do not (necessarily) give an opportunity to the children of the accused person to participate, either directly or indirectly, in the proceedings. This may be problematic in light of both Article 12 CRC (the right of the child to be heard) and Article 3 CRC (the best interests of the child).

The right to be heard is one of the fundamental principles of the Convention on the Rights of the Child. Additionally, it is an important element in the assessment of the best interests of the

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<sup>111</sup> Tânia Loureiro, 'Child and family impact assessments in court: implications for policy and practice' (2009) Families Outside <[www.familiesoutside.org.uk/content/uploads/2019/03/child-impact-statements-stage1.pdf](http://www.familiesoutside.org.uk/content/uploads/2019/03/child-impact-statements-stage1.pdf)> accessed 8 July 2019; Holly Mason-White and Helen F. Kearny, 'Children of (alleged) offenders: revised draft framework for decision-making' (2012) Quaker United Nations Office <<https://quono.org/resource/2012/3/children-alleged-offenders-revised-draft-framework-decision-making>> accessed 8 July 2019.

<sup>112</sup> Doret de Ruyter, Sanne Hissel and Catrien Bijleveld, 'Children, mothers and the criminal justice system' (2013) 5, Review of European Studies 43; Tamar Lerer, 'Sentencing the family: recognizing the needs of dependent children in the administration of the criminal justice system' (2013) 9 Northwestern Journal of Law and Social Policy, 24.

<sup>113</sup> UN Committee on the Rights of the Child, *General Comment No. 14 'The right of the child to have his or her best interests taken as a primary consideration'*, 29 May 2013, CRC/C/GC/14, paras 48-51.

child: who better than the child can say what he or she wants?<sup>114</sup> The right to be heard is rather controversial, as very often it is questioned to what extent the opinion of the child concerned should weigh in the final decision. Although, the opinion of the child concerned may not be decisive when determining his or her best interests, it is one of the elements to be taken into consideration.<sup>115</sup>

Linked to the issue of child participation in the trial proceedings, is the issue of information presented to the court. Usually, criminal courts are not informed about the family situation of the defendant. Parent offenders are often not inclined to share this information, as they may fear their children might be taken away from them permanently.<sup>116</sup> Pre-sentence reports are used to inform the various judicial authorities in their decisions, but the family situation or more detailed information on the potential impact of the potential children is usually not included.<sup>117</sup> Research in England & Wales indicates, however, that when pre-sentence reports containing information on the family situation of the defendant are used, children are more easily acknowledged in the sentencing process.<sup>118</sup> Very often, defence lawyers are assumed to share this information in their pleadings before the court. However, this assumption neglects the possible conflict of interests of parent defendants and their children.<sup>119</sup>

Here, some procedures and mechanisms to realise both the child's right to be heard and the need for proper information on the child's best interests are discussed together.

The right of the child to be heard can, according to the Committee on the Rights of the Child, be realised both directly and by representation.<sup>120</sup> Firstly, it is possible to allow the judge to hear the child him- or herself. This could be organised in a private meeting, without the audience and maybe even the parent present. This may, however, be a traumatic experience for the child involved, and would therefore not be considered appropriate. Such a procedure should, like all other mechanisms ensuring the right of the child to be heard, to be child-

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<sup>114</sup> The UN Committee has interpreted and clarified this right in a General Comment: UN Committee on the Rights of the Child, *General Comment No. 12 'The right of the child to be heard'*, 20 July 2009, CRC/C/GC/12.

<sup>115</sup> UN Committee on the Rights of the Child, *General Comment No. 14 'The right of the child to have his or her best interests taken as a primary consideration'*, 29 May 2013, CRC/C/GC/14, paras 43-44, 53-54, 89-91.

<sup>116</sup> Kate Philbrick, *Assessing the impact on a child when their parent is imprisoned: some ethical questions*. European Journal of Parental Imprisonment, (2015) Winter 2015, European Journal of Parental Imprisonment <<https://childrenofprisoners.eu/european-journal-of-parental-imprisonment/>> accessed 8 July 2019.

<sup>117</sup> Rona Epstein, 'Mothers in prison: The sentencing of mothers and the rights of the child'. Howard League What is Justice? Working Papers 3/2014, <[www.howardleague.org/what-is-justice/](http://www.howardleague.org/what-is-justice/)> accessed 8 July 2019.

<sup>118</sup> Shona Minson and Rachel Condry, 'The visibility of children whose mothers are being sentenced for criminal offences in the courts of England and Wales' (2015) 32 Law Context: A Socio-Legal J. 28.

<sup>119</sup> Rob Canton, 'A holistic consideration of probation, resettlement and family life: Interview' (2016) 4 European Journal of Parental Imprisonment, <<https://childrenofprisoners.eu/european-journal-of-parental-imprisonment/>> accessed 8 July 2019.

<sup>120</sup> UN Committee on the Rights of the Child, *General Comment No. 12 'The right of the child to be heard'*, 20 July 2009, CRC/C/GC/12, paras 35-37; UN Committee on the Rights of the Child, *General Comment No. 14 'The right of the child to have his or her best interests taken as a primary consideration'*, 29 May 2013, CRC/C/GC/14, para 45.

friendly. Elements to be considered are ‘provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms’.<sup>121</sup>

Secondly, the child could be represented in the courtroom in his or her absence. For instance, in South Africa, a *curator* or *guardian ad litem* can be appointed to represent the children of the defendant at the sentencing stage.<sup>122</sup> It is then the duty of the curator ad litem to give information to the court on the situation of the child of the accused and to guard the child’s best interests in the proceedings.<sup>123</sup> A legal representative, on the other hand, could realise an even higher degree of child participation, by representing the child’s views to the court and acting on instructions from the child he or she is representing.<sup>124</sup> The UN Committee on the Rights of the Child also asserted that a guardian or representative should be appointed to represent the child in best interests determinations, especially when there is a potential conflict between the parties.<sup>125</sup>

Thirdly, social workers or probation officers could include the child’s views when drafting a pre-sentence report for the sentencing court. In a few jurisdictions, *child or family impact statements* are used to this end. These statements resemble pre-sentence reports, but provide the judiciary with the relevant information regarding the family situation of the defendant and the potential impact of the sentence on the children involved.<sup>126</sup> Both a more general pre-sentence report and a child impact statement could incorporate the child’s views regarding his or her accused parent.

Especially in sentencing decisions, it can be questioned which role should be attributed to the child’s views. It may be argued that these children would always argue that they would prefer their parent to stay at home instead of being sent to prison. The child can still offer their views on their relationship with their parent and help the sentencing court in evaluating the potential consequences of a sanction on the child. Furthermore, it is necessary for the child to receive

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<sup>121</sup> UN Committee on the Rights of the Child, *General Comment No. 12 ‘The right of the child to be heard’*, 20 July 2009, CRC/C/GC/12, para 34.

<sup>122</sup> Although practice shows that such a *guardian ad litem* is hardly appointed in practice.

<sup>123</sup> Trynie Boezaart, ‘The role of a curator ad litem and children’s access to the courts’ (2013) 46 *De Jure*, 707.

<sup>124</sup> This does not seem to be practice yet in relation to sentencing decisions regarding parents in South Africa, however. See: Carina Du Toit, ‘Legal representation of children’ in Trynie Boezaart (ed), *Child law in South Africa*, (2<sup>nd</sup> ed. Juta 2017).

<sup>125</sup> UN Committee on the Rights of the Child, *General Comment No. 14 ‘The right of the child to have his or her best interests taken as a primary consideration’*, 29 May 2013, CRC/C/GC/14, para 96.

<sup>126</sup> Margaret Dizerega, ‘San Francisco’s family-focused probation: a conversation with Chief Adult Probation Officer Wendy Still’ (2011) 24 *Federal Sentencing Reporter* 54; Tânia Loureiro, ‘Child and family impact assessments in court: implications for policy and practice’ (2009) *Families Outside* <[www.familiesoutside.org.uk/content/uploads/2019/03/child-impact-statements-stage1.pdf](http://www.familiesoutside.org.uk/content/uploads/2019/03/child-impact-statements-stage1.pdf)> accessed 8 July 2019; Nancy Loucks and Tânia Loureiro, ‘Someone should have just asked me what was wrong’ in Rachel Condry and Peter Scharff Smith (eds), *Prisons, punishment, and the family: towards a new sociology of punishment?* (OUP 2018).

more information on the role of his or her views in this decision, especially in cases where the parent is still sent to prison, while the child has expressed a different outcome. It is furthermore important to keep in mind that the child's right to be heard is not a duty: a child has the right to not exercise this right as well.<sup>127</sup>

## 4 Conclusion

Over the past years, the EU has invested in the development of a legal framework to anchor and shape the participation rights of children when they are confronted with criminal law proceedings. To structure the analysis, a distinction was made between (i) children who are suspects or accused persons in criminal proceedings, (ii) children who are victim of a crime and (iii) children who are affected by criminal proceedings against their care givers.

In 2016, a new EU Directive was adopted to ensure the rights of the children in the first category, namely children who are suspects or accused persons in criminal proceedings. The diverging opinions on how to scope the concept of 'criminal proceeding' and how to qualify juvenile justice systems as either or not 'criminal' in nature, constitute a threat to the correct and effective application of the Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. With respect to ensuring the effectiveness of participation, the EU's instrument could have been more elaborate on the nature of the adaptations that need to be made to traditional criminal law proceedings in order to tailor them to children's needs. Properly understanding the proceedings is far from self-evident even for adults, let alone for children. For that reason, even more tangible guidelines regarding both the content and modalities of the information rights of the child could have been added. Finally, the recognition of the child's competence to take decisions and their right to privacy in relation to their parents might require additional thought in light of developments in scientific literature.

Already in 2012, a Directive was adopted to ensure the rights of victims of crime, which is also applicable to child victims, the second category of possible child participants distinguished for this analysis. The most important remark related to the scope of the Directive is not child-specific in that it goes to the general position of the EU to make the

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<sup>127</sup> UN Committee on the Rights of the Child, *General Comment No. 12 'The right of the child to be heard'*, 20 July 2009, CRC/C/GC/12, paras 16, 22-25.

scope of the participation rights dependent of the nationally applicable rules. The directive does not have the ambition to amend the existing participation rights and leaves it to the discretion of individual Member States to decide to what extent victims are allowed to participate to the criminal procedures regarding the offence they have fallen victim to. Even though the directive takes due account of the additional safeguards needed for child victims, analysis revealed that the provisions governing the right to make a complaint, could have been drafted in a more child friendly fashion. Analysis also revealed some inconsistencies in the right of children suspected or accused of having committed a crime when compared to the rights of children who have fallen victim to a crime, when it related to their right to be accompanied by an appropriate adult. Differences in information sharing are apparent. Finally, some provisions do not take full account of the ongoing discussions regarding the gradual gaining of competence and the impact this should have on e.g. the nomination of a special representative.

Finally, the analysis aimed at raising awareness for the rights of children who are affected by criminal proceedings even though they are neither suspect/accused or victim of the crime. This children are the third type of possible child participants in a criminal procedure. One of the EU's goals in this matter is to promote 'the prevention of and responses to violence against children'. Children of parents in prison are considered to be more vulnerable and at risk. The EU website on this matter also states that 'All EU policies that have an impact on children must be designed in line with the best interests of the child'.<sup>128</sup> Furthermore, a Commission coordinator for the rights of the child and an inter-service group coordinate ensure that all departments of the European Commission consider the rights of the child properly in all relevant policies and actions.<sup>129</sup> The 2017 Forum on the Rights of the Child, which was dedicated to the International Study on children deprived of their liberty, also devoted attention to this particular group of children. In its 2014 resolution to celebrate the 25th anniversary of the UN Convention on the Rights of the Child, the European Parliament specifically addressed the issue of children of imprisoned parents: "*[c]alls on the Commission to assess the impact of detention policies and criminal justice systems on children; points out that across the EU children's rights are directly affected in the case of children living in detention facilities with their parents; underlines the fact that an estimated 800,000 children in the EU are separated from an imprisoned parent each year, which impacts on the rights of*

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<sup>128</sup> <[https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/violence-against-children\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/violence-against-children_en)> accessed 9 July 2019.

<sup>129</sup> <[https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/eu-action-rights-child\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/eu-action-rights-child_en)> Accessed 9 July 2019.

*children in multiple ways.*”<sup>130</sup> Taking account of these initiatives, there might be a window of opportunity to initiate a debate on the extent to which these children should have participation rights and what the legislative framework should look like in order to firmly ensure the rights of the child and guarantee that the best interests of the child are always acknowledged as a primary consideration.

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<sup>130</sup> European Parliament resolution of 27 November 2014 on the 25th anniversary of the UN Convention on the Rights of the Child (2014/2919(RSP)), para 13.