

# Reflections on the position of children in criminal proceedings in the European Union

27 February 2020, Lisbon,  
ERA Conference - Procedural Rights in the EU:  
Status Quo and the Need for Further Measures

# CHILDREN SUSPECTED OR ACCUSED



**Scope**



**Effective**



**Understand**



**Adult**



Prof. dr. Wendy De Bondt

# CHILDREN SUSPECTED OR ACCUSED

## Scope

1

## Directive (EU) 2016/800 – procedural safeguards for children

- Children labelled as suspected or accused
- Children as requested persons in an EAW
- Not extended to the execution phase

# Criminal proceeding

Criminally Responsible      *Protective*  
*Corrective*  
*Educative*

Effective  
Understanding

Adult

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# CHILDREN SUSPECTED OR ACCUSED

Scope

1

**Directive (EU) 2016/800 – procedural safeguards for children**

*Clause 17 - Directive should apply only to criminal proceedings. It should not apply to other types of proceedings, in particular proceedings which are specially designed for children and which could lead to protective, corrective or educative measures.*

**Framework Decision 2002/584/JHA – EAW**

*Article 3 (3) - shall refuse if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.*

Effective

Understanding

Adult

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# CHILDREN SUSPECTED OR ACCUSED

## Scope

### 1

## Directive (EU) 2016/800 – procedural safeguards for children

- Children labelled as suspected or accused
- Children as requested persons in an EAW
- Not extended to the execution phase

- Need for autonomous interpretation of the scope of the directive
- Suggested scope : “criminal matters” as interpreted by ECtHR

Effective

Understanding

Adult

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# CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

2

## Directive (EU) 2016/800 – procedural safeguards for children

- Merit of European Parliament amendments
- Present, participate effectively, opportunity to be heard, express their views, right to new trial
- Individual assessment vulnerabilities
- Audio-recorded where appropriate

- No guidance on interpretation and application of 'effective'
- No specific procedural safeguards established (despite mentioned in Directive (EU) 2016/343 PIO)

Understanding

Adult

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# CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand **3**

Adult

## Directive (EU) 2016/800 – procedural safeguards for children

- Informed promptly about their (child-tailored) rights
    - Right to have adaptations to the proceedings
    - Information about how to complain
    - Written and/or orally
- Why not mirror CoE Guidelines: *“information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture-sensitive”.*

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# CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand **3**

Adult

## Directive (EU) 2016/800 – procedural safeguards for children

- General aspects of the conduct of the procedure

(19) Children should receive information about general aspects of the conduct of the proceedings. To that end, they should, in particular, be given a brief explanation about the next procedural steps in the proceedings in so far as this is possible in the light of the interest of the criminal proceedings, and about the role of the authorities involved. The information to be given should depend on the circumstances of the case

→ Why in the preamble only?

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# CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand

Adult

4

## Directive (EU) 2016/800 – procedural safeguards for children

- Right to inform appropriate adult + be accompanied by them
- Automatic involvement of holder parental responsibility (linked to civil liability principles)
- Limited to court hearings unless decided otherwise

→ Quid discussion right to privacy?

→ Quid discussion gradually recognising competence of children to make their own decisions?

→ Why not align with the presence of a lawyer?

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# CHILDREN SUSPECTED OR ACCUSED

Scope

Effective

Understand

Adult

## **Criminal Responsibility**

*Participation* Criminal  
Adaptation Proceeding  
**Privacy**

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# CHILD VICTIMS OF A CRIME

Scope

Complaint

Company

Represented

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# CHILD VICTIMS OF A CRIME

## Scope

### 1

Complaint

Company

Represented

## Directive 2012/29/EU – victim of a crime

- No explicit provision in the CRC
- Significant national diversity

(42) The right of child victims to be heard in criminal proceedings should **not be precluded solely** on the basis that the victim is a **child** or on the basis of that victim's age

Art 10 – 1. Member States shall ensure that **victims may be heard** during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the **child's age and maturity.**

2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.

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# CHILD VICTIMS OF A CRIME

## Scope

### 1

Complaint

Company

Represented

## Directive 2012/29/EU – victim of a crime

- Adaptation to the procedure

Art 22 (4) For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.

Art 24 - Right to protection of child victims during criminal proceedings (audiovisually recorded) (appoint a special representative for child victims)(the right to legal advice and representation, in his or her own name)

→ Child victims to child accused?

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# CHILD VICTIMS OF A CRIME

Scope

## Complaint 2

Company

Represented

### Directive 2012/29/EU – victim of a crime

- 2011 Agenda on the Rights of the Child
- No amendment of statutory limitations
- No amendment of formalities

Art 5 - 1. Member States shall ensure that victims receive written acknowledgement of their formal complaint made by them to the competent authority of a Member State, stating the basic elements of the criminal offence concerned.

→ Why not real transcript (added later-on)?  
Cfr. Audio-visual recording.

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# CHILD VICTIMS OF A CRIME

Scope

Complaint

Company **3**

Represented

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## Directive 2012/29/EU – victim of a crime

- Person of their choice (best friend, school teacher, ...)
  - Article 3 – understand / be understood during first contact
  - Article 20 – during criminal investigations
- Lo legal guarantee for children
  - “where the victim requires assistance”
  - Effect presumption Article 22 (4) ?
- No automatic information sharing
  - Link with diversity in legal positions
  - Link with right to legal representation
  - In contrast to directive Directive (EU) 2016/800 on child suspects

# CHILD VICTIMS OF A CRIME

Scope

Complaint

Company

Represented **4**

## Directive 2012/29/EU – victim of a crime

- Dependent on the role of victims in the relevant national criminal justice system
- Parents as holders of parental responsibility

→ No guidance on the meaning and effect of Art. 12 CRC in the appointment and instruction of legal representative

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# CHILD VICTIMS OF A CRIME

Scope

Complaint

Company

Represented

## Presumed Vulnerability

*Participation*      Appropriate  
Legal representation      Adult  
**Privacy**

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# CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS



Context



Scope



Organisation



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# CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

## Context

1

Scope

Organisation

## No general awareness of the international legal framework

- Emotional, psychological and financial impact
- Article 3 CRC – best interest of the child as a primary consideration
- 2013 General Comment 14 CRC

*“Without prejudice to the independence of the judiciary, before a judicial order or a sentence is imposed on a parent, account shall be taken of the rights and needs of their children and the potential impact on them. The judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures”*

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# CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

## Context

1

Scope

Organisation

## No general awareness of the international legal framework

- Emotional, psychological and financial impact
  - Article 3 CRC – best interest of the child as a primary consideration
  - 2013 General Comment 14 CRC
- No children's rights approach in the criminal proceedings of most Member States

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# CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

2

Organisation

## For which offenders?

- Parents vs primary caregivers
- Women vs men

## For which sanctions?

*“In sentencing parent(s) and primary caregivers, noncustodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase.*

*Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)”*

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# CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

2

Organisation

## For which offenders?

- Parents vs primary caregivers
- Women vs men

## For which sanctions?

- Alternative sanctions not always better for the child
- E.g. financial penalty vs clothing/summer camp

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# CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

Organisation **3**

## Who should see to this?

- Ex officio: lack of information
- Prosecution via Child & Family impact statements?
- Defense council: Conflict of interest
  
- Child participation and representation

→ Youth lawyer appointed with this particular task?

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# CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

Organisation **3**

**What weight should be attributed to this?**

- Primary consideration vs overruling consideration
- Alternative if the same objective can be achieved?

→ Need for CRC guidance on the implications in practice

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# CHILDREN AFFECTED BY CRIMINAL PROCEEDINGS

Context

Scope

Organisation

Best interest  
of the child

*Equality*

**Participation**

Motivation

**Primary  
Care  
Giver**

*Representation*

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