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PROCEDURAL SAFEGUARDS FOR JUVENILE SUSPECTS IN INTERROGATIONS

A Look at the Commission's Proposal in Light of an EU Comparative Study

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ABSTRACT

This article discusses the recent European Commission's Proposal for a Directive on procedural safeguards for children suspected and accused in criminal proceedings and the protection that it offers to juvenile suspects during interrogations. Given the importance of the interrogations for the outcome of a case and its sensitivity for the personality of vulnerable suspects, understanding how the Proposal protects children in this stage of proceedings seems a required step in the overall assessment of the quality of the proposed legislation. The Proposal's evaluation is conducted in light of the preliminary findings of an on-going EU funded research project that the authors are currently coordinating. After a critical assessment of the scope and relevant definitions of the Proposal, the attention will turn to some specific safeguards related to (pre-trial) interrogations such as the right to legal assistance, the right to an appropriate adult and the right to an individual assessment. By referring to the current legal status quo in a selection of EU Member States, the article challenges some aspects of the Proposal such as its relatively narrow scope, the lack of definitions of certain concepts and the fact that the complexity of the vulnerability of juvenile suspects is not adequately taken into account by some of the proposed rules. With this critical evaluation and by emphasizing the importance of taking full account of the complexity of the matter, the authors hope

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to offer a contribution to the future debate and negotiations on how to effectively strengthen the protection of juvenile suspects.

Keywords: juvenile justice; right to a lawyer; right to information; safeguards; suspect interrogation

1. INTRODUCTION

As part of a larger package aimed at strengthening the procedural rights of suspects and defendants, the European Commission tabled on 27 November 2013 a Proposal on procedural safeguards for children suspected or accused in criminal proceedings (hereinafter: the Proposal).¹ This Proposal is an implementation of ‘measure E’ of the so-called ‘Roadmap for strengthening procedural rights’² and deals with the largest and most important category of vulnerable suspects: juveniles. It does not address the topic of adult vulnerable defendants, which is covered by a separate recommendation, accompanying the Proposal.³

With this Proposal the Commission pursues two goals. On the one hand, it aims at ensuring a more homogeneous protection of children’s rights within the European Union (hereinafter: EU) with a view to improving mutual recognition and judicial cooperation.⁴ On the other hand, the Commission intends to promote greater protection of the rights of children in criminal proceedings, particularly during those phases where they are more exposed to the risk of harm, undue suffering or to detrimental consequences for the outcome of their case. The Proposal covers some of the most significant rights of juvenile suspects and defendants during criminal proceedings such as the right to be informed of procedural rights, the right to be assisted by an appropriate adult and a lawyer, the right to an individual assessment and an appropriate treatment, the protection of privacy, the right to liberty and the right to be present in person at trial.

The discussion on procedural rights for juvenile suspects and defendants must take international legislation into account. There are various supranational norms

¹ European Commission, “Proposal for a Directive of the European Parliament and the Council on procedural safeguards for children suspected or accused in criminal proceedings”, COM (2013) 822/2. As a result of a DROIPEN meeting on 5 May 2014 the text of the Proposal was amended on several points. See for the changed text: Council of the European Union, “Proposal for a Directive of the European Parliament and the Council on procedural safeguards for children or accused in criminal proceedings – General approach” (2013/0408 (COD)), Brussels, 12 May 2014. This contribution was finalised before the adoption of these changes and therefore refers to the original text of the Proposal.

² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceeding [2009] OJ C295/01.

³ European Commission, “Commission Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings”, C (2013) 8178/2.

⁴ As provided by Article 82 Treaty on the Functioning of the European Union.

dealing with the protection of children, such as the Convention on the Rights of the Child of 1989⁵ (hereinafter CRC) and several soft law instruments adopted by the United Nations such as the UN Standard Minimum Rules for the Administration of Juvenile Justice in 1985 (*Beijing Rules*)⁶, the UN Rules for the Protection of Juveniles Deprived of their Liberty of 1990 (*Havana Rules*)⁷, the UN Guidelines for the Prevention of Juvenile Delinquency of 1990 (*Riyadh Guidelines*)⁸ and the UN (ECOSOC) Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime of 2005.⁹ At the European level, Article 24 of the Charter of Fundamental Rights of the EU emphasizes the best interests of the child as the main focus of all actions regarding children. Furthermore the Council of Europe has issued several recommendations, including the European Rules for juvenile offenders subject to sanctions or measures of 2009 and the Guidelines on Child-friendly justice 2010. Furthermore, there is – of course – the European Convention of Human Rights (hereafter: ECHR) and the case law of the European Court of Human Rights (hereafter: ECtHR) which has repeatedly stressed the importance of providing juveniles with specific procedural safeguards.¹⁰

Although important, most of these supranational norms take a very general, often rather vague approach and the majority of them do not have a real binding force. Furthermore, only a few of them concern the protection of juveniles during the early stages of criminal proceedings. Given these undisputed shortcomings, it is realistic to presume that an EU Directive is a more appropriate tool to effectively strengthen the protection of rights of juveniles in criminal proceedings.

When considering the effective protection of juvenile suspects and defendants, particular attention should be paid to the early stage of the proceedings and, more specifically, to pre-trial interrogations. Pre-trial interrogations usually constitute the juveniles' first contact with law enforcement authorities and this is often when children are in an extremely stressful and unfamiliar situation. Furthermore, it is a known fact that in most criminal justice systems the results of this first interrogation – in adult as

⁵ Convention on the Rights of the Child (adopted 20 November 1989; entered into force 2 September 1990) 1577 UNTS 3.

⁶ UNGA 'Standard Minimum Rules for the Administration of Juvenile Justice' ("The Beijing Rules"), 40 U.N. GAOR Supp. No. 53 at 207, U.N. Doc. A/40/53 (1985).

⁷ UNGA 'Rules for the Protection of Juveniles Deprived of their Liberty' ("The Havana Rules"), UN Doc. A/Res/45/113.

⁸ UNGA 'Guidelines for the Prevention of Juvenile Delinquency' ("The Riyadh Guidelines"), UN Doc. A/Res/45/112.

⁹ UN ECOSOC, 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime', Res. 2005/20, 22 July 2005.

¹⁰ In short, the ECtHR emphasizes that the juvenile should be able to understand the steps of the procedure, participate in it, effectively exercise his rights and benefit from the protection of privacy. This was stressed for the first time in the cases *T. and V. v. United Kingdom*: ECtHR, Grand Chamber, *T. v. United Kingdom*, 16 December 1999, appl. no. 24724/94; ECtHR, Grand Chamber, *V. v. United Kingdom*, 16 December 1999, appl. no. 24888/94.

well as in juvenile cases – can and often will be of fundamental importance for the development and the outcome of the case.¹¹

Given the importance of pre-trial interrogations for the protection of juveniles in criminal justice, this article discusses how the Proposal protects children in these situations, and offers a contribution to the future debate with the prospect of strengthening the protection of juvenile suspects. To this end, the article evaluates a selection of the provisions of the Proposal particularly in light of the preliminary findings of an on-going EU-funded research project on the protection of young suspects during interrogation that the authors are presently coordinating. The project, titled *Protecting Young Suspects in Interrogations*, is a legal comparative and empirical study that attempts to shed more light on the field of procedural rights for juveniles during (pre-trial) interrogation.¹² It sprung from the observation that the position of juvenile suspects and defendants throughout Europe deserves greater attention¹³ and, most likely, improvement.¹⁴ Some of the issues raised by the Proposal are in fact the same as those encountered during the project.

After discussing the scope and definitions of the Proposal, the focus turns to a selection of safeguards directly related to the interrogation of juveniles during the investigations: the right to information on rights, the involvement of the holder of parental responsibility, the right to a lawyer and legal aid, the right to an individual assessment, the questioning of children and training of relevant authorities. These provisions have been selected so as to allow a proper and exhaustive assessment of the amount of protection afforded to the juvenile suspects during the interrogations by the draft legislation. To that end, the authors also compare the Proposal with the preliminary findings of the research project.¹⁵ Finally, some concluding remarks are made.

¹¹ Cape, E., Hodgson, J., Prakken, T. and Spronken, T., *Suspects in Europe*, Antwerp: Intersentia 2007, p. 19–20.

¹² The full name of the project is “Protecting Young Suspects in Interrogations: a study on safeguards and best practice”. The research is carried out jointly by the Maastricht University, Antwerp University, Jagiellonian University, Macerata University, Warwick University, Defence for Children and PLOT Limburg. It consists of a legal comparative and an empirical study in five Member States representing different systems of juvenile justice in Europe (Belgium, England and Wales, Italy, Poland and The Netherlands). More information on the project can be found at www.youngsuspects.eu.

¹³ For an extensive work on the existing variety of European juvenile justice systems, see Dünkel, F., Grzywa, J., Horsfield, P. and Pruin, I., *Juvenile Justice Systems in Europe – Current Situation and Reform Developments*, Vol 1–4, Mönchengladbach: Forum Verlag Godesberg, 2011 and Patané, V. (ed.), *European Juvenile Justice Systems*, Milano: Giuffrè 2007.

¹⁴ See *inter alia* Cape, E., Hodgson, J., Prakken, T. and Spronken, T., *Suspects in Europe*, Antwerp: Intersentia 2007, Spronken, T., Vermeulen, G., De Vocht, D., Van Puyenbroeck, L., *EU Procedural Rights in Criminal Proceedings*, Antwerp: Maklu 2009, Cape, E., Namoradze, Z., Smith, R. and Spronken, T., *Effective Criminal Defence in Europe*, Antwerp: Intersentia 2010 and Blackstock, J., Cape, E., Hodgson, J., Ogorodova, A. and Spronken, T., *Inside Police Custody – An Empirical Account of Suspects’ Rights in Four Jurisdictions*, Cambridge (etc.): Intersentia 2014.

¹⁵ The information on domestic legislation contained in the article is taken from the country reports that have been drafted within the project and that will be published in a collective volume. The

It is thus not the goal of this contribution to discuss other provisions, such as the right to liberty and the right to protection of privacy. This does not mean that these provisions are of less importance for the effective protection of juvenile suspects' rights, but they are not an indicator of what protection is offered to children during a criminal interrogation.

2. SCOPE OF THE PROPOSAL

At first sight, the Proposal appears as a very ambitious endeavour considering the variety of issues that it intends to cover. Article 1 identifies the subject matter of the Proposal by referring to “minimum rules concerning the rights of suspects or accused persons in criminal proceedings who are children and of children subject to European arrest warrant proceedings”. The provision of Article 1 is complemented by Article 2, which confines the application of the Directive's provisions by using two criteria.

The first is the age of the suspect; when it comes to this criterion, the Directive only covers proceedings against children under the age of 18. The age criterion relates to the time frame in which proceedings are underway and not simply to the time when the offence was committed (“at the time when they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings”), rather, it can exclude the latter. Hence, the Directive does not apply to young adults who (allegedly) committed the crime when they were minors but who have reached the age of maturity before the start of the proceedings.¹⁶ Nevertheless, Article 2 para. 3 makes explicitly clear that the Directive covers juveniles who turn 18 in the course of the proceedings, in which case the safeguards apply until the conclusion of the proceedings.

The Proposal notes that the national rules on the age of criminal responsibility for children remain unaffected by the Directive. The threshold of criminal liability is one of the most sensitive issues of national juvenile justice policy and it seems entirely plausible that the Directive does not interfere with it. Furthermore, the Directive deals with procedural safeguards and not with issues of substantive criminal law, hence there would be no direct need to intervene on the age of criminal liability.¹⁷

The second criterion used to confine the scope of the Directive is the type of proceedings. The Directive only applies to criminal proceedings and European Arrest

authors of the country reports – to whom we express our sincere gratitude – are M. van Oosterhout and J. Meese (Belgium), J. Hodgson and V. Kemp (England and Wales), C. Cesari (Italy), B. Stando-Kawecka and J. Kuzstal (Poland) and D. de Vocht and M. van Oosterhout (the Netherlands).

¹⁶ However, recital 10 of the preamble does recommend countries to extend the applicability of the safeguards to juveniles under 21 years of age.

¹⁷ The Impact Assessment recognizes that meetings with stakeholders showed that “there would be no consensus to legislate on this issue”, Commission staff working document, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council, Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings, SWD(2013) 480 final, p. 10.

Warrant (hereafter: EAW)-proceedings. Inevitably, this raises the question whether the criminal nature of proceedings should be considered in a formal or in a substantial manner. The explanatory notes take the first approach. They state that the Directive does not apply to proceedings that the domestic law does not formally label as criminal. In particular, the Directive does not apply to "other forms of proceedings which may lead to the imposition of certain restrictive measures (for instance protection measures and education measures)".¹⁸ This is quite a striking exclusion. The issue of the boundary between criminal and non-criminal proceedings is in fact crucial in juvenile criminal justice. When dealing with juvenile delinquency many countries do not follow a purely criminal approach. Some prefer to avoid labelling the action taken against juvenile offenders (or alleged offenders) as criminal proceedings. For instance, in Poland proceedings against a juvenile who committed an offence are not formally criminal. The same is true in Belgium. In both countries the greater part of punitive/preventive proceedings against juveniles takes the label of "educative" proceedings. Countries may opt for such a non-criminal approach for different reasons. For instance, it could be connected to the policy choice made as to the age of criminal liability: if the threshold is set at a very high age (16, 17 or even 18), the inevitable need to punish and deter younger offenders must be met through non-criminal proceedings. It could also be for avoiding the stigma that may derive to a juvenile from the formal "criminal" label or for ensuring that the juvenile receives a milder treatment and the like.

It is a known fact that the ECtHR takes a broad approach when considering whether national proceedings constitute a "criminal charge" within the meaning of Article 6 ECHR. Whether proceedings are labelled as criminal under domestic law, is not necessarily decisive in this respect. In several cases the Court has recognized that the safeguards provided for in Article 6 also apply to for example administrative proceedings against juveniles, following the widely known 'Engel' criteria. In *Adamkiewicz v. Poland*, the ECtHR confronted the fairness of Polish (formally non criminal) juvenile proceedings under the direction of the family judge.¹⁹ The Court had no doubt that the proceedings in question were criminal, thus requiring the application of the safeguards provided for by Article 6 ECHR. This line of reasoning was made even clearer in *Blokhin v. Russia*²⁰ dealing with a juvenile who was questioned without any safeguards and placed in a detention centre for minors by an administrative order. No criminal proceedings were opened against the juvenile since he was below the age of criminal responsibility. The Court's reasoning – resulting in the conclusion that the relevant administrative proceedings were criminal in nature – moved along the traditional lines of the Engel case-law, taking into account the nature of the allegations raised against the juvenile, the afflictive consequences

¹⁸ Part 3 Legal elements of the Proposal (para. 16).

¹⁹ ECtHR, 4th Section, *Adamkiewicz v. Poland*, 2 March 2010, appl. no. 54729/00.

²⁰ ECtHR, 1st section, *Blokhin v. Russia*, 14 November 2013, appl. no. 47152/06.

suffered by him and, lastly, the presumption of criminal nature of proceedings that entail a deprivation of liberty.²¹

In sum, many juvenile justice systems remove the “criminal” label when dealing with juvenile suspects, yet a large part of them preserve a substantial punitive nature that requires respect for fair trial safeguards. States should not be able to dispense with the protection of procedural rights simply because of the label they attach to certain type of proceedings. Hence, if the divide for the application of the safeguards of the Directive is traced along the line of the formal criminal label of the proceedings, the risk is a patchy and non-homogeneous implementation of safeguards across Europe. The Directive’s provisions would in fact have no impact in those countries where juvenile punitive justice is formally placed outside the realm of criminal justice. This would represent a significant limitation for the application of the Directive.

Looking into why the Commission has made this choice, one could attempt to defend the Commission by using the subsidiarity argument. The Union’s aim is to increase mutual trust with a view to foster mutual recognition and judicial cooperation. Proceedings of a non-criminal nature against juveniles do not give rise to judicial cooperation. For this reason such proceedings would fall outside the remit of the harmonization promoted by the European Union, even though their substantial criminal nature would require the same safeguards according to the ECtHR. However, this subsidiarity argument is not wholly convincing. First, it cannot be completely excluded that proceedings against juveniles give rise to cooperation proceedings (forfeiture orders, for instance) and, exceptionally, even to EAW cases.²² Second, when the harmonization of one area of procedural law is deemed to be the most appropriate type of action for the European Union, it cannot be artificially confined to a part of the selected procedural area simply because the remaining part would not affect judicial cooperation. Procedural rules intertwine with each other and they should compose a sound ensemble. Thus, once the harmonization of an aspect of procedural law is deemed necessary, the scope of the harmonization should then be determined not simply by looking at the needs of judicial cooperation, but also by taking into account the need to ensure the overall coherence of the procedural system. A system that offers strong protection to the rights of an adult suspect, while affording no protection to those of a juvenile suspect might not (sufficiently) meet the overall coherence requirement. There is a third decisive argument. Several juvenile justice systems that deal with delinquent minors outside criminal proceedings allow for

²¹ The scrutiny of the Court went so much in depth that it even contested that the placement of the juvenile in a temporary detention centre for minors could pursue the purpose of educational supervision, *ibid.*, §§143–147.

²² For instance, there was an EAW case between Belgium (as issuing authority) and Poland concerning the surrender of a 17 year-old ordered by a family judge. The Polish judge held that surrender was not precluded by the formally non-criminal nature of the Belgian proceedings (see Council of the European Union, Evaluation report on the fourth round of mutual evaluations “the practical application of the European arrest warrant and corresponding surrender procedures between member states”. Report on Poland, 14 December 2007 (ST 14240/1/07), p. 22–24.

some forms of transferral of the most serious cases to ordinary criminal courts/justice or provide for some exceptions to the competence of juvenile courts. For instance, Belgium and Poland are two countries where proceedings against juveniles are normally dealt with by the juvenile/family judge and are not labelled as criminal. Nonetheless, in Belgium, the Youth Protection Act empowers the prosecutor with the possibility of transferring the case against a juvenile to an ordinary criminal court when an educational measure is deemed inadequate (“*dessaisissement*”).²³ Similarly, in Poland 15–16 year-old juveniles (17 being the age of criminal majority) can be brought in front of ordinary criminal courts if charged with some of the most serious crimes or if tried together with an adult.²⁴ In other words, in juvenile justice there is often a direct connection between non-criminal and criminal proceedings, with the former type of proceedings that can convert in, or give way to, the latter type. In light of this possibility, it is essential that the safeguards applicable in the two types of proceedings are not divergent. The juvenile should be given an equivalent level of protection in all the cases that may lead to some form of punishment, regardless of whether the proceedings take a formally criminal nature.

Another issue connected to the scope of the Proposal revolves around the exact notion of proceedings. When exactly do (criminal) proceedings start against a suspect and when exactly do they end?

Apparently, the starting moment for the application of the safeguards is the time when the juvenile becomes suspected or accused. In order to clarify that, what counts is not the formal status of suspects (e.g. being formally registered as a suspect in some official record) but rather a more substantial status. Article 2 para. 4 states that the rules also apply to children other than suspected or accused who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons. This is the same approach that was taken in the previous Directive on the right of access to a lawyer.²⁵

With regard to the conclusion of proceedings, it is not clear whether the stage of the execution of the sentence is covered by the proposed safeguards. In many countries criminal proceedings include the stage of the execution of the sentence. The Proposal consistently refers to juveniles suspected or accused, thus leaving the impression that it predominantly refers to the proceedings until a decision of guilt is made. Even putting aside the stage of the execution of the sentence, the expression “conclusion of proceedings” leaves open the question whether appellate stages are included in the scope of the Directive or not. The question is relevant with regard to some, though not all, safeguards (for instance, the rights mentioned in Article 10, 13, 15, 16, 18, 19). In general, in the majority of European continental countries, proceedings are not over

²³ Article 57bis para. 1 *Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait* (Youth Protection Act).

²⁴ Article 10 *Ustawa o postępowaniu w sprawach nieletnich* (Act on juvenile delinquency proceedings).

²⁵ Article 2 para. 3 Directive 2013/48/EU.

until all appellate remedies have been exhausted. But whether this conclusion can be generalised for all Member States to the extent that the safeguards are also applicable in front of appellate courts is not clear. Both the Directive on information on rights (2012/13) and on access to a lawyer (2013/48) expressly clarify the concept of “conclusion of proceedings”, by referring to “the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal”.²⁶ It is recommendable that the same clarification is added in the context of the current Proposal, in order to avoid any confusion.

3. RELEVANT DEFINITIONS

Since the Directive should eventually be implemented in the many different juvenile justice systems across the EU, it is important to have a broad consensus on some of its key notions. Nevertheless the definitions provision of the Proposal (Article 3) only defines the term “child”. In defining children as persons below the age of 18, the Directive is in line with the main international law instruments on this matter, particularly the CRC. Article 1 of the CRC in fact defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.²⁷ When comparing this provision with the definition of the proposed Directive it is noticeable that the latter does not contain a similar reservation as that incorporated in the final part of Article 1 CRC (“unless under the law applicable to the child, majority is attained earlier”). In general, one could argue that using the definition of the CRC might cause terminological confusion because of the fundamental differences in scope and content of the two instruments (CRC and the Proposal). On the other hand, the Proposal could also have taken a less straightforward and potentially more problematic approach by opting for the notion of ‘juvenile’ considering the rather ambiguous definition of this concept in already existing supranational instruments.²⁸

It should be stressed that the Proposal does not set out a definition of vulnerability. The impact assessment acknowledges the importance of defining the concept, but it

²⁶ Article 2 §1 Directive 2013/48; Article 2 §1 Directive 2012/13.

²⁷ The same approach is taken in the Guidelines on Child-friendly justice of 2010 (“For the purposes of these guidelines on child friendly justice (...) a ‘child’ means any person under the age of 18 years”, *supra* 2). See also Article 2 the Convention on Jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for protection of children, The Hague, 19 October 1996.

²⁸ Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, adopted by the Committee of Ministers on 24 September 2003: “For the purpose of this recommendation ‘juveniles’ means persons who have reached the age of criminal responsibility but not the age of majority; however, this recommendation may also extend to those immediately below and above these ages”, *supra* §1.

observes that “it is very difficult if not impossible to find a definition for vulnerability”.²⁹ In a way, the Proposal seems to circumvent the problem by defining its object and scope without direct reference to vulnerability. In the Proposal, anyone who is a child (i.e. under the age of 18) should be considered vulnerable. The underlying – understandable – assumption is that children are automatically vulnerable because of their age.³⁰ According to this line of reasoning, children are probably the easiest group to identify within the category of vulnerable suspects.³¹ In the majority of cases it is not difficult to assess a suspect’s age – age being the most objective parameter of vulnerability – while it is certainly more difficult to identify and assess other factors ‘causing’ vulnerability (such as mental health problems, addictions et cetera) let alone define them in a legal instrument.

Although it might be true that a general and sufficiently precise definition of vulnerability is not available at present and may even be impossible to achieve, this does not mean that the debate on the concept should be dismissed. It would be wrong to believe that there is no further need to reflect on the vulnerability of (juvenile) suspects and defendants: it still appears important to understand what exactly makes a suspect or defendant vulnerable, particularly when he is a juvenile. This certainly is a very complex matter, strongly connected to developmental psychology – a discipline with which the average lawyer will probably be not (too) familiar. Nevertheless, an explicit discussion on the different aspects of the vulnerability of juveniles might help identify and shape the specific safeguards needed to provide them with sufficient protection during the various stages of criminal proceedings.

It appears from the preliminary results of the project *Protecting Young Suspects in Interrogations* that – at present – such an explicit discussion seems to be lacking in the legal systems involved in the study. The laws in each of the countries observed generally seem to ignore the complexity of the matter and do not provide an answer to the question what exactly defines the juvenile’s vulnerability. As a rule, there are no legal definitions of vulnerability of the juvenile suspect during interrogation or in general. Moreover, the countries involved share a common tendency in that they make no distinction in age between children, employing what could be called a ‘one size fits all approach’.³² It remains to be seen whether the Proposal will have any effect

²⁹ Commission staff working document, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council, Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings, SWD(2013) 480 final, p. 20.

³⁰ Commission staff working document, Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council, Proposal for a on procedural safeguards for children suspected or accused in criminal proceedings, SWD(2013) 480 final, p. 18.

³¹ This is probably why the Commission has decided to deal with vulnerable adults in a separate instrument: “Due to the lack of a common definition of vulnerable adult persons (...) the Commission has refrained at this stage from extending the scope of this Directive to vulnerable adult persons.’ Commission has drafted a separate Recommendation on procedural safeguards for vulnerable suspects suspected or accused in criminal proceedings” (Explanatory notes to the Proposal, number 10).

³² Although not common, the differentiation of children in age categories is present in some domestic legislation. An example can be found in the Dutch Instruction on legal assistance during police interrogation (*Aanwijzing rechtsbijstand politieverhoor, Staatscourant 2010, 4003*) which sets out

on this aspect of national legislation. At present, none of the rights foreseen in the Proposal make any distinction in age nor do they make any reference to the specific characteristics of the juvenile's vulnerability. From a psychological perspective, this could be problematic since it is a known fact that various age categories of juveniles are – in general – connected to various levels of mental and emotional development.

As stressed before, it appears important to understand what exactly makes a juvenile suspect vulnerable and to try and identify their own needs and specific legal problems. For example: what defines the vulnerability of the juvenile suspect in terms of comprehending what is at stake (the proceedings, his rights et cetera) and which psychological characteristics of juveniles influence their vulnerability during questioning (susceptibility to suggestion, greater risk of giving false confessions et cetera)? Only when these specific needs and accompanying legal problems are identified and acknowledged – which may even require a classification of children in different age categories – will it be possible to formulate firm and clear minimum rules strengthening the effective protection of juvenile suspects. In its current shape and wording, the Proposal will most likely not encourage any debate on the matter and might even stimulate Member States to maintain their current 'one size fits all' approach in protecting juveniles' procedural rights.

Finally, a definition that appears to be missing is the one of the term 'questioning' (or 'interview' or 'interrogation'). Several of the safeguards are connected to the interview of young defendants, which raises the question what should be considered as an interview in the context of the Proposal. Article 9 of the Proposal (on the audio-visual recording of questioning of children³³) refers to 'any questioning of children by police or other law enforcement or judicial authority carried out prior to the indictment'. It is clear from Article 2 of the Proposal that the scope of the Directive is limited to criminal proceedings but it remains to be seen whether this makes clear enough to which kind of questioning the Directive applies. As mentioned earlier, throughout the EU a wide variety of juvenile justice systems are represented. It follows from the preliminary results of the legal part of the research project that structural as well as fundamental differences between the various juvenile justice systems are also reflected in the many different ways and forms in which a juvenile suspect can be questioned in pre-trial proceedings. While in some Member States or Member State jurisdictions – such as England and Wales – the scope and meaning of the concept of pre-trial questioning of juvenile suspects seems to be rather unproblematic (with pre-trial interrogations of juveniles with the purpose of evidence gathering being exclusively conducted by the police) in other Member States the goals of the interrogations as well as the competent authorities may vary widely. For example in the Italian juvenile justice system the juvenile suspect may be

different rules on the right to legal assistance before and during police interrogation for different age categories of juveniles.

³³ See paragraph 4.5.

subjected to many different kinds of interviewing – by different authorities such as the police, the prosecutor or a judge – with different functions varying from evidence gathering to providing the juvenile suspect with the possibility to put forward his/her defence.³⁴

Without a clear definition of the concept of ‘questioning’ implementation problems could arise in Member States which allow the juvenile suspect to be questioned in several different ways and with several different functions.³⁵

4. A LOOK AT SOME OF THE SAFEGUARDS

As mentioned, the main focus here is on the safeguards related to (pre-trial) interrogations, more specifically: the right to be informed of rights; the right to an appropriate adult; the right to legal assistance; the right to an individual assessment; the right to have interviews audio-visually recorded and, finally, the requirement of actors involved in juvenile proceedings to be specialized and trained.

This contribution does not examine in depth the right to liberty of young suspects, covered by Articles 10, 11 and 12 of the Proposal. Article 10 provides that children should be deprived of their liberty only as a measure of last resort and for the shortest time possible, taking account of the age and individual situation of the child. Article 11 requires that the States resort to alternative measures insofar as possible, listing a number of possible measures. Article 12 stipulates how children should be treated when deprived of their liberty. They should be kept separate from adults and dealt with in a way that preserves their rights and their personality. Although children might be deprived of their liberty, while being interrogated, this is not always the case. In the large majority of countries the police power to question a suspect is independent of the power to arrest or keep in detention, to the extent that an interrogation could even take place on the street or in other informal settings. While children can be questioned without having been arrested or detained, it should always be kept in mind that the restriction of liberty strongly increases the potential oppressiveness of the confrontation. From the perspective of the effective protection of young suspects in interrogations, the restriction of liberty is relevant in that it constitutes a situation where greater attention and safeguards are required due to the increased vulnerability of the young suspect who is (or has been) kept in a cell.

³⁴ This is in particular the difference of the police investigative interview (Article 350 of the Italian code of criminal procedure) and the public prosecutor’s questioning (Article 375) with the interrogation carried out by the judge of the preliminary investigations after a pre-trial detention order (Article 294).

³⁵ The fact that – in the Proposal – different terms are used without making clear how they should be interpreted adds to the confusion. For example: in part 3 of the explanatory memorandum (Legal elements of the Proposal) the terms ‘questioning’ and ‘interview’ are simultaneously used.

4.1. RIGHT TO INFORMATION OF CHILDREN

Article 4 of the proposed Directive deals with a fundamental procedural safeguard: the right to information. The provision is divided into three parts. First, there is a general rule that children – just like adult suspects – should be informed ‘promptly’ of their rights in accordance with the Directive on the right to information in criminal proceedings.³⁶ Second, Article 4 adjusts and supplements the list of rights of the previous Directive in relation to the juvenile suspect. To this extent explicit reference is made to some of the specific rights incorporated in the Proposal. Some of these rights are ‘juvenile specific’, such as the right to have the holder of parental responsibility informed, the right to an individual assessment and a medical examination and the right of the holder of parental responsibility to have access to court hearings. Others are more traditional procedural safeguards, which are given a specific shape and content in connection to the needs of juvenile suspects, such as the right to a lawyer and the right to legal aid, the right to appear in person at the trial, the right to liberty and to specific treatment in detention. Third, paragraph 2 of Article 4 of the Proposal regulates separately the communication to children deprived of their liberty³⁷: for this category of suspects an oral information is not enough but they should be given a (standardised) Letter of Rights as foreseen in the aforementioned Directive on the right to information.³⁸ In the case of children deprived of their liberty, the Letter of Rights should include the specific rights of the proposed Directive.

The Proposal does not clarify in detail *when* and *how* the information on rights should be given. As for the timing, the Proposal clearly intends to follow the approach taken by the Directive on information on rights³⁹ by stating that information on rights should be given ‘promptly’. Although the use of this term could give rise to questions of interpretation which are not explicitly answered by the Proposal (‘promptly’ after what?), the preamble of the Directive on information on rights sets some boundaries in this respect by stating that the information should be provided ‘at the latest before the first official interview of the suspect or accused person by the police or by another competent authority’.⁴⁰

More importantly, the Proposal does not clearly indicate *how* the information should be administered to the juvenile. This is a vital issue when dealing with vulnerable suspects. It is self-evident that the capacity of a juvenile to understand the scope and content of his procedural rights differs from the ability of an adult to do so.

³⁶ Directive 2012/13/EU.

³⁷ According to the Directive on information on rights references to suspects or accused persons who are arrested or detained should be understood to refer to any situation where, in the course of criminal proceedings, suspects or accused persons are deprived of liberty within the meaning of Article 5(1)(c) ECHR, as interpreted by the case-law of the European Court of Human Rights.

³⁸ Directive 2012/13/EU.

³⁹ Directive 2012/13/EU.

⁴⁰ Preamble Directive 2012/13/EU, recital 19.

For instance, several studies conducted in the United States show that juvenile suspects, in comparison with their adult counterparts, are much more likely not to comprehend the exact meaning of a Miranda warning.⁴¹ The research also shows that the lower the age of the juvenile the higher the risk of not comprehending. Children below the age of 14 seem to be at the highest risk of not understanding the procedural rights they are informed of.⁴² Despite the undisputed fact that a juvenile may face specific problems in the context of the right to be informed during criminal proceedings, at present the topic generally seems to be ignored by domestic law makers. The preliminary findings of the research project *Protecting Young Suspects in Interrogations* show that currently there is a lack of clear rules at the national level on how to properly inform juvenile suspects of their procedural rights. A notable and rare exception in this regard is the Italian legislation, where the law on juvenile criminal proceedings spells out the obligation for all public authorities to ensure that the young suspect effectively understands the meaning of all procedural steps and activities.⁴³

It should go without saying that the specific vulnerability of (the different categories of) juvenile suspects in the context of understanding their rights should be taken into account as much as possible when reflecting on proper minimum rules on the right to information. For instance, it could be important to require that information be given in a language and manner which are comprehensible for the juvenile, adapting the use of legal terminology to the knowledge and level of understanding of children. In this respect, it should be noted that the Directive on information on rights explicitly states that information on procedural rights should be given ‘in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons’.⁴⁴ However, besides the fact that Article 4 of the Proposal

⁴¹ Only 21% of children as opposed to 42,3% of adults can comprehend the understanding and significance of Miranda warnings: See King, K., “Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children, From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights”, *Wis. L. Rev.*, 2006–2, p. 431–478, p. 433. See – for example – also: Chao, R., “Mirandizing Kids: Not as Simple as A-B-C”, *Whittier Law Review*, 21, 2000, p. 521–555, Feld, B., “Juveniles’ competence to exercise Miranda rights: an empirical study or policy and practice”, *Minnesota Law Review*, 91, 2006, p. 26–100 and Overbeck, Z., “No Match for the Police: An Analysis of Miranda’s Problematical Application to Juvenile Defendants”, *Hastings Constitutional Law Quarterly*, 2010–2011, p. 1053–1084.

⁴² See King, K., “Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children, From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights”, *Wis. L. Rev.*, 2006, p. 431–478.

⁴³ Thus, the information on rights should be explained in simple and accessible language for the young suspect to properly understand it. See Article 1 para. 2 *Decreto del Presidente della Repubblica* 22 September 1988, n. 448 (*Approvazione delle disposizioni sul processo penale a carico di imputati minorenni* –Provisions on criminal proceedings against juvenile defendants).

⁴⁴ Article 3 para. 2 Directive 2012/13/EU. Recital 26 adds to this that: “When providing suspects or accused persons with information in accordance with this Directive, competent authorities should pay particular attention to persons who cannot understand the content or meaning of the information, for example because of their youth or their mental or physical condition.”

does not contain an explicit reference to this part of the Directive on information⁴⁵, the question still remains whether this provision of the Directive on information on rights is specific enough to effectively take into account the particular needs of (different categories of) juvenile suspects. It could be argued that the silence on such a crucial issue is counterbalanced by the provision on the right to an individual assessment foreseen in the Proposal⁴⁶, in that the assessment is meant to allow the prosecuting authorities to adjust the type and tone of the communication to the maturity of the child. Nevertheless, the text makes no explicit connection between the two rights (individual assessment and information). Most importantly, there is no requirement that the individual assessment is carried out before administering the information on rights.

4.2. INVOLVEMENT OF THE HOLDER OF PARENTAL RESPONSIBILITY

A selection of provisions of the draft Directive concern the involvement of the holder of parental responsibility or other appropriate adult.⁴⁷ The legal research conducted in the project *Protecting Young Suspects in Interrogations* shows that the right to the presence of an appropriate adult when the child is confronted by authorities (particularly during the interrogation) is one of the few “youth specific” legal procedural safeguards in most Member States. Therefore, the right to an appropriate adult represents a traditional safeguard of juvenile punitive justice. The role of the appropriate adult in juvenile criminal proceedings varies from country to country; and in some Member States this right is quite strongly developed. These differences are clearly illustrated by the preliminary results of the research project *Protecting Young Suspects in Interrogations*. From this research it transpires that in England and Wales it is a mandatory requirement for juvenile (as well as other vulnerable) suspects to have an appropriate adult present during interrogation. However, in other EU jurisdictions – such as the Netherlands – parents and guardians play a more limited role in pre-trial proceedings.

⁴⁵ Recital 12 of the Preamble to the Proposal merely states in general terms that the Directive on procedural safeguards for children suspected or accused in criminal proceedings should be implemented taking into account the provisions of Directive 2012/13/EU and Directive 2013/48/EU.

⁴⁶ See below paragraph 4.4.

⁴⁷ The term ‘holder of parental responsibility’ is defined in Article 2 of the Council Regulation (EC) 2201/2003, according to which it identifies those who enjoy “all rights and duties relating to the person or the property of a child, which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access”. The term ‘appropriate adult’ obviously has a broader meaning than ‘holder of parental responsibility’. The role of appropriate adult could also be fulfilled by persons/institutions who do not have parental responsibility over the child, such as a teacher or a priest (Italy) or a member of a Youth Offending Team, social services or a volunteer (England and Wales). In some Member States – such as Belgium and the Netherlands – the term ‘trusted person’ is also used.

The Proposal values the role of the bearer of responsibility as a person to monitor the well-being of the child, who should ensure “moral and psychological support and adequate guidance to the child”.⁴⁸ However, there are only few provisions concerning the prerogatives of the adult in the proceedings against the juvenile. In this respect, Article 5 of the Proposal provides that the adult should be given the same information on rights that the child receives under Article 4.⁴⁹ Article 5 covers the information to be given to the adult but it does not clarify *when* the adult should be informed. It can hardly be argued that Article 5 implicitly requires that the adult and the young suspect be informed simultaneously.⁵⁰ The silence of the Proposal on the moment when the adult should be informed is even more noticeable when compared with the provisions of the Directive on access to a lawyer.⁵¹ Article 5 para. 2 of this Directive states that “If the suspect or accused person is a child, the Member States shall ensure that the holder of the parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed (...)”. The latter provision refers to cases of deprivation of liberty, and does not, therefore, cover those situations where the young suspect has not been arrested or deprived of his liberty in any other way. If the juvenile is not arrested but is summoned to the police office for questioning, when and by whom should the parent be informed? Furthermore, the Proposal does not make explicit reference to the Directive on access to a lawyer on this point (while such a direct reference is made in other occasions, e.g. in Article 6), leaving even greater uncertainty as to whether and how the aforementioned Article is applicable. To give a small taste of the difficulties of combining the two texts, Article 5 para. 2 of the Directive on access to a lawyer can be derogated under the conditions provided for by Article 5 para. 3 and Article 5 para. 4; on the contrary, the Proposal – although it does not clarify when the adult should be informed – provides for no derogations.

Besides Article 5, the Proposal touches on the role of the holder of parental responsibility on two other occasions: in Article 8 para. 2b – granting the adult the right to ask for a medical examination – and in Article 15 – on the adult’s right to access to hearings involving the child. Besides these three rights (the right to be

⁴⁸ See in this regard the explanatory memorandum (Legal elements of the Proposal, para. 23) where the protective role of parental responsibility is explicitly stressed: “The holder of parental responsibility is important to ensure moral and psychological support and adequate guidance to the child. The holder of parental responsibility is well placed to enhance the protection of the rights of the defence of the suspected child (e.g. to appoint a lawyer or to decide to appeal a decision)”.

⁴⁹ See *supra* 4.1.

⁵⁰ When the text of Article 5 states that the adult shall be provided with the same information of the child, this does not literally nor logically entail that the adult should be informed together with the child. Furthermore, Article 4 point 1 provides that the child shall be informed of his right to have the holder of parental responsibility informed. From the latter provision it follows that the holder of parental responsibility shall normally be informed at a later stage.

⁵¹ Directive 2013/48/EU.

informed, to ask for medical examination and to take part in court hearings), the Proposal does not provide for any other specific rules on the role and function of the holder of parental responsibility during the juvenile's criminal proceedings. For instance, there are no specific provisions on whether the adult should necessarily be present at some point of the proceedings or on his role and function during questioning. The reason for this may be the fact that the effectiveness of the role of parents/appropriate adults during questioning is not undisputed throughout the EU. For example, some studies in England and Wales have observed that appropriate adults only play a limited role during interrogations with varying effectiveness. However, it seems that the presence of an adult could result in less pressure being put on juveniles during interrogation and in a more active role of the legal advisor.⁵²

As mentioned above, the role of the appropriate adult in juvenile proceedings varies among the different EU Member States. Especially in countries where the role of the parent or appropriate adult is strongly developed, their involvement in proceedings may give rise to many complex questions. For example, how does the role of the adult relate to the role of the lawyer? Should the adult be prepared/trained for his role in proceedings and – if so – how and by whom? What should happen when the involvement of parents seems to be in conflict with the best interest of the child?⁵³ It is clear that the Proposal is not intended to help answer these and similar questions: to a large extent it will remain up to the Member States to determine the role of the holder of parental responsibility and the proposed Directive will in its present state probably have a very limited effect on his current different roles and functions in pre-trial proceedings.

4.3. RIGHT TO A LAWYER AND RIGHT TO LEGAL AID

Article 6 of the Proposal grants juveniles the right of access to a lawyer, by extending to juvenile suspects the same prerogatives provided for adult suspects by the recently approved Directive on access to a lawyer.⁵⁴

This means that access to a lawyer must be given without undue delay and, in any case: a) before interrogation or other listed investigative acts (e.g. identity parades, confrontations, reconstruction of the crime scene); b) immediately after the

⁵² Medford, S., Gudjonsson, G., and Pearse, J., "The efficacy of the appropriate adult safeguard during police interviewing", *Legal and Criminological Psychology*, 2003, 8/2, p. 253–266.

⁵³ This question is dealt with to certain extent in part 3 of the explanatory memorandum (Legal Elements of the Proposal, para. 25): "If the information of ['informing', editor's note] the holder of parental responsibility would be contrary to the best interest of the child, this right should not be applied. (...) In this case another appropriate adult shall be informed and asked to be present. 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".

⁵⁴ Directive 2013/48/EU.

deprivation of liberty; or c) when summoned to appear in front of a court.⁵⁵ The right of access to a lawyer entails the defendant's right to meet and communicate in private with the lawyer, including prior to questioning, the counsel's right to be present and participate during questioning and the right to attend some listed investigative acts.⁵⁶

There is however a fundamental difference to the regime applicable to adults. The Proposal makes the juvenile's right to a lawyer a mandatory right that cannot be waived. This constitutes a significant departure from the rule applicable to adults under Article 9 of the Directive on access to a lawyer⁵⁷, where a waiver is possible as long as it is voluntary and unequivocal and the suspect has been properly informed of his rights and of the possible consequences. Clearly the underlying assumption is that juveniles are in too vulnerable a position to properly waive their right to counsel. In other words: they have not yet reached the level of maturity required to make this kind of procedural choices which may have a crucial impact on the outcome of the case.

In making the right to a lawyer mandatory, the Proposal marks a significant change from the domestic rules currently in force throughout Europe. In the majority of countries children are granted a right to access to a lawyer, equivalent to that of adults or even slightly strengthened. But it is only in few countries that the right of access to a lawyer cannot be waived and the majority of juvenile justice systems take mandatory legal assistance as an exceptional situation. In the Netherlands, for instance, whether the right to consult a defence lawyer can be waived depends on the age of the juvenile as well as on the seriousness of the offence. According to the rules currently in force, juveniles between the age of 12 and 15 who are suspected of an offence for which pre-trial detention can be imposed cannot waive their right to consult a lawyer before their first interrogation. For juveniles of 16- and 17-year-old waiving the right to consult a lawyer is impossible only in case of a more limited category of serious offences.⁵⁸ Similarly, in Poland, the law provides for mandatory assistance of lawyers only if the juvenile is a) deaf, blind, affected by some forms of mental impairment or b) if there are conflicting interests between the juvenile and his/her parents or guardians or c) if the juvenile has been placed in a youth detention institution.⁵⁹ In Italy the presence of a lawyer is mandatory at court hearings and when the suspect (juvenile or adult) is questioned by the police on the spot (on the crime scene).⁶⁰ One of the countries with the strongest protection of the right to legal assistance for juvenile suspects seems to be Belgium, where the juvenile can never

⁵⁵ Depending on whichever of these points in time mentioned above is the earliest: Article 3 Directive 2013/48/EU.

⁵⁶ Article 3 Directive 2013/48/EU.

⁵⁷ Directive 2013/48/EU.

⁵⁸ *Aanwijzing rechtsbijstand politieverhoor* (Instruction on legal assistance during police interrogation of the Board of Prosecutors General), *Staatscourant* 2010, 4003.

⁵⁹ Article 32 *c Ustawa o postępowaniu w sprawach nieletnich* (Act on juvenile delinquency proceedings).

⁶⁰ Article 97, 350, 364 Italian code of criminal procedure.

waive the right when appearing in front of/before the judge and during interrogation after arrest.⁶¹

In light of the different rules enforced at domestic level it might be difficult to reach a consensus on this point. Notwithstanding this difficulty, the intention to make the right to access to a lawyer mandatory shows the Commission's concern to affording greater protection to the vulnerability of juvenile defendants. It appears that the approach taken is to emphasize the role of the lawyer in support of the juvenile even more than the role of the appropriate adult. The assumption seems to be that juveniles could do without an appropriate adult but they can never do without a lawyer. Comparative research shows that, while in some countries the roles of lawyers and appropriate adults tend to partially overlap, in others the two roles are intended more as complementary. In this regard the Proposal seems to move in the direction of the latter than of the former. The choice to make the right of access to a lawyer a mandatory right is justified in the explanatory memorandum through reference to international documents and to the ECtHR case-law.⁶² The reference is particularly to the Panovits case, where the ECtHR observed that waiver by a juvenile of this right should be looked at with some diffidence.⁶³

Whether or not the choice to make the right to legal assistance mandatory is necessary or appropriate, it must be considered that the present formula – “the right of access to a lawyer cannot be waived” – might lend itself to different interpretations causing some difficulties of implementation. For instance, at present in Italy the right to legal assistance cannot be waived, but while the counsel is under a duty to attend court hearings, he can decide not to be present on other occasions (e.g. during interrogations, ID parades, etc.). Furthermore, it should be made clear that while the right itself cannot be waived, the young suspect can legitimately appoint another lawyer as long as the prosecuting authorities has not forced the juvenile to make this choice.

Article 6 para. 2 of the Proposal expressly clarifies that the right of access to a lawyer covers also the part of “criminal proceedings that may lead to the final dismissal of the case by the prosecutor after the child has complied with certain conditions”. As it is explained in the bottom part of recital 17, Member States sometimes empower prosecutors to deal directly with juveniles and impose penalties or reach agreements in order to divert them as early as possible from the stigmatising track of criminal

⁶¹ See Article 54bis *Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait* (Youth Protection Act) and Article 47bis paragraph 2 section 3 of the Belgian Code of Criminal Procedure.

⁶² Explanatory memorandum (Legal Elements of the Proposal), para. 28.

⁶³ In ECtHR, 1st section, *Panovits v Cyprus*, 11 December 2008, appl. no. 4268/04, §68, the Court held that “given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequence of his conduct”.

proceedings. This brings along the possibility of out of court settlements or early dismissals by the public prosecutor, during which – according to the Proposal – the right to legal assistance should be fully respected. This is not always the case at present. In the Netherlands, for instance, the prosecutor can opt for several alternatives of early diversion, in which case the juvenile is only partially covered by the right to legal assistance.

Since the scope of the right is determined by reference to the Directive on access to a lawyer⁶⁴, the right to a lawyer does not apply with regard to minor offences.⁶⁵ The exclusions are expressly considered in the preamble (at recitals 17 and 18) and the explanatory part of the Proposal refers to situations where it would be unreasonable or disproportionate to ensure mandatory access to a lawyer. On the one hand, reference is made to minor offences, such as traffic offences, that are normally dealt with through non-criminal proceedings and are brought in front of criminal courts only at a later stage (appeal, referral). In this case, according to recital 17 of the preamble, the right of access to a lawyer should apply only to the proceedings in appeal or after a referral in front of the ordinary criminal courts. Recital 18 of the preamble also refers to minor offences (in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences) that, despite being considered as criminal offences in some countries, are not punished with a deprivation of liberty: “where the law of a Member State provides that deprivation of liberty cannot be imposed as a penalty in respect of minor offences, the right of mandatory access to a lawyer should therefore apply only to proceedings before a court having jurisdiction in criminal matters.”

Furthermore, Article 6 para. 2 might cause tension with some of the rules of the previous Directive on access to a lawyer.⁶⁶ For instance, Article 3 para. 5 and 6 of the Directive on access to a lawyer provides for temporary derogations to the right at the pre-trial stage, though only in limited and exceptional circumstances. Do these provisions apply to juveniles as well or are they instead written off by the mandatory clause of the Proposal?

Inextricably linked to the right to access to a lawyer is the right to legal aid which is provided for in Article 18 of the Proposal. The text of this provision is rather meagre. It obliges Member States to ensure that national law in relation to legal aid guarantees the effective exercise of the right to access to a lawyer as referred to in Article 6. This is no more than a statement of principle, while all details are left to the sovereign discretion of national lawmakers. The reason for this choice can be easily grasped when reading the explanatory notes, where it is clarified that the right to legal aid even for juveniles will be covered by a separate instrument: the (Proposal for a) Directive on the right to provisional legal aid for suspects or accused persons that are deprived

⁶⁴ Directive 2013/48/EU.

⁶⁵ Article 2 para. 4 Directive 2013/48/EU.

⁶⁶ Directive 2013/48/EU.

of liberty and for requested persons in EAW proceedings.⁶⁷ It must be remembered that legal aid was originally part of the Proposal for a Directive on access to a lawyer⁶⁸ but was later cast aside due to disagreement on the matter between the Member States. Difficult as it is to harmonize rules on legal aid, particularly in times of economic crisis, it should be kept in mind that the issue is a crucial one for juvenile justice. In fact, it is directly connected with the possibility for young suspects to make a free and personal decision on the counsel they want to instruct. The Proposal does not provide, or discuss, whether the appointment of the legal counsel should be made by the juvenile, alone or with the family's consent, or by the family.

4.4. RIGHT TO INDIVIDUAL ASSESSMENT

One of the most noticeable features of the Proposal is its attention to the vulnerability of each juvenile. A clear sign of this is the right to an individual assessment spelled out in Article 7 of the Proposal, which provides that all state authorities involved shall “ensure that the specific needs of children concerning protection, education, training and social integration are taken into account”.

The right to an individual assessment (and to a medical examination) is not a common feature of all juvenile justice systems across the EU. In some countries individual assessment is strongly emphasized and even considered to be a general principle of juvenile law (“principle of individualisation”), as is the case of Italy.⁶⁹ A “principle of ‘individualisation’” also exists in Poland.⁷⁰ In other countries, like the Netherlands and Belgium, however, there is no general legal provision of the sort and the decision is thus left to the discretion of the practitioners.

Article 7 provides that the individual assessment should be carried out at an appropriate stage of the proceedings and in any case before the indictment. Furthermore, the assessment should be regularly updated in order to ensure that it effectively captures at each time the present condition of the juvenile involved in the proceedings (Article 7 para. 6). The assessment must be carried out with the direct involvement of the child and it may have a different degree of detail depending on the seriousness of the offence, with more serious sentences requiring a greater and more careful scrutiny. Yet, Member States are given the possibility to derogate from this

⁶⁷ (Proposal for a) Directive on the right to provisional legal aid for suspects or accused persons that are deprived of liberty and for requested persons in EAW proceedings, 27 November 2013, COM (2013) 827. The Proposal contains several rules, including provisions on means and merits test, but it sets out no rules specifically tailored for juveniles.

⁶⁸ That eventually became Directive 48/2013/EU.

⁶⁹ Article 9 *Decreto del Presidente della Repubblica* 22 September 1988, n. 448, according to which every procedural step and decision taken should be tailored to the needs of the child and this requires public authorities to assess the personality of the juvenile as well as his familiar and social conditions.

⁷⁰ Article 3 para. 2 of the of the *Ustawa o postępowaniu w sprawach nieletnich* (Act on juvenile delinquency proceedings).

obligation when they consider it “not proportionate” to carry out in an individual assessment in a particular case, and even if it is the first time that a child comes in contact with criminal justice. All that is required in such cases is to inform “an authority for the protection or welfare of children”.⁷¹

It is not entirely clear whether the individual assessment should serve the purposes of taking the most appropriate decisions concerning the punishment of the child, or if it instead should only serve procedural purposes, by making it possible for the authorities to tailor the procedural steps to be taken to the juveniles’ specific needs. It seems that the Article wants to move in both directions, but the risk of the current provision could be that countries emphasize one of the purposes only, probably the former, more than the latter. After all, since Article 8 expressly spells out a right to medical examination aimed at “assessing the general mental and physical condition of the child” with a view to investigative measures, this might leave the impression that while the examination of Article 8 is geared towards adjusting the procedural steps, the individual assessment of Article 7 is mainly connected to determining what type of treatment or punishment the juvenile deserves.

4.5. QUESTIONING OF CHILDREN

In the explanatory memorandum of the Proposal, it is recognised that the questioning of children ‘is a potentially risky situation where their procedural rights and dignity may not always be respected and their vulnerability may not be duly taken into account.’⁷² In order to ensure protection in such a sensitive situation, Article 9 of the proposed Directive is entirely devoted to the ‘Questioning of children’. Notwithstanding its very general heading, the Article focusses exclusively on the safeguard of audio-visual recordings. It prescribes that Member States ensure audio-visual recording of any questioning of children by the police or other law enforcement or judicial authority carried out prior to the indictment.⁷³ There is one exception to this rule: audio-visual recording is not mandatory when it would not be proportionate in light of the complexity of the case, the seriousness of the alleged offence and the potential penalty that can be imposed. In addition to this, the questioning of children must always be audio-visually recorded where the child is deprived of liberty, irrespective of the stage of the criminal proceedings (Article 9 para. 2). A second ‘exception’ to the rule is that questions for the purpose of personal identification of the child need not be audio-visually recorded (Article 9 para. 3).

Audio-visual recording has the potential of constituting an important safeguard against abuse and (other) inadmissible forms of pressure on the juvenile suspect

⁷¹ Legal elements of the Proposal, para. 35.

⁷² Legal Elements of the Proposal, para. 40.

⁷³ Again, this raises the question of which kind of questioning are covered by the Proposal, see paragraph 3.

during questioning, reducing the risk of false confessions and increasing the reliability of statements given by the juvenile. Furthermore, audio-visual recordings may provide for an objective record of what actually happened in the interrogation room which can be of great value in later stages of the proceedings should questions arise on the course or content of the interview. Also, it enables police or other interrogating officials to focus on the juvenile suspect and his responses, it avoids distortions and it reduces the need for an officer to take notes.⁷⁴ From this perspective, it is quite understandable that the Proposal places such a strong focus on this safeguard.

Despite the important effects, making audio-visual recordings of the interrogations of juvenile suspects is at present not mandatory in all EU Member States. For example, in the five selected Member States involved in *Protecting Young Suspects in Interrogations*, audio-visual recording of juvenile suspect interrogation is possible but – most often – not obliged (or only in a limited number of cases). For example, in Belgium recording is not mandatory and the same is true in Italy unless the suspect is in detention.⁷⁵ In the Netherlands audio-visual recording of juvenile suspects' interviews is prescribed only when the juvenile is below the age of 16 and suspected of a serious crime.⁷⁶ Audio- or tape recordings seem to be more common in the UK or at least in England and Wales: interviews in police custody suites are as a rule tape or digitally recorded.

Given the current situation in (some of) the Member States, Art. 9 of the Proposal may result in substantial and necessary changes to the practice of audio-visual recording of interrogations throughout the EU. Nevertheless, it is to be hoped that the rather broad 'escape' possibility provided for by Article 9 (recording is not necessary when it would not be proportionate given the complexity of the case, the seriousness of the alleged offence and the potential sanction) will be used by Member States with the necessary restraint.

Finally, It should be stressed that – despite the importance of audio-visual recording of interrogations – it constitutes a rather 'one dimensional' form of protection which does not make other safeguards or rules redundant. For example, audio-visual recordings should probably not be viewed as compensation for the absence of a lawyer or an appropriate adult. Also, most likely, it does not reduce the need for clear and specific minimum rules on how to conduct the interrogation of juvenile suspects. Nevertheless, apart from audio-visual recordings, the Proposal does not offer further instructions or safeguards. Recital 23 of the preamble merely states that "the questioning of children should be carried in a manner that takes into account their age and level of maturity", but this statement does not receive any further specification. There are no rules or guidelines on how to conduct the

⁷⁴ Feld, B.C., "What Actually Happens When Cops Question Kids", *Law & Society Review*, 2013, vol. 47-1, p. 1-35, p. 27.

⁷⁵ Article 141bis Italian code of criminal procedure.

⁷⁶ Instruction on audio- and audio-visual registration of interrogations of persons making declarations, witnesses and suspects, *Staatscourant* 2010, nr. 11885.

interrogation of a juvenile suspect concerning – for example – duration, breaks, how to formulate and ask questions, admissibility of interrogation techniques, repeated interrogations and night-time interrogations. In the explanatory memorandum one finds a general observation that “length, style and pace of interviews should be adapted to the age and maturity of the child questioned” (para. 42). This statement is however not incorporated in the actual text of Article 9 of the Directive, and in any case it is worded so broadly that it would have little practical effect even if it were incorporated in a rule.

The absence of any rules or guidelines on how to conduct the interrogation of a juvenile suspect (other than the obligation of making audio-visual recordings) is not surprising. The preliminary results of the project *Protecting Young Suspects in Interrogations* show that domestic legislation tends to ignore the issue of how young suspects should be interviewed. This is one of the main gaps in the existing (legal) procedural protection of juvenile suspects during interrogation. Striking fact is that in most countries youth specific rules on how to conduct the interrogation of a juvenile do exist when it concerns juvenile *witnesses*.⁷⁷

4.6. TRAINING AND SPECIALIZATION OF ACTORS INVOLVED IN JUVENILE PROCEEDINGS

Notwithstanding all formal declarations of rights in a legal text, there can be no adequate protection of children in criminal proceedings if the authorities are not capable to interact with the juvenile in an appropriate way. In this regard, training and specialization are of fundamental importance.

According to Article 19 of the Proposal, Member States must ensure that “judicial and law enforcement authorities and prison staff who deal with cases involving children are professionals specialising in the field of criminal proceedings involving children. They shall receive particular training with regard to children’s legal rights, appropriate interviewing techniques, child psychology, communication in a language adapted to the child and pedagogical skills”.

The term “specialising” leaves some doubt as to the effective specialisation that is required. Furthermore, it is not clear whether specialisation and training are taken as synonyms, i.e. whether the training is enough for the members of the authority to be specialised. As follows from *Protecting Young Suspects in Interrogations*, countries usually try to ensure that the relevant authorities are specialised in two ways. The first is by providing that the authorities deal only, or predominantly, with cases involving children. In this respect, the maximum degree of specialisation is usually granted to judicial authorities. Save for some exceptions, in the majority of countries juvenile

⁷⁷ Such an example can be drawn from the guidelines *Achieving Best Evidence in Criminal Proceedings* (2011 Ministry of Justice (U.K.)) which *inter alia* state that an interview should be planned in detail or that language should be kept simple and timing and pace should be appropriate.

judges are organised in a separate branch of the judiciary which deals exclusively with proceedings against juvenile defendants. Prosecutors are usually specialised too, but in several states this is true to a lesser extent. The lower degree of specialisation is normally found within police forces, also because it is difficult to predict whether the police will encounter a juvenile in their action. Specialisation in terms of exclusive competence is normally a very important feature of juvenile justice, although it should be kept in mind that an excess of specialisation could also be counterproductive in that it might generate biased approaches based on a one-dimensional perspective of the way in which juveniles should be dealt with. Furthermore, all countries involved in the project try to ensure specialisation by offering training to the public authorities.

The provision of the Proposal is not too detailed on the type of training that should be offered. It only identifies some of the topics that must be covered by the training (children's legal rights, appropriate interviewing techniques, child psychology, communication in a language adapted to the child and pedagogical skills). Explanatory note 64 offers little supplementary information in this regard.⁷⁸ No reference is made – either in the text and or in the illustrative notes – of the quality of the training. Neither does the Proposal clarify anywhere the general principles of adequate training, for instance that it should offer some practical exercise or that it should be provided repeatedly on a regular basis in order to safeguard continuity.

Article 19 para. 3 also requires that lawyers defending children receive adequate training and para. 4 encourages training for those providing children with support and restorative justice services. The preliminary results of *Protecting Young Suspects in Interrogations* indicate that with regard to the specialisation of lawyers there is ample room for improvement. In some countries there is some form of specialisation to a certain extent (Belgium, Netherlands and Italy) but this does not always include the guaranteed assistance of a specialized juvenile lawyer at the early stages of police interrogation. In England and Wales and Poland defence lawyers are not required at all to have some specialist training in dealing with juveniles.

5. CONCLUDING REMARKS

The Proposal on procedural safeguards for children marks an important step in the European process of strengthening the procedural rights of suspects and accused. It represents an attempt to ensure a higher and more homogeneous level of safeguards for juvenile suspects across Europe and in this respect it must be welcomed as a step forward. Yet, how large-scale is the projected forward movement, and how far is the departure from the status quo? In other words; how much of an improvement would

⁷⁸ It states that practitioners should receive appropriate training with regard to children's legal rights and the need of children of different age groups, child development and child psychology, pedagogical skills, communicating with children at all ages and stages of development and on children in situations of particular vulnerability.

this Proposal actually generate? One of the keys for answering this question is to look at the safeguards offered in pre-trial interrogations, which constitute one of the most sensitive moments in the course of criminal proceedings for vulnerable suspects such as juveniles.

From this perspective it can be said that the proposal regulates a number of fundamental rights and safeguards, such as the mandatory assistance of a lawyer and the right to an individual assessment, which potentially may improve the current level of procedural protection offered to juvenile suspects throughout the EU.

Yet, some of these safeguards seem to be dealt with without taking full account of the complexity of each of them. This is, for example, illustrated by the narrow scope of the Proposal (limited to juvenile proceedings formally labelled as criminal) and the lack of certain relevant definitions ('vulnerability', 'questioning'). Furthermore, the complexity of the issues at hand seems to be partly ignored when looking at some of the specific safeguards provided for in the Proposal. For example, in providing for the right to an individual assessment, the Proposal does not make clear what exactly is to be assessed, how and when; in regulating the right to information no attention has been paid to how information should be given; in the provision on questioning there are no (minimum) rules on how to question. Yet, these are all matters which currently lack clear regulation at the level of the EU Member States and thus deserve improvement at European level. Finally, it is not always clear how the current Proposal relates to already existing Directives (mainly the right to information in criminal proceedings and the right to access to a lawyer).⁷⁹ Clearly, these 'missing links' may eventually hamper the improvement in the children's protection sought by the Directive, hence it is worth considering them in the future debate and negotiations.

In light of the foregoing, it is not entirely surprising that the Proposal has been met with some scepticism and that it has already raised some objections at the domestic level, mostly related to the principle of subsidiarity. For instance, the UK Parliament has approved of the Government decision to opt out of this draft directive, just like it opted out of the other proposals concerning procedural rights (draft directives concerning the presumption of innocence and legal aid).⁸⁰ The UK laments that the scope of the Proposal is too wide, particularly as concerns the definition of 'children', and that some of the rules are too far reaching (e.g. the rules on personal liberty) and might raise issues of compatibility with their domestic legislation. However, the UK Government does not oppose in principle EU legislation on this matter and will in fact participate directly in the coming negotiations. The Dutch Government has also taken a sceptical position. It considers the Proposal to be disproportionate and is critical of its compliance with the principle of subsidiarity. The Government contends that some of the procedural rights in the Proposal are already incorporated in previous Directives; more specifically it believes that the right of access to a lawyer will probably

⁷⁹ Directive 2013/48/EU and Directive 2012/13/EU.

⁸⁰ See www.bbc.co.uk/democracylive/house-of-commons-26630349.

compensate most of the juvenile's vulnerability.⁸¹ According to the Dutch Government, providing for more and extra safeguards will result in 'overcompensation' of vulnerabilities, with safeguards overlapping and formulated in too absolute terms.⁸² These critical positions show that while there is general consensus on the importance to protect juvenile suspects, it is important to carefully ponder each legislative step and to offer a detailed and exhaustive justification of the choices that are made.

⁸¹ See the Government's position and debate at www.bbc.co.uk/democracylive/house-of-commons-26630349.

⁸² Letter of Dutch minister of foreign affairs to the Dutch Lower House, d.d. 17 January 2014, nr. 1772.