



**Briefing to the Rapporteur, Shadow Rapporteurs, Permanent Representations & the Presidency on the proposed directive on safeguards for children suspected or accused in criminal proceedings**

**Annexed: Letter from Mrs Justice Renate Winter, Committee on the Rights of the Child**

**11 November 2015**

## **About Fair Trials / LEAP**

Fair Trials is a human rights organisation based in Brussels which works for fair trials according to recognised international standards. Our vision is a world in which every person's right to a fair trial is respected. Fair Trials coordinates the Legal Experts Advisory Panel ('LEAP'), a network of 156 criminal lawyers and other criminal justice professionals from the 28 EU Member States.

## **Previous documents**

Fair Trials and LEAP have previously published a position paper<sup>1</sup> on the proposed directive on safeguards for children suspected or accused in criminal proceedings (the 'proposed directive'), responding to the European Commission's proposal and the Council's General Approach. Together with other organisations, we also circulated a briefing to MEPs with suggested amendments to the Commission proposal in January 2014.<sup>2</sup>

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<sup>1</sup> Available at [http://www.fairtrials.org/wp-content/uploads/Joint-Policy-Paper-FTandCRAE\\_Updated.pdf](http://www.fairtrials.org/wp-content/uploads/Joint-Policy-Paper-FTandCRAE_Updated.pdf).

<sup>2</sup> MEPs: see emails of 26 January 2015; others: the document is available on request.

## **Introduction**

In the context of the ongoing trilogue on the proposed directive on safeguards for children in criminal proceedings (the ‘proposed directive’), this short briefing is intended to reiterate four key positions of the Legal Experts Advisory Panel (LEAP) on this file.

We annex a letter from Mrs Justice Renate Winter, of the United Nations Committee on the Rights of the Child, with comments on the two of the issues discussed in this briefing.

In general terms, we would underline that the objective of the Roadmap was to “**strengthen** procedural rights” with a view to enhancing mutual trust. It makes sense that some things will have to change at the national level to ensure this objective is met. It cannot be the purpose of legislation under Article 82(2)(b) TFEU to reaffirm the existing status quo in all Member States.

### **1. Article 7: individual assessment**

As we have previously stated, the central mission of this Directive is to address the specific vulnerabilities of children in criminal proceedings. As Justice Winter states in her letter, “child-friendly justice should be age-sensitive, accessible, speedy, and diligent, adapted to the rights of the child and should support a child to participate in and understand the proceedings”.

As stated in LEAP’s original position paper and its previous briefing to MEPs of January 2015, adjustments are therefore needed to ensure their effective participation in criminal proceedings. For this purpose, the child’s needs have to be identified by means of an individual assessment, so that appropriate adjustments can be made *to the procedure*.

For this reason, LEAP criticised the Council’s General Approach, which seemed to suggest that the individual assessment served only to inform sentencing, whereas it should provide the basis for adaptations throughout the procedure. The European Parliament’s position, pointing to the earliest appropriate stage, was more favourable.

We continue to support an outcome ensuring that individual assessment happens at a stage when it can serve its intended purpose. Enabling adjustments in the trial phase (courtroom layout etc.) is one aspect. But we continue to believe that – as shown by the whole Roadmap project, which has focused on the early stages of the proceedings including questioning – the crucial phase when injustice must be avoided is the pre-trial phase. That phase needs tailoring to children too. Accordingly, individual assessment should take place at the earliest possible stage, before questioning to the extent possible unless the child’s best interests justify doing this afterwards.

### **2. Article 6: Access to a lawyer**

#### **a. No possibility of waiver**

LEAP has already expressed that it agrees with the approach of ensuring that access to a lawyer is guaranteed. There is general concern in LEAP about the use of waivers of the right to a lawyer in all cases, and this applies with particular force for children for whom it appears very difficult to be sure whether this crucial right is validly waived. Accordingly, children should not be able to waive this right.

#### **b. No possibility of derogation**

Further, there should be no possibility of derogation. LEAP's view as expressed in previous documents is that the right of access to and assistance by a lawyer should be absolute for children. Derogations available under Directive 2013/48/EU (the 'Access to a Lawyer Directive') should not apply for children: they are an extremely unusual exception in ordinary cases (only *one* case at the ECtHR has so far found a derogation justified since *Salduz v Turkey*), and their application should be excluded altogether for children. We therefore welcomed the European Parliament's approach of expressly providing that the derogations in the Access to a Lawyer Directive should not apply for children and to refer explicitly to assistance by a lawyer.

We maintain that it is a valid and commendable policy choice to ensure children are always assisted by a lawyer – in particular in questioning and other situations envisaged by the Access to a Lawyer Directive – without the possibility of waiver or derogation, and urge Council to agree to this point.

LEAP has previously suggested that this should be achieved by referring explicitly to the situations in Article 3(3) of the Access to a Lawyer Directive in which there should be a right of access to a lawyer (questioning, identity parades, confrontations etc.), whilst explicitly excluding the derogations in Article 3(5) and (6) of the Access to a Lawyer Directive. LEAP's view is that this is the clearest way of ensuring that there is always access to a lawyer in these situations. This will also facilitate uniform implementation in the Member States.

Further on the question of access to a lawyer, LEAP has previously responded to proposed amendments in the Council's General Approach which proposed limitations on access to a lawyer based on proportionality considerations which are not even featured in the Access to a Lawyer Directive. We continue to strongly oppose any such derogation, which would undercut the minimum standard articulated in the Access to a Lawyer Directive – leaving child suspects with a lower level of protection rather than the enhanced safeguard which the proposed directive is intended to provide.

#### **c. Assistance by a lawyer in minor cases**

Finally, LEAP has previously welcomed the broad scope of the Commission proposal, which was supported by the European Parliament, and opposed the proposal of the Council to limit the scope to exclude minor offences which are dealt with partially out of court on the basis that . We would suggest that, if such a limitation is envisaged as part of a trilogue compromise, it should be attended by a clear provision ensuring access to a lawyer in those out-of-court proceedings (this would be achieved by ensuring the scope provision was 'subject to' a provision of Article 6 requiring this, and that the provision in Article 6 was expressed as applying 'notwithstanding the provision of Article 2 limiting the scope).

### **3. Audio-visual recording**

LEAP has also expressed the view that, in addition to access to a lawyer, the directive should ensure audio-visual recording of questioning (as envisaged in article 9 of the original proposal). Since this serves to protect against injustice arising in questioning and to enable effective review of pre-trial proceedings by the courts, it should not be done in every case. It should not be subject to a proportionality derogation. We believe that, though initial work may be needed for installing equipment and stocking capacity, routine audio-visual recording should not be a major difficulty.

#### **4. Deprivation of liberty**

Interference with a child's right to liberty must be subject to particularly stringent safeguards. It would be unsatisfactory to set out to protect this vital right and do so only half-way, omitting key procedural protections which should be considered uncontroversial.

LEAP's view is that if a child is deprived of his/her liberty, for any reason, s/he is in any case entitled to reasons for that deprivation of liberty in accordance with Article 5(2) of the ECHR. As soon as that deprivation of liberty is effected in the context of criminal investigations (for the reason provided by Article 5(1)(c) ECHR), the deprivation of liberty (whether it is branded an arrest, a detention, or a temporary deprivation of liberty as highlighted in certain proposed European Parliament amendments) attracts the protections of Article 5(3) and 5(4) ECHR, requiring ongoing review of detention **and** a right to apply for judicial review of detention respectively. We continue to think that these protections should be clearly enshrined, cumulatively and not alternatively, in this measure.

#### **5. Protection of privacy**

Whilst the approach of the Commission's proposal was in the right spirit, it fell short in allowing for the exceptional presence of the public without providing for specific requirements as to possible media reporting. The European Parliament report rightly made this possibility more exceptional and *subject to the best interests of the child*. We continue to support an approach which makes the presence of the media a remote and strictly controlled exception.