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Directive (EU) 2016/800 on procedural safeguards for children

1. The scope and content of the Directive

The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings was formally adopted on 11 May 2016, with a transposition date of 11 June 2019. The Impact Assessment prepared by Commission staff (SWD(2013) 480 final) stated that despite the existence of certain international standards, 'there are insufficient standards in some Member States with regard to special safeguards for children... to ensure the effective exercise of their fair trial rights' (para 1). The United Kingdom and Ireland have not opted in to this Directive and, for the reasons noted earlier, it does not apply to Denmark. Note that the procedural rights roadmap originally envisaged that a Directive would cover procedural safeguards for both children and vulnerable suspects and accused persons. However, it was decided to confine the Directive to children, and for safeguards for vulnerable suspects to be covered by a Commission Recommendation, which was issued on 27 November 2013 (available at <https://tinyurl.com/y9g6kdz5>).

1.1 The purpose of the Directive

The purpose of the Directive is to establish procedural safeguards to ensure that children, meaning persons under the age of 18, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration (Recital 1).

The age of a child should be determined on the basis of the child's own statement, checks on their civil status, documentary research and other evidence, and if such evidence is not available and as a last resort, by medical examination (Recital 13). If there is uncertainty as to whether the person has reached the age of 18, they should be presumed to be a child (Art 3).

The Directive does not address the age of criminal responsibility, which is for Member States to determine.

1.2 The scope of the Directive

The Directive applies to children who are suspects or accused persons in criminal proceedings, until sentence and any appeal (Art 2(1)). Thus, as with the Directive on the presumption of innocence, it is not limited to those who have been formally notified that they are a suspect or accused. The Directive also applies to children who are requested persons from the time that an EAW is executed, although certain Articles do not apply in such circumstances (Arts 2(2) and 17). The Directive is specifically applied to children who are not initially a suspect or accused, but who become a suspect or accused person in the course of questioning by the police or other law enforcement authority (Art 2(4)).

There is a similar minor offences exemption to that in the Directive on the right to interpretation and translation (Art 2(6) and Recitals 14-16).

1.3 Right to information

Member States must ensure that children are made aware that they are suspected or accused, and informed about their procedural rights in accordance with the Directive on the right to information (Directive 2012/13/EU). In addition, they must be informed of the rights set out in this Directive, in accordance with the provisions in Art 4(1)(a)-(c).

Information must be provided in simple and accessible language, and the fact that the information has been provided must be recorded (Art 4(2)).

1.4 Notification and role of the holder of parental responsibility

Information that must be given to a child under Article 4 must also be given to the holder of parental responsibility as soon as possible. However, the information may be given to another appropriate adult nominated by the child if providing it to the holder of parental responsibility: (a) would be contrary to the child's interests; (b) is not possible because the holder of parental responsibility cannot be contacted; or (c) could substantially jeopardise the proceedings (Art 5 and Recitals 22-24).

Children have the right to be accompanied by the person specified above during court proceedings and other stages of the process at which the child is present, which would include during police questioning (Art 15 and Recitals 57-59).

1.5 Right to a lawyer

Article 6 provides for mandatory assistance by a lawyer from the earliest moment specified in Article 6(3). However, there is provision for derogation where:

- (a) assistance by a lawyer is not proportionate in light of the circumstances of the case, taking into account the seriousness of the alleged offence, complexity of the case and the measures that could be taken in respect of the offence, although the child's best interests are always the primary consideration; although a child must be assisted by a lawyer when brought before a court or judge to decide upon detention, and during detention (Art 6(6)); or
- (b) temporarily, in exceptional circumstances (which are similar to those set out in article 3(6) of the Directive on the right to a lawyer, except that there is no provision for derogation on the grounds of geographical remoteness); although the authorities must take the best interests of the child into account, and decisions to question a child in the absence of a lawyer must be taken on a case-by-case basis either by a judicial authority or another competent authority, on condition that the decision can be judicially reviewed (Art 6(8) and Recital 31).

The meaning of 'assistance of a lawyer' is partially defined in Article 6(5), in similar terms to that set out in the Directive on the right to a lawyer (2013/48/EU).

1.6 Right to legal aid

Member States must ensure that national law in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer pursuant to Article 6 (Art 18). Note that the EU Directive on legal aid ((EU) 2016/1919) contains no special provision for children. Under Article 4 of that Directive, Member States can apply a means test, although a means test must take into account all relevant factors. It remains to be determined whether the fact that legal assistance is mandatory will be treated as a relevant factor.

1.7 Individual assessment and medical examination

Child suspects and accused must be individually assessed to ensure that their specific needs concerning protection, education, training and social integration are taken into account. The assessment should normally be carried out prior to indictment, but the level of assessment may vary depending on the circumstances of the case, the measures that can be taken if the child is found guilty,

and whether the child has recently been assessed. The obligation may be derogated from if 'warranted in the circumstances of the case', provided that this is compatible with the best interests of the child (Art 7 and Recitals 35-40). The purpose of the assessment is set out in Article 7(4).

A child deprived of their liberty has the right to medical examination without undue delay, in particular, to assess their mental and physical condition. The examination may be carried out either on the initiative of the competent authorities or on request by the child, the holder of parental responsibility or other appropriate adult, or the child's lawyer. The results of the examination must be taken into account when determining the capacity of the child to be subjected to questioning, other investigative acts, or any measure taken or envisaged against the child (Art 8 and Recital 41).

1.8 Recording of interviews

Questioning of children must be audio-visually recorded where this is proportionate in the circumstances of the case (Art 9 and Recitals 42-49). Questioning must be carried out in a manner that takes account of the age and maturity of the child (Recital 44).

1.9 Deprivation of liberty

Deprivation of liberty must be limited to the shortest appropriate period, and imposed only as a measure of last resort (Art 10 and Recitals 45-53). Where possible, authorities must have recourse to measures alternative to detention (Art 11). Where deprived of their liberty (including when held in police custody), children must normally be held separately from adults (Art 12). This is subject to exception if it is considered not to be in the child's best interests and, in the case of police custody, if in exceptional circumstances it is not practically possible to do so, provided that this is compatible with the child's best interests.

1.10 Other provisions

The Directive also makes other provisions regarding children –

- (a) Criminal proceedings involving children must be treated as a matter of urgency and with due diligence (Art 13).
- (b) The privacy of children must be respected (Art 14).
- (c) Children have a right to be present at trials and Member States must take all necessary measures to enable them to participate effectively, including the opportunity to express their views (Art 16).
- (d) There must be an effective remedy in the event of breach of rights under the Directive (Art 19).
- (e) Law enforcement and detention staff must receive appropriate training; and judges, prosecutors and lawyers must have specific competence and/or training (Art 20).

2. Existing information as to implementation of the Directive

The transposition date post-dates the period during which the ERA training events were held.

As of 28 March 2018, one Member State (Spain) had notified the Commission of measures adopted by way of transposition of the Directive.

With regard to the position in Member States concerning the matters covered by the Directive prior to transposition, a number of sources of information are available. The most comprehensive, in terms of coverage, is the Impact Assessment that was carried out by Commission staff in preparation for the proposed Directive (SWD(2013) 480 final). A number of research studies examining some of the matters covered by the Directive in some Member States, funded by the European Commission, have been conducted in the past decade. These include E Cape, et al, *Effective Criminal Defence in Europe*

(Intersentia, 2010), and J Blackstock, et al, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia 2014). In addition, the study reported in E Cape and Z Namoradze, *Effective Criminal Defence in Eastern Europe*, examined criminal processes in two further Member States (Bulgaria and Lithuania).

The NGO Fair Trials is planning to produce and publish implementation guidance. A useful study examining some of the matters covered by the Directive, conducted in five Member States, and funded by the Commission, was published in two volumes in 2015. See M Panzavolta et al, *Interrogating Young Suspects: Procedural Safeguards from a Legal Perspective (vol 1)* and *Procedural Safeguards from an Empirical Perspective (Vol 2)* (Intersentia, 2015).

3. Developments in Member States

Neither speakers nor delegates were asked to address the state of implementation in their jurisdictions.