Faculteit Rechtsgeleerdheid

Universiteit Gent

Academiejaar 2012-2013

Towards European Safeguards for Minors in Criminal Proceedings?

Masterproef van de opleiding
'Master in de rechten'

Ingediend door

Sigrid Heirbrant

Promotor: Prof. Dr. Gert Vermeulen

Commissaris: Prof. Dr. Tom Vander Beken

Acknowledgements

I would like to extend a word of thanks to the people who indisputable have contributed to the accomplishment of this master's paper.

I would like to express my sincere gratitude to my parents, Hilde and Stephan, for mentally encouraging and financially supporting me and for providing me with the opportunity to pursue a law education in Ghent and in Australia. It is because of the two of you that I am the person I am today.

Secondly, special thanks go out to my boyfriend, Kevin Van de Wiele, for his persistent support and patience, for his calming words and for being my personal ICT-helpdesk.

Furthermore, I would like to thank Saskia Lemeire and Toby De Backer for being as a sounding board when I was stressed and for having faith in me when I had not.

To conclude, I would like to express my gratitude to Prof. Dr. Gert Vermeulen for his ambitious enthusiasm and inspiration, and to Dr. Wendy De Bondt for making me see the wood for the trees again, by giving me valuable advice on content and structure.

Table of Contents

List of abbreviations

Charter	Charter of Fundamental Rights of the European Union, 2000.
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950.
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU Member States	Member States of the European Union
Guidelines	Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010
Lisbon Treaty	Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing European Community, 13 December 2007, 2007/C 360 (OJ 17 December 2007)
Procedural roadmap	Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCRC	Convention on the Rights of the Child of the United Nations

Introduction

In the present European society, characterised by open borders between the EU Member States, juvenile criminal law is faced with cross-border elements more than ever. The MP3-murder in Antwerp by the Polish minor Adam G. in 2006 and the severe assault and battery in Eindhoven in 2013 by, among others, two Belgian minors, are only a couple of illustrations. However, neither the European Union, nor the Council of Europe provide for a specific legal position for minor (alleged) delinquents. Because of the subsidiarity principle, the general policy with respect to children and minors is left to the responsibility of the national authorities. However, soon in this paper, the necessity of common standards in this matter becomes clearly visible at European level.

The first part includes a brief assessment of the existing national, international and European regulations in order to examine why it is needed to develop an (additional) European instrument with respect to procedural rights for minor (alleged) offenders. Especially because of the increasing and thoroughgoing judicial cooperation in criminal matters between the EU Member States, it becomes clear that the development of such procedural safeguards are urgently required in the European Union.

The second part then examines to what extent it is feasible for the European Union to establish these procedural rights. Because political willingness, competence and imposing and enforcing mechanisms are of crucial importance in the development of procedural rights and for their effectiveness, these criteria are analysed for the European Union and the Council of Europe. The comparison of the European Union with the Council of Europe aims to clarify what the added value (and limits) of the European Union can be in the development of procedural rights for minors subject to criminal proceedings.

The final part examines to what extent it is needed for minors in particular, to be protected by procedural rights on the level of the European Union. In order to come to know minors' actual needs in criminal proceedings, their vulnerabilities in each step of criminal proceedings against them are analysed by means of the results of forensic psychological and criminological research on this topic. Next to the focus on the weaknesses of minors in each step of (domestic) proceedings, also attention is paid to the vulnerabilities of minors subject to foreign criminal proceedings. After all, in the context of judicial cooperation between the EU Member States, it is likely to happen that a minor is suspected, accused and/or tried in a foreign Member State. Once the actual needs and weaknesses of minors are clear in the various steps of the proceedings, corresponding procedural safeguards are proposed in order to protect them and to guarantee that minors, who are inherently vulnerable, have a fair trial in every Member State of the European Union.

Therefore, this paper covers absolutely more than a mere analysis of today's existing minors' rights. It focuses on the need for common standards of procedural safeguards for minor alleged offenders in the European Union, and especially in the context of judicial cooperation in criminal matters.

The paper aims to provide a legally correct and well-founded answer to the question to what extent procedural rights for minors are needed and feasible in the European Union. It aims to provide an answer that might serve as a guide for the European authorities in the development of measure E of the procedural roadmap.

Part I: European procedural rights for minors.

This part aims to explain why it is needed to establish European procedural safeguards for juveniles subject to criminal proceedings. Various national and international, as well as European instruments already aim to protect and promote children's rights, including procedural rights. However, a critical analysis of the existing regulations demonstrates the need for an additional European instrument.

The first chapter briefly outlines that merely national regulations with regard to juveniles' procedural rights do not suffice.

In the second chapter, it is explained briefly what are the shortcomings of the UNCRC and that European action can strengthen the UNCRC. The first two chapters are discussed deliberately in a brief way, as they only serve to illustrate the need for action at European level.

The final chapter examines the need for procedural rights for minors in Europe in particular. Especially in the light of the application of article 6 ECHR to minors and the issues of judicial cooperation within the European Union, the need for action at European level becomes clearly visible.

1 Chapter 1: Shortcomings of merely national regulations.

National law on procedural rights for minors subject to criminal proceedings[1] heavily differ among the European countries. In addition, the European states are not clear of violations of article 6 ECHR.

1.1 Significant differences in level of protection

From research of SPRONKEN and ATTINGER, it is clear that (at least the EU member-) states generally agree on the necessity of special mechanisms and measures for vulnerable suspects, such as minors. Nevertheless, there are significant differences among the states in their approach to minors.[2]

Firstly, the age applied to define a person as a juvenile (to whom special safeguards apply because he or she is vulnerable because of his or her low age) or an adult vary among the states. For example, in Finland only persons under the age of 15 are considered to be vulnerable, while in Ireland every person under the age of 18 is protected by special safeguards for vulnerable suspects.[3]

Furthermore, also the approach to juvenile, vulnerable suspects differ in and among the countries. Depending on the age of the vulnerable person concerned, a different level or mechanism of protection may apply. For example, in Denmark, offenders under the age of criminal responsibility (15 years) are dealt with by social authorities, whereas offenders between 15 and 18 years old are being tried in the same way as adult offenders. However, they are exposed to 'youth sanctions' only (such as, a maximum of 8 years in prison). In this

[1] Hereinafter, the terms 'criminal' should be understood broadly as defined by the ECtHR in the case *Engel v. Netherlands*. It follows that, next to adult criminal proceedings, also disciplinary and juvenile criminal proceedings are intended to be covered by this term.

[2] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, http://arno.unimaas.nl/show.cgi?fid=3891.

[3] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, 55-56, http://arno.unimaas.nl/show.cgi?fid=3891.

limited sense they are considered to be juveniles.[4] In France, minors are split up in three groups: between 10 and 13 years old, between 13 and 16 years old, and between 16 and 18 years old. For all three groups of minors, the parents/guardians are notified in case of an offence, the children have the right to consult a lawyer if detained, and questioning is always video/tape recorded. The difference between the three groups is found in the permitted maximum amount of hours detention in prison.[5]

At last, a significant variation can be seen in the extent of special treatment of juveniles during criminal proceedings. For instance, only a couple of states provide for a specially established juvenile court. And not every state declared in the study that a defence counsel is obligatory, and that the publication of data obtained during pre trial investigations is prohibited.[6]

1.2 Violations of article 6 ECHR

Irrespective of the diverse approaches of the national states, research shows that the compliance of the national regulations with article 6 ECHR may not be overestimated.[7] This follows from the many violations of article 6 ECHR that are still found by the ECtHR.[8] They are, however, not discussed in detail in this paper.

According to the Council of Europe, article 6 ECHR does not suffice to protect juveniles effectively. It states that a new legal instrument is also needed because governments and professionals working with children are requesting guidance to ensure the effective implementation of their rights and to bridge the gap between internationally agreed principles and reality.[9]

It can be concluded that the different levels of protection applied in the several European countries do not suffice to protect juveniles' rights in criminal proceedings, because of their continuing violations of article 6 ECHR and the gaps that remain between law and practice.[10]

In the following chapter, it is demonstrated that even the principal international instrument as regards children's rights, which is the UNCRC, could be strengthened by European action.

2 Chapter 2: Shortcomings of the UNCRC

It goes without saying that the UNCRC is the most important international instrument as regards children's rights, including procedural rights. However, its effective power and influence is questioned.

---

[4] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, 54, http://arno.unimaas.nl/show.cgi?fid=3891.
[5] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, 55, http://arno.unimaas.nl/show.cgi?fid=3891.
[6] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, 53-61, http://arno.unimaas.nl/show.cgi?fid=3891.
[7] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, http://arno.unimaas.nl/show.cgi?fid=3891; T. SPRONKEN, G. VERMEULEN, D. DE VOCHT and L. VAN PUYENBROECK, *EU Procedural Rights in Criminal Proceedings*, 8 September 2009, http://arno.unimaas.nl/show.cgi?fid=16315; L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1017-1038.
[8] L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1018.
[9] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 13, § 2.
[10] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 13, § 2.

The United Nations emphasized already in 1980 that specific attention and special care should be paid to 'the way in which juveniles are handled, because of their early stage of development'.[11] The UN recognises that particular assistance with regard to physical, mental and social development is required, as well as legal protection in conditions of peace, freedom, dignity and security.[12] Developing standard minimum rules for the administration of juvenile justice is required to guarantee the fundamental human rights for juveniles, and they should serve as a model for member states.[13] The standard minimum rules should reflect some basic principles, as defined by the UN.

The UNCRC is legally binding upon the states that ratify it, but it cannot be considered as a very powerful instrument.[14] This is demonstrated by the controversy about whether or not the UNCRC has direct effect on the national level[15], by the weakness of the supervision mechanism[16], etc.

Therefore, a new European instrument covering these rights can give these fundamental children's rights more strength by making them more enforceable.[17] Consequently, the rights would be more effective.

In part two of this paper, the enforceability of rights will be one of the criteria used to decide which level is the most appropriate one to establish procedural rights for minors.

3 Chapter 3: Shortcomings of existing European instruments

From the previous chapters, it is clear that national and international regulations with respect to children's rights, including procedural rights, do not suffice to protect juveniles adequately in criminal proceedings. In chapter 3, it is firstly examined why article 6 ECHR, as principal European regulation regarding procedural rights is unsatisfactory to protect the rights of children subject to criminal proceedings. Subsequently, a closer look is taken to the need for procedural rights on the level of the European Union.

The current policy on, and actions in juveniles' procedural rights within the Council of Europe, as well as in the European Union are examined more extensively in the second part of this paper.

3.1 Council of Europe

The two main elements in procedural rights on the level of the Council of Europe are article 6 ECHR and the principle of effective participation, as introduced by the ECtHR. The following

---

[11] Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF.87/14/Rev.1, Caracas, 25 August 1980, 7.

[12] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985.

[13] Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF.87/14/Rev.1, Caracas, 25 August 1980, 7; United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985.

[14] K.A. MCSWEENEY, "The potential for enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base", *Boston College International & Comparative Law Review*, 1993, 475.

[15] E. VERHELLEN, *Verdrag inzake de rechten van het kind. Achtergrond, motieven, strategieën, hoofdlijnen*., Anwerpen, Garant, 2000, 107.

[16] S. MEUWESE, M. BLAAK and M. KAANDORP, *Handboek Internationaal Jeugdrecht*, Nijmegen, Ars Aequi Libri, 2005, 297.

[17] S. MEUWESE, M. BLAAK and M. KAANDORP, *Handboek Internationaal Jeugdrecht*, Nijmegen, Ars Aequi Libri, 2005, 550; Communication from the Commission, *Towards an EU Strategy on the Rights of the Child*, COM(2006)367, Brussels, 4 July 2006, 6.

aims to examine whether these safeguards sufficiently protect juveniles subject to criminal proceedings.

3.1.1 **The application of article 6 ECHR to children**

Analysis reveals that the entire ECHR should apply equally to minors as it does to adults, because also minors have the right to have access to justice and to a fair trial, as guaranteed by article 6 ECHR in all its components. However, the Guidelines on Child-Friendly Justice of the Council of Europe immediately add the reservation that children's 'capacity to form their own views' needs to be taken into account in the application of article 6 ECHR to children.[18]

It follows that equal application of article 6 ECHR to children, as the basic principle, cannot be considered as an absolute principle, because variation in the application is allowed, based on a child's capacity to form his or her views.

As a result, procedural safeguards for minors can (and should) differ from these for adults. Especially because children are still faced with obstacles within the justice system, such as

> 'the non-existing, partial or conditional legal right to access to justice, the diversity in and complexity of procedures, possible discrimination on various grounds'.[19]

Furthermore -mindful of the non-discrimination principle, the difference in application to children on the one hand and to adults on the other hand, is not necessarily legally incorrect. Article 14 ECHR includes the non-discrimination principle, but does not say that 'age' or 'young age' is a criterion on which base discrimination is prohibited. Nevertheless, article 14 does include the criterion 'other status' on which base discrimination is prohibited. The term 'other status' can include minority. However, this has never been interpreted this way by the ECtHR.[20]

Although the Council of Europe admits that children need special assistance and care in criminal proceedings -because they are inherently vulnerable-, and therefore need different procedural safeguards from adults, the ECHR omits to indicate concretely to what extent. The ECHR does not include any specific standard for the assistance of vulnerable persons in criminal proceedings, including minors.[21]

The lack of procedural safeguards in article 6 ECHR specifically focused on minors and article 14 ECHR, that indirectly allows to treat minors differently from adults, paves the way for the ECtHR to differentiate between procedural standards for adults and minors subject to criminal proceedings.

In the following, a closer look is taken at the case law of the ECtHR, applying article 6 ECHR to children. Soon, it becomes obvious that the ECtHR is more demanding when it comes to procedural safeguards for children subject to criminal proceedings. Article 6 ECHR is interpreted more strenuous if children are involved.

---

[18] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 2-3.

[19] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 3.

[20] E. VERHELLEN, *Verdrag inzake de rechten van het kind. Achtergrond, motieven, strategieën, hoofdlijnen*., Anwerpen, Garant, 2000, 108.

[21] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, 12, http://arno.unimaas.nl/show.cgi?fid=3891.

3.1.2 **Effective participation and fitness to stand trial**

According to the ECtHR, it is necessary - in order to guarantee a fair trial - that the accused is able to effectively participate in legal proceedings, and that he is fit to stand trial.[22] The ECtHR case law shows that a fair trial implies effective participation[23]. Obviously, an accused who is not able to participate or to fully understand the legal proceedings cannot be considered as having a fair trial, because in this way he hardly can defend himself in a proper manner. Therefore, it is necessary that an accused has the mental fitness to stand trial. It follows that the principle of fitness to stand trial can be seen as a derivative of the concept of effective participation.[24]

Is a minor suspected or accused person considered as having the required mental capacity to fully understand the nature of the trial and its consequences?

In contrast to the lack of detail and refinement with respect to the right to fair trial in general, analysis reveals that the ECtHR did develop and refine the principle of effective participation in several cases with accused minors. What follows is a selection of the relevant case law, by way of illustration. A more in-depth analysis of the relevant ECtHR case law can be found in part three of this paper.

3.1.2.1 ***T. and V. v. United Kingdom***

Firstly, in *T.* and *V. v. United Kingdom*, two boys, aged eleven, were tried and convicted of murder and abduction of a two-year-old boy. The proceedings were subject to massive media attention because of the cruel facts. The trial was conducted with the formality of an adult criminal trial, except for the fact that the defendants were seated next to social workers in a specially raised dock. They were also represented by skilled lawyers. Psychiatric evidence showed that both of the young offenders suffered a post-traumatic stress disorder. Moreover, T. had a generalised high level of anxiety and poor eating and sleeping patterns, while V. did not understand the situation, because he functioned emotionally at far younger than his chronological age.[25]

The ECtHR ruled in both cases that these minor offenders had been deprived of a fair trial, because they were not able to participate effectively in the criminal proceedings against them. The ECtHR observed that the post-traumatic stress disorder, combined with the lack of any therapeutic treatment since the offence, impeded T. and V. to give informed instructions to their lawyers.[26] The only fact that the boys were represented by skilled lawyers is not considered to be a sufficient guarantee to a fair trial[27], because

---

[22] L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 120.
[23] ECtHR 23 February 1994, no. 16757/90, Stanford/United Kingdom.
[24] L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 120-126.
[25] ECtHR 16 December 1999, no. 24724/94, T/United Kingdom; ECtHR 16 December 1999, no. 24888/94, V/United Kingdom; L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 127.
[26] ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, § 88; ECtHR 16 December 1999, no. 24888/94, V/United Kingdom, § 11 and 65; L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 127-128.
[27] L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 128.

> 'given their immaturity and disturbed emotional state, the applicant would not have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence'.[28]

It follows that, by examining the defendant's youth or by the presence of a disorder, a minor offender can be considered as unfit to stand trial. From the conclusions of the ECtHR, it is clear that a good and effective legal assistance only compensate ineffective participation to a certain degree.[29]

In this sense, the reasoning of the ECtHR leading to the violation of article 6 ECHR is contrary to the reasoning in *Stanford v. United Kingdom*[30], a case that concerned an accused adult. In the latter, ECtHR observes that, albeit the accused could not hear some of the evidence given at trial, his effective participation was sufficiently guaranteed by his representation by skilled and advanced lawyers.[31]

It follows that the ECtHR does differentiate between minors and adults as regards the necessary procedural rights to guarantee effective participation and, thus, a fair trial in criminal proceedings.

Moreover, in *T.* and *V. v. United Kingdom*, the ECtHR also defines what effective participation means in case of a child[32], stating that

> 'it is essential that a child, charged with an offence, is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceeding'.[33]

3.1.2.2 ***S.C. v. United Kingdom***

Later on, in *S.C. v. United Kingdom*[34], the ECtHR provides for the first time an actual definition - for minors as well as for adults- of 'effective participation', including some cumulative conditions.[35] One of the conditions, is the right of an accused to be assisted, *if necessary*, by, for example, an interpreter, lawyer, social worker or friend. The necessary-reservation should be interpreted as follows: if the accused is unfit to stand trial, because of his youth or mental disorder, he or she is in more need of assistance.[36]

In addition, the ECtHR observes in this case that

---

[28] ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, §88-89.
[29] L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 128.
[30] ECtHR 23 February 1994, no. 16757/90, Stanford/United Kingdom.
[31] ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, § 88; L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 128.
[32] L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 128; H. DAVIS, *Human rights law: directions*, New York, Oxford University Press, 2007, 252.
[33] ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, §84; ECtHR 16 December 1999, no. 24888/94, V/United Kingdom, § 86.
[34] ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom.
[35] ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom, § 29; L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 128.
[36] L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 129.

> 'it is essential that the child should be tried in a specialist tribunal which is able to give full consideration to, and make proper allowance for, the handicaps under which he labours and adapt its procedure accordingly'.[37]

From this selection of ECtHR case law, it is clear that the ECtHR pays more and thoroughly attention to procedural safeguards for minor (alleged) offenders than the convention strictly requires. The case law also illustrates that the ECtHR is far more demanding, when minors are involved, regarding the several conditions that needs to be complied with for a fair trial, in correspondence with article 6 ECHR.

It can be concluded that article 6 ECHR is applied to children in a different, more protective way. Although the ECtHR case law demonstrates the need for procedural rights for minors in particular, fixed standards on the application of article 6 ECHR to minors are missing. Furthermore, the ECtHR case law is not of an enforceable nature. As a result, it cannot be taken for granted that the legislation and practices in the European states concerning procedural rights are adapted to the case law of the ECtHR.[38] Obviously, the latter should be used as model for the establishment of European standards for minors subject to criminal proceedings.

3.2 **European Union**

From the foregoing, it is clear what are the shortcomings of article 6 ECHR and the case law of the ECtHR. This shows the need to introduce additional European procedural safeguards for particularly children subject to criminal proceedings. Especially, in the European Union the need is high.[39] The following explains why. Firstly, the degree of compliance of the Member States with article 6 ECHR is unsatisfactory. Secondly, in the context of the far-reaching judicial cooperation in criminal matters within the European Union, procedural rights (for minors) are neglected.

3.2.1 **EU Member States and article 6 ECHR**

As previously mentioned[40], a study of 2005[41], followed up by a new study of 2008-09[42], commissioned by the European Commission, demonstrates that compliance of the national law in the Member States with article 6 ECHR may not be overestimated, let alone presumed.

Although it seems that the national regulations of the Member States are more or less in accordance with the ECHR, a more in depth-look at the implementation of these rights shows that the everyday practice in Member States are not entirely in line with the standards, as further developed by the ECtHR. For example, the right to remain silent, to have access to the

---

[37] ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom, § 35; L. VAN DEN ANKER, L. DALHUISEN and M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 129.

[38] L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1018.

[39] For more information on the need for defence rights in the European Union: C. MORGAN, "The EU Procedural Roadmap. Background, importance, overview and state of affairs" in G. VERMEULEN (ed.), *Defence Rights. International and European Developments*, Antwerpen, Maklu, 2012, 76 *et seq.*

[40] Cfr. Part I, Chapter 1.2.

[41] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, http://arno.unimaas.nl/show.cgi?fid=3891.

[42] T. SPRONKEN, G. VERMEULEN, D. DE VOCHT and L. VAN PUYENBROECK, *EU Procedural Rights in Criminal Proceedings*, 8 September 2009, http://arno.unimaas.nl/show.cgi?fid=16315.

file and to call and/or examine witnesses or experts are not implemented in the legislation of all Member States. However, these rights are basic requirements of a fair trial in the ECHR.[43]

The troubles of unsatisfactory compliance with article 6 ECHR start with the diverse implementation of it in national law. Member States do not implement the safeguards of article 6 in the same way. It follows that various standards are being applied in the several Member States. In addition, Member States do not always amend their legislation to adapt them to the rule of law, as stated by the ECtHR in condemnatory judgments.[44]

It can be concluded that the framework of article 6 ECHR does not suffice to have a common understanding and commitment to minimum procedural rights in the European Union.[45] Nevertheless, the European Union highly needs this, not only in order to counterbalance the far-reaching judicial cooperation between the Member States, but also in order to increase the necessary mutual trust among the Member States.

3.2.2 **Far-reaching and prosecution-oriented judicial cooperation[46]**

From the increasing initiatives of the European Union in matters of criminal justice since the implementation of the Tampere Programme, it is clear that the European Union strongly has been focussing on how to facilitate the mutual recognition and judicial cooperation. Creating an effective prosecution policy within the European Union was the main aim of the Tampere Programme.[47]

Critics became aware of the little attention being paid to the procedural safeguards of suspected or accused persons[48], as the Tampere Programme has been 'mainly repressive and prosecution-oriented'.[49] Gradually, consensus grew on the need for the development of individual procedural rights in order to protect persons, subject to a criminal procedure, against the penal authorities and in order to control the latter.[50]

Strikingly, analysis reveals that only some of the judicial cooperation instruments provide for grounds for refusal because of the young age of the person involved. In addition, none of the instruments include a ground for refusal because of the lack of certain procedural safeguards during the criminal proceedings in the issuing Member State, according to the laws of the executing Member State. For the purpose of this paper, the EU instruments regarding judicial

---

[43] T. SPRONKEN, G. VERMEULEN, D. DE VOCHT and L. VAN PUYENBROECK, *EU Procedural Rights in Criminal Proceedings*, 8 September 2009, http://arno.unimaas.nl/show.cgi?fid=16315; L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1038.

[44] L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1018.

[45] E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN, "Procedural rights at the investigative stage: Towards a real commitment to minimum standards" in E. CAPE (ed.), *Suspects in Europe*, Antwerp, Intersentia, 2007, 26.

[46] L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1018 and references.

[47] L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1017.

[48] S. PEERS, *EU Justice and Home Affairs Law*, New York, Oxford University Press, 2011, 655.

[49] L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1017 and references.

[50] L. GRONING, "A Criminal Justice System or a System Deficit? Notes on the System Structure of the EU Criminal Law", *European Journal of Crime, Criminal Law and Criminal Justice*, 2010, 129; T. SPRONKEN and D. DE VOCHT, "EU Policy to Guarantee Procedural Rights in Criminal Proceedings: "Step by Step"", *North Carolina Journal of International & Commercial Regulation*, 2011-2012, 437-438.

cooperation in criminal proceedings are examined to what extent minors are protected in this thoroughgoing cooperation.[51] The following is a brief schematic outline. The instruments as regards judicial cooperation in criminal proceedings can be categorized into two groups.

Provide for several grounds for refusal, but not because of the young age of the person involved	**Provide for a ground for refusal to cooperate if the person involved, cannot be held criminal liable in the executing State, because of his young age.**
Framework Decision on the execution of orders freezing property or evidence (22 July 2003)	Framework Decision on the European arrest warrant (13 June 2002)
Framework Decision on the mutual recognition of confiscation orders (6 October 2006)	Framework Decision on the mutual recognition of financial penalties (24 February 2005)
Framework Decision on taking account of convictions in the course of new criminal proceedings (24 July 2008)	Framework Decision on the mutual recognition of judgments involving custodial sentences (27 November 2008)
Framework Decision on the European evidence warrant (18 December 2008)	Framework Decision on the mutual recognition of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (27 November 2008)
	Framework Decision on the mutual recognition of decisions on supervision measures as alternative to provisional detention (23 October 2009)

From the examination, it follows that nearly all of the instruments include -mandatory or optional- grounds for refusal to cooperate. However, it is clear that they are inconsistent.

Especially problematic is the non-existence of a ground for refusal in the Framework Decision on taking account of previous convictions in the course of new criminal proceedings. *Quid* a minor's rights in the next situations:

1. A minor -under the age of criminal liability- is tried in his own Member State as a juvenile. According to the laws of this Member State, his 'conviction' cannot be used

[51] A schedule on the grounds for refusal in the judicial cooperation instruments in the European Union can be found in annex 1.

in later criminal proceedings if he would be tried as an adult. However, a year later, the same juvenile is accused of an offence committed in another Member State, where he is tried as an adult, because he has reached the age of criminal liability that applies in that Member State. The latter applies a lower age of criminal liability than the juvenile's Member State, and as a result, the minor concerned would have been criminal liable for his first offence too (committed in his own Member State). Therefore, the Member State of the second offence takes into account his previous "conviction" as if he is an adult.

Does the second Member State attach too great weight to the judgement of the first Member State, in the sense that the consequences in the second Member State go much further than intended by the authorities that delivered judgment in the first place? One can argue that this is not the case, applying the principle *nemo censetur ignorare legem*. The minor concerned should have known that, in the situation of an offence in another Member State, his 'conviction' in the first Member State could be used as an aggravating circumstance. However, can this actually be expected from an underage person? Is it desirable that the effects of a judgement are more far-reaching in another Member State than in the Member State that delivered judgement? Or, on the contrary, is it advisable that the authorities in the second Member State take into account the considerations and intentions of the initial judge? The Framework Decision does not provide for any explanation on this or guidelines for magistrates in practice. However, the lack of legal certainty affects the legal position of the minor concerned.

2. A minor -under the age of 18, but above the age of criminal liability- is tried and convicted as an adult in a foreign Member State. However, a year later, the same person is tried as a juvenile in his own Member State, because he is still under the age of criminal liability that applies in his own Member State. The Framework Decision[52] says that

> 'previous convictions handed down against the same person for different facts in other Member States [...] are taken into account [in the course of new criminal proceedings] to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law'.

But how can the second Member State take into account a judgment that could not even have been delivered, and therefore, could not even exist in its own legal system? What are the judicial authorities expected to do in this kind of situation? In this case, it would not be desirable for the minor to take account of the intentions of the initial judge.

Recital 3 and 5 of this Framework Decision stipulate that the only aim is to establish a minimum obligation for Member States. It is up to them to decide what effect they attach to convictions handed down by another Member State, because it would not be a mutual recognition instrument.[53] Recital 6 of the Framework Decision include examples of circumstances which discharge the Member State of the obligation to take account of previous

[52] Art. 3 §1 Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, 2008/675/JHA, 24 July 2008 (OJ L 220, 15 August 2008).
[53] Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, 2008/675/JHA, 24 July 2008 (OJ L 220, 15 August 2008), recital 3 and 5; G. VERMEULEN, W. DE BONDT, C. RYCKMAN and N. PERSAK, *The disqualification triad. Approximating legislation. Executing Requests. Ensuring equivalence*, Antwerpen, Maklu, 2012, 89.

convictions handed down by another Member State. However, article 3 §1 of the Framework Decision is formulated imperatively and the Framework Decision does not provide for a corresponding ground for refusal. Neither do the examples in recital 6 include the circumstance that the person involved could not be held criminal liable.

In any case, in leading legal doctrine, the principle of the *lex mitior* is suggested as a possible solution. The cooperation by multiple Member States should not have a negative impact on the legal position of the individual concerned.[54] It follows on the one hand, that a judgement cannot bring more effects than intended by the Member State that delivered judgement, and on the other hand, that it cannot bring more effects than ever possible in the second Member State.

Also problematic is the Framework Decision on mutual recognition of confiscation orders, because it does not include a ground for refusal for the executing Member State, because of the young age of the person concerned. In most cases, the executing Member State is even likely to be the Member State of nationality or residence of the convicted person. However, it cannot refuse to cooperate. Neither it can refuse to cooperate, because the issuing Member State did not apply certain procedural safeguards the minor involved would have had in his own -and executing- Member State.

From this examination, it can be concluded that, in the thoroughgoing judicial cooperation between the Member States, the procedural rights (of minors) are neglected by the European Union. All the more, since it is well-known that juvenile criminal -substantive and procedural- law, as well as the age of criminal liability can differ heavily among the Member States. It follows that action in this matter is highly needed in the European Union.

4 Chapter 4: Interim conclusion

In this part, the author aimed to provide an answer to the question why European procedural safeguards for minors are needed.

It became clear that, although various national, European and international regulations on this matter exist, the European Union is in high need for an additional instrument on procedural rights for minors.

In the far-reaching judicial cooperation in criminal matters, based upon mutual recognition, the Member States need to be able to fully trust each other. Enhancing mutual trust in the context of prosecution-oriented cooperation, can only occur by means of using common standards of procedural rights.[55]

Unfortunately, analysis reveals that national laws of the Member States heavily vary with respect to procedural safeguards for minor (alleged) offenders, whereas common standards on European and international level do exist, such as article 6 ECHR and the UNCRC.

However, it is clear that they do not suffice.

Firstly, because article 6 ECHR does not provide for any standards in specific for juvenile offenders, and furthermore, because the ECtHR case law is not of an enforceable nature.

[54] G. VERMEULEN, W. DE BONDT and C. RYCKMAN (eds.), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in* reality, Antwerpen, Maklu, 2012, 348-349. G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE and W. DE BONDT, *Cross-border execution of judgments involving deprivation of liberty in the EU,* Antwerpen, Maklu, 2011, 94.

[55] L. VAN PUYENBROECK and G. VERMEULEN, "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1019.

Secondly, because the Member States of the European Union are failing to comply with article 6 ECHR. Thirdly, although the UNCRC is ratified by all Member States of the European Union, the rights are formulated too broadly in order to provide for a common standard.[56] In addition, the UNCRC is not of an enforceable nature neither, which negatively affects its effectiveness.

Therefore, it can be concluded that an additional, more powerful instrument is needed, focused on procedural rights for minor offenders. Especially in the European Union in the context of judicial cooperation in criminal matters.

[56] E. CAPE, J. HODGSON, T. PRAKKEN and T. SPRONKEN, "Procedural rights at the investigative stage: Towards a real commitment to minimum standards" in E. CAPE (ed.), *Suspects in Europe*, Antwerp, Intersentia, 2007, 25-26.

Part II: Feasibility in the European Union

Part one made clear that it is certainly needed to develop European common standards with respect to procedural safeguards for minors subject to criminal proceedings. Especially within the European Union, it is high time. In part two, it is examined to what extent it is feasible in the European Union to establish such procedural rights. What are the pros and cons of procedural safeguards developed by the European Union, compared to the Council of Europe? To put it differently: what can be the added value, and what are the limits, of an additional procedural rights instrument, issued by the European Union?

The first chapter is dedicated to the current policy and actions taken on this matter by the European Union, as well as by the Council of Europe.

Firstly, it is interesting to take a closer look at the current policy of the Council of Europe, not only because it could be an interesting source of inspiration and knowledge -the Council of Europe has done research on this matter much more extensively than the European Union has done, but also because of the accession of the European Union to the ECHR. Therefore, by developing procedural rights for minors, the European Union should try as hard as it can to comply with the background policy on it of the Council of Europe.

Secondly, a closer look at the current policy and actions taken by the European Union is needed, as there is no point in examining to what extent it is the most appropriate level, if there is a lack of political willingness and no room for procedural safeguards for minors in its policy. In addition, it helps to gain an insight into which procedural rights are possibly matching with the current policy. This will be helpful particularly in part three, which includes a concrete proposal of procedural rights to be introduced.

In the second chapter, it is examined to what extent the European Union, and the Council of Europe are competent to establish common standards of procedural rights for minors. Obviously, in order to examine what level would be the most appropriate, it is needed to examine the powers of these two entities.

The third chapter focuses on imposing and enforcing powers of both, the European Union and the Council of Europe. Because imposing and enforcing powers are necessary to render procedural rights effective in practice, this is a significant criterion in order to come to know to what extent the European Union can offer an added value in developing additional common standards of procedural rights.

1 Chapter 1: European current policy

In the first chapter, it is examined to what extent the Council of Europe and the European Union have paid attention to procedural safeguards for minors. It includes an examination of their current policy and activities in this matter.

1.1 Council of Europe's focus on children's rights

Analysis reveals that the Council of Europe has a broad base of standard-setting texts which purpose it is to promote and protect children's rights. The most important and general one is indeed the ECHR. But the current policy of the Council of Europe on procedural rights (for minors) can also be deduced from several recommendations, and last but not least, particularly from the Guidelines on Child-Friendly Justice.[57] Although these

[57] For more information about the key legal texts of the Council of Europe on children's rights in general: http://www.coe.int/t/dg3/children/keyLegalTexts.

recommendations and guidelines are not legally binding, their significance may not be underestimated, as they serve as important guidelines for the policy development in the Member States.

1.1.1 **Article 6 ECHR: Right to fair trial**

Obviously, the first and most important instrument of the Council of Europe as regards procedural rights, is article 6 ECHR. However, as previously mentioned[58], the right to a fair trial has been formulated very generally and article 6 ECHR does not provide specific rights for minors, that are more demanding than these applied to adults. However, it follows from the case law of the ECtHR that the right to a fair trial, as formulated in article 6 is a very important fundamental right, also for minors in criminal proceedings. As illustrated in the first part[59], the ECtHR interprets article 6 more strenuously if minors are involved in criminal proceedings. This is definitely necessary, precisely because article 6 has been formulated so broadly in the ECHR.

1.1.2 **Recommendation on dealing with juvenile delinquency**

The Council of Europe also issued several recommendations on procedural rights for children in criminal proceedings. In the recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, the Committee of Ministers states that the traditional criminal justice system

> 'may not by itself offer adequate solutions as regards the treatment of juvenile delinquents, given that their specific educational and social needs differ from those of adults'.[60]

Although this recommendation mainly focuses on effective prosecution and avoiding recidivism, it also recommends appropriate treatment of accused juveniles in court. Member States should set short time periods for each stage of the criminal proceeding in order to reduce delays and in order to be able to provide a quick response to juvenile delinquency. A long period between the offence and receiving a sanction, disconnects the two events in a child's mind and would undermine the effectiveness of any disposal.[61]

The next two principles do include far more specific rights, meant for minors detained in custody. It says that juvenile (alleged) offenders should be informed promptly of their rights, accompanied by their parents or guardians, have the right of access to a lawyer and a doctor and that they should be supervised by competent authorities while detained. In addition, it provides a maximum total of hours a minor can be detained.[62]

1.1.3 **Recommendation on juvenile offenders subject to sanctions**

In this recommendation, the Council of Europe mainly focuses on safeguards that need to be guaranteed for minor offenders who are subject to sanctions or measures. The

---

[58] Cfr. Part I, Chapter 3.1.1.
[59] Cfr. Part I, Chapter 3.1.1.
[60] Recommendation of the Committee of Ministers of the Council of Europe to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, R (2003) 20, 24 September 2003, preamble; also see: S. MEUWESE, M. BLAAK and M. KAANDORP, *Handboek Internationaal Jeugdrecht*, Nijmegen, Ars Aequi Libri, 2005, 543 *et seq*.
[61] Draft Explanatory Memorandum on the Recommendation of the Committee of Ministers of the Council of Europe to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, CM (2003) 109, 27 August 2003, 14.
[62] Recommendation of the Committee of Ministers of the Council of Europe to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, R (2003) 20, 24 September 2003, 15-16.

recommendation also includes some basic principles on the way minors should be dealt with in criminal proceedings against them.

Firstly, the sanctions or measures that may be imposed on juveniles need to be specified by law. Furthermore, they need to be imposed by a court or another legally recognised authority. In the latter situation they need to be subject to prompt judicial review. The recommendation also demands that special efforts need to be undertaken to avoid pre-trial detention.[63] More important, but very vague, it recommends that

'any justice system dealing with juveniles shall ensure their effective participation in the proceedings concerning the imposition as well as the implementation of sanctions or measures' and that

'the juvenile's right to privacy shall be fully respected at all stages of the proceedings'.[64]

1.1.4 Recommendation on social reactions to juvenile delinquency

In 1987, the Committee of Minister of the Council of Europe defined some guarantees for minors in proceedings against them. The recommendation explicitly demands the governments of the Member States to review their legislation and practice, if necessary. The Member States need to guarantee the following safeguards:

1) Minors should be tried rapidly, avoiding undue delay[65];
2) Where juvenile courts exist, minors need to be tried in these, instead of in adult courts[66];
3) Member States should avoid, as far as possible, that minors are being kept in police custody[67];
4) Minors should be excluded from the remand in custody, except in very serious offences committed by older minors. In the latter situation the remand in custody needs to be restricted in length, and minors need to be kept apart from adults[68];
5) Minors' legal position throughout the proceedings need to be reinforced by recognising:
    a. The presumption of innocence,
    b. the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the state,
    c. the right to the presence of parents or of another legal representative who should be informed from the beginning of the proceedings,
    d. the right of minors to call, interrogate and confront witnesses,
    e. the possibility for minors to ask for a second expert opinion or any other equivalent investigative measure,
    f. the right of minors to speak and, if necessary, to give an opinion on the measures envisaged for them,

[63] Recommendation of the Committee of Ministers of the Council of Europe to member states on the European Rules for juvenile offenders subject to sanctions or measures, R (2008) 11, 5 November 2008, 2, 3 and 10.
[64] Recommendation of the Committee of Ministers of the Council of Europe to member states on the European Rules for juvenile offenders subject to sanctions or measures, R (2008) 11, 5 November 2008, 13 and 16.
[65] Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, 4.
[66] Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, 5.
[67] Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, 6.
[68] Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, 7.

g. the right to appeal,
h. the right to apply for a review of the measure ordered, and
i. the right of juveniles to respect for their private lives[69];

6) All persons concerned at various stages of the proceedings (police, counsel, prosecutors, judges, social worker, etc.) should receive specialised training on the law relating to minors and juvenile delinquency[70];
7) The entries of decisions relating to minors in the police records may not be used after the persons concerned come of age[71].

This recommendation is issued fifteen to twenty years before the previous mentioned ones, but is still not outdated. On the contrary, it provides much more specific safeguards for suspected or accused juveniles.

1.1.5 **Guidelines on child-friendly justice**

Next to article 6 ECHR and the recommendations, the Council of Europe recently issued the Guidelines on Child-Friendly Justice.[72] In its program "Building a Europe for and with Children", the Council of Europe made child-friendly justice one of the core-pillars of the Council of Europe's strategy on children's rights.

The Guidelines aim to stimulate discussion on children's rights in practice and concern the status, position and way children are treated in both judicial and non-judicial proceedings. Although they target all proceedings involving children, including family law cases, as well as criminal cases with under aged victims, and criminal cases with minor offenders, the analysis is limited -for the purposes of this paper- to those affecting the legal position of an (alleged) minor offender in criminal proceedings.

As this is the most detailed and extensive instrument covering children's rights in proceedings, it is dealt with extensively in this paper. It can serve as a significant guide for the European Union, while developing procedural rights for minors subject to criminal proceedings.

The Guidelines distinguish fundamental principles and general principles of Child-Friendly Justice.

1.1.5.1 ***Fundamental principles***

Effective participation.

One of the guiding principles is the principle of effective participation. As in article 12 UNCRC, it means that

> 'children have the right to speak their mind and give their views in all matters that affect them'.[73]

[69] Recommendation of the Committee of Ministers to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, 8.
[70] Recommendation of the Committee of Ministers to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, 9.
[71] Recommendation of the Committee of Ministers to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, 10.
[72] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, edited 31 May 2011.
[73] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 18, § 32.

This does not mean that children's opinions will be followed in any case. On the contrary, the guidelines require that

> 'their opinions be taken into account seriously and given due respect, according to their age, maturity and the circumstances of the case, subject to national and procedural law'.[74]

Furthermore, the guidelines state that the term 'capable of forming his or her own views', as used in article 12 UNCRC, cannot be seen as a limitation. States are also discouraged from introducing standardised age limits.[75]

Child's best interest.

The second fundamental principle is that, in all cases involving children, the child's best interest should be a primary consideration. It should be assessed professionally and on a case-by-case basis and always in combination with other children's rights.

The guidelines state that a comprehensive approach must be the rule.[76] Although this is almost common practice in family law matters, it is not when a minor (alleged) offender is being tried.

Dignity, non-discrimination and the rule of law.

Respecting dignity, the prohibition of discrimination and the rule of law are the other fundamental principles comprehended by the Guidelines.[77] Although the principles of *nullum crime sine lege* and *nulla poena sine lege* are just as valid for children as they are for adults, in many countries children are accountable for 'acts of anti-social behaviour', that are not defined as a crime, and therefore would go unpunished if committed by an adult. Children often are vulnerable to a lack of standard legal safeguards, such as the burden of proof attributable to the state and the right to a fair trial, if they commit such a "status" offence, because strictly it is not a criminal act.[78]

1.1.5.2 ***General principles***

Information and advice

The right to information is the first general principle. It says that

> 'from the very first contact with the justice system and on each and every step of the way, all relevant and necessary information should be given to the child'.[79]

It includes information of

[74] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 18, § 32.
[75] General Comment no. 12, The right of the child to be heard, CRC/C/GC/12, Committee on the Rights of the Child of the United Nations, Geneva, 1 July 2009, § 20-21.
[76] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 19, § 37.
[77] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 21-22.
[78] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 22, § 47.
[79] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 23, § 50.

a. their rights,
b. the instruments they can use to actually exercise their rights,
c. the procedural system,
d. possible alternatives to proceedings,
e. all charges against them,
f. possible complaint mechanisms, available systems of legal aid, representation or other possible advice they may be entitled to.[80]

Receiving information on the procedural system would enable the child to fully understand how the procedure will take place, what the standing and the role of the child will be, how the questioning will be carried out, what the expected timing will be, the importance and impact of any given testimony, the consequences of a certain act, etc.[81]

The information on all the charges against the child needs to be provided promptly and directly, both to child and to the parents.[82]

Protection of private and family life

In the second general principle, the Guidelines stipulate that Member States have positive obligations in respect of the protection of the private and family life of the child. Suggestions are made as proceedings in camera, preserving confidentiality of records, delivering judgment which will not reveal the child's identity, the possibility for courts of having cases tried behind closed doors, etc.[83]

Well trained professionals

The Guidelines also emphasise the importance of well trained professionals who are working with children, including police, judges, attorneys, mediators, social workers, ...[84]

Multidisciplinary approach

The principle of the multidisciplinary approach warns that the existing and growing understanding of children's psychology, needs, behaviour and development is not always sufficiently shared with professionals in the law enforcement areas.[85]

Avoiding deprivation of liberty

Following the standards on the rights of juveniles deprived of their liberty, the Guidelines state that the main principle is that

> 'no other children's right shall be restricted except the right to liberty, as a consequence of the deprivation of liberty'.[86]

[80] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 23.
[81] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 23, § 54.
[82] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 23, § 51.
[83] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 24-25, § 57-60.
[84] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 26, § 67-69.
[85] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 26, § 72.

In addition, it is repeated that special efforts need to be undertaken in order to avoid pre-trial detention, and that detention

> 'should only be a measure of last resort, used for the shortest time possible and restricted to serious cases."[87]

The Committee of Ministers also recommends that juveniles shall not be detained in institutions for adults, but in institutions specially designed for them.[88]

Children and the police

Also the police should apply the guidelines on child-friendly justice. When a child is arrested or questioned by the police, he or she should have the right to have access to a lawyer or to any other entity responsible for defending children's rights, and the right to notify parents or a person whom they trust. In any case, the parents should be promptly notified of the arrest of their child.[89] If detained, the child cannot be forced to sign any document or to make any statement related to the offence without the presence and assistance of a lawyer or trusted person.[90]

Free legal aid

The Guidelines recommend a system of free legal aid for children. A system that does not need to be a completely separate system of legal aid as it applies to adult. It may be provided under the same, or more lenient, conditions. According to the Guidelines, it also may

> 'be dependent on the financial means of the holder of the parental responsibility or the child him or herself.'[91]

Furthermore, a system of specialised youth lawyers is recommended. The lawyer should defend the child's views and not what he or she considers to be in the best interests of the child. The lawyer should reflect with the child on the best strategy to use and strive for an informed consent.

Avoiding undue delay

The urgency principle, which aims to avoid undue delay, takes account of the fact that children have a different perception of time than adults.[92] A good example is provided in the Guidelines:

---

[86] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 27, § 74.
[87] Recommendation of the Committee of Ministers of the Council of Europe to member states on the European Rules for juvenile offenders subject to sanctions or measures, R (2008) 11, 5 November 2008, § 59.1; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 27, § 74.
[88] Recommendation of the Committee of Ministers of the Council of Europe to member states on the European Rules for juvenile offenders subject to sanctions or measures, R (2008) 11, 5 November 2008; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 27, § 77.
[89] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 30, § 87.
[90] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 30, § 88.
[91] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 33, § 104.

> ‘One year of proceedings in a custody case may seem much longer to a 10-year-old than to an adult.’[93]

Therefore, it is important to emphasise that minors should be treated more rapidly, avoiding undue delay. The Committee of Ministers of the Council of Europe has pointed this out before in the Recommendation on social reactions to juvenile delinquency.[94]

Child-friendly court settings

Special attention ought to go to child friendly court settings. They need to avoid the uncomfortable feeling children have in formal courthouses. Proposals has been made as providing special interview rooms and not wearing any wigs, gowns or other official uniforms. Most importantly, the behaviour of officials should be less formal and, in any case, should be child-friendly.[95]

A major point is that every minor subject criminal proceedings needs to understand the nature, scope and effects of the decision the judge has made. Since it is not always possible to explain the judgment in child-friendly wording, children do need a clarification of it. This may be provided by his or her lawyer, social worker, parents, etc.[96]

This recommendation does not cover a very new idea, as the Committee of Ministers of the Council of Europe has recommended yet in 1987 to avoiding referring minors to adult courts, where juvenile courts exist.[97]

According to the Committee of Ministers of the Council of Europe, the Guidelines on Child-Friendly Justice serve as a practical means that encourages the Member States to take further steps in turning children’s rights into reality and filling in existing lacunae. In general, the Guidelines on Child-Friendly Justice aim to enhance the guiding principles of the UNCRC.[98]

After the analysis of the current policy and political willingness in the Council of Europe with respect to procedural safeguards for minors subject to criminal proceedings, a closer look is taken to the European Union.

1.2 European Union’s focus on procedural rights

Analysis reveals that the European Union has only recently started to realise the need for procedural rights in criminal proceedings. In several legal and policy documents, it expresses its wish to counter this need. Because the political willingness on developing procedural rights within the European Union culminates in the procedural roadmap, the latter receives ample treatment.

---

[92] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 35, § 118.
[93] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 35, § 118.
[94] Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, III.4.
[95] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 36.
[96] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 36, § 124.
[97] Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, III.5.
[98] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 17, § 24-25.

1.2.1 **Charter of fundamental rights**

In 2000, the European Union officially proclaims the EU Charter of Fundamental Rights. The Charter formulates a range of personal, civil, political, social and procedural rights previously found in a lot of national and international documents. With the coming into force of the Lisbon Treaty, the Charter became directly enforceable, as article 6 TEU declares it binding upon the Member States by granting it 'the same legal value as the Treaties'.[99] But does the Charter includes safeguards for minors subject to criminal proceedings?

Generally, article 24 of the Charter comprehends the right for children to have 'such protection and care as is necessary for their well-being', to express their views freely and that their views 'shall be taken into consideration on matters which concern them in accordance with their age and maturity'. Furthermore, the child's best interests shall be the primary consideration in all actions relating to children.

More specifically, article 47 to 50 formulate basic rights and principles guaranteed in criminal proceedings:

1. the right to an effective remedy and to a fair trial
2. the presumption of innocence and right of defence
3. the principles of legality and proportionality of criminal offences and penalties
4. the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Obviously, none of these very fundamental rights are new in the European Union. The intention of this Charter is only to make these rights more visible.[100] The Charter's objective is not

> 'to establish new rights, but to assemble existing rights that are scattered over a range of various sources'.[101]

Furthermore, according to article 51, the Charter only applies to all Member States when they are implementing EU-law. It must be seen as a binding instrument and reference for Member States while implementing EU-regulation in domestic law. It follows that citizens are only able to use the rights and principles in the Charter in court when it comes to a review of EU-measures or to challenge the legality of national measures implementing EU-legislation.[102]

The Charter may give the European citizens a false reassurance that the Charter may protect them in all situations. But these rights does not form any obligation for the national public authorities, except when they implement EU-law. Furthermore, these rights do not apply directly and fully to citizens in order to protect them from any policy action by any pubic authority. Therefore, the Charter certainly cannot be regarded as the "Bill of Rights" of the European Union.[103]

---

[99] Art. 6 §1 TEU; More information on the Charter, also see: T.P. MARGUERY, "The protection of fundamental rights in European criminal law after Lisbon: what role for the Charter of Fundamental Rights?", *European Law Review* 2012, 444-463. More information on children's rights policy of the European Union in criminal cases in general, see: S. MEUWESE, M. BLAAK and M. KAANDORP, *Handboek Internationaal Jeugdrecht*, Nijmegen, Ars Aequi Libri, 2005, 545 *et seq*. and http://www.eucharter.org/home.php?page_id=66 (May 2013).

[100] http://www.eucharter.org/home.php?page_id=66 (May 2013).

[101] http://www.eucharter.org/home.php?page_id=66 (May 2013).

[102] http://www.eucharter.org/home.php?page_id=66 (May 2013).

[103] J. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 160.

It can be concluded that the Charter pays attention to the rights of the child and to fundamental rights that are needed to be guaranteed in (criminal) proceedings. However, the content, scope and force of the Charter is rather limited for the first formal document of the European Union that combines in a single text the whole range of civil, political, economic and social rights.[104] Also, none attention is paid to the specific needs of children in criminal proceedings.

1.2.2 **Tampere programme**

The Tampere programme has laid the foundation of the judicial cooperation between the Member States based upon the principle of mutual recognition. From the beginning, it has formulated the significance of procedural rights in this context. However, it only says that, next to the focus on intense judicial cooperation in criminal matters,

> 'work should also be launched on [...] those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States'.[105]

1.2.3 **Hague and Stockholm programme**

In 2004-2005, the European Union insists on the development of standards for procedural rights in criminal proceedings, because they are highly necessary in the further realisation of the principle of mutual recognition as the cornerstone of judicial cooperation.[106] This statement is repeated in the Stockholm programme in 2010.[107]

However, neither programme goes into it more deeply. They omit to produce actual safeguards to protect the right to fair trial.

1.2.4 **EU-accession to the ECHR**

Another element that shows the political willingness of the European Union to take action in the development of procedural rights is article 6 §2 TEU. It prescribes that the European Union shall accede to the ECHR.

The decision of the accession to the ECHR is not only dependent on the political will and competence of the European Union, but also depends on the Council of Europe. The latter has approved the accession by a 14th protocol to the ECHR and thus provided the possibility of accession. Recently, the European Union and Council of Europe have reached a draft agreement on the accession.[108]

---

[104] http://www.eucharter.org/home.php?page_id=66 (May 2013).
[105] Presidency Conclusions on the Tampere European Council, 15 and 16 October 1999, § 37, http://www.europarl.europa.eu/summits/tam_en.htm.
[106] Information from the Council, *The Hague programme on strengthening freedom, security and justice in the European Union*, 2005/C 53 (OJ 3 March 2005), §3.3.1.
[107] Notices from the European Council, *The Stockholm programme on an open and secure Europe serving and protecting citizens*, 2010/C 115 (OJ 4 May 2010), §2.4 and §3.3.
[108] Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, Strasbourg, 5 April 2013, http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008_final_report_EN.pdf.

The advantages and disadvantages of the accession are extensively discussed in the literature, as well as the representation of the European Union in the ECtHR's supervisory mechanism and the role to play by the European Court of Justice.[109]

Article 6 §2 TEU shows that the European Union does take action with regard to fundamental rights. However, it is unlikely that the accession actually is going to affect procedural safeguards for minors subject to criminal proceedings, as the ECHR itself does not cover this.[110]

1.2.5 **Article 82 TFEU**

More concretely, by means of article 82 TFEU, the European Union enlarges its power to establish certain minimum rules, concerning the rights of individuals in criminal procedures. Article 82 and the competence of the European Union is analysed more extensively in the second chapter of this part.

1.2.6 **Procedural roadmap**

Whereas the foregoing legal and policy documents only demonstrate the political willingness of the European Union, the procedural roadmap goes one step further by actually starting the development of procedural safeguards in criminal proceedings. By adopting the procedural roadmap, the European Union finally starts to use its power. It forms a turning point in action being taken on procedural rights by the European Union. The resolution on the procedural roadmap says that

> 'such action [...] will enhance citizens' confidence that the European Union and its Member States will protect and guarantee their rights'.[111]

It is clear that the procedural roadmap aims to strengthen the procedural rights of suspected or accused persons in criminal proceedings. Doing so, it has formulated six measures:

- Measure A formulates the right to translation and interpretation of essential documents, when the suspected or accused person does not speak or understand the language used in the proceedings;
- Measure B affects the right to information on their rights and information about the charges;
- Measure C indicates that the right to legal advice for the suspect or accused person at the earliest appropriate stage of the criminal proceedings is fundamental in order to safeguard the fairness of the proceedings. The right to legal advice has been linked to the right to legal aid, because the latter is needed to guarantee effective access to the right to legal advice;
- Measure D affects the right to communicate with third parties when deprived of liberty and;
- Measure E indicates that
  > 'in order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot

[109] M. KUIJER, "The accession of the European Union to the ECHR: A gift for the ECHR's 60th anniversary or an unwelcome intruder at the party?", *Amsterdam Law Forum*, 2011, 17-32; N. O'MEARA, "A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR", *German Law Journal*, 2011, 1813-1832.
[110] Cfr. Part I, Chapter 3.1.1.
[111] Resolution of the Council on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 2009/C 295 (OJ 4 December 2009), 30 November 2009, § 5.

> understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition'.[112]

In the following, it is analysed to what extent the European Union particularly has paid attention to minor alleged offenders as vulnerable persons, while executing the procedural roadmap.

1.2.6.1 *Measure A & B*

The European Union began to carry out the procedural roadmap by adopting the directive on the right to interpretation and translation in criminal proceedings.[113] In 2012 the directive on the right to information in criminal proceedings followed.[114] Hereby, the European Union has executed both, measure A and B of the procedural roadmap. Furthermore, there is an upcoming directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, which would combine the execution of both, measure C and measure D.[115]

Striking is the scarce attention paid to the rights of children subject to criminal proceedings.

The directive on the right to interpretation and translation only stipulates that

> 'the duty of care towards suspected or accused persons who are in a *potentially weak position*, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice'[116]

and that

> 'the prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this directive, for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed'.[117]

The directive on the right to information only says that

> 'member states shall ensure that the information provided [...] shall be given orally or in writing, in simple and accessible language, *taking into account*

[112] Resolution of the Council on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 2009/C 295 (OJ 4 December 2009), 30 November 2009.
[113] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.
[114] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
[115] Proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326, 8 June 2011.
[116] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, § 27.
[117] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, § 27.

any particular needs of vulnerable suspects or vulnerable accused persons'.[118]

These two directives omit to emphasise that particularly *minors* subject to criminal proceedings are considered to be (inherently) vulnerable and that Member States are obliged to pay specific attention to this category of vulnerable suspected and accused persons. The European Union should have made more use of its powerfulness in order to provide some sort of minimal instructions for the Member States how to deal with minor (alleged) offenders.

According to the resolution on the roadmap, however, the European Union deliberately aims to focus on each individual measure and one area at the time.[119]

Nevertheless, it would have been a good commencement in the adopted directives of 2010 and 2012 to have already emphasised the vulnerability of suspected or accused children and that they should be treated in a way that respect their age and maturity.

1.2.6.2 ***Measure C & D***

The deliberations on the directive on the right of access to a lawyer still continues and are taking a long time because of the sensitive subject matter. In the progress report on the proposal of the directive on the right of access to a lawyer, it is only suggested that a child subject to criminal proceedings is not able to waive any right under this directive. Nevertheless in article 9 of the proposal itself, it has not been mentioned (yet) that way.[120]

Because measure C and D cover a quite sensitive matter, it does not surprise that difficulties arise as a result of the existing substantial differences between the national systems and of the disagreement of the Member States on the interpretation of the case law of the ECtHR.[121]

Logically, criticism appeared when the European Commission presented its proposal.[122] Firstly, some of the Member States, as well as the European Economic and Social Committee, regretted that the right to legal advice has been treated separately from legal aid, while it was explicitly linked to it in the procedural roadmap.[123] Secondly five Member States expressed their dissatisfaction because the proposal "went on several points beyond the requirements of the European Convention of Human Rights, as interpreted in the case-law of the European Court of Human Rights". Furthermore, the United Kingdom and Ireland decided not to opt-in from the outset. Therefore the text of the proposal has been significantly redrafted, trying to strike the balance between the positions of all Member States.[124]

---

[118] Article 3 §2 of the directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
[119] Resolution of the Council on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 2009/C 295 (OJ 4 December 2009), 30 November 2009, § 11.
[120] Progress Report of the Council of Europe on the *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, 6 December 2011, 22 and 34, http://register.consilium.europa.eu/pdf/en/11/st18/st18215.en11.pdf.
[121] Background note of the Justice and Home Affairs Council, 7-8 June 2012, 8, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/130662.pdf.
[122] Background note of the Justice and Home Affairs Council, 7-8 June 2012, 8, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/130662.pdf.
[123] Opinion of the European Economic and Social Committee on the *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, 2012/C 43 (OJ 15 February 2012), § 3.6.2.
[124] Background note of the Justice and Home Affairs Council, 7-8 June 2012, 9, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/130662.pdf.

It is unclear, and unlikely, that the directive on the right of access to a lawyer would include special safeguards and rules with respect to vulnerable suspected and accused persons, such as minors. Another missed opportunity.

1.2.6.3 *Measure E*

Currently, the European Union is preparing to elaborate the fifth measure concerning special safeguards for vulnerable persons subject to criminal proceedings. Next to the problems mentioned above with regard to the substantial differences between the national systems and disagreement of the Member States on the interpretation of the case-law of the ECtHR, specific issues will arise with regard to these safeguards for vulnerable persons. Who will be considered to be vulnerable? Is there a need to formulate a common definition? Should vulnerable adults and children be treated in a different way?

In part three of this paper, it is aimed to provide an answer to these questions, among others.

1.3 Comparative conclusion on current policy

From the foregoing, it is clear that the Council of Europe has placed procedural rights, children's rights and child-friendly justice on the agenda much earlier than the European Union.

Whereas the majority of the initiatives of the Council of Europe with respect to procedural rights remains quite vague as regards the protection of minor alleged offenders, the recently developed Guidelines on Child-Friendly Justice are more precise and concrete, and start to pay attention to procedural rights for minors subject to criminal proceedings.

The European Union only recently pays attention to procedural safeguards, in general. However, the procedural roadmap includes a measure E that particularly focuses on procedural safeguards for minors and other vulnerable persons. It shows a political will to establish them, but it has not yet led to concrete action.

It can be concluded that the Council of Europe, as well as the European Union are only recently working on the strengthening of procedural rights for minors subject to criminal proceedings. Obviously, more powerful instruments will be needed than mere guidelines and a mere roadmap in order to protect children in court effectively.

The Council of Europe may have paid attention to children's rights and child-friendly justice in a more extensive way, the European Union shows a greater political willingness to make change happen with regard to procedural rights for minors subject to criminal proceedings. But to what extent is the European Union competent to execute their policy?

2 Chapter 2: European Competences

This chapter aims to compare the competences of the European Union and the Council of Europe. This is needed in order to find out to what extent it is feasible for the European Union to develop procedural rights for minor alleged offenders, and to find out what are its possible limits.

2.1 Justice and Cooperation in European Union

The system of division of the competences between the Member States and the European Union is governed by the principle of conferral.[125] The principle of conferral means that the European Union only has the competences that are allocated to it unanimously by the Member

[125] Art. 5 TEU.

States. The competences not conferred on the European Union remain with the Member States.[126]

Furthermore, the European Union always needs to take into account the principles of subsidiarity and proportionality in its legislative activity.[127]

Because competences *ratione personae*, *tempore* and *loci* are not considered to be problematic, this paper focuses on the competence *ratione materiae*.

2.1.1 **Area of freedom, security and justice**

To make the European Union an area of freedom, security and justice, the European Union has a shared competence with the Member States, which means that both are allowed to legislate in order to create this area.[128]An important limitation for the Member States is, however, the supremacy of the EU-legislation in this matter. The Member States can only exercise their competence to the extent that the European Union has not yet exercised its competence, or to the extent that the European Union has decided to cease exercising its competence.[129] The latter situation may occur when the latter decides to repeal a legislative act in order to better ensure the respect of the principles of subsidiarity and proportionality.[130]

It is precisely this competence concerning the area of freedom, security and justice that enables the European Union to take common measures in order to fight against crime[131], but also in order to establish minimum safeguards in criminal proceedings. After all, article 4 TFEU must be read together with article 6 TEU.

Article 6 TEU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights and which is granted 'the same legal value as the Treaties'.[132] Article 6 TEU also imposes the accession of the European Union to the ECHR, but only to the extent that it 'shall not affect the European Union's competences as defined in the Treaties'.[133]

It can be concluded that the European Union is authorised to establish minimum procedural safeguards for suspected minors or accused on the base of article 4 TFEU, combined with article 6 TEU. This is unlikely to infringe on the subsidiarity principle, because of the need

[126] Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, C83/335 (OJ 30 March 2010), 13 December 2007, § 18.
[127] Art. 5 §1 and 4 §1 TEU; art. 5 §3 and 5 §4 TEU; A. FUEREA, "Legal Personality and Powers of the European Union", *Lex ET Scientia International Journal*, 2010, 207; C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 133.
[128] Art. 4 §2 TFEU.
[129] Art. 2 §2 TFEU; A. FUEREA, "Legal Personality and Powers of the European Union", *Lex ET Scientia International Journal*, 2010, 204; S. PEERS, *EU Justice and Home Affairs Law*, New York, Oxford University Press, 2011, 71-72; C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 140.
[130] Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, C83/335 (OJ 30 March 2010), 13 December 2007, § 18; A. FUEREA, "Legal Personality and Powers of the European Union", *Lex ET Scientia International Journal*, 2010, 208; also see: C. HARDING and J.B. BANACH-GUTIERREZ, "The emergent EU criminal policy: identifying the species", *European Law Review* 2012, 762-763.
[131] C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 75.
[132] Art. 6 §1 TEU.
[133] Art. 6 §2 TEU; For more information on the Charter of Fundamental Rights and the European Union's competence, also see: T.P. MARGUERY, "The protection of fundamental rights in European criminal law after Lisbon: what role for the Charter of Fundamental Rights?", *European Law Review* 2012, 444-463.

for action in this matter at European level, as explained in the first part of this paper, chapter 3.2.

2.1.2 **Judicial cooperation in criminal matters**

In order to create the area of freedom, security and justice the European Union wants to

> 'ensure a high level of security through measures to prevent and combat crime [...] and through measures for coordination and cooperation between police and judicial authorities [...] as well as through the mutual recognition of judgements in criminal matters and, if necessary, through approximation of criminal laws'.[134]

Article 82 TFEU includes a couple of principles which the European Union should be guided by in executing its legislative power within the field of judicial cooperation in criminal matters.

The main guiding principle is mutual recognition of judgments and judicial decisions.[135]

Furthermore, article 82 §2 says the following:

> 'To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in *criminal matters having a cross-border dimension*, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish *minimum rules*. Such rules shall take into account the differences between the legal traditions and systems of the Member States.
> They shall concern: [...]; (b) the rights of individuals in criminal procedure; [...]'.

From the formulation of article 82 §2, it can be concluded that the article is drafted in a limitative way, in contrary to the former article 31 of the former TEU on judicial cooperation in criminal matters. The issues where competences are conferred on the European Union are now considered to be exhaustive.[136]

In addition, article 82 §2 explicitly states that the European Union may establish *minimum rules*, but that it is open to the Member States to introduce a higher standard of protection for individuals.[137]

More importantly, article 82 §2 explicitly limits the European Union's power to criminal matters *having a cross-border dimension*. It follows that the European Union is not authorised to interfere with the domestic criminal (procedural) law of the Member States if it comes to mere national criminal cases. As a result, each initiative of the European Union can only cover binding measures with regard to criminal cases with a cross-border dimension.

---

[134] Art. 67 §3 TFEU.
[135] Art. 82 §1 TFEU.
[136] J. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 181-183.
[137] Art. 82 §2 TFEU.

What follows is a critical review of the Charter of Fundamental Rights and the procedural roadmap in order to examine their compliance with the limitation of the European Union's competence, accordingly article 82 §2 TFEU.

2.1.2.1 *EU Charter of Fundamental Rights*

As mentioned before, the Charter sets out some basic fundamental principles and rights for the individual in criminal proceedings.[138] The European Union is justified to do so by virtue of article 82 TFEU.

Significantly, the principles and rights covered by the Charter are not only addressed to the institutions, bodies, offices and agencies of the European Union, but also to the Member States, however, only if they are implementing EU-law. Since article 51 limits the scope of the Charter in this way, the Charter does not interfere with the domestic criminal procedural law of the Member States. It can be concluded that the European Union has not exceeded its competence in the Charter.

2.1.2.2 *Procedural Roadmap*

In order to create the area of freedom, security and justice, the European leaders agreed that it is necessary to develop a common approach as regards police and judicial cooperation in criminal matters.[139] As previously mentioned[140], the Tampere programme of 1999 says that the principle of mutual recognition of judgments should become the cornerstone of judicial co-operation in criminal matters. Furthermore, it explicitly states that the approximation of legislation is necessary to facilitate judicial co-operation between authorities and the judicial protection of individual rights.[141]

Based on the Tampere programme the European Union has issued several framework decisions to facilitate judicial co-operation in criminal matters and cross-border prosecution.[142] As the framework decisions all intend to facilitate the cross-border prosecution and make the cross-border co-operation more efficient, the European Union does not handle in excess of its competence. Article 82 §2 precisely enables the European Union to take action in criminal matters having a cross-border dimension.

The principle of mutual cooperation requires an almost blind faith of the Member States in each other's legal systems. They are expected to accept, and execute, judicial decisions in

---

[138] Art. 47-50 Charter of Fundamental Rights of the European Union.
[139] G. VERMEULEN, "Het Europees Aanhoudingsmandaat", *Tijdschrift voor Mensenrechten*, 2002, 3-7.
[140] Part II, Chapter 1.1.2.
[141] Presidency Conclusions on the Tampere European Council, 15 and 16 October 1999, § 33, http://www.europarl.europa.eu/summits/tam_en.htm.
[142] Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA (OJ 18 July 2002), 13 December 2007; Council Framework Decision on the execution in the European Union of orders freezing property or evidence, 2003/577/JHA (OJ 2 August 2003), 22 July 2003; Council Framework Decision on the application of the principle of mutual recognition to financial penalties, 2005/214/JHA (OJ 22 March 2005), 24 February 2005; Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, 2008/675/JHA (OJ 15 August 2008), 24 July 2008; Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, 2008/978/JHA (OJ 30 December 2008), 18 November 2008; Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 2008/909/JHA (OJ 5 December 2008), 27 November 2008.

criminal proceedings without any formality- or double incrimination requirement. Striking is that this confidence of the Member States in reality is not at all as big as presumed.[143]

Therefore, several documents of the European Union mention the necessity to create and develop procedural safeguards for the individual. After all, confidence needs to be deserved by the Member States on individual basis. Logically, a Member State is only going to be willing to cooperate with another Member State if the latter will guarantee equal procedural safeguards for the individual involved. It follows that the presumed confidence will only be established in reality, if the Member States are guaranteed some kind of minimum, equal procedural safeguards for their citizens in all Member States.

However, the question arises whether the European Union's ambition reaches farther than its competence.

The Tampere programme, but also following initiatives as the Hague programme and the Stockholm programme emphasise the need to develop European standards for individuals in criminal proceedings in the European Union.[144] As regards common procedural safeguards, the initiatives are less clear whether the safeguards should only apply in criminal cases having a cross-border dimension, as well as in merely domestic cases.[145]

Analysis reveals that the Procedural Roadmap originally intended to launch procedural safeguards throughout the entire European Union in criminal cases with a cross-border dimension, as well as in merely domestic cases.[146]

Obviously, this vagueness should be interpreted in accordance with article 82 §2 TFEU. It follows that, whatever the intention is, or formulation being used, in the documents of the European Union, legislation of the European Union in criminal matters will only be applicable to criminal cases with a cross-border dimension. Article 82 §2 TFEU indirectly prohibits the European Union to interfere with or affect internal, pure domestic criminal procedures of the Member States.

However, according to PEERS and PIRIS[147], the phrase 'cross-border dimensions' should not be interpreted that restrictive, because it also governs the scope of the European Union's substantive criminal law power. He finds it hard to believe that

> 'the Union's powers to harmonize substantive criminal law was intended to be limited to cases where an alleged offence has factual links to more than one Member State'.[148]

Furthermore, he adds that

---

[143] G. VERMEULEN, "Het Europees Aanhoudingsmandaat", *Tijdschrift voor Mensenrechten*, 2002, 3-7.
[144] Cfr. Part II, Chapter 1.2.2 and 1.2.3.
[145] Presidency Conclusions on the Tampere European Council, 15 and 16 October 1999, § 37, http://www.europarl.europa.eu/summits/tam_en.htm; Information from the Council, *The Hague programme on strengthening freedom, security and justice in the European Union*, 2005/C 53 (OJ 3 March 2005), §3.3.1; Notices from the European Council, *The Stockholm programme on an open and secure Europe serving and protecting citizens*, 2010/C 115 (OJ 4 May 2010), § 2.4 and § 3.3.
[146] Resolution of the Council on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 2009/C 295 (OJ 4 December 2009), 30 November 2009, § 2.
[147] J. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 179, note 34.
[148] S. PEERS, *EU Justice and Home Affairs Law*, New York, Oxford University Press, 2011, 670.

> 'the EU's specific criminal procedure powers would be rendered meaningless if they could only be applied in cross-border proceedings, given that article 82.1 already sets out a power to regulate criminal proceedings with a purely cross-border nature.'[149]

In any case and irrespective of the interpretation given, it cannot be denied that procedural rules, issued by the European Union, concerning cross-border criminal proceedings are having an indirect, but significant impact on merely domestic procedures of the Member States, although the European Union's competence is limited to cross border cases. The following explains why.

At first, quid the situation in which an alleged offence seems *prima facie* a merely domestic case, but only after a certain amount of time it becomes clear that the case is having a cross-border dimension?[150] At first, the European procedural rights for the suspect are not supposed to be applied, but after all, it becomes clear that they should have been applied since the beginning of the procedure (read: investigation). In practice, it is highly unlikely that national authorities want to risk a violation, therefore they are going to apply, anyways, the European rules from the beginning of each investigation.

Furthermore, another consequence of European Union's procedural standards for the individual in criminal cases, is that the Member States may be faced with a different level of procedural rights, depending on the national or cross-border dimension of a criminal case. The national procedural law is applicable to criminal cases having a cross-border dimension as well as to criminal cases without a cross-border dimension. However, the EU-procedural law will only be applicable to the cross-border criminal procedures. It follows that, as far as the national and European procedural law differ, the involved individual will be treated differently depending on the national or cross-border dimension of the criminal case.

Since a lot of Member States, if not all, have a constitutional non-discrimination clause, it remains to be seen whether or not the different legal status of individuals in cross-border and internal procedures can be justified on legitimate, objective and reasonable grounds.

If this difference is considered to be discriminating by the Constitutional Court of a Member State, its national authorities will be obliged to reform the procedural rights in national procedures to the EU-procedural standards intended for cross-border criminal cases. Consequently, the EU-standards will affect (in)directly the national procedural rules in domestic cases as well.

Last but not least, striking is the wording of the two directives[151], based upon the procedural roadmap, from which it can be concluded that the European Union does affect the domestic procedures. The directives prescribe procedural rules that the Member States need to comply with irrespective of the cross-border dimension of a criminal case. By doing so, the European Union exceeds its competence.

It can be concluded that it is important to keep in mind these limitations of the European Union's competence when introducing procedural rights for minors subject to criminal

[149] S. PEERS, *EU Justice and Home Affairs Law*, New York, Oxford University Press, 2011, 670.
[150] S. PEERS, *EU Justice and Home Affairs Law*, New York, Oxford University Press, 2011, 670.
[151] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings and the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

proceedings. They may only serve to facilitate the judicial cooperation, by enhancing the mutual trust between the Member States.

Now that the limitations of the competence of the European Union have become clear, a closer, but brief, look is taken at the competence of the Council of Europe.

2.2 Human Rights in Council of Europe

The Council of Europe is a European intergovernmental organisation of 47 countries which has the main purpose (and competence *ratione materiae*) to promote the protection of fundamental human rights and the respect for the democracy and the rule of law.

Article 1 of the Statute of the Council of Europe sets out the principal aim of the Council of Europe. The parties of the treaty want to achieve a greater unity

> 'for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'.

This main objective represents the desire to create a common area of democracy throughout the whole continent in which respect is ensured for the fundamental values, as human rights and the rule of law.[152]

The Council of Europe has also significant objectives beyond its main aim in article 1. It wants to

- protect human rights, pluralist democracy and the rule of law;
- promote awareness and encourage the development of Europe's cultural identity and diversity;
- find common solutions to the challenges facing European society and
- consolidate democratic stability in Europe by backing political, legislative and constitutional reform.[153]

As the Council of Europe is a governmental organisation, the parties (read: Member States) have the power to determine, to extend and to decrease its powers.

Precisely, the protection of human rights is a matter in which the Council of Europe is the most active and successful. Several human rights treaties, conventions and projects are initiated by the Council of Europe.[154]

Obviously, the most important achievement to date is the realisation of the ECHR, which includes certain fundamental procedural rights for European citizens.

The legal competence of the Council of Europe to establish minimum standards for suspected or accused minors in criminal proceedings is unlikely to be questioned by the Member States, because of the following reasons.

Firstly, the powers and objectives are formulated sufficiently broadly to enable the Council of Europe to take action in matters as procedural safeguards in criminal proceedings. It falls within the scope of the Statute of the Council of Europe.

---

[152] http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en (May 2013).
[153] http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en (May 2013).
[154] J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM deel I*, Antwerpen, Intersentia, 2005, 43.

Furthermore, since the Council of Europe is a governmental organisation, the Member States all need to agree on initiatives being taken. Because this is a pre-condition for the initiative to be binding upon the Member States, it follows that the power and authority remains with the individual Member States. If a party (country) does not agree on an initiative of the Council of Europe, it can simply refuse to sign and ratify it. Consequently, the party is not bound by the proposed initiative.[155]

It can be concluded that its competence enable the Council of Europe to undertake action as regards procedural safeguards for suspected or accused minors - actions that go further than article 6 ECHR. Nevertheless, it is open to Member States not to agree and to withdraw from the initiative.

2.3 Comparative conclusion on competences

From the foregoing, it can be concluded that the European Union is able to establish procedural safeguards for the individual within its competence to create a European area of freedom, security and justice based upon article 4 TFEU and 6 TEU.

Measure E of the procedural roadmap forms an excellent basis to launch procedural rights for suspected or accused minors. Nevertheless, compared to the Council of Europe, the European Union' competence is limited in two significant ways. Article 82 §2 TFEU only enables the European Union to develop some *minimum* rules for the individual in criminal proceedings. In addition, a strict reading of article 82 §2 TFEU leads to the finding that these possible European procedural rules may only be applicable in *cross-border cases*.

Although the European Union's powers are more limited as regards procedural rights in criminal proceedings than the powers of the Council of Europe, the European Union has a more ambitious policy to establish them throughout its Member States. The extensive aspirations, but the limited powers of the European Union on the one hand, and the extensive powers, but less extensive aspirations of the Council of Europe on the other hand, requires an examination of the enforceability of initiatives of both institutions.

3 Chapter 3: European imposing and enforcing mechanisms

The previous chapters analysed the current policy (and political willingness) and competences of the European Union, compared to the Council of Europe. The existence of imposing and enforcing powers is the third criterion in the examination to what extent the European Union is the most appropriate level to develop procedural rights for minor alleged offenders. After all, procedural rights can only be effective in practice if they can be imposed and enforced on the Member States.

Therefore, this chapter briefly analyses the supranational character of the European Union, its legislative instruments and procedure, as well as the role of the European Court of Justice in human rights. This is compared to the Council of Europe, as a governmental organisation, and the role of the European Court of Human Rights.

3.1 EU's legislative strength, but poor judicial protection

Firstly, the power of the European Union to impose rules to the Member States is analysed. Secondly, the renewed legislative procedure since the Lisbon Treaty shows even more the power of the European Union to lay down laws. At last, it is examined what role the European Court of Justice can play in the enforcement of the rights imposed by the European Union.

[155] Cfr. Part II, chapter 3.2.1.

3.1.1 **Supranational legislative power**

The European Union is a supranational institution, to which the Member States have conferred certain powers, resulting in the restriction of their own sovereignty. In matters conferred to the European Union, it has the power to legislate, thus to dictate rules to the Member States, that are then bound by the European legislation.

The European Union has an independent and multi-institutional central government and its laws have primacy over domestic law. These elements distinguish the European Union from the Council of Europe and that is why the European Union is called a supranational organisation.[156]

Various legislative instruments are open to the European Union. It can make use of directives, regulations or decisions.[157] By means of regulations, it may affect the national legal systems most thoroughly, because regulations have general application, they are binding in its entirety and are directly applicable in all Member States.[158]

If the European Union develops rights for the European citizens by means of regulations, the European citizens are able to invoke these rights directly in national proceedings. This is possible because of the direct effect, that is specifically attached to regulations.[159]

It follows that regulations have a significant sovereignty-limiting effect on the Member States. Therefore, the European Union is only qualified to issue regulations in matters that are explicitly conferred to the it by the TEU and TFEU.[160]

The last decade, framework decisions were very popular legislative instruments in order to develop the area of freedom, security and justice. Framework decisions have a similar function to directives. They aimed to achieve adjustment of the national law of the Member States and they were binding only to the extent of the result that needed to be achieved. Member States were open to choose by what means the result was to be achieved.[161] Framework decisions were issued by the Committee of Ministers.[162]

As a result of the Lisbon Treaty, the framework decisions are abolished as legislative instrument. Probably, partly due to the critics of the democratic deficit. Since the coming into force of the Lisbon Treaty, the European Union more often makes use of directives in matters of criminal law and procedural rights.[163] A directive is binding as to the result to be achieved, but the national authorities can choose form and methods.[164]

3.1.2 **Legislative procedure since Lisbon Treaty**

The decision-making process in the European Union has been subject to change and to criticism. For the purposes of this paper, this chapter is limited to the legislative procedure that applies after the Lisbon Treaty.

---

[156] S.C. SIEBERSON, "Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon", *Virginia Journal of International Law*, 2009-2010, 930.
[157] Art. 288 TFEU.
[158] Art. 288 TFEU.
[159] ECJ 14 December 1971, no. 43-71, Politi s.a.s/Ministery for Finance of the Italian Republic.
[160] M. MARESCEAU, *Europees Recht*, Gent, unpublished, 2010, 42.
[161] Ex art. 34 TEU.
[162] Ex art. 34 §2B TEU.
[163] E.g. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.
[164] Art. 288 TFEU.

The Lisbon Treaty simplifies the decision-making process by reducing it to two categories of legislative procedures: the ordinary legislative procedure and the special legislative procedure. The ordinary legislative procedure can be compared to the co-decision process, that applied before the Lisbon Treaty. But the European Union has extended the scope of the application of this procedure. Since the Lisbon Treaty, the European Union can use the ordinary legislative procedure in order to execute their policy with regard to the area of freedom, security and justice and thus with regard to criminal law.[165]

The two main features of the ordinary legislative procedure is that the European Parliament and the Council are considered to be equal and that the Council can act by qualified majority voting.[166] The equality of the European Parliament and the Council means that both are considered to be two complete legislators, thus that both need to agree to adopt acts. Neither the Council, nor the Parliament is able push through a decision without approval of the other.[167]

In a number of matters, including criminal law, directives can be adopted without the requirement of unanimity. This is a significant change from the procedure that applied before the Lisbon Treaty.[168]

A qualified majority is something beyond a simple majority of the Member States and is based on a system of weighted voting where each Member State's votes are set forth in the treaties. Unlike unanimity voting, qualified majority voting will prevent a single Member State from blocking EU-legislation. It allows EU-action to be taken over the objection of one Member State.[169]

With regard to the area of freedom, security and justice, the Lisbon Treaty replaces unanimity with qualified majority voting.[170] This is a very strong mechanism the European Union possesses in order to impose legislation in this matter, including procedural safeguards, to all Member States, even if there is a lack of unanimity.

---

[165] S. PEERS, *Guide to EU decision-making and justice and home affairs after the Treaty of Lisbon*, London, Statewatch, 2010, 3, C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 148-149.

[166] S. PEERS, *Guide to EU decision-making and justice and home affairs after the Treaty of Lisbon*, London, Statewatch, 2010, 3; C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 148-149.

[167] J. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 119; C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 149.

[168] S.C. SIEBERSON, "Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon", *Virginia Journal of International Law*, 2009-2010, 950.

[169] S.C. SIEBERSON, "Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon", *Virginia Journal of International Law*, 2009-2010, 936-940.

[170] S.C. SIEBERSON, "Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon", *Virginia Journal of International Law*, 2009-2010, 950; S. PEERS, *Guide to EU decision-making and justice and home affairs after the Treaty of Lisbon*, London, Statewatch, 2010, 3; J. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 180; S. PEERS, *EU Justice and Home Affairs Law*, New York, Oxford University Press, 2011, 665; C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 148-149.

PIRIS states that this major swift from unanimity to qualified majority voting is made acceptable because of certain measures, including the 'brake-accelerator'. The latter contains two elements: the 'emergency brake' and the 'accelerator'.[171]

If a Member State believes that a draft directive 'would affect fundamental aspects of its criminal justice system', it can bring the matter to the European Council, in which case the legislative procedure is suspended. The European Council aims to achieve a consensus decision, after discussion. This is called the 'emergency brake'. It is a highly significant protection for the Member States.[172]

If within four months, no consensus can be found in the European Council, and if at least nine Member States want to go further with the draft directive, they can choose for an enhanced cooperation, that will automatically apply between them. This is called the 'accelerator', because the nine Member States can escape the preliminary steps which are normally required under the enhance cooperation procedure.[173]

According to SIEBERSON, it follows that the Lisbon Treaty is intended to make the European Union more effective, and that it 'was not designed as an assault on the sovereignty of the Member States or on their national competences'.[174]

Nevertheless, the democratic aspect of the European Union is frequently criticised.

Before the coming into force of the Lisbon Treaty, the European Union often was blamed to act in a democratic deficit, because the framework decisions were adopted by the Committee of Ministers, the executive. This way, the decisions escaped true scrutiny by the European Parliament, the only democratically elected body in the European Union. This can hardly be considered democratic.[175]

Although the Lisbon Treaty has altered the decision-making procedures and has given the European Parliament more power in the legislative process, the democratic deficit cannot be seen as eliminated, according to critics.

Firstly, the monopoly of legislative initiatives is still reserved for the European Commission only, while it does not consist of democratic elected members.[176] Furthermore, the Council retains its primary role as the European Union's legislature, while it also retains the right to

---

[171] J. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 184-185.

[172] Art. 82 §3 TFEU; S.C. SIEBERSON, "Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon", *Virginia Journal of International Law*, 2009-2010, 950 and 976; J. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 184-185; S. PEERS, *EU Justice and Home Affairs Law*, New York, Oxford University Press, 2011, 65-70; C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 157.

[173] Art. 82 §3 TFEU; J. PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 185; C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 157.

[174] S.C. SIEBERSON, "Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon", *Virginia Journal of International Law*, 2009-2010, 995.

[175] D. LOWE, "Justice and Home Affairs en the Third Pillar of Union: EU Criminal Law - In Through the Back Door", *Journal of Academic Legal Studies*, II, 30-38.

[176] J. BONDE, "The European Union's Democratic Deficit: How to Fix It?", *The Brown Journal of World Affairs*, 2010-2011, vol. 17, 149; C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 96.

act as an executive that carries out the implementation of EU law. These legislative and executive roles are confusing.[177]

On the other hand, DEHULLU believes that there is still an 'institutional balance' within the European Union.[178] Since the coming into force of the Lisbon Treaty, it benefits a strengthened democratic legitimacy. GRONINGEN adds that the European Union is going to pay more attention to the rights of the individual and is going to create a better balance between the vertical and horizontal level of the EU criminal law.[179]

In any case, it can be concluded that the legislative powers are strengthened and that this is a significant advantage for the European Union to develop procedural rights for minor individuals subject to criminal proceedings.

3.1.3 **Court of Justice of European Union**[180]

The European Union is a supranational institution that is able to impose regulation to its Member States, including the obligation to guarantee procedural safeguards in criminal proceedings to a certain extent. Nevertheless, the power to impose procedural rights does not suffice to have these rights enforced in daily practice in the Member States.

Therefore, it is needed to check the legal protection of the European citizens in case (one of) the Member States do(es) not observe the binding regulations, issued by the European Union.

Firstly, articles 258, 259 and following TFEU explain that only the European Commission or another Member State can take action if a Member State fails to fulfil an obligation under the treaties. They can bring the matter to the European Court of Justice in order to achieve a condemnation of the infringing Member State.

It follows that an aggrieved European citizen is not allowed to bring a violation of its rights by its own (or another) Member State to the European Court of Justice in order to achieve a compensation. It means that an individual cannot sue a Member State before the European Court of Justice if that individual is aggrieved by its actions that are inconsistent with European rights. Nevertheless, aggrieved individuals do have the opportunity to bring the case before the national courts.

Secondly, the European Commission is not obliged to bring the matter to the European Court of Justice, in the case of a violation. Article 258 TFEU literally says

> 'the Commission, [...] *may* bring the matter before the Court of Justice of the European Union'.

Even if there is a manifest violation by a Member State, the European Commission is not obliged to sue it. As a consequence, an aggrieved citizen cannot even use article 265 TFEU to claim a compensation of the European Commission because it fails to act.

---

[177] S. C. SIEBERSON, "The Treaty of Lisbon and its impact on the European Union's democratic deficit", *Columbia Journal of European Law*, 2007-2008, vol. 14, 458.

[178] C. DEHULLU, *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 149.

[179] L. GRONINGEN, "A Criminal Justice System or a System Deficit? Notes on the System Structure of the EU Criminal Law", *European Journal of Crime, Criminal Law and Criminal Justice*, 2010, 128-129.

[180] This chapter is mainly based upon the TFEU and M. MARESCEAU, *Europees Recht*, Gent, unpublished, 2010, 77-86.

Thirdly, even if the matter has been brought before the European Court of Justice by the European Commission and it rules there was an actual infringement, the aggrieved citizen is not able to claim a compensation.

At last, a condemnation of the European Court of Justice has a mere declarative function and has a merely moral authority. An additional procedure is needed to impose a penalty payment to the Member State.[181]

From the foregoing, it can be concluded that the legal protection of the European citizens, offered by the European Court of Justice is very low. Although, aggrieved individuals are able to seek satisfaction before their national courts, they are not able to enforce their rights from the Member States on individual basis.

3.2 **Powerful Court of Human Rights in Council of Europe**

Contrary to the European Union, the Council of Europe is a traditional governmental organisation.[182] It follows that the 'legislative' instruments and procedures will strongly differ from the instruments and procedures of the European Union. But in case rights are established in the Council of Europe, it is needed to examine to what extent they are enforceable. Not surprisingly, the European Court of Human Rights plays a very important role.

3.2.1 **Governmental organisation**

If the Council of Europe would decide to introduce procedural rights specifically for minors in criminal proceedings, suddenly its weakness becomes visible. Because, the Council of Europe, contrary to the European Union, is not a supranational institution to which sovereignty has been delegated by its Member States, not all of the initiatives are binding for all 47 Member States.

To be legally binding, each initiative of the Council of Europe requires a classical treaty. The Council of Europe does not have a legislative power as the European Union that enables to impose rules to its Member States. Consequently, the governments of the several Member States need to form a treaty and need to agree on each rule they want to establish.

Classical treaties have significant disadvantages. Firstly, a Member State is a contracting party and is only bound by a treaty of the Council of Europe, if it signs and ratifies the treaty. Furthermore, the formation of a classical treaty between the governments of the Member States is difficult, long-winded and time-consuming. It follows that treaties also are difficult to change or alter, if needed by circumstances, depending on the evolution of society.

For example, the Guidelines on Child-Friendly Justice -how sincere they might be- shall not change the current landscape of children's rights in the individual Member States, as they are not binding at all. If the Council of Europe's intention is real change, a more enforceable instrument is needed.

Considering the intense differences between the 47 Member States with regard to the prosecution of minors, it is not going to be easy to reach a consensus about procedural safeguards. Therefore, it is highly unlikely the Council of Europe will achieve a more powerful instrument than the Guidelines on Child-Friendly Justice.

[181] Art. 260 §2 TFEU.
[182] Statute of the Council of Europe, London, 1949.

3.2.2 **European Court of Human Rights**

Human rights are universal and are considered to be fundamentally essential in a democratic state. Therefore, they also bind the democratic elected majority of a state.[183] Given that human rights are that fundamental and binding for authorities, the Council of Europe foresees in a sanctioning mechanism in order to enforce these rights: the European Court of Human Rights.

The ECtHR was set up by the ECHR in 1950 and draws its legitimacy from an international treaty and from the will of democratic states.[184] The ECtHR has jurisdiction in all matters concerning the interpretation and application of the ECHR and its protocols.[185]

The states that are contracting party of the ECHR have the obligation to guarantee the rights and freedoms to each individual within their jurisdiction. The national governments are obliged to prevent infringements of the ECHR, and if necessary, to correct and repair violations.[186] It is the task of the ECtHR to ensure the compliance of the contracting parties with their engagements under the Convention and the Protocols.[187]

If a contracting party violates the ECHR, another contracting party, as well as an individual victim are able to submit an application to the ECtHR.[188] However, there is a significant admissibility criterion. The individual, claiming to be the victim of a violation, firstly needs to exhaust domestic remedies. A case can only be brought for the ECtHR if the infringing contracting party itself has had the opportunity to repair its violation(s). If it has not, the ECtHR is able to condemn the contracting party because of a violation of the ECHR and to allocate a compensation to the victim.[189] Important, the judgments of the ECtHR are only declarative, but binding, and the ECtHR can only impose a compensation if the national remedies fall short.[190]

The final judgment is binding upon the condemned contracting party and is transmitted to the Committee of Ministers for the supervision of the execution of the judgment. If it is clear that the condemned state does not abide the judgment, the Committee of Ministers can refer the case to the ECtHR again.[191]

It follows that the ECtHR has two significant added values in the enforceability of the human rights, established by the ECHR. Firstly, applications are open to individual citizens claiming to be the victim of a violation of the ECHR. Secondly, the ECtHR is able to afford the victim just satisfaction.

3.3 **Comparative conclusion on imposing and enforcing mechanisms**

Compared to the Council of Europe, the European Union has undoubtedly one major advantage, which is its supranational character. In addition, it has the power to legislate in

---

[183] J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM deel I*, Antwerpen, Intersentia, 2005, 3.
[184] Art. 1 and 19 ECHR; J.P. COSTA, "On the Legitimacy of the European Court of Human Rights' Judgments", *European Constitutional Law Review*, 2011, 174.
[185] Art. 32 ECHR.
[186] Art. 1 ECHR; J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM deel I*, Antwerpen, Intersentia, 2005, 179-182.
[187] J.P. COSTA, "On the Legitimacy of the European Court of Human Rights' Judgments", *European Constitutional Law Review*, 2011, 175.
[188] Art. 33 and 34 ECHR.
[189] Art. 35 ECHR; J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM deel I*, Antwerpen, Intersentia, 2005, 179-183.
[190] Art. 41 ECHR; J. VANDE LANOTTE and Y. HAECK, *Handboek EVRM deel I*, Antwerpen, Intersentia, 2005, 182-183.
[191] Art. 46 ECHR.

criminal law matters by means of qualified majority voting. Consequently, the European Union has the power to impose procedural rights for minor individuals subject to criminal proceedings, even if not all Member States fully agree on the details.

These powerful legislative procedure of the European Union significantly differs from the "powers" of the Council of Europe. The Council of Europe always needs full agreement of the Member States as a pre-condition for the binding force of the initiatives on them. This follows from the Council of Europe's governmental nature. If consensus cannot be found between the Member States of the Council of Europe, the latter can only issue some guidelines and principles, but they cannot be enforced at all, because they are not binding.

Furthermore, in case there cannot be reached a qualified majority within the European Union, the Member States that want to push through the initiative, are able to establish an enhanced cooperation between at least nine Member States. Enhanced cooperation is facilitated by the Lisbon Treaty. It enables the Member States to go further with their project on a smaller scale, but a more solid base. Although this big advantage of enhanced cooperation, it is advised against establishing procedural rights for minors in the context of judicial cooperation by means of enhanced cooperation between only a couple of Member States. This matter affects the entire European Union, and procedural safeguards on too many and various levels cross effective prosecution, which is precisely the principal aim of judicial cooperation in the European Union.

The legislative power of the European Union is certainly an added value, compared to the Council of Europe, in the development of procedural rights for minors subject to criminal proceedings.

Nevertheless, it is one thing to impose the obligation to Member States to guarantee certain procedural rights to suspected or accused minors, but another to observe this obligation and the compliance with these rights.

To the extent that the developed procedural rights need to be enforced, the Council of Europe has a significant added value, compared to the European Union. If a Member State (read: contracting party) does not comply with rules they have agreed on, an aggrieved individual has access to the ECtHR to seek compensation.

If a Member State of the European Union does not comply with EU-regulation, it is only open to the European Commission and other Member States to react. An aggrieved citizen cannot bring this matter before the ECJ to seek compensation. However, this should be put in perspective, as the EU-citizens do have the possibility to bring the case before their national courts to seek compensation, whereas an appeal to the ECtHR requires that all domestic remedies are exhausted.[192]

The overall conclusion is that the European Union, compared to the Council of Europe, can exercise more power in order to establish the procedural rights for minors, but that the legal protection of the EU-citizens is rather poor.

4 Chapter 4: Interim conclusion

From the first part in this paper, it is clear that the need for procedural rights for minors in criminal proceedings is bigger in the European Union than in the Council of Europe. In this

[192] C. MORGAN, "The EU Procedural Roadmap. Background, importance, overview and state of affairs" in G. VERMEULEN (ed.), *Defence Rights. International and European Developments*, Antwerpen, Maklu, 2012, 76.

part, it is examined to what extent it is feasible for the European Union to develop such safeguards.

The Council of Europe has been taking much more initiatives and has been paying attention to rights for minors in court earlier and more extensively than the European Union has been doing. However, the European Union has developed the procedural roadmap that lays the foundation of procedural safeguards in criminal proceedings in the European Union. The procedural roadmap includes a measure E that concerns special safeguards for -generally- vulnerable suspected or accused persons, including minors. It follows that the development of procedural safeguards for minors subject to criminal proceedings fits in the current policy of the European Union and that there is sufficient political willingness to take further action.

In addition, the European Union possesses more powerful tools to establish procedural rights for minors in criminal proceedings and to make them concrete and effective in the daily practice of the Member States. The European Union has already used its far-reaching legislative power by issuing the directive on the right to interpretation and translation in criminal proceedings and the directive on the right to information in criminal proceedings.

However, by issuing these two directives in the context of the procedural roadmap, the European Union has exceeded its competence. The European Union's competences are limited by article 82 §2 TFEU in two significant ways. It can only introduce *minimum* rules, and they can only affect criminal proceedings *having a cross border dimension*.

As a result, the European Union can only establish certain minimum rules with respect to procedural safeguards for minors subject to criminal proceedings in the context of judicial cooperation between the Member States. Remind that judicial cooperation is based upon the principle of mutual recognition and that the latter presumes mutual trust among the Member States. In order to increase that presupposed mutual trust, Member States should only be obliged to cooperate with each other if certain procedural safeguards (for minors) are observed. It can be concluded that, although the European Union's competence is limited, it does suffice to develop the strongly needed minimum procedural rights in the context of judicial cooperation in criminal matters.

Next to its limited -but adequate- competence, an important disadvantage of the European Union has become clear. The possibly established procedural rights in the European Union would not be enforceable by the individual before the ECJ. This contrasts sharply with the ability of individual European citizens to seek compensation before the ECtHR if a Member State of the Council of Europe infringes with fundamental rights covered by the ECHR.

If the European Union aims to develop procedural rights for minors in the context of judicial cooperation that are effective in practice, it also should consider a possible sanctioning mechanism. Although, this is not analysed extensively because of the limited scope and purpose of this paper, certain considerations cannot be refrained.

If a Member State fails to comply with the proposed procedural rights, could it be excluded from judicial cooperation? Or does the failure provide a ground for refusal to cooperate for other Member States? This would require a legislative adaption of the existing instruments concerning judicial cooperation in criminal matters, since they do not provide such a

ground.[193] Obviously, sanctioning mechanisms require effective supervisory mechanisms. Does the usual infringement procedure of the European Commission suffice? Or is a complaint mechanism needed that is adapted in specific to children, and that is particularly accessible to children? Also, the European Union must take into account that the ECJ is not open to citizens to claim compensation for infringements by Member States.

In this paper, the European Union is chosen as most appropriate level to develop procedural safeguards for minors, because it is highly necessary in the context of judicial cooperation and because the European Union has the appropriate tools to impose them on national authorities. However, it is of importance that the Council of Europe continues promoting and protecting safeguards for minors in court. Not only because it covers a geographically much bigger area than the European Union, but also because of their experience and successes as regards human rights, and especially because the ECtHR is open to individual European citizens to enforce their rights on their national authorities.

[193] Cfr. annex 1.

Part III: What procedural rights should be guaranteed?

From the first part of this paper, it is clear that procedural safeguards in the European Union are highly necessary in the context of judicial cooperation in criminal matters between the Member States. In the second part, it is demonstrated that the development of such procedural rights fits in the current policy and that there is sufficient political willingness to take further action in this matter. This is illustrated by the procedural roadmap that includes measure E, which aims to propose special safeguards in criminal proceedings for suspected or accused persons who are vulnerable, including minors.

Therefore, the third part examines to what extent it is needed particularly for minor (alleged) offenders to be protected by certain safeguards in criminal proceedings in the context of judicial cooperation. It aims to propose procedural rights that should be covered in the new instrument of the European Union relating to measure E of the procedural roadmap.

Although measure E of the procedural roadmap intends to cover procedural safeguards for vulnerable persons in general, there is no clear and comprehensive legal definition of a vulnerable person at European level. It goes without saying that minors are inherently vulnerable and would fit within the term 'vulnerable persons'. Nevertheless, the European Union should consider to split measure E into a specific measure for children and a measure for vulnerable adults. Obviously, minors are inherently vulnerable and have other specific needs than vulnerable adults. It follows that both need a different, but specific approach as point of departure. Still the different and specific approach can result in certain safeguards that may overlap.

This part deliberately focuses on additional procedural safeguards that are necessary for minors in particular, by examining to what extent minors are more vulnerable than (non-vulnerable) adults in criminal proceedings. This knowledge is important and needed in order to propose procedural rights that specifically meet the needs of a minor (alleged) offender.

Firstly, in order to come to know the specific needs of minors in court, it is necessary to define the term 'minor'. Chapter one aims to clarify what should be understood by this term.

Secondly, the needs of a minor may alter in the successive steps of the proceedings. Therefore, the next chapters analyse the vulnerabilities and weaknesses of minors in each different step of the criminal procedure. For this analysis, the results of studies in forensic psychological and criminological literature are examined, as well as the case law of the ECtHR. The case law that is discussed in this part, is not intended to be exhaustive, but is selected to illustrate the theories of the ECtHR on the vulnerability of minors in court.

1 Chapter 1: Minors

An examination of the weaknesses and needs of minors subject to criminal proceedings requires a definition of the term 'minor'. Can all persons under the age of criminal responsibility be considered as 'minors'?

1.1 Age of criminal responsibility

Analysis reveals that the age of criminal responsibility strongly differs between the Member States.[194] For instance, in Belgium, 16 is the youngest age a person can be criminal responsible for his or her acts, but in Ireland, the United Kingdom and Cyprus, a 10-year-old person can be held liable for his or her criminal acts. In addition, adult criminal law can be applied to a 14-year-old person in Lithuania and Denmark.[195]

Therefore, it is highly unlikely that the EU Member States are going to achieve a consensus on a common age of criminal responsibility. Although this could be a very useful tool to define minors. Minors could be all persons under the common age of criminal responsibility. All persons having a lower age, could claim the provided procedural safeguards. However, it is not necessary to have a harmonised age of criminal liability in all Member States, because of the following reason.

A distinction can be drawn between the upper age limit for protection and the age of criminal liability. The upper age limit of protection is the maximum age for children to be protected by special procedural safeguards. This upper age limit certainly can overlap with the age of criminal liability, which means that specific protection for children should not come to an end because the child has reached the age of criminal liability. For example, if a 14-year-old commits a crime in Denmark, he or she can be held criminal liable and can be formally charged and be subject to adult penal law. But does this mean that this child does not need any specific protection during investigation and trial? On the contrary, precisely because the child has reached the age of criminal liability (and may be charged with an offence as if he or she would be an adult), he or she needs extra safeguards to be protected. After all, the person involved is still a child.

Also the Committee on the Rights of the Child of the United Nations writes in its general comment in 2007 on children's rights in juvenile justice that

> 'children above the minimum age of criminal responsibility at the time of the commission of an offence but younger than 18 years can be formally charged and subject to penal law procedure. But these procedures, including the final outcome, must be in full compliance with the principles and provisions of CRC as elaborated in the present general comment.'[196]

1.2 Upper age limit for juvenile justice

Irrespective of the different ages of criminal liability in the EU Member States, the upper age limit of protection and special safeguards in court is 18. 18 years is the lowest age that may serve as the upper age limit for juvenile justice. This proposition is justified by article 1 UNCRC and the general comment in 2007 of the UN Committee on the Rights of the Child.[197]

---

[194] T. SPRONKEN and M. ATTINGER, *Procedural Rights in Criminal Proceedings: Existing Levels of Safeguards in the European Union*, Maastricht, 12 December 2005, 1-297, http://arno.unimaas.nl/show.cgi?fid=16315; F. LOSEL, A. BOTTOMS and D.P. FARRINGTON (eds.), *Young Adult Offenders: Lost in Transition?*, Oxon, Routledge, 2006, 28.

[195] F. LOSEL, A. BOTTOMS and D.P. FARRINGTON (eds.), *Young Adult Offenders: Lost in Transition?*, Oxon, Routledge, 2006, 28.

[196] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, § 31.

[197] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, § 36.

As follows from the UNCRC and paragraphs 31, 36 and following of the general comment no. 10 from the UN Committee on the Rights of the Child, every person younger than 18 years old is considered to be a child that needs protection. Irrespective of the type of court (juvenile court or adult criminal court) and irrespective of the stage of the proceedings, all persons under the age of 18 years must be treated in accordance with the rules of juvenile justice.[198]

The European Union indirectly shares this opinion in the EU Strategy on the Rights of the Child, because it cites the UNCRC to define the term 'child' as every person under the age of 18.[199] In addition, the EU Agenda for the Rights of the Child of 2011 states that action in the European Union

> 'should be exemplary in ensuring the respect of the provisions of [...] the UNCRC with regard to the rights of children.'[200]

Since all EU Member States have signed the UNCRC, it follows that in general, the European Union acknowledges the UNCRC and consequently the UN policy with respect to children's rights as a model.

It can be concluded that 'minors' are all persons under the age of 18 years. The provided procedural safeguards for minors subject to criminal proceedings at the level of the European Union should apply to all persons under the age of 18 years, irrespective of the age of criminal responsibility in the Member State. Especially in the context of judicial cooperation in criminal matters in the European Union, it is needed that special safeguards apply to persons above the age of criminal liability as applied in the Member State, because there is (only) a ground for refusal to cooperate if the person involved cannot be held criminal liable because of his or her low age. It follows that minors above the age of criminal responsibility, but under the age of 18 are still at risk to a foreign investigation or criminal proceeding in the context of judicial cooperation between the Member States.

2 Chapter 2: Pre-trial investigation

The needs of a minor in criminal proceedings indisputably differ depending on the stage of the proceedings. It goes without saying that a minor finds him- or herself in a weaker position during the pre-trial investigation than during trial in court. Trial in court is lead by an impartial judge that is supposed to guard constantly against an unfair trial, whereas police officers during investigation precisely have the aim to prove the guilt of the suspect and therefore push the boundaries of certain procedural rights once in a while.

2.1 Police interrogation

Research has been done to the mental competence of young people to provide reliable reports in legal contexts, but the majority of research is limited to the deficiency of young witnesses

[198] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, § 36-38.
[199] Communication from the Commission of the European Union, *Towards an EU Strategy on the Rights of the Child*, COM(2006)367, Brussels, 4 July 2006, 2.
[200] Communication from the Commission of the European Union, *An EU Agenda for the Rights of the Child*, COM(2011)60, Brussels, 15 February 2011, 14.

and victims. The parallel need for examining and responding to the developmental competence of young suspects in interrogations has received relatively little attention.[201]

Nevertheless, various case law clearly indicates the vulnerability of minors during police interrogation, and especially their susceptibility to false confessions.[202]

2.1.1 **Analysis of weaknesses**

2.1.1.1 ***False confessions***

In 1989, five boys, between 14 and 16 years old at the time, were wrongfully convicted of a brutal assault on a female jogger in the Central Park of New York, because of their detailed videotaped confession. They each served more than 6 years in prison. Only 12 years after the convictions, the real offender admitted that he committed the offence alone, confirmed by DNA evidence. Afterwards, the boys mentioned that they confessed because they thought they would go home after confessing.[203] Another example of false confessions by children is the high-profile Chicago case in 1998 in which two boys, aged 7 and 8, falsely confessed to the sexual assault and killing of an 11-year-old kid after they were promised candy and "happy meals" by the interrogators. Within a month, new evidence revealed that the boys could not have committed the crime to which they had confessed.[204]

Not surprisingly, also forensic psychological studies that focused on young suspects, indicate that they are more vulnerable than adult suspects to interrogative pressure.[205]

But what drives juveniles to false confessions?

This question needs to be answered firstly, in order to find out how juveniles can be protected against it. In psychological research and literature three main reasons can be found, being - in short -

1. Juveniles want to go home;
2. Juveniles have an increased trust in authority figures and tend to obey them;
3. Juveniles are more susceptible to intimidating and manipulating police interrogation techniques.

Furthermore, from GUDJONSSON's examination, it appears that

> 'in particular, *interrogative suggestibility*, defined as "the tendency of an individual's account of events to be altered by misleading information and

[201] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 286 (and references).
[202] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 286-287 (and references).
[203] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 286, 287 and 295 (and references).
[204] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 298 (and references); B. KABAN and A.E. TOBEY, "When Police Question Children: Are Protections Adequate?", *Journal of the Center for Children and the Courts*, 1999, 151.
[205] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 291.

> interpersonal pressure within interviews ", is negatively related to age and positively related to the likelihood of false confession.'[206]

At first, a suspected minor often just wants to go home after interrogation. Research results show that juveniles themselves indicate that they have confessed falsely because they thought they would go home afterwards. Juveniles tend to comply because they think it will help them to get what they want.[207]

In addition, adolescents are considered to be more susceptible to stress than adults and they value the present more than the future. A combination of these two elements increases the risk that they will confess in exchange for the hoped-for departure from the situation of police interrogation. Especially because confession is often presented as the only means by which escape from the present situation -interrogation- is possible.[208]

A second explanation as to why younger individuals were especially likely to sign confessions, concerns obedience to authority. Even people in general are willing to obey authority figures because of their authoritative status *per se*.[209] Add to this that children in particular tend to view adults as authority figures[210] and are considered to have an increased trust in them.[211] As a result, it does not surprise that they are more susceptible than adult alleged offenders to negative feedback from authority figures. Research revealed that juveniles had a tendency to change their previous answers in response to negative feedback.[212] This also supports the thesis that they are more likely than adults to provide false confessions.

Thirdly, intimidating and manipulating police interrogation techniques only increase the vulnerability of children to false confessions. REDLICH and GOODMAN state that

> 'in regard to age, less advanced cognitive and psychosocial development may place juveniles at increased risk for false confession in comparison to adults, particularly in consideration of intimidating and manipulative police interrogation techniques.'[213]

---

[206] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 291 (and references).
[207] S.A. DRIZIN and R.A. LEO, "The problem of false confessions in the post-DNA world", *North Carolina Law Review*, 2004, vol. 82, 891-1007; J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 296.
[208] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 295.
[209] A.D. REDLICH and G.S. GOODMAN, "Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility", *Law and Human Behavior*, 2003, Vol. 27, 152.
[210] J. PIAGET, *The moral judgment of the child*, New York, the Free Press, 1965, 1-498.
[211] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 296; also see: E. RASSIN and P.J. VAN KOPPEN, "Het verhoren van kinderen in zedenzaken", in P.J. VAN KOPPEN, D.J. HESSING, H.L.G.J. MERCKELBACH and H.F.M. CROMBAG (eds.), *Het Recht van Binnen. Psychologie van het Recht*, Deventer, Kluwer, 2002, 511-518.
[212] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 292 (and references).
[213] A.D. REDLICH and G.S. GOODMAN, "Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility", *Law and Human Behavior*, 2003, Vol. 27, 142 (and references).

Current police interrogation techniques often heavily rely on psychological manipulation to procure confessions.[214] They include the opening with a statement that expresses the suspect's guilt, interrupting all denials, and presenting false evidence. OWEN-KOSTELNIK correctly links this to the effect authority figures have on minors by stating that

> 'children's and adolescents' suggestibility with authority figures might make them less likely than adults to correct misinformation presented by the police, which means that they might be more vulnerable to the presentation of false evidence.'

In addition, from the study of REDLICH and GOODMAN, it can be concluded that minor suspects who are presented false evidence by authority figures are more likely to falsely confess and are more prone to take responsibility for something they did not do.[215]

2.1.1.2 *Difficulty comprehending their rights*

Next to their susceptibility to false confessions,

> 'young people [also] have a diminished capacity to understand the lexicon of their constitutional rights'.[216]

Children

> 'have difficulty understanding some lexical language, including legal terminology' and it 'impedes their ability to communicate effectively in investigative and interrogative contexts.' It follows that this situation 'sacrifices due process [...] and erodes the possibility of protection within the forthcoming interrogation.'[217]

This affects children not only during police interrogations, but more generally during all stages of the proceedings.[218]

Also from the case law of the ECtHR, it follows that juvenile suspects cannot be expected to fully understand what is at stake for them and what are their rights of defence. This is illustrated by the following cases.

Whereas in *T* and *V v. United Kingdom*, the ECtHR focuses on the effective participation during trial on the one hand, it emphasises in *Panovits v. Cyprus*, on the other hand, that effective participation requires that the juvenile's vulnerability is taken into account from the first stage of the proceedings.

In the *Panovits* case, the police officers had made use of very manipulative and intimidating interrogation techniques towards the 17-year-old suspect. At a certain stage during the

---

[214] A.D. REDLICH and G.S. GOODMAN, "Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility", *Law and Human Behavior*, 2003, Vol. 27, 143.

[215] A.D. REDLICH and G.S. GOODMAN, "Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility", *Law and Human Behavior*, 2003, Vol. 27, 143 and 155; J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 295.

[216] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 293.

[217] J. OWEN-KOSTELNIK, N.D. REPPUCCI and R. MEYER, "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 292-293 (and references).

[218] U. KILKELLY, *Listening to children about justice: Report of the Council of Europe consultation with children on child-friendly justice*, Strasbourg, 2010, 17-18.

interrogation, the police officer even put his gun on the desk and told the suspect to hurry up as they had other things to do. In addition, they told the minor suspect that if he wanted to go home, he should confess.[219] The 17-year-old suspect was accompanied by his father, but not by a lawyer, neither by a social worker. In addition, his father preferred not to join his son in the interview room. Finally, the boy confessed his guilt to murder and robbery.

The ECtHR observes that

> 'the right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation, and, in particular, during any questioning by the police. The authorities must [...] ensure that the accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her, including the significance of any penalty which may be imposed as well as his rights of defence and, in particular, of his right to remain silent. [...] It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police.'[220]

and that

> 'it was unlikely, given the applicant's age, that he was aware that he was entitled to legal representation before making any statement to the police. Moreover, given the lack of assistance by a lawyer or his guardian, it was also unlikely that he could reasonably appreciate the consequences of his proceedings concerning the investigation of a murder [...].'[221]

The ECtHR confirms these statements in *Adamkiewicz v. Poland*.[222]

In this case, the suspect is a 15-year-old boy and accused of murder. He is being interrogated for five hours by the police officers, accompanied by a psychologist, and he confesses the murder at some stage in the interrogation. Afterwards, he confirms his confessions to a judge, again without assistance of his lawyer. Striking is that his lawyer has been formulating no less than 8 requests to see his client. Finally he was allowed to see the boy once during the - 6 months lasting - investigation. Their conversation only lasted for one hour.[223]

In its observations the ECtHR cites the cases *T* and *V v. United Kingdom*, but also states that

> '[...], étant donné qu'à l'époque des faits le requérant était âgé de quinze ans et n'avait aucun antécédent criminel, il serait difficile d'affirmer qu'au vu de son âge, il aurait pu raisonnablement savoir qu'il avait le droit de solliciter l'assistance d'un défenseur ou qu'il aurait été capable d'apprécier les conséquences de l'absence d'une telle assistance lors de son interrogatoire [...].'[224] *(no official English translation available)*

[219] ECtHR 11 December 2008, no. 4268/04, Panovits/Cyprus, §8.
[220] ECtHR 11 December 2008, no. 4268/04, Panovits/Cyprus, §67.
[221] ECtHR 11 December 2008, no. 4268/04, Panovits/Cyprus, §71.
[222] ECtHR 2 Mars 2010, no. 54729/00, Adamkiewicz/Poland.
[223] ECtHR 2 Mars 2010, no. 54729/00, Adamkiewicz/Poland, §7, §17 and §86.
[224] ECtHR 2 Mars 2010, no. 54729/00, Adamkiewicz/Poland, §70.

The ECtHR adds that, given the circumstances that he has been deprived of his family (and lawyer) while he has been staying in a home for minors, he should have had access to a lawyer from the first stages of the proceedings.[225]

From this case law, it can be concluded that juveniles are more vulnerable during police questioning than adults to the extent that they cannot be expected to broadly understand, just like that, the nature of an investigation against them. Neither can they be expected to fully understand what is at stake for them, including their rights of defence. Because of their young age, they should not be expected, just like that, to be aware of their entitlement to legal representation, nor to be aware of the consequences of not being assisted by a lawyer.

2.1.1.3 *Minors in foreign Member State*

From the foregoing, it is clear that, in general, suspected minors need protection against false confessions and the lack of comprehension of their rights during police questioning. Add to this that, more than ever in the context of judicial cooperation within the European Union, a minor offender in a foreign Member State can be faced with a police questioning in an unfamiliar environment and in a language he or she does not understand.

Obviously, this contributes to the intimidating and stressful feelings a minor already has. Therefore, an interrogation by foreign police officers causes fear and additional pressure for a minor and contributes to his wish to go home. It follows that underage alleged offenders who are being questioned by police in a foreign Member State are particularly vulnerable to false confessions.

Furthermore, it can certainly not be expected from a young person to know what rights he or she has in a Member State that is not even his home country.

2.1.2 **Corresponding procedural safeguards**

From the foregoing, it is clear what are the vulnerabilities and needs of minors during police questioning. In the following, it is aimed to propose certain procedural safeguards that should counter these needs.

2.1.2.1 *The right to information*

Article 6 ECHR guarantees every person charged with an offence, the right

> 'to be informed promptly, in a language he or she understands and in detail, of the nature and cause of the accusation against him'.[226]

Also article 40 §2(b)(ii) UNCRC stipulates that every child that allegedly has infringed the penal law should, at least,

> 'be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians'.

Naturally, it does not suffice that police officers hand over an official document to the child (not even translated). Often, an oral explanation is necessary. Therefore, the information can be provided through his or her parents or legal guardians. However, this should not be interpreted as being the responsibility of the latter. It remains the responsibility of the authorities to make sure the child has understood each charge brought against him or her. It

[225] ECtHR 2 Mars 2010, no. 54729/00, Adamkiewicz/Poland, §89.
[226] Art. 6 §3(a) ECHR.

follows that providing information about the charges to the parents or legal guardians should not be an alternative to communicating this information to the child.[227]

The Guidelines on Child-Friendly Justice add that children do not only need information on the charges, but also need detailed information on the procedural system, their rights and instruments they can use to exercise their rights.[228] The information should be provided

> '*from the very first contact* with the justice system and on each and every steps of the way'.[229]

This could enable them to fully understand what is happening. This is even more important in later stages of the proceedings and will be reiterated further in this paper.

In the *Panovits* case, the ECtHR ruled that article 6 ECHR was violated due to the fact that

> 'whilst being a minor, his questioning had taken place in the absence of his guardian and without him being sufficiently informed of his right to receive legal representation or of his right to remain silent'.[230]

Furthermore, this information should be provided by means of child-friendly material and both to the child and to the parents.[231] A child should have access to all information independently from his or her parents, especially in cases where parents and children may have opposite interests.

Obviously, this right to information should be provided in every stage of the proceedings.

2.1.2.2 ***The right to interpretation and translation***

Naturally, from the EU directive of 20 February 2010, it follows that suspected minors

> 'who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with the interpretation during criminal proceedings before investigative and judicial authorities, *including police questioning*, all court hearings and any necessary interim hearings'.[232]

The same directive also compels the Member States to provide

> 'within a reasonable period of time, [...] a written translation of all documents which are essential to ensure that [the suspected persons concerned] are able to exercise their right of defence and to safeguard the fairness of the proceedings'.[233]

---

[227] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §48.
[228] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 23, §50-55.
[229] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 23, §50.
[230] ECtHR 11 December 2008, no. 4268/04, Panovits/Cyprus, §84.
[231] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 23, §55.
[232] Art. 2 §1 *juncto* preamble (§27) of the directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.
[233] Art. 3 §1 of the directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

Logically, this *a fortiori* applies to underage persons.[234]

The right to be assisted with an interpreter is also assured by article 6 §3(e) of the ECHR.

The Committee on the Rights of the Child adds that the interpreter should be a person who is trained to work with children, as 'the use and understanding of their mother tongue might be different from that of adults'.[235]

However, interpretation of legal language and translation of essential documents do not suffice to protect minors against false confessions and to make them aware of their rights. Therefore, they need the assistance of a lawyer and possibly another appropriate adult.

2.1.2.3 ***Right to be assisted with a lawyer***

Article 40 §2(b)(ii) UNCRC stipulates that every child that allegedly has infringed the penal law should at least

> 'have legal or other appropriate assistance in the preparation and presentation of his or her defence.'

A critical reading of this provision shows that the State Parties are not obliged to ensure access to a lawyer from the first step of the proceedings, which is the police questioning.

However, pressure can be considered as - even unintentionally - inherent in police interrogations. Analysis reveals that the presence of a parent only does not restrain the coercive circumstances. Parents do not tend to urge their children to assert their rights against self incrimination.[236] This finding is material to the argument that lawyers are needed from the stage of police questioning.

Furthermore, from psychological research and ECtHR case law, it is clear that children have a difficulty understanding legal language and cannot be expected to know or appreciate their rights.

From *Panovits v. Cyprus*, it is clear that the only presence of a parent does not suffice to protect the child against unlawful pressure during police interrogation.[237] The *Adamkiewicz* case demonstrates that neither the only presence of a psychologist, without a parent or lawyer, forms an adequate protection.[238]

At last, the European Union opens the door in its proposal for a directive on the right of access to a lawyer in criminal proceedings. The European Commission states that

> 'irrespective of any deprivation of liberty, access to a lawyer must be granted upon questioning'.[239]

---

[234] Preamble (§27) of the directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

[235] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §62.

[236] T. GRISSO and C. POMICTER, "Interrogations of Juveniles. An Empirical Study of Procedures, Safeguards, and Right Waiver", *Law and Human Behavior*, 1977, vol. 1, 340.

[237] Cfr. Part III, Chapter 2.1.1.2.

[238] Cfr. Part III, Chapter 2.1.1.2.

[239] Proposal for a directive of the European Parliament and the of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011)326, 8 June 2011, §20.

A fortiori, this applies to minors.

It can be concluded that an underage person, who is being interrogated by the police about an alleged offence, needs the automatic assistance of a lawyer in order to make them aware of and explain their rights (such as the right to remain silent). That lawyer needs to advise the child promptly in a comprehensible way, taking into account the age and cognitive abilities of the child concerned.

The assistance of a lawyer should be granted automatically, without the need to ask for it by the minor him or herself. Especially, because minors cannot be considered to think, reason and assess possible consequences, in case they are only informed of his or her right to a lawyer.[240]

For a minor who is being interrogated by foreign police, the best scenario is to be assisted by a lawyer who speaks the foreign language as well as the mother tongue of the juvenile concerned. This way, the confidentiality of the attorney-client relationship can be assured a 100 percent, because there is no interpretation needed for the conversation between the child and his attorney.

That the child's lawyer speaks the mother tongue of the child, may also increase the trust of the child in his or her lawyer. The attorney-client relationship is of crucial importance for the development of a defence.[241] Research has shown that children do not always trust entirely their attorney without any suspicion.[242] However, the perception of a young person towards his or her lawyer, strongly depends on the quality of the representation. Study results reveal that children are more satisfied with, and have more trust in, a lawyer that spends more time in direct contact with them.[243]

In order to achieve quality lawyers assisting and representing children, lawyers should have a training that is focused on working with children in conflict with the law. Because a lawyer, who is assisting a child while questioning by the police, does not only need to explain the child's rights, but also needs to be able to talk to the child and to mitigate his or her feelings of fear, pressure and wish to go home.

2.1.2.4 ***Right to be accompanied by a confidant or another appropriate adult***

The Californian Supreme Court in the U.S.A. once said that a child's call for help from the only person to whom he normally looks, which is a parent or guardian, may not be underestimated. It is the normal reaction of an underage suspect who is in trouble with the law.[244]

---

[240] Also see: Part III, Chapter 2.1.2.5.

[241] T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 70.

[242] B.C. FELD, "Juveniles' Waiver of Legal Rights: Confessions, *Miranda*, and the Right to Counsel", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 125-126; C.S. PIERCE and S.L. BRODSKY, "Trust and Understanding in the Attorney-Juvenile Relationship", *Behavioral Sciences and the Law*, 2002, vol. 20, 89-107.

[243] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 155.

[244] Supreme Court of California, 28 December 1971, no. 15823, People/Burton; C.H. SAYLOR, "Interrogation of Juveniles: The Right to a Parent's Presence", *Dickinson Law Review*, 1972-1973, 543.

The presence (and assistance) of another appropriate adult, next to a lawyer, during police questioning may be necessary to put the minor concerned at ease. Indeed, a parent, guardian, another family member, a good friend or someone else whom the young suspect trusts, may be able to make him or her more relaxed. To a certain extent it is necessary that the child feels relaxed, because it diminishes the risk to false confessions - which are very often the product of an intensive wish to go home. That wish to go home may be mitigated if the child is accompanied by a person that makes them feel comfortable.

However in case the assistance of a lawyer is provided, the Beijing Rules, UNCRC and the Guidelines on Child-Friendly Justice, omit to require in addition the assistance of a confidant of the minor during police questioning, in the case that the assistance of a lawyer is provided. In the Guidelines on Child-Friendly Justice and the UNCRC, the assistance of a confidant of a questioned minor is proposed as an alternative to the assistance of a lawyer. As follows from the foregoing section, it is clear that the assistance of a lawyer is of prime concern and a necessity, with or without the presence of any other assisting adult.

In addition, in the cross-border context of judicial cooperation within the European Union, a possible right for the minor to be accompanied by a confidant encounters with the following obstacles.

The obliged presence of a confidant of the minor being questioned in a foreign Member State, could extremely damage the efficiency of the investigation -which is the main goal of the cross-border cooperation.

For example, an underage, German girl is being questioned by the Belgian police, because she robbed an old lady and stole her purse in a Belgian city nearby the border. The girl made the old lady fall, and the latter died later in the hospital. The German authorities want the Belgian police to do this investigation, because of practical reasons. The girl has been caught red-handed, and other evidence or witnesses can only be found in Belgium nearby the crime scene. However, if the girl needs to be accompanied by a confidant of hers from Germany, this will retard, and thus hamper, the investigation.

Add to the previous example the hypothesis that she travelled to Belgium with a couple of her 'friends' who all have a criminal history, and who helped her committing the offence. If the girl needs to be accompanied by a confidant for the purpose of the legitimacy of the interrogation, according to German law, she might choose one of her friends (of age) as her confidant. That would not be surrealistic, since her parents are in Germany. Obviously, this kind of situations raise doubts about the aim of the proposed right for the underage suspect and about the balance between procedural rights and efficient prosecution.

Whether the assistance of another adult (than a confidant), such as a social worker or psychologist, can be considered as an added value for the foreign police interrogation is a slightly different issue. Firstly, because a social worker or psychologist are more likely to be appointed by the authorities than by the child being questioned. Secondly, it is unlikely that, in every case, there would be found a psychologist or social worker that is able to speak the minor's mother tongue.

That this other adult is appointed by the foreign authorities, and that the minor hardly ever is going to be able to talk with that person in his or her native language, are facts that precisely are likely to hinder the mitigation of the child's feelings of fear, pressure and the wish to go home. It is just another adult in the interrogation room whom the child does not know and

does not understand (directly). It follows that this is rather going to have an intimidating effect than a comforting one.

Therefore, the assistance of another appropriate adult only has a doubtful added value, especially because the child is already assisted with a lawyer. A lawyer that is trained to work with children in conflict with the law and therefore should be able to mitigate the minor's feelings of fear, pressure and wish to go home.

Moreover, the competence of the European Union is only to establish *minimum* rules as regards procedural rights.[245] Obviously, it is open to the Member States to foresee in an obliged assistance of another adult, next to a lawyer.

It can be concluded that the right for a minor to be accompanied with a confidant or another adult -next to a lawyer- during police interrogation should not be established as a minimum procedural right in the context of judicial cooperation in criminal matters.

2.1.2.5 *(In)ability to waive rights*

Research shows that underage persons, and especially persons under the age of 16, often have a difficulty completely understanding their rights.[246] In addition, minors tend to confess more often than adults, as they are

> 'less capable than adults of controlling their impulses and appreciating the consequences of their actions'.[247]

It follows that children cannot be expected to think and reason as adults do, because they cannot physically.[248]

However, for a waiver (by a minor) of important rights under article 6 ECHR to be accepted, the ECtHR only requires that

> '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'.[249]

Striking is that minors are particularly unable to appreciate their rights and consequences of their conduct, according to psychological research.

Therefore, as previously mentioned[250], children should be granted access to and the assistance of a lawyer automatically without the need for the child to claim this first. In addition, the minor involved should be unable to waive his or her right of this mandatory defence by a lawyer. Furthermore, a waiver of other rights by an underage person subject to a criminal investigation , can only be accepted if he or she has been assisted with a lawyer, the waiver is written down and signed by the minor him or herself and his or her lawyer.

---

[245] Art. 82 §2 TFEU.
[246] M.W. BROOKS, "Kids Waiving Goodbye to their Rights: An Argument Against Juveniles' Ability to Waive their Right to Remain Silent During Police Interrogations", *George Mason Law Review*, 2004-2006, 235.
[247] M.W. BROOKS, "Kids Waiving Goodbye to their Rights: An Argument Against Juveniles' Ability to Waive their Right to Remain Silent During Police Interrogations", *George Mason Law Review*, 2004-2006, 235.
[248] J.K. KENNETH, "Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights", *Wisconsin Law Review*, 2006, 435.
[249] ECtHR 11 December 2008, no. 4268/04, Panovits/Cyprus, § 68.
[250] Part III, Chapter 2.1.2.3.

2.2 Pre-trial detention

Next to juveniles' vulnerability during police interrogation, minors are also more vulnerable than adults during pre-trial detention. Psychological and criminological research on the vulnerability of juveniles - particularly compared to adults - in pre-trial detention, is rather rare. Nevertheless, from the policy of the Council of Europe, the case law of the ECtHR and the UNCRC it is clear that specific attention should go to juveniles in police custody.

2.2.1 Analysis of weakness

It goes without saying that, in general, children are still going through their growth until they reach the age of 18. Precisely the fact that they are still developing -physically and mentally- to full grown-ups, distinguishes them from adults. Juveniles have specific needs, such as educational, social and family needs, which are of major concern for the development of children.

2.2.1.1 *Educational needs*

At first, when a minor is held in police custody, he or she is temporarily excluded from school. Analysis reveals that

> 'school rejection contributes powerfully to the social exclusion that many juveniles feel, and consequently, those experiences propel them towards the company of other antisocial or excluded peers.'[251]

A minor who drops out of school, risks to face decreased job opportunities later on. In addition, the fact that charges are dropped or that the involved juvenile is acquitted in a later stage of the proceedings, does not always counter that risk.[252]

2.2.1.2 *Mental health needs*

Furthermore, deprivation of liberty obviously is a very stressful incident for a child. Not only because they are confronted with another environment, but also because their freedom and autonomy is strongly limited in custody. They have an obliged day schedule, they need to live together with other people they do not know before and who have their own issues.[253] Add to this that juveniles, deprived of their liberty, often do not know what is going to happen next. Analysis reveals that juveniles in detention often feel ashamed and anxious.[254] It follows that pre-trial detention often leads to intense emotional reactions. This sometimes goes together with depression and suicide (attempts).[255]

It goes without saying that the fact that one is detained in a foreign state, contributes to one's intense emotional reactions and feelings of fear.

---

[251] P. CHITSABESAN and S. BAILEY, "Mental health, educational and social needs of young offenders in custody and in the community", *Current Opinion in Psychiatry*, 2006, vol. 19, 356-357.
[252] D. TOMASINI-JOSHI and D. KEILLOR, "Protecting Children in Pretrial Detention", Open Justice Society Initiative, 29 March 2012, http://www.opensocietyfoundations.org/voices/protecting-children-pretrial-detention.
[253] V. I. EICHELSHEIM and A. M. VAN DER LAAN, *Jongeren en vrijheidsbeneming*, Meppel, Boom Juridische uitgevers, 2011, 27.
[254] A.M. VAN DER LAAN, L. VERVOORN, C.A. VAN DER SCHANS and S. BOGAERTS, *Ik zit vast*, Meppel, Boom Juridische uitgevers, 2008, 5.
[255] V. I. EICHELSHEIM and A. M. VAN DER LAAN, *Jongeren en vrijheidsbeneming*, Meppel, Boom Juridische uitgevers, 2011, 27.

The feeling they lost grip on their lives, sometimes leads to mental and behavioural disturbance.[256] Research shows that

> 'two thirds of minors in custody meet the diagnosis criteria for one or more psychiatric disorders.'[257]

For example,

> 'a Greek study including youth delinquents aged 13 to 24 years found that three-quarters of them had significant mental health problems. In Holland, 108 minors were assessed before trial, and three-quarters were identified as having at least one psychiatric disorder. Respectively 46% and 17% of these youths met the criteria for two or three psychiatric diagnoses. In a British survey, 75% of young people in penal establishments were described as needing mental health care.'[258]

In addition, research reveals that adolescents are more susceptible to the use of drug, drug abuse and dependence to it.[259] For example,

> 'a Swiss study assessed the alcohol and drug use of 82 male adolescents (44% of which were offenders attending an educational program). Although the greatest proportion of these adolescents used alcohol, results showed that juvenile offenders were more likely to use cannabis. Juvenile offenders also more frequently met the criteria of abuse or dependence to this substance.'[260]

However, it is not clear whether detention of juveniles causes mental issues or whether it is more likely for juveniles with mental disorders to face detention than for juveniles without. In any case, irrespective of the causal connection, research demonstrates that young offenders, faced with deprivation of liberty, do have mental issues. Obviously, also adult offenders in detention generally suffer psychiatric disorders.[261] But precisely because minor offenders are still developing, this may have more severe consequences in their lives. It follows that it is of the highest importance for juveniles to have access to psychological assistance, when needed.

2.2.1.3 ***Physical health needs***

Thirdly, children held in detention are at a heightened risk for abuse, especially if they are detained in adult detention facilities.[262] Therefore, it is of high importance for juveniles to have access to medical care and psychological assistance.

---

[256] V. I. EICHELSHEIM and A. M. VAN DER LAAN, *Jongeren en vrijheidsbeneming*, Meppel, Boom Juridische uitgevers, 2011, 27.
[257] D. GISIN, D.M. HALLER, *et. al.*, "Mental health of young offenders in Switzerland: Recognizing psychiatric symptoms during detention", *Journal of Forensic and Legal Medicine*, 2012, vol. 19, 332-336.
[258] D. GISIN, D.M. HALLER, *et. al.*, "Mental health of young offenders in Switzerland: Recognizing psychiatric symptoms during detention", *Journal of Forensic and Legal Medicine*, 2012, vol. 19, 332-336.
[259] D. GISIN, D.M. HALLER, *et. al.*, "Mental health of young offenders in Switzerland: Recognizing psychiatric symptoms during detention", *Journal of Forensic and Legal Medicine*, 2012, vol. 19, 332-336.
[260] D. GISIN, D.M. HALLER, *et. al.*, "Mental health of young offenders in Switzerland: Recognizing psychiatric symptoms during detention", *Journal of Forensic and Legal Medicine*, 2012, vol. 19, 332-336.
[261] E. BLAAUW, "Psychologische problemen van gedetineerden", in P.J. VAN KOPPEN, D.J. HESSING, H.L.G.J. MERCKELBACH and H.F.M. CROMBAG (eds.), *Het Recht van Binnen. Psychologie van het Recht*, Deventer, Kluwer, 2002, 979.
[262] D. TOMASINI-JOSHI and D. KEILLOR, "Protecting Children in Pretrial Detention", Open Justice Society Initiative, 29 March 2012, http://www.opensocietyfoundations.org/voices/protecting-children-pretrial-detention.

2.2.1.4 *Criminal contamination*

Furthermore, the Beijing rules also stress that

> 'the danger to juveniles of "criminal contamination" while in detention [...] must not be underestimated'.[263]

Minors are in particular vulnerable to the negative influences of adult detainees.[264]

Periods spent in juvenile detention may undermine efforts done to reintegrate juveniles. More than that, they can be counterproductive and may even turn juveniles into adult criminals.[265]

2.2.1.5 *Perception of time*

The Guidelines on Child-Friendly Justice of the Council of Europe state that

> 'children have a different perception of time from adults' and that 'the time element is very important for them'.[266]

Also, from the following case law, it is clear that the ECtHR is of the opinion that minor detainees are more vulnerable than adults and that therefore the length of detention should be kept as short as possible. What follows is a brief outline of the relevant case law.

In *Selçuk v. Turkey* in 2006, the ECtHR did not provide any explanation why minors are particularly vulnerable in pre-trial detention, but it is clear that it requires from state authorities to take account of the young age of a detainee. If a minor is involved, the ECtHR generally requires a higher degree of justification from the state authorities to explain why the length of the detention until trial is still within a "reasonable time" as prescribed by art. 5 §3 ECHR.[267]

In 2008, the ECtHR ruled the two most significant judgments in this matter. In *Nart v. Turkey*, it ruled that Turkey had violated art. 5 §3 ECHR, whereas in the *Salduz v. Turkey*, article 6 has been contravened.

In *Nart v. Turkey*, a 17-year-old boy got arrested on the suspicion of being involved in an armed robbery of a small grocery store. An interrogation by the investigating judge followed. Nart was assisted by his lawyer, but was asleep and could only stand up with the help of his co-accused. His lawyer claimed that it would not be appropriate or lawful, in the given circumstances, to take a statement of the boy, but the judge rejected this objection and continued the interrogation. During this interrogation, Nart accepted the charges and admitted that he and the co-accused had stolen from the shop. Subsequently, the judge sent the boy to an adult prison.[268]

In this case, the ECtHR reiterates that

---

[263] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 13.
[264] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 13.
[265] T. HAMMARBERG, "Children should not be treated as criminals", 2 February 2009, http://www.coe.int/t/commissioner/viewpoints/090202_en.asp.
[266] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 35, §118.
[267] ECtHR 10 January 2006, no. 21768/02, Selçuk/Turkey, §34-36.
[268] ECtHR 6 May 2008, no. 20817/04, Nart/Turkey, §5-8.

> 'the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults.'[269]

Also, once more the ECtHR emphasises that the state authorities need to take the young age of the suspect into consideration when ordering detention.[270]

Later on, in the case of *Ipek and others v. Turkey* in 2009, the ECtHR emphasised again that the age of the person in custody is a specific element that needs to be taken into consideration by the state authorities when ordering and maintaining detention. In this case three 16-year-old boys were arrested and were only brought before a judge after three days and nine hours.[271]

The ECtHR repeated that the strict time constraint imposed for detention without judicial control is a maximum of four days. Although 3 days and nine hours, *prima facie*, seem compatible with this requirement, the ECtHR held that

> 'the delayed presentation of the applicants to a judge does not appear to have been sufficiently prompt, within the meaning of [article 5 § 3 ECHR].'[272]

The first argument the ECtHR provides is

> 'the fact that the applicants were minors at the time of their arrest.'[273]

Secondly, the ECtHR adds that

> 'these minors were incarcerated for more than three days in the absence of any safeguards - such as access to a lawyer - against possible arbitrary conduct by the State authorities.'[274]

The ECtHR concluded that, 'especially in view of the applicants' young age', the government of Turkey did not justify sufficiently the length of detention in police custody.[275]

Also in the case *Bouamar v. Belgium*, a 16-year-old boy was detained for 119 days. The ECtHR ruled that the lapses of time during the proceedings

> 'are scarcely compatible with the speed required by the terms of [article 5.4 ECHR].'[276]

At last, in *Korneykova v. Ukraine*, the ECtHR stressed once again that the defendant's age is a very important factor in pre-trial detention questions. Furthermore it reiterates that it should

[269] ECtHR 6 May 2008, no. 20817/04, Nart/Turkey, §31.
[270] ECtHR 6 May 2008, no. 20817/04, Nart/Turkey, §33.
[271] ECtHR 3 February 2009, no. 17019/02 and 30070/02, Ipek and others/Turkey, §36.
[272] ECtHR 3 February 2009, no. 17019/02 and 30070/02, Ipek and others/Turkey, §36.
[273] ECtHR 3 February 2009, no. 17019/02 and 30070/02, Ipek and others/Turkey, §36.
[274] ECtHR 3 February 2009, no. 17019/02 and 30070/02, Ipek and others/Turkey, §36.
[275] ECtHR 3 February 2009, no. 17019/02 and 30070/02, Ipek and others/Turkey, §36.
[276] ECtHR 29 February 1988, no. 9106/80, Bouamar/Belgium, §63.

be used only as a measure of last resort and for the shortest possible period, citing *Selçuk v. Turkey* and *Nart v. Turkey*.[277]

2.2.1.6 *Little knowledge of their rights*

Last but most importantly, minors in detention are less aware of their rights.[278] Especially, in the situation that minors are subject to a criminal investigation in one of the Member States of the European Union that is not his or her home country. This is more than likely to happen in the context of judicial cooperation in criminal proceedings in the European Union. For instance, a 17-year-old Belgian boy commits an offence in Poland, but tries to return to Belgium, afterwards. However, on his way back to Belgium, the German authorities are able to arrest the boy in Germany. The Belgian state wants to start an investigation, and asks the extradition of the boy. In the meantime, the boy is still detained in Germany. In this kind of situation the 17-year-old boy cannot be expected to know what his (procedural) rights are in Germany. This cannot even be expected from an adult suspect, let alone from a underage one. It follows that suspected minors in foreign countries within the European Union are not be able to exercise their rights effectively.

2.2.2 **Corresponding procedural safeguards**

From the foregoing, it follows that children are in a particularly vulnerable position in relation to pre-trial detention. It is clear that the deprivation of a child's liberty seriously interfere with his or her harmonious development and reintegration in society.[279] Therefore, a minor in police custody needs additional safeguards in order to protect him or her against these vulnerabilities.

2.2.2.1 *Right to be assisted with a lawyer*

Because minor detainees cannot be expected to be aware of their rights and thus neither to be able to claim their rights, they need assistance of a lawyer while detained. This statement is supported by the UNCRC, the Guidelines on Child-Friendly Justice, the EU Green Paper on detention and the ECtHR case law.

Article 37(d) UNCRC stipulates that

> 'every child deprived of his or her liberty shall have the right to prompt legal *and* other appropriate assistance [...]'.

The Guidelines on Child-Friendly Justice prescribe that the child should have access to a lawyer whenever he or she is apprehended by the police. They also stipulate that

> 'a child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer *or* one of the child's parents *or*, if no parent is available, another person whom the child trusts.'[280]

---

[277] ECtHR 19 January 2012, no. 39884/05, Korneykova/Ukraine, §44.
[278] D. TOMASINI-JOSHI and D. KEILLOR, "Protecting Children in Pretrial Detention", Open Justice Society Initiative, 29 March 2012, http://www.opensocietyfoundations.org/voices/protecting-children-pretrial-detention.
[279] Green Paper of the European Commission, *Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011)327, Brussels, 14 June 2011, 10.
[280] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 8, §30.

The European Union has already opened the door for the introduction of the right to be assisted with a lawyer in the Green Paper of the European Commission on detention of 2011, by citing article 37 UNCRC.[281]

Also the case law of the ECtHR, and especially *Salduz v. Turkey*, observes that the assistance of a lawyer is needed to protect a minor suspect while in pre-trial detention.

In *Salduz v. Turkey*, a 17-year-old boy got arrested on the suspicion of having participated in an unlawful demonstration in support of an illegal organisation, the PKK. He was also accused of hanging an illegal banner from a bridge. While he was being interrogated without the assistance of a lawyer, he admitted his participation in the demonstration in question. Two days later, he was brought before the public prosecutor and subsequently the investigating judge. To both, the boy retracted his statement to the police and denied to have participated in the demonstration. He explained the investigating judge that he only told the police this because he was under duress. However, the judge remanded him in custody. Only then he could have access to a lawyer.[282]

Not surprisingly, but significantly the ECtHR notes that one of the specific elements of this case was the applicant's age. It emphasised,

> 'having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody [...], the fundamental importance of providing access to a lawyer where the person in custody is a minor.'[283]

2.2.2.2 ***Right to have other appropriate assistance***

Because minor detainees often have mental and/or physical health needs, they also need other appropriate assistance, next to legal assistance.

This is imposed by article 37(d) UNCRC and reiterated in the Green Paper of the European Commission on detention in 2011.[284]

Therefore, while being detained, minors should have the right to see a doctor or psychologist, if they want to. Also the Guidelines on Child-Friendly Justice prescribe that minors should have the right to receive appropriate medical care.[285]

However, the Guidelines on Child-Friendly Justice and the UN Committee on the Rights of the Child go much further than the right to receive adequate medical care. They also prescribe safeguards as the right to education, the right to participate in sports and to leisure time activities, ...[286] Those rights should apply in all cases of detention, and not only in pre-trial detention. Obviously, they are of a higher importance in detention as educational measure

---

[281] Green Paper of the European Commission, *Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011)327, Brussels, 14 June 2011, 10.

[282] ECtHR 27 November 2008, no. 36391/02, Salduz/Turkey, §12-17.

[283] ECtHR 27 November 2008, no. 36391/02, Salduz/Turkey, §60.

[284] Green Paper of the European Commission, *Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011)327, Brussels, 14 June 2011, 10.

[285] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 7, §21.

[286] For more information: General Comment no. 10, Children's rights in juvenile justice, CRC/GC/C/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §89; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 7, §21.

after trial than in pre-trial detention. In any case, pre-trial detention and detention pending trial should be as short as possible, in order to keep possible damages to a strict minimum. Therefore, although the Member States are recommended to implement these rights in national law, it is not needed to introduce these additional rights as a minimum for the purpose of facilitating the judicial cooperation in criminal proceedings within the European Union.

2.2.2.3 *Right to contact family and notification of custody*

To counter a child's family needs, he or she needs to be able to contact his or her family when arrested. As previously mentioned[287], talking with parents and family can indirectly protect a child against intimidating feelings and therefore against false confessions.

The Guidelines on Child-Friendly Justice prescribe that a detained minor needs to be able to contact their parents or a person whom they trust.[288] They add that parents should always be informed of the apprehension of their child, the reason why and they also should be asked to come to the police station, except in exceptional circumstances.[289]

Also the European Union is opening the door to a right to communicate upon arrest. Within the context of the procedural roadmap, the European Union is preparing a proposal for a directive on the right of access to a lawyer and the right to communicate upon arrest.[290] These procedural rights are intended to affect all criminal proceedings: national and cross-border cases, concerning adults and children. It

> 'provides for the right of persons deprived of their liberty in criminal proceedings to communicate as soon as possible upon arrest with one person nominated by them [...], so as to inform him of the detention'.[291]

It adds that

> 'legal representatives of children deprived of their liberty should be notified as soon as possible of the child's custody and the reasons pertaining thereto, unless it is against the best interests of the child. Where it is not possible to communicate with or notify the person designated by the detained person, despite best endeavours to do so [...], the detained is to be informed of the fact that the notification did not occur'.[292]

Obviously, the rights proposed in this directive should be adopted as minimum rules in the context of the judicial cooperation between criminal proceedings within the EU.

---

[287] Cfr. Part III, Chapter 2.1.2.4.

[288] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 8, §28.

[289] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 8, §29.

[290] Proposal for a Directive of the European Parliament and the of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011)326, 8 June 2011.

[291] Proposal for a Directive of the European Parliament and the of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011)326, 8 June 2011, §22.

[292] Proposal for a Directive of the European Parliament and the of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011)326, 8 June 2011, §22.

2.2.2.4 *Measure of last resort and for the shortest appropriate period of time*

Because of a child's educational, social and family needs, and a child's different perception of time as well as the risk of criminal contamination, a child should only be detained as a measure of last resort and for the shortest appropriate period of time.

This safeguard cannot only be found in article 37(b) UNCRC, but also in the Beijing Rules[293], as well as in the Guidelines on Child-Friendly Justice[294]. Also, the European Commission supports this in its Green Paper on detention[295]. Furthermore, the ECtHR often confirms and applies this rule in its case law.[296]

It follows that the EU Member States should be obliged to take this principle into account when detaining minors. This principle should serve as a minimum rule for the Member States in order to increase the necessary mutual trust in judicial cooperation in criminal proceedings.

2.2.2.5 *Right of being kept separately from adults*

Because minors in custody run an increased risk of criminal contamination and abuse, if they are detained together with adults, they should be placed separately.

Article 37(c) UNCRC imposes on the States Parties the obligation to foresee in separate facilities for children from adults. This is adopted by the Council of Europe in the Guidelines on Child-Friendly Justice[297] and by the European Commission in the Green Paper on detention of 2011.[298]

The Committee on the Rights of the Child adds that evidence has shown that the future ability of minors to remain free of crime and to reintegrate is jeopardized if they are being held in custody together with adults.[299] Furthermore, whether or not a child, who turns 18, can stay or needs to be moved to a facility for adults, depends on the best interest of the child concerned, but also on the best interests of younger children in the facility.[300]

It follows that this is of a high importance for the well-being of the child concerned. Therefore, this rule should be introduced as a minimum rule in the context of judicial cooperation in the European Union.

---

[293] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 13 and commentary *in fine*.

[294] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 7, §19.

[295] Green Paper of the European Commission, *Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011)327, Brussels, 14 June 2011, 10.

[296] E.g. ECtHR 10 January 2006, no. 21768/02, Selçuk/Turkey, § 35-36; ECtHR 6 May 2008, no. 20817/04, Nart/Turkey, §31 and §36; ECtHR 19 January 2012, no. 39884/05, Korneykova/Ukraine, §44.

[297] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 7, §20.

[298] Green Paper of the European Commission, *Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011)327, Brussels, 14 June 2011, 10.

[299] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §85.

[300] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007,§86.

3 Chapter 3: Minors' fitness to stand trial

Juveniles are not only vulnerable during police questioning or in pre-trial detention. They also need particular care during their trial in court. This chapter attempts to provide an answer to the question to what extent accused minors are more vulnerable than adults during their trial.

In many legal systems, and in the Council of Europe, 'fitness to stand trial' is a fundamental principle stipulated as a condition for a fair trial. It means that a trial cannot be considered to be fair, if the accused does not understand what is going on. This would preclude his ability to participate effectively in the legal proceedings.[301]

The ECtHR consistently rules in many case law that article 6 ECHR includes the right of an accused to effective participation.[302] Crucial is the following question:

> To what extent can accused minors, because of their young age, be unfit to stand trial, and therefore be hindered to participate effectively in the legal proceedings against them?

3.1 Analysis of weakness

The answer to that question is crucial in order to know what procedural safeguards needs to be established for minors during their trial in court.

S.C. v. United Kingdom is the first case in which the ECtHR provided a real definition of 'effective participation'[303]:

> 'Effective participation [...] presupposes that the accused has a broad *understanding* of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to *follow* what is said by the prosecution witnesses and, if represented, to *explain* to his own lawyers his version of the events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.'[304]

From this case law, it follows that the three main abilities a person ought to have to participate effectively is

- the ability to understand and follow legal proceedings,
- the ability to understand what is at stake for him or her and
- the ability to explain his or her thoughts and opinions.

[301] L. VAN DEN ANKER, L. DALHUISEN AND M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review*, 2011, vol. 7, 120.
[302] L. VAN DEN ANKER, L. DALHUISEN AND M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review*, 2011, vol. 7, 130; ECtHR 23 February 1994, no. 16757/90, Stanford/United Kingdom; ECtHR 16 December 1999, no. 24888/94, V/United Kingdom; ECtHR 16 December 1999, no. 24724/94, T/United Kingdom; ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom.
[303] L. VAN DEN ANKER, L. DALHUISEN AND M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review*, 2011, vol. 7, 128.
[304] ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom, §29.

As mentioned earlier, research has not been done massively on this topic. However, the little psychological and criminological research that has been done on juveniles in court, precisely reveal that young people are susceptible to lack these abilities to a certain extent.[305]

3.1.1 **Difficulty understanding legal proceedings**

Not surprisingly, KILKELLY found that children often struggle to understand proceedings at a number of levels.[306]

Also the ECtHR emphasises the significance of a good understanding of legal proceedings in order to be able to effectively participate in them. In *T* and *V v. United* Kingdom the ECtHR observes that

> 'it is essential that a child charged with an offence is dealt with in a manner which takes full account of his *age, level of maturity and intellectual and emotional capacities*, and that steps are taken to promote his ability to *understand* and participate in the proceedings.'[307]

Study results reveal that most children aged 13 and over are generally capable of accurately identifying the roles of the trial participants and the purpose of the trial at a fundamental level.[308]

Furthermore, understanding legal proceedings, also includes 'knowing [...] that one has certain rights, [and] also knowing what a right is.'[309]

However, as regards the concept and the meaning of a defendant's procedural rights during trial, minors score more badly compared to adults.[310]

GRISSO suggests that, if minors can learn from their attorneys what rights they have and what they mean, this could reduce the deficits in their knowledge. This could make them more competent to participate in their trials. However, research shows that only sixteen-to-nineteen-year-olds are capable to understand well a warning of their rights. It was found that younger children had more difficulties to comprehend certain rights, for example, the right of silence. They thought it meant that they should keep quiet until they were told to talk.[311]

---

[305] What follows is mainly based upon T. GRISSO AND R.G.SCHWARTZ, *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 462 p, since this is the only comprehensive work found on this topic.
[306] U. KILKELLY, *Listening to children about justice: Report of the Council of Europe consultation with children on child-friendly justice*, Strasbourg, 2010, 17-18.
[307] L. VAN DEN ANKER, L. DALHUISEN AND M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review*, 2011, vol. 7, 128; ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, §84; ECtHR 16 December 1999, no. 24888/94, V/United Kingdom, §86.
[308] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 146.
[309] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 148.
[310] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 149.
[311] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 149.

Obviously, a defendant's knowledge and acquisition of information about trials and rights also depends on prior legal experience, intellectual functioning, ethnicity and socioeconomic status and possible mental disorders.[312]

3.1.2 **Appreciating what is at stake**

Besides understanding legal proceedings in general and knowing what a right is and what rights a defendant has, it is crucial to appreciate what is at stake for him or her.[313] Research results demonstrate that

> 'defendants who understand the meaning of events, participants and rights in the trial sometimes fail to appreciate that these actually apply to their circumstances.'[314]

However, a juvenile defendant can only be prepared to attend to and decide carefully about their situations, if they appreciate 'the seriousness of the penalties they face as well as the probability of those penalties happening.'[315]

According to GRISSO there is no empirical evidence that suggests that adolescents are at any greater risk than adults of failing to appreciate the dangers they face during legal proceedings against them.[316]

3.1.3 **Reasoning and communication**

Next to understanding legal proceedings, their rights and what is at stake for them, young defendants also need to be able

> 'to explain to his own lawyers his version of the events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence'.[317]

Psychological research reveals that minor accused persons cannot be expected to explain their lawyer(s) how they would like to have the case handled, because they are technically unable to do so.[318]

Younger adolescents would be at risk of

> 'experiencing difficulties in communication, as a consequence of developmental immaturity, that could interfere with their assistance to counsel.'[319]

---

[312] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 150-152.
[313] ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom, §29.
[314] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 153.
[315] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 153.
[316] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 153-154.
[317] ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom, § 29.
[318] Committee on Psychosocial Aspects of Child and Family Health of the American Academy of Pediatrics "The Child in Court: A Subject Review", *Pediatrics*, 1999, vol. 104, 1147.
[319] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 157.

Furthermore, a juvenile can only make effective decisions, if he or she has developed certain formal cognitive abilities, such as transitive thinking. He or she also needs to be able to think in abstractions and hypotheses.[320] Even if they can, and even if their capacities are comparable to those of adults, emotions, mood and stress have a negative influence on decision making. It follows that minors

> 'will deploy those abilities with less dependability in new, ambiguous, or stressful situations, because the abilities have been acquired more recently and are less well established.'[321]

Also ECtHR explicitly states that ineffective participation still can occur, even when a person is being well assisted by a lawyer. In the case *T* and *V v. United Kingdom*, the ECtHR did not consider that

> 'it was sufficient for the purposes of article 6 §1 that the applicant was represented by skilled and experience lawyers [because] although the applicant's legal representatives were seated [...] "within whispering distance", it is highly unlikely that the applicant would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with them during the trial or, indeed, that, *given his immaturity and his disturbed emotional state, he would have been capable outside the courtroom of cooperating with his lawyers and giving them information for the purposes of his defence*.'[322]

3.1.4 **Minors tried in foreign Member State**

From the examination of juveniles' vulnerability in court during a trial in their own country, it follows that juveniles who are tried in a foreign Member State are even more vulnerable and, thus, need additional safeguards. Not only the language issue, but also different legal and cultural customs could hinder the effective participation of the minor concerned.

3.2 **Corresponding procedural safeguards**

3.2.1 **Right to interpretation and translation**

As expounded previously in this paper, the right to interpretation and translation is of a high importance for a minor who is interrogated or tried in a foreign country.[323]

3.2.2 **Right to be assisted with and represented by a lawyer**

Study results reveal that children under the age of 16 do not fully comprehend and appreciate a warning of their rights only. In addition, children are considered to have difficulties with communication, that may interfere with their assistance to counsel. Therefore, it is not only needed that minors are assisted by a lawyer, but also that they are represented in court by their lawyer.

In 1985, the Beijing Rules has already prescribed that

---

[320] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 157-159. .

[321] T. GRISSO, "What We Know about Youths' Capacities as Trial Defendants", in T. GRISSO and R.G. SCHWARTZ (eds.), *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 158-159.

[322] L. VAN DEN ANKER, L. DALHUISEN AND M. STOKKEL, "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review*, 2011, vol. 7,128; ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, §88; ECtHR 16 December 1999, no. 24888/94, V/United Kingdom, §90.

[323] Details are set out in Part III, Chapter 2.1.2.2.

> 'throughout the proceedings the juvenile shall have the right to be represented by a legal adviser [...]'.[324]

Article 40 UNCRC is less far-reaching. It guarantees that each child alleged or accused of having infringed the penal law should have, at least,

> 'legal *or* other appropriate assistance in the preparation and presentation of his or her defence'[325]

and

> 'the matter determined [...]by [...] impartial authority or judicial body in a fair hearing [...] in the presence of legal *or* other appropriate assistance [...]'.[326]

A restrictive reading of these provision may lead to the interpretation that it is not even required that the child has legal assistance during trial.

The Committee on the Rights of the Child confirms and refines this interpretation. It says that other appropriate assistance is allowed as an alternative, e.g. a social worker. But from this person, it is required that he or she has sufficient understanding of the legal aspects of the proceedings and that he or she is trained to work with children who infringed the law. On the other hand, the Committee on the Rights of the Child does recommend 'adequate trained legal assistance, such as expert lawyers or paralegal professionals'.[327] It follows that children who have the assistance of their parents only in the preparation and presentation of their defence are not protected sufficiently. Since most of the parents do not have adequate knowledge of the legal proceedings, nor are they trained to work with children in conflict with the law.

The Council of Europe goes one step further by recommending in its Guidelines on Child-Friendly Justice that

> 'children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties'.[328]

In a couple of paragraphs further, the need is reiterated for an independent representative to represent the views and interests of the child, in cases with conflicting interests between parents and children.[329]

Striking, however, is that article 6 §3(c) ECHR in any case guarantees legal assistance as a requisite for a fair trial. It is self-evident that this applies, *a fortiori*, to minors.

---

[324] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 15, §1.
[325] Art. 40 §2(b)(ii) UNCRC.
[326] Art. 40 §2(b)(iii) UNCRC.
[327] General Comment no. 10, children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §49.
[328] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 8, §37.
[329] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 9, §42.

Also, the European Commission intends to introduce a right of access to a lawyer in all criminal proceedings.[330]

Therefore, the right for a minor to be assisted and represented by a lawyer during trial, should be a minimum rule in the context of judicial cooperation in criminal proceedings within the European Union.

3.2.2.1 *Free of charge*

In addition, article 6 ECHR says that the legal assistance should be given free of charge, if the person charged with a criminal offence 'has not sufficient means to pay for [it]', and if 'the interest of justice so requires'.[331]

The right of access to a lawyer, as proposed by the European Commission, only requires that the domestic legal aid regimes are in line with the EU Charter and the ECHR and that

> 'Member States may not apply less favourable conditions to legal aid covering instances where access to a lawyer is granted under this Directive, compared to instances where access to a lawyer was already available under national law'.[332]

The Guidelines on Child-Friendly Justice recommend the states to assure children access to free legal aid, under the same or more lenient conditions as adults.[333]

Also the Beijing Rules are considered to be rather weak with regard to the free legal aid for minors throughout the proceedings. Since juveniles' right to apply for free legal aid is attached to the condition that 'there is a provision for such aid in the country.'[334]

Although the Committee on the Rights of the Child is rather indifferent to the type of assistance provided for minors in the preparation and presentation of their defence, it does require that whatever assistance is provided, it should be free of charge.[335]

In contrast with what the Guidelines on Child-Friendly Justice stipulate[336], a child's right to free legal aid should **not** be based upon the financial situation of the parents or the child him or herself, in order to be effective in practice. The following explains why.

If, according to the national system of legal aid, the parents have sufficient financial means and this results in the exclusion of the child from free legal aid, the child is totally dependent on his or her parents to pay a lawyer to defend him or her. There is nothing to worry about, assuming that parents always act in the best interest of the child. But we cannot deny that this is not always the case. Also, an alleged minor offender may have his or her parents as

[330] Art. 3 Proposal for a Directive of the European Parliament and the of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011)326, 8 June 2011.
[331] Art. 6 §3(c) ECHR.
[332] Art. 12 Proposal for a Directive of the European Parliament and the of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011)326, 8 June 2011.
[333] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 9, §38.
[334] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 15, §1.
[335] General Comment no. 10, children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §49.
[336] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 33, §102.

opponents in court if the offence has been committed against (one of) the child's parent(s). Particularly, in these situations it is very important that children have the right to free legal aid and have the capacity to actually exercise this right independently from his or her parents.

Imposing that the right to free legal aid is dependent on the financial means of the child his or herself is neither a good idea, largely because of the same reason. However, if the child is supposed to have sufficient financial means, according to the legal-aid-system, to pay an attorney him or herself, other problems may arise. For example, in Belgium, a child has the right to possess money and is entitled to certain rights, but he or she has not necessarily the full legal capacity, needed to exercise his or her rights. If the child wants to spend his or her money on something, he or she usually needs a parental approval for the transaction. So, if the child wants to spend his or her money on a lawyer to defend him or her in court, the parents will need to confirm this. Also in this situation, the child depends on his or her parents. Supposing the child has committed the offence against his or her parents, and he or she does not qualify for free legal aid, the right to legal aid cannot be guaranteed, since the child and the parents will be opponents in court.

In general, there can also be a discrimination issue if the right to free legal aid would be dependent on the condition of insufficient financial means of the parents or the child him or herself. Because, as soon as the parents or the child reach the specified minimum financial means, as a result of which they are excluded from the right to free legal aid, the child is directly or indirectly dependent on his or her parents to pay a lawyer. This is not the case when the child (or his or her parents) has/have insufficient financial means, because they have the right to free legal aid, independently from the holder(s) of the parental responsibility.

Therefore, every under age alleged offender needs to have access to free legal aid, independently from the holder(s) of the parental responsibility. Only in this way, the right to legal aid will be guaranteed and effective in practice.

3.2.2.2 *Professional requirements*

Furthermore, the Guidelines on Child-Friendly Justice insist on introducing professional requirements for the lawyers representing children.

They recommend a system of specialised youth lawyers who are trained and skilled in children's rights, and who followed an 'in-depth training' and who are capable of communicating with children at their level of understanding.[337] Youth lawyers should not bring forward what he or she thinks is in the best interest of the child, but should defend the child's views and opinions.[338] In addition, a child's lawyer needs to provide the child with all necessary information and explanations concerning possible consequences of the child's views and/or opinions. Also, they should seek the child's informed consent on the best strategy to use.[339]

3.2.3 **Right to be accompanied by another appropriate adult**

From the foregoing, it is clear that children should have the right to be assisted and represented by a lawyer during their trial. However, from case law of the ECtHR, it follows

[337] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 9 and 33, §39, §103 and §104.
[338] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 9 and 33, §40 and §104.
[339] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 33, §104.

that assistance and representation by a lawyer may not suffice to guarantee the child effective participation in the proceedings and, thus, a fair trial.

In *T.* and *V. v. United* Kingdom, the ECtHR rules that the right to a fair trial was violated, although the children were assisted and represented by skilled lawyers. The violation was caused by the intimidating and inhibited feelings of the child that hampered them to communicate with their lawyers.[340]

In *S.C. v. United Kingdom*, the ECtHR rules that effective participation requires that the child is assisted by a social worker or a friend, if necessary for the child in order to 'understand the general thrust of what is said in court'.[341]

The UNCRC foresees in the right for the child to have appropriate assistance during trial, but is indifferent whether this is legal or other appropriate assistance.[342] The Bejing Rules, however, observe that

> 'whereas legal counsel and free legal aid are needed to assure the juvenile legal assistance, the right of the parents or guardian to participate [...] should be viewed as general psychological and emotional assistance to the juvenile - a function extending throughout the procedure'.[343]

Also the Guidelines on Child-Friendly Justice recommend a right for the child

> 'to be accompanied by their parents or, where appropriate, an adult of their choice, unless a reasoned decision has been made to the contrary in respect of that person'.[344]

The Committee on the Rights of the Child mainly focuses on the free character of whatever assistance is provided and on the professional requirements of persons assisting minors in and out of court. They must have

> 'sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law'.[345]

From the ECtHR case law it is clear that children need to be entitled to appropriate assistance, in addition to legal assistance, in order to guarantee a fair trial. As the persons assisting the child need to make the child understand what is happening, that person needs to be trained to work with children in conflict with the law. In addition, as previously explained[346], it is necessary that whatever assistance is provided for the child, this must be free of charge.

Therefore, the right to be assisted -during trial- with another appropriate adult of the child's choice who is trained to work with children is essential and should be guaranteed free of

---

[340] ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, §88; ECtHR 16 December 1999, no. 24888/94, V/United Kingdom, §90.
[341] ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom, §29.
[342] Art. 40 §2(b)(iii) UNCRC.
[343] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 15 and commentary.
[344] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 10, §58.
[345] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §49.
[346] Cfr. Part III, Chapter 3.2.2.1.

charge in criminal proceedings as a condition for judicial cooperation within the European Union.

3.2.4 **Right to be tried by a specialist tribunal**

In *S.C. v. United Kingdom*, the ECtHR goes one step further by observing that children need to be tried in a specialist tribunal.[347] What should be understood by a 'specialist tribunal' is essential, however, it is not refined by the ECtHR.

To the extent that Member States would be obliged to create a completely separate court from adults, for the criminal proceedings against underage persons, this would have a great impact on the national criminal legal system of the Member States. Especially, because in many Member States, the age of criminal responsibility is often lower than the age of majority. These Member States precisely aim to prosecute underage alleged offenders, that are older than the age of criminal responsibility, according to adult criminal law. Furthermore, it must not be forgotten that in the case where the ECtHR ruled this, the boy concerned was only 11, whereas this paper aims to propose certain minimum procedural rights in the context of judicial cooperation and thus to protect minors that has reached the age of criminal responsibility. Because of these reasons, it is not feasibly nor needed to align the policy with regard to this topic in all Member States, in order to achieve mutual trust in the context of judicial cooperation.

However, the ECtHR case law serve as a guide for the introduction of procedural rights on the level of the European Union. It follows that the ruling in *S.C. v. United Kingdom* cannot be disregarded. Furthermore, yet in 1987 the Council of Europe has recommended to avoiding referring minors to adult courts, where juvenile court exist.[348] Therefore, 'a specialist tribunal' can be interpreted as a tribunal, consisting of magistrates specializing in cases concerning juveniles, that takes into account the child's age, maturity and special needs.

The Beijing Rules only say that the proceedings need to be

> 'conducive to the best interests of the juvenile and [that they need to] be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely'.[349]

The Committee on the Rights of the Child adds that this may require 'modified courtroom procedures and practices', taking into account the child's age and maturity.[350]

Because 'taking into account the child's age, maturity and special needs' is too vague, it is needed to introduce more concrete safeguards in order to guarantee a fair trial. In the Guidelines on Child-Friendly Justice, the Council of Europe recommends its Member States to organise the proceedings in a child-friendly way, by means of creating a child-friendly environment and the use of child-friendly language. In short, it is recommended that

- 'before the proceedings begin, children should be familiarised with the layout of the court, [...] the roles and identities of the officials involved'[351];

[347] ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom, §35.
[348] Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987, 4.
[349] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 14, §2.
[350] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §46.

- ‘language appropriate to children’s age and level of understanding should be used’[352];
- ‘court sessions involving children should be adapted to the child’s pace and attention span: regular breaks should be planned and hearings should not last too long’[353];
- ‘as far as possible, specialist courts (or court chambers), procedures and institutions should be established for children in conflict with the law. This could include the establishment of specialised units within the police, the judiciary, the court system and the prosecutor’s office’.[354]

It is not feasible, nor necessary to establish entirely the last recommendation as a minimum rule in the context of judicial cooperation. However, the first three could actively increase the effective participation of a child in criminal proceedings against him or her. Therefore, only the first three safeguards should be guaranteed in the EU Member States in the context of judicial cooperation in criminal proceedings against minors.

4 Chapter 4: End of trial

The foregoing chapters focused on the weaknesses of minors during pre-trial investigation and during trial in court in order to come to know what corresponding procedural safeguards can protect them against their vulnerabilities. The next two chapters aim to clarify that minors’ vulnerabilities do not disappear when the trial has been finished.

4.1 Analysis of weakness

4.1.1 Perception of time

As previously explained[355], minors have a different perception of time than adults. It is important to handle a case as expeditiously as possible, and not only in the situation that the minor concerned is detained in pre-trial custody or/and pending trial.

The Beijing rules emphasise that

> ‘the speedy conduct of formal procedures in juvenile cases is a paramount concern’.

Because, the longer it takes to finish the proceedings, the more difficult it is for juveniles - intellectually and psychologically- to relate the procedure and the disposition to the offence they committed. As a consequence, the possibly good results of it are at risk.[356]

The Guidelines on Child-Friendly Justice of the Council of Europe confirm that the effectiveness of a possible educational measure can only be ensured if minors are treated rapidly, avoiding undue delay.[357]

---

[351] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 10, §55.
[352] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 10, §56.
[353] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 10, §61.
[354] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 10, §63.
[355] Part III, Chapter 2.2.1.5.
[356] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), A/RES/40/33, General Assembly, 29 November 1985, 20.

4.1.2 **Susceptibility to stigmatisation**

According to the United Nations, children are particularly vulnerable to stigmatisation. Criminological research reveals that the perpetual identification of juveniles as "delinquent" or "criminal" has diverse harmful effects.[358] Criminalisation would undermine efforts done to juveniles for their reintegration into the community and may even be counterproductive and turn juveniles into adult criminals.[359]

Furthermore, also the publication in the mass media of information about the pending case, such as the names of alleged or convicted young offenders, may have detrimental effects. Obviously, suspected or accused minors need protection against this kind of attacks on their integrity in order to protect them against stigmatisation.[360]

4.2 **Corresponding procedural safeguards**

In order to protect suspected, accused and convicted minors, from stigmatisation and attacks on their privacy, and in order to have the most effective results produced out of the proceedings, minors need various safeguards. Member States need to avoid unnecessary delay, and need to protect juveniles' privacy in criminal proceedings, including by means of keeping their records strictly confidential.

4.2.1 **Avoiding unnecessary delay**

Avoiding delay between 'the commission of the offence and the final response to this act' is also recommended by the Committee on the Rights of the Child. Unnecessary delay does not only result in a risk of a decreased pedagogical impact, but also of an increased risk that the child will be stigmatised.[361]

In order to guarantee juvenile (alleged) offenders the right to have their case handled within a reasonable time - thus, without unnecessary delay -, the European Union should implement time limits.[362] Time limits for essential periods in the proceedings, such as 'between the commission of the offence and the completion of the investigation', or between the commission of the offence and 'the final adjudication and decision by the court', have already been suggested by the Committee on the Rights of the Child.[363] The implementation of this kind of time limits would certainly increase mutual trust between the Member States within the context of judicial cooperation.

However, the length of these maximum terms, will depend on the political comprise between the Member States. In any case, they should be shorter than those imposed for adults.[364]

---

[357] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 35, §119.
[358] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 8.
[359] T. HAMMARBERG, "Children should not be treated as criminals", 2 February 2009, http://www.coe.int/t/commissioner/viewpoints/090202_en.asp.
[360] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 8; ECtHR 16 December 1999, no. 24724/94, T/United Kingdom; ECtHR 16 December 1999, no. 24888/94, V/United Kingdom.
[361] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §51.
[362] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §51.
[363] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §52.
[364] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §52.

4.2.2 **Right to have privacy protected**

4.2.2.1 ***Ban on identity-revealing publicity***

Yet in 1985, the Beijing Rules stipulate that in all stages of the proceedings, a minor's right to privacy needs to be respected,

> 'in order to avoid harm being caused to her or him by undue publicity or by the process of labelling'.[365]

This includes an explicit ban on publishing information that may reveal the identity of a juvenile (alleged) offender.[366]

Article 6 §1 ECHR only provides for the ability that

> 'public may be excluded from all of part of the trial, [...] where the interests of juveniles or the protection of the private life of the parties so require [...].'

In *T.* and *V. v. United Kingdom*, the ECtHR observes that

> 'in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his or her feelings of intimidation and inhibition'.[367]

By only saying that a minor's privacy needs to be fully respected at all stages of the proceedings, the UNCRC remains very vague.[368] However, the Committee on the Rights of the Child goes into it in greater depth in its general comment no. 10.

It emphasises the importance to avoid stigmatisation of the juvenile (alleged) offender, and discourages the publicity of identity-revealing information of the child concerned, because this may have an impact on his or her future ability to get education, work, housing, etc. Measures need to be taken in order to guarantee that children are not identifiable. In addition, journalists who violate a child's right to privacy should be sanctioned, possibly with penal law sanctions.[369] More important, the Committee recommends that

> 'court and other hearings of a child in conflict with the law be conducted behind closed doors'.[370]

In the cases *T.* and *V. v. United Kingdom*, the ECtHR observes that the general interest in the open administration of justice also can be satisfied 'by a modified procedure providing for

---

[365] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 8 §1.
[366] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 8 §2.
[367] ECtHR 16 December 1999, no. 24888/94, V/United Kingdom, §87; ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, §85.
[368] Art. 40 §2(b)(vii) UNCRC.
[369] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §64.
[370] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §66; General Comment no. 12, The right of the child to be heard, CRC/C/GC/12, Geneva, 1 July 2009, §61.

selected attendance rights and judicious reporting'.[371] The fact that the children had a public hearing is considered as an element that contributed to the violation of article 6 §1 ECHR.

Therefore, the European Union needs to impose the right to private hearings, including a trial behind closed doors and a ban on identity-revealing information in the press on the child concerned.

4.2.2.2 ***Records***

The Beijing Rules, the Committee on the Rights of the Child, as well as the Council of Europe in its Guidelines on Child-Friendly Justice, recommend that records of juvenile offenders are kept strictly confidential and are not being used in adult proceedings in subsequent cases involving the same offender.[372]

It aims to promote the reintegration within society[373] of the child concerned and to avoid stigmatisation and/or prejudgements.[374]

The Committee refines that this requires of

> 'all professionals involved in the implementation of the measures taken by the court [...] to keep all information that may result in the identification of the child confidential in all their external contacts'.[375]

The Guidelines on Child-Friendly Justice add that

> 'criminal records of children should be non-disclosable outside the justice system on reaching the age of majority'.[376]

It follows that, as previously mentioned, a juvenile's privacy should be protected in all stages of the proceedings, and also after the proceedings.

Therefore, also these recommendation should be taken into account by the European Union for the purpose of mutual trust between the Member States in the context of judicial cooperation in criminal proceedings involving minor alleged offenders.

---

[371] ECtHR 16 December 1999, no. 24888/94, V/United Kingdom, §87; ECtHR 16 December 1999, no. 24724/94, T/United Kingdom, §85.

[372] United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 21; General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §66; Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 11, §83.

[373] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 11, §83.

[374] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §66.

[375] General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007, §66.

[376] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum, 17 November 2010, 11, §83.

5 Chapter 5: Post-trial

5.1 The right to have an imposed penalty/measure executed in Member State of residence

Analysis reveals that there is an international and European consensus about the main objectives of juvenile justice: education, social (re)integration and prevention of re-offending.[377] In order to achieve an effective reintegration of a juvenile offender, special measures are needed in the context of judicial cooperation within the European Union. The following explains why and how.

Especially in the context of judicial cooperation within the European Union, it occurs that minors are being tried in another Member State than the Member State of residence or nationality.

If the foreign judge imposes an educative measure or a criminal penalty, and the involved minor needs to carry out this in the foreign country, his or her chances to rehabilitation and re-integration are reduced terribly. At least, in the situation where there are no strong ties between the juvenile and the foreign prosecuting state (and state of execution). Therefore, in order to achieve an effective re-integration and in order to respect the right to family life, also minors (next to adults) should be able to execute the imposed penalty or measure in the Member State which they have the strongest and most abiding ties with, and that is likely to be the Member State of residence. This can be the prosecution (and executing) state, the Member State of nationality or another Member State.

It is up to the lawyer of the minor concerned to provide evidence that the latter has strong and abiding ties with the Member State in which he or she wants to execute his or her measure or penalty. Strong and abiding ties with a country can follow from, among others: going to school, having friends and family, being a resident or having a (student) job there, etc. In sum, proof of living and residing. A mandatory motivation in the judgement, that rules to have the measure or penalty executed in another Member State than the prosecuting Member State, could prevent that the execution of measures or penalties are reduced to an export mechanism.[378]

5.2 Right to be assisted with a lawyer

It is self-evident that minors should have the right to appeal under the same conditions, at least, as it applies to adults. Not only to challenge the legality of the deprivation of liberty, but also to challenge the final decision on their case.

A minor, convicted of an offence, can be imposed a penalty or measure, such as community service, or placement in an institution. If this minor, who executes well this imposed measure,

[377] Recommendation of the Committee of Ministers of the Council of Europe to member states on the European Rules for juvenile offenders subject to sanctions or measures, R (2008) 11, 5 November 2008, 2; Recommendation of the Committee of Ministers of the Council of Europe to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, R (2003) 20, 24 September 2003, 1; Recommendation of the Committee of Ministers of the Council of Europe to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987.

[378] Similar considerations, but on transferring prisoners, can be found in G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE and W. DE BONDT, *Cross-border execution of judgments involving deprivation of liberty in the EU*, Antwerpen, Maklu, 2011, 47-55.

and can qualify for conditional or accelerated release[379], he or she should have access to a lawyer.

It follows that a minor does not only need a lawyer during the pre-trial investigation and during trail in court, but also after judgement. A minor should have the right of access to a lawyer until the measure imposed is completed fully and successfully.

This right should especially apply in the context of judicial cooperation within the EU Member States.

For example, a juvenile offender is being tried and convicted in another Member State than the Member State of nationality, but the judge needs to decide in what Member State the execution of the imposed measure is going to take place. If the prosecuting Member State is guaranteed that the juvenile offender has the right of access to a lawyer, also during the execution of the imposed measure in the Member State of residence, this can encourage the judge to impose the execution of the measure in the latter. As explained in the first part of this chapter, execution in the Member State of residence is most likely in the best interest of the minor concerned - as regards reintegration and rehabilitation, unless in the exceptional case that the minor has more strong and abiding ties with the country of trial.

Because it increases the mutual trust among the judicial authorities of the Member States, the right of access to a lawyer until the measure or penalty is completed fully and successfully, should apply as a minimum rule in the context of judicial cooperation within the European Union.

6 Chapter 6: Interim conclusion

In this part, it is examined to what extent minor (alleged) offenders are more vulnerable than adults. The weaknesses of minors are examined in each part of the criminal proceeding by means of forensic psychological and criminological study results.

A critical reader may have observed that the majority of psychological and criminological literature is American, while the aim is to develop European procedural rights that meet the needs of minors in European criminal proceedings. However, this is not problematic at all as the weaknesses and vulnerabilities of minors are considered to be universal rather than local. Neither are the American legal system and criminal proceedings so different from the European ones, as the European Union also includes Member States having a common law system, characterised by adversarial proceedings.

The specific vulnerabilities of minors show what corresponding procedural rights are necessary in order to guarantee minors a fair trial. In this part, specific procedural rights for minors are proposed for each step of the criminal proceedings.

This part has focused on the specific needs of underage (alleged) offenders, and the corresponding procedural rights to meet and counter these needs. Obviously, these specific procedural rights adapted to minor (alleged) offenders need to be supplemented with all basic procedural rights as formulated by the ECHR, because of the following reasons. Firstly, as previously mentioned, the rights covered in the ECHR equally apply to children as they do to adults, although the ECHR omits to mention this explicitly. Secondly, the rights covered in

[379] This possibility is recommended by United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985, 28.

the ECHR are adopted in the UNCRC. Thirdly, although the case law of the ECtHR refines the rights covered in the ECHR for minors, it is not of an enforceable nature. Therefore, the basic procedural rights as formulated in article 3, 5, 6 and 7 of the ECHR should certainly be included in the new instrument of the European Union on procedural safeguards for minors in criminal proceedings.

Conclusion

It has been the aim of this paper to examine to what extent it is needed and feasible to develop European procedural safeguards for minor (alleged) offenders in criminal proceedings.

Various national, international and European instruments already cover procedural rights, including certain rights for children in (criminal) proceedings, or generally focus on children's rights, including certain procedural rights. However, it has become clear that they do not suffice to effectively guarantee minors a fair trial. Especially, in the thoroughgoing and prosecution-oriented judicial cooperation in criminal matters in the European Union, it is highly necessary to introduce common procedural safeguards focused on minors subject to criminal proceedings in the context of judicial cooperation. Firstly, because the national safeguards heavily differ among the Member States, albeit international and European standards. Secondly, because Member States are still failing to comply with article 6 ECHR. As a result, and not surprisingly, the mutual trust which is presupposed for the principle of mutual recognition in the context of judicial cooperation, is in reality not at all as big as presumed. The current lack of common standards with respect to procedural rights for minors in criminal proceedings in the European Union, decreases the mutual trust and hinders judicial cooperation between the Member States. Therefore, it is highly necessary to develop such procedural safeguards at the level of the European Union.

The examination to what extent it is feasible for the European Union to establish common procedural rights for minors has shown what added value the European Union possesses to develop these rights, as well as what are its limitations. Because the feasibility mainly depends on three criteria -being the political willingness, competence and imposing and enforcing powers, each of these criteria are analysed in the second part of this paper.

The European Union shows a great political willingness to take action in this matter. This is illustrated by the procedural roadmap which includes measure E on special safeguards for vulnerable suspected or accused persons. Although this measure covers vulnerable adults as well as minors, this paper advocates splitting up these two categories of vulnerable persons as they both have specific needs and therefore need a specific approach and different safeguards.

The most significant added value the European Union has, is its strong legislative power, due to its supranational character. In addition, there is no need for unanimity anymore in the context of the area of freedom, security and justice, since the Lisbon Treaty. In any case, however, the eventually issued procedural rights are still going to be a compromise between the Member States, because the rules and practices on safeguards for minors in criminal proceedings heavily differ among the Member States. Obviously, certain Member States are going to strive for a higher protection, whereas others for a lower one.

The procedural roadmap, including measure E forms an excellent basis to launch procedural rights for minor (alleged) offenders, but the European Union's competence is limited in two significant ways by article 82 §2 TFEU. It can only develop minimum rules to facilitate the judicial cooperation in criminal matters and these rules may only apply to cases having a cross-border dimension. Therefore, the European Union should act with great caution to avoid exceeding competence -again- while issuing a new instrument with respect to procedural safeguards for minor suspected or accused persons.

A significant disadvantage of the European Union is the lack of a real sanctioning mechanism in order to enforce the imposed procedural rights. The infringement procedure of the European Commission is not a very enforceable instrument and furthermore, the inability for

aggrieved individuals to seek recovery before the ECJ is problematic. Therefore, the European Union needs to consider a possible supervisory and sanctioning mechanism if it wants the procedural safeguards to be effective in practice.

The third and final part of this paper examined to what extent it is needed for minors in particular to have guaranteed certain procedural safeguards and what procedural safeguards could counter those needs. By means of an analysis of forensic psychological and criminological study results, it has become clear what are the specific weaknesses and needs of minors in each step of the criminal procedure. It can be concluded that minor (alleged) offenders need the following safeguards in the context of judicial cooperation:

1. The right to be informed, from the very first contact with the justice system and in every step of the proceedings, in a language they understand and in detail, independently from their parents and by means of child-friendly material,
    a. of the nature and cause of the accusation against them;
    b. on the procedural system;
    c. of their rights and;
    d. of instruments to exercise their rights.
2. The right to interpretation and translation in every step of the proceedings, by an interpreter who is trained to work with children.
3. The right to be assisted with a lawyer, who is trained to work with children, automatically and free of charge from the moment the minor involved is being interrogated in the context of a criminal investigation and in every next step of the proceeding, and until the measure or penalty imposed is completed fully and successfully.
4. In case of pre-trial detention,
    a. the right to see a doctor or psychologist, if they want to;
    b. the right to communicate as soon as possible upon arrest with one person nominated by them;
    c. the right that legal representatives are notified as soon as possible of their custody and the reasons pertaining hereto, unless this is against the minors' best interests;
    d. minors can only be detained for the shortest appropriate period of time and only as a measure of last resort;
    e. the right to be kept separately from adults.
5. During trial, the right to be accompanied free of charge by another appropriate adult of their choice en who is trained to work with children.
6. Criminal proceedings involving minor (alleged) offenders need to be finished without unnecessary delay. Certain time limits for essential periods in the proceedings need to be imposed on the Member States.
7. The right to have their privacy protected in all stages of the proceedings and afterwards, which means that a ban applies on identity-revealing publicity, that minors are tried behind closed doors and that criminal records are non-disclosable outside the justice system on reaching the age of majority.
8. The right to have an imposed penalty or measure executed in Member State of residence
9. Minors are not able to waive their right of the mandatory defence by a lawyer, and are only able to waive other rights if they are assisted with a lawyer during the waiver, if the latter is written down and signed by the minor him or herself and their lawyer.

Last but not least, next to these specific procedural rights corresponding to the needs of minor (alleged) offenders, the new instrument of the European Union also needs to include the basic procedural rights as formulated in article 3, 5, 6 and 7 of the ECHR.

It has been the purpose of this paper to provide a legally correct and well-founded answer to the questions to what extent it is needed and feasible in the European Union to issue this kind of procedural rights, that might serve as a guide for the European authorities in the development of measure E of the procedural roadmap.

Annex I: Grounds for refusal in the EU instruments on judicial cooperation

13 June 2002 - Framework Decision on the **European arrest warrant** and the surrender procedures between Member States	Art. 3: Grounds for mandatory non-execution of the European arrest warrant The judicial authority of the Member State of execution (hereinafter executing judicial authority) shall refuse to execute the European arrest warrant in the following cases: 1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law; 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State; ***3. 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.*** Art. 4: Grounds for optional non-execution of the European arrest warrant The executing judicial authority may refuse to execute the European arrest warrant: 1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State; 2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based; 3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

	4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law; 5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country; 6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law; 7. where the European arrest warrant relates to offences which: (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.
22 July 2003 - Framework Decision on the execution in the European Union of **orders freezing property or evidence**	Art. 7: Grounds for non-recognition or non-execution 1. The competent judicial authorities of the executing State may refuse to recognise or execute the freezing order only if: (a) the certificate provided for in Article 9 is not produced, is incomplete or manifestly does not correspond to the freezing order; (b) there is an immunity or privilege under the law of the executing State which makes it impossible to execute the freezing order; (c) it is instantly clear from the information provided in the certificate that rendering judicial assistance pursuant to Article 10 for the offence in respect of which the freezing order has been made, would infringe the *ne bis in idem* principle; (d) if, in one of the cases referred to in Article 3(4), the act on which the freezing order is based does not constitute an offence under the law of the executing State; however, in relation to taxes or duties, customs and exchange, execution of the freezing order may not be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State. 2. In case of paragraph 1(a), the competent judicial authority may: (a) specify a deadline for its presentation, completion or correction; or (b) accept an equivalent document; or (c) exempt the issuing judicial authority from the requirement if it considers that the information provided is sufficient. 3. Any decision to refuse recognition or execution shall be taken and notified forthwith to the competent judicial authorities of the issuing State by any means capable of

	producing a written record. 4. In case it is in practice impossible to execute the freezing order for the reason that the property or evidence have disappeared, have been destroyed, cannot be found in the location indicated in the certificate or the location of the property or evidence has not been indicated in a sufficiently precise manner, even after consultation with the issuing State, the competent judicial authorities of the issuing State shall likewise be notified forthwith. ➔ ***No exception because of the young age of the person involved***
24 February 2005 - Framework Decision on the application of the principle of **mutual recognition to financial penalties**	Art. 7: Grounds for non-recognition and non-execution 1. The competent authorities in the executing State may refuse to recognise and execute the decision if the certificate provided for in Article 4 is not produced, is incomplete or manifestly does not correspond to the decision. 2. The competent authority in the executing State may also refuse to recognise and execute the decision if it is established that: (a) decision against the sentenced person in respect of the same acts has been delivered in the executing State or in any State other than the issuing or the executing State, and, in the latter case, that decision has been executed; (b) in one of the cases referred to in Article 5(3), the decision relates to acts which would not constitute an offence under the law of the executing State; (c) the execution of the decision is statute-barred according to the law of the executing State and the decision relates to acts which fall within the jurisdiction of that State under its own law. (d) the decision relates to acts which: (i) are regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State or in a place treated as such, or (ii) have been committed outside the territory of the issuing State and the law of the executing State does not allow prosecution for the same offences when committed outside its territory; (e) there is immunity under the law of the executing State, which makes it impossible to execute the decision; ***(f) the decision has been imposed on a natural person who under the law of the executing State due to his or her age could not yet have been held criminally liable for the acts in respect of which the decision was passed;*** (g) according to the certificate provided for in Article 4, the person concerned (i) in case of a written procedure was not, in accordance with the law of the issuing State, informed personally or via a representative, competent according to national law,

	of his right to contest the case and of time limits of such a legal remedy, or (ii) did not appear personally, unless the certificate states: - that the person was informed personally, or via a representative, competent according to national law, of the proceedings in accordance with the law of the issuing State, or - that the person has indicated that he or she does not contest the case; (h) the financial penalty is below EUR 70 or the equivalent to that amount. 3. In cases referred to in paragraphs 1 and 2(c) and (g), before deciding not to recognise and to execute a decision, either totally or in part, the competent authority in the executing State shall consult the competent authority in the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay. ➔ ***No ground for refusal because of a lack of certain procedural safeguards, that has contributed to the unfairness of the trial in the issuing Member State, according to the laws of the executing Member State.***
6 October 2006 - Framework Decision on the application of the principle of **mutual recognition to confiscation orders**	Art. 8: Reasons for non-recognition or non-execution 1. The competent authority of the executing State may refuse to recognise and execute the confiscation order if the certificate provided for in Article 4 is not produced, is incomplete, or manifestly does not correspond to the order. 2. The competent judicial authority of the executing State, as defined in the law of that State, may also refuse to recognise and execute the confiscation order if it is established that: (a) execution of the confiscation order would be contrary to the principle of ne bis in idem; (b) in one of the cases referred to in Article 6(3), the confiscation order relates to acts which do not constitute an offence which permits confiscation under the law of the executing State; however, in relation to taxes, duties, customs duties and exchange activities, execution of a confiscation order may not be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain the same types of rules concerning taxes, duties, customs duties and exchange activities as the law of the issuing State; (c) there is immunity or privilege under the law of the executing State which would prevent the execution of a domestic confiscation order on the property concerned; (d) the rights of any interested party, including bona fide third parties, under the law of the executing State make it impossible to execute the confiscation order, including

	where this is a consequence of the application of legal remedies in accordance with Article 9; (e) according to the certificate provided for in Article 4(2), the person concerned did not appear personally and was not represented by a legal counsellor in the proceedings resulting in the confiscation order, unless the certificate states that the person was informed personally, or via his representative competent according to national law, of the proceedings in accordance with the law of the issuing State, or that the person has indicated that he or she does not contest the confiscation order; (f) the confiscation order is based on criminal proceedings in respect of criminal offences which: - under the law of the executing State, are regarded as having been committed wholly or partly within its territory, or in a place equivalent to its territory, or - were committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory; (g) the confiscation order, in the view of that authority, was issued in circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2(d)(iv); (h) the execution of a confiscation order is barred by statutory time limitations in the executing State, provided that the acts fall within the jurisdiction of that State under its own criminal law. 3. If it appears to the competent authority of the executing State that: - the confiscation order was issued in circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Article 2(d)(iii), and - the confiscation order falls outside the scope of the option adopted by the executing State under Article 3(2) of Framework Decision 2005/212/JHA, it shall execute the confiscation order at least to the extent provided for in similar domestic cases under national law. 4. The competent authorities of the executing State shall give specific consideration to consulting, by any appropriate means, the competent authorities of the issuing State before deciding not to recognise and execute a confiscation order pursuant to paragraph 2, or to limit the execution thereof pursuant to paragraph 3. Consultation is obligatory where the decision is likely to be based on: - paragraph 1, - paragraph 2(a), (e), (f) or (g), - paragraph 2(d) and information is not being provided under Article 9(3),

	or - paragraph 3. 5. Where it is impossible to execute the confiscation order for the reason that the property to be confiscated has already been confiscated, has disappeared, has been destroyed, cannot be found in the location indicated in the certificate or the location of the property has not been indicated in a sufficiently precise manner, even after consultation with the issuing State, the competent authority of the issuing State shall be notified forthwith. ➔ ***No exception because of the young age of the person involved*** ➔ ***No ground for refusal because of a lack of certain procedural safeguards, that has contributed to the unfairness of the trial in the issuing Member State, according to the laws of the executing Member State.***
24 July 2008 - Framework Decision on **taking account of convictions** in the Member States of the European Union in the course of new criminal proceedings	Art. 3: Taking into account, in the course of new criminal proceedings, a conviction handed down in another Member State 1. Each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law. 3. The taking into account of previous convictions handed down in other Member States, as provided for in paragraph 1, shall not have the effect of interfering with, revoking or reviewing previous convictions or any decision relating to their execution by the Member State conducting the new proceedings. 4. In accordance with paragraph 3, paragraph 1 shall not apply to the extent that, had the previous conviction been a national conviction of the Member State conducting the new proceedings, the taking into account of the previous conviction would, according to the national law of that Member State, have had the effect of interfering with, revoking or reviewing the previous conviction or any decision relating to its execution. 5. If the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, paragraphs 1 and 2 shall not have the effect of requiring Member States to apply their national rules on imposing sentences, where

	the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings. ➔ ***No exception because of the young age of the person involved*** ➔ ***No ground for refusal because of a lack of certain procedural safeguards, that has contributed to the unfairness of the trial in the issuing Member State, according to the laws of the executing Member State.***
27 November 2008 - Framework Decision on the application of the principle of **mutual recognition to judgments in criminal matters imposing custodial sentences** or measures involving deprivation of liberty for the purpose of their enforcement in the European Union	Art. 9: Grounds for non-recognition and non-enforcement 1. The competent authority of the executing State may refuse to recognise the judgment and enforce the sentence, if: (a) the certificate referred to in Article 4 is incomplete or manifestly does not correspond to the judgment and has not been completed or corrected within a reasonable deadline set by the competent authority of the executing State; (b) the criteria set forth in Article 4(1) are not met; (c) enforcement of the sentence would be contrary to the principle of ne bis in idem; (d) in a case referred to in Article 7(3) and, where the executing State has made a declaration under Article 7(4), in a case referred to in Article 7(1), the judgment relates to acts which would not constitute an offence under the law of the executing State. However, in relation to taxes or duties, customs and exchange, execution of a judgment may not be refused on the ground that the law of the executing State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing State; (e) the enforcement of the sentence is statute-barred according to the law of the executing State; (f) there is immunity under the law of the executing State, which makes it impossible to enforce the sentence; ***(g) the sentence has been imposed on a person who, under the law of the executing State, owing to his or her age, could not have been held criminally liable for the acts in respect of which the judgment was issued;*** (h) at the time the judgment was received by the competent authority of the executing State, less than six months of the sentence remain to be served; (i) the judgment was rendered in absentia, unless the certificate states that the person was summoned personally or informed via a representative competent

	according to the national law of the issuing State of the time and place of the proceedings which resulted in the judgment being rendered in absentia, or that the person has indicated to a competent authority that he or she does not contest the case; (j) the executing State, before a decision is taken in accordance with Article 12(1), makes a request, in accordance with Article 18(3), and the issuing State does not consent, in accordance with Article 18(2)(g), to the person concerned being prosecuted, sentenced or otherwise deprived of his or her liberty in the executing State for an offence committed prior to the transfer other than that for which the person was transferred; (k) the sentence imposed includes a measure of psychiatric or health care or another measure involving deprivation of liberty, which, notwithstanding Article 8(3), cannot be executed by the executing State in accordance with its legal or health care system; (l) the judgment relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory. 2. Any decision under paragraph 1(l) in relation to offences committed partly within the territory of the executing State, or in a place equivalent to its territory, shall be taken by the competent authority of the executing State in exceptional circumstances and on a case-by-case basis, having regard to the specific circumstances of the case, and in particular to whether a major or essential part of the conduct in question has taken place in the issuing State. 3. In the cases referred to in paragraph 1(a), (b), (c), (i), (k) and (l), before deciding not to recognise the judgment and enforce the sentence, the competent authority of the executing State shall consult the competent authority of the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary additional information without delay. ➔ ***No ground for refusal because of a lack of certain procedural safeguards, that has contributed to the unfairness of the trial in the issuing Member State, according to the laws of the executing Member State.***
27 November 2008 - Framework Decision on the application of the principle of **mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions**	Art. 11: Grounds for refusing recognition and supervision 1. The competent authority of the executing State may refuse to recognise the judgment or, where applicable, the probation decision and to assume responsibility for supervising probation measures or alternative sanctions if: (a) the certificate referred to in Article 6(1) is incomplete or manifestly does not correspond to the judgment or to the probation decision and has not been completed or corrected within a reasonable period set by the competent

	authority of the executing State; (b) the criteria set forth in Articles 5(1), 5(2) or 6(4) are not met; (c) recognition of the judgment and assumption of responsibility for supervising probation measures or alternative sanctions would be contrary to the principle of ne bis in idem; (d) in a case referred to in Article 10(3) and, where the executing State has made a declaration under Article 10(4), in a case referred to in Article 10(1), the judgment relates to acts which would not constitute an offence under the law of the executing State. However, in relation to taxes or duties, customs and exchange, execution of the judgment or, where applicable, the probation decision may not be refused on the grounds that the law of the executing State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes or duties, customs and exchange regulations as the law of the issuing State; (e) the enforcement of the sentence is statute-barred according to the law of the executing State and relates to an act which falls within its competence according to that law; (f) there is immunity under the law of the executing State, which makes it impossible to supervise probation measures or alternative sanctions; ***(g) under the law of the executing State, the sentenced person cannot, owing to his or her age, be held criminally liable for the acts in respect of which the judgment was issued;*** (h) the judgment was rendered in absentia, unless the certificate states that the person was summoned personally or informed via a representative competent according to the national law of the issuing State of the time and place of the proceedings which resulted in the judgment being rendered in absentia, or that the person has indicated to a competent authority that he or she does not contest the case; (i) the judgment or, where applicable, the probation decision provides for medical/therapeutic treatment which, notwithstanding Article 9, the executing State is unable to supervise in view of its legal or health-care system; (j) the probation measure or alternative sanction is of less than six months' duration; or (k) the judgment relates to criminal offences which under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory. 2. Any decision under paragraph 1(k) in relation to offences committed partly within the territory of the executing State, or in a place equivalent to its territory, shall be taken by the competent authority of the executing State only in exceptional circumstances and on a case-by case basis, having regard to the specific circumstances of

	the case, and in particular to whether a major or essential part of the conduct in question has taken place in the issuing State. 3. In the cases referred to in paragraph 1(a), (b), (c), (h), (i), (j) and (k), before deciding not to recognise the judgment or, where applicable, the probation decision and to assume responsibility for supervising probation measures and alternative sanctions, the competent authority of the executing State shall communicate, by appropriate means, with the competent authority of the issuing State and shall, as necessary, ask it to supply all additional information required without delay. 4. Where the competent authority of the executing State has decided to invoke a ground for refusal referred to in paragraph 1 of this Article, in particular the grounds referred to under paragraph 1(d) or (k), it may nevertheless, in agreement with the competent authority of the issuing State, decide to supervise the probation measures or alternative sanctions that are imposed in the judgment and, where applicable, the probation decision forwarded to it, without assuming the responsibility for taking any of the decisions referred to in Article 14(1)(a), (b) and (c). ➔ ***No ground for refusal because of a lack of certain procedural safeguards, that has contributed to the unfairness of the trial in the issuing Member State, according to the laws of the executing Member State.***
18 December 2008 - Framework Decision on the **European evidence warrant** for the purpose of obtaining objects, documents and date for use in proceedings in criminal matters	Art. 13: Grounds for non-recognition or non-execution 1. Recognition or execution of the EEW may be refused in the executing State: (a) if its execution would infringe the *ne bis in idem* principle; (b) if, in cases referred to in Article 14(3), the EEW relates to acts which would not constitute an offence under the law of the executing State; (c) if it is not possible to execute the EEW by any of the measures available to the executing authority in the specific case in accordance with Article 11(3); (d) if there is an immunity or privilege under the law of the executing State which makes it impossible to execute the EEW; (e) if, in one of the cases referred to in Article 11(4) or (5), the EEW has not been validated; (f) if the EEW relates to criminal offences which: (i) under the law of the executing State are regarded as having been committed wholly or for a major or essential part within its territory, or in a place equivalent to its territory; or (ii) were committed outside the territory of the issuing State, and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory;

	(g) if, in a specific case, its execution would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities; or (h) if the form provided for in the Annex is incomplete or manifestly incorrect and has not been completed or corrected within a reasonable deadline set by the executing authority. 2. The decision to refuse the execution or recognition of the EEW pursuant to paragraph 1 shall be taken by a judge, court, investigating magistrate or public prosecutor in the executing State. Where the EEW has been issued by a judicial authority referred to in Article 2(c)(ii), and the EEW has not been validated by a judge, court, investigating magistrate or public prosecutor in the issuing State, the decision may also be taken by any other judicial authority competent under the law of the executing State if provided for under that law. 3. Any decision under paragraph 1(f)(i) in relation to offences committed partly within the territory of the executing State, or in a place equivalent to its territory, shall be taken by the competent authorities referred to in paragraph 2 in exceptional circumstances and on a case-by-case basis, having regard to the specific circumstances of the case, and in particular to whether a major or essential part of the conduct in question has taken place in the issuing State, whether the EEW relates to an act which is not a criminal offence under the law of the executing State and whether it would be necessary to carry out a search and seizure for the execution of the EEW. 4. Where a competent authority considers using the ground for refusal under paragraph 1(f)(i), it shall consult Eurojust before taking the decision. Where a competent authority is not in agreement with Eurojust's opinion, Member States shall ensure that it give the reasons for its decision and that the Council be informed. 5. In cases referred to in paragraph 1(a), (g) and (h), before deciding not to recognise or not to execute an EEW, either totally or in part, the competent authority in the executing State shall consult the competent authority in the issuing State, by any appropriate means, and shall, where appropriate, ask it to supply any necessary information without delay. ➔ ***No exception because of the young age of the person involved***
23 October 2009 - Framework Decision on the application, between Member States of the European Union, of the principle of **mutual recognition to decisions on supervision measures as an alternative to provisional detention**	Art. 15: Grounds for non-recognition 1. The competent authority in the executing State may refuse to recognise the decision on supervision measures if: (a) the certificate referred to in Article 10 is incomplete or obviously does not correspond to the decision on supervision measures and is not completed or corrected within a reasonable period set by the competent authority in the executing State; (b) the criteria laid down in Article 9(1), 9(2) or 10(4) are not met; (c) recognition of the decision on supervision measures

	would contravene the ne bis in idem principle; (d) the decision on supervision measures relates, in the cases referred to in Article 14(3) and, where the executing State has made a declaration under Article 14(4), in the cases referred to in Article 14(1), to an act which would not constitute an offence under the law of the executing State; in tax, customs and currency matters, however, execution of the decision may not be refused on the grounds that the law of the executing State does not prescribe any taxes of the same kind or does not contain any tax, customs or currency provisions of the same kind as the law of the issuing State; (e) the criminal prosecution is statute-barred under the law of the executing State and relates to an act which falls within the competence of the executing State under its national law; (f) there is immunity under the law of the executing State, which makes it impossible to monitor supervision measures; ***(g) under the law of the executing State, the person cannot, because of his age, be held criminally responsible for the act on which the decision on supervision measures is based;*** (h) it would, in case of breach of the supervision measures, have to refuse to surrender the person concerned in accordance with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [6] (hereinafter referred to as the "Framework Decision on the European Arrest Warrant"). 2. In the cases referred to in paragraph 1(a), (b) and (c), before deciding not to recognise the decision on supervision measures, the competent authority in the executing State shall communicate, by appropriate means, with the competent authority in the issuing State and, as necessary, request the latter to supply without delay all additional information required. 3. Where the competent authority in the executing State is of the opinion that the recognition of a decision on supervision measures could be refused on the basis of paragraph 1 under (h), but it is nevertheless willing to recognise the decision on supervision measures and monitor the supervision measures contained therein, it shall inform the competent authority in the issuing State thereof providing the reasons for the possible refusal. In such a case, the competent authority in the issuing State may decide to withdraw the certificate in accordance with the second sentence of Article 13(3). If the competent authority in the issuing State does not withdraw the certificate, the competent authority in the executing State may recognise the decision on supervision measures and monitor the supervision measures contained therein, it being understood that the person concerned might not be surrendered on the basis of a European Arrest Warrant. ➔ ***No ground for refusal because of a lack of certain procedural safeguards, that***

	has contributed to the unfairness of the trial in the issuing Member State, according to the laws of the executing Member State.

Annex II: Nederlandstalige samenvatting

Procedurele waarborgen voor minderjarigen in strafzaken is geen verrassend nieuw onderwerp. Zowel in nationale, Europese als internationale regelgeving wordt hier in zekere mate reeds aandacht aan besteed. Echter, de Europese Unie schijnt hier -tot voor kort- nauwelijks tot geen aandacht aan te besteden. Nochtans blijkt al snel dat de Europese Unie procesrechten voor minderjarigen hard nodig heeft, omwille van de verregaande samenwerking tussen de lidstaten op het vlak van strafvervolging, en de beperkte weigeringsgronden voor de lidstaten.

Er wordt onderzocht in welke mate het haalbaar is om procedurerechten voor minderjarigen in te voeren in de Europese Unie door zowel het huidig beleid als de politieke wil te analyseren, als ook de materiële bevoegdheid en de mogelijkheid om regels op te leggen aan de lidstaten en deze af te dwingen. Voor deze criteria wordt telkens een vergelijking gemaakt tussen de Europese Unie en de Raad van Europa om de meerwaarde van de Europese Unie en eventuele tekortkomingen of beperkingen duidelijk te maken.

Uit de analyse volgt dat de Europese Unie voldoende politieke wil toont om actie te ondernemen, onder andere door de routekaart ter versterking van de procedurele rechten van verdachten en beklaagden die een specifieke maatregel voorziet die focust op kwetsbare verdachten en beklaagden, waaronder minderjarigen. Belangrijk is wel dat de Europese Unie bij de uitwerking van deze procedurele routekaart rekening houdt met de bevoegdheidsbeperkingen uit artikel 82 §2 TFEU. Dit artikel schrijft voor dat de Europese Unie enkel bevoegd is om bepaalde minimumregels uit te vaardigen die tot doel hebben de samenwerking te vergemakkelijken en die (enkel) betrekking hebben op grensoverschrijdende rechtszaken. De grote meerwaarde van de Europese Unie bij de invoering van procedurele rechten, is het krachtig wetgevingsmechanisme dat mogelijk maakt bepaalde regelgeving aan lidstaten op te dringen. Maar het groot nadeel voor de afdwingbaarheid van eventuele procesrechten op niveau van de Europese Unie is dat de deze laatste niet beschikt over controle- en sanctiemechanismen voor de individuele burger die in zijn rechten is geschaad en compensatie wenst te bekomen van de in gebreke blijvende lidstaat.

Verder wordt ook onderzocht in welke mate minderjarigen nood hebben aan procedurerechten in strafzaken. Er wordt beroep gedaan op forensisch-psychologisch en criminologisch wetenschappelijk onderzoek om de specifieke kwetsbaarheden van minderjarigen in elke stap van een strafrechtelijke procedure bloot te leggen. Ook wordt nagegaan in welke mate minderjarigen kwetsbaar zijn, wanneer ze onderhevig zijn aan een buitenlandse strafprocedure, in het kader van de gerechtelijke samenwerking in strafzaken.

Eens de kwetsbaarheden van minderjarigen in strafprocedures duidelijk zijn, wordt nagegaan in welke mate de vooropgestelde waarborgen in verscheidene instrumenten van de Raad van Europa en de Verenigde Naties een antwoord bieden op hun noden. Vervolgens is het de bedoeling om procesrechten voor te stellen die hieraan zijn aangepast en die als minimum moeten worden toegepast in alle lidstaten vooraleer minderjarigen het voorwerp zouden kunnen uitmaken van gerechtelijke samenwerking in strafzaken tussen de lidstaten in de E.U.

Aldus beoogt deze masterproef een gids te zijn voor de Europese autoriteiten in de ontwikkeling van maatregel E van de procedurele routekaart in de Europese Unie.

Bibliography

1) Legal and policy documents

a) United Nations

Convention on the Rights of the Child, A/RES/44/25, General Assembly, 12 December 1989.

General Comment no. 10, Children's rights in juvenile justice, CRC/C/GC/10, Committee on the Rights of the Child, Geneva, 25 April 2007.

General Comment no. 12, The right of the child to be heard, CRC/C/GC/12, Committee on the Rights of the Child, Geneva, 1 July 2009.

Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, A/CONF.87/14/Rev.1, Caracas, 25 August 1980.

United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), A/RES/40/33, General Assembly, 29 November 1985.

b) Council of Europe

Draft Explanatory Memorandum on the Recommendation of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, CM (2003)109, 27 August 2003.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

Fifth negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, Strasbourg, 5 April 2013, http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008_final_report_EN.pdf.

Guidelines of the Committee of Ministers on child-friendly justice and their explanatory memorandum, 17 November 2010, edited 31 May 2011.

Recommendation of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, R (2003) 20, 24 September 2003.

Recommendation of the Committee of Ministers to member states on social reactions to juvenile delinquency, R (87) 20, 17 September 1987.

Recommendation of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, R (2008) 11, 5 November 2008.

Statute of the Council of Europe, London, 1949.

c) European Union

Background note of the Justice and Home Affairs Council, 7-8 June 2012, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/130662.pdf.

Charter of Fundamental Rights of the European Union, 2000.

Communication from the Commission of the European Union, *An EU Agenda for the Rights of the Child*, COM(2011)60, Brussels, 15 February 2011.

Communication from the Commission, *Towards an EU Strategy on the Rights of the Child*, COM(2006)367, Brussels, 4 July 2006.

Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, 2008/675/JHA (OJ 15 August 2008), 24 July 2008.

Council Framework Decision on the application of the principle of mutual recognition to financial penalties, 2005/214/JHA (22 March 2005), 24 February 2005.

Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, 2008/909/JHA (OJ 5 December 2008), 27 November 2008.

Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, 2002/584/JHA (OJ 18 July 2002), 13 June 2002.

Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, 2008/978/JHA (OJ 30 December 2008), 18 November 2008.

Council Framework Decision on the execution in the European Union of orders freezing property or evidence, 2003/577/JHA (OJ 2 August 2003), 22 July 2003.

Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, C83/335 (OJ 30 March 2010), 13 December 2007.

Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

Green Paper of the European Commission, *Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011)327, Brussels, 14 June 2011.

Information from the Council, *The Hague programme on strengthening freedom, security and justice in the European Union*, 2005/C 53 (OJ 3 March 2005).

Notices from the European Council, *The Stockholm programme on an open and secure Europe serving and protecting citizens*, 2010/C 115 (OJ 4 May 2010).

Opinion of the European Economic and Social Committee on the *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, 2012/C 43 (OJ 15 February 2012).

Presidency Conclusions on the Tampere European Council, 15 and 16 October 1999, http://www.europarl.europa.eu/summits/tam_en.htm.

Progress Report of the Council of Europe on the *Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest*, 6 December 2011, http://register.consilium.europa.eu/pdf/en/11/st18/st18215.en11.pdf.

Proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326, 8 June 2011.

Resolution of the Council on a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 2009/C 295 (OJ 4 December 2009), 30 November 2009.

Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing European Community, 2007/C 360 (OJ 17 December 2007), 13 December 2007.

Treaty on the European Union

Treaty on the Functioning of the European Union

2) Case law

a) European Court of Human Rights

ECtHR 11 December 2008, no. 4268/04, Panovits/Cyprus.

ECtHR 2 Mars 2010, no. 54729/00, Adamkiewicz/Poland.

ECtHR 10 January 2006, no. 21768/02, Selçuk/Turkey.

ECtHR 6 May 2008, no. 20817/04, Nart/Turkey.

ECtHR 27 November 2008, no. 36391/02, Salduz/Turkey.

ECtHR 3 February 2009, no. 17019/02 and 30070/02, Ipek and others/Turkey.

ECtHR 19 January 2012, no. 39884/05, Korneykova/Ukraine.

ECtHR 23 February 1994, no. 16757/90, Stanford/United Kingdom.

ECtHR 16 December 1999, no. 24888/94, V/United Kingdom.

ECtHR 16 December 1999, no. 24724/94, T/United Kingdom.

ECtHR 15 June 2004, no. 60958/00, S.C./United Kingdom.

ECtHR 29 February 1988, no. 9106/80, Bouamar/Belgium.

b) European Court of Justice

ECJ 14 December 1971, no. 43-71, Politi s.a.s/Ministery for Finance of the Italian Republic.

c) Other case law

Supreme Court of California 28 December 1971, no. 15823, People/Burton.

3) Doctrine

BONDE, J., "The European Union's Democratic Deficit: How to Fix It?", *The Brown Journal of World Affairs*, 2010-2011, vol. 17, 147-162.

BROOKS, M.W., "Kids Waiving Goodbye to their Rights: An Argument Against Juveniles' Ability to Waive their Right to Remain Silent During Police Interrogations", *George Mason Law Review*, 2004-2006, 219-250.

CAPE E.(ed.), *Suspects in Europe*, Antwerp, Intersentia, 2007, 280 p.

CHITSABESAN, P. and BAILEY, S., "Mental health, educational and social needs of young offenders in custody and in the community", *Current Opinion in Psychiatry*, 2006, vol. 19, 355-360.

Committee on Psychosocial Aspects of Child and Family Health of the American Academy of Pediatrics "The Child in Court: A Subject Review", *Pediatrics*, 1999, vol. 104, 1145-1148.

COSTA, J.P., "On the Legitimacy of the European Court of Human Rights' Judgments", *European Constitutional Law Review*, 2011, 173-182.

DAVIS, H., *Human rights law: directions*, New York, Oxford University Press, 2007, 447 p.

DEHULLU, C., *Van Europese gemeenschappen tot Europese unie: wegwijs in de verdragen*, Leuven, Acco, 2012, 259 p.

DRIZIN, S.A. and LEO, R.A., "The problem of false confessions in the post-DNA world", *North Carolina Law Review*, 2004, vol. 82, 891-1007.

EICHELSHEIM, V.I. and VAN DER LAAN, A.M., *Jongeren en vrijheidsbeneming*, Meppel, Boom Juridische uitgevers, 2011, 238 p.

FUEREA, A., "Legal Personality and Powers of the European Union", *Lex ET Scientia International Journal*, 2010, 204-212.

GISIN, D., HALLER, D.M., *et. al.*, "Mental health of young offenders in Switzerland: Recognizing psychiatric symptoms during detention, *Journal of Forensic and Legal Medicine*, 2012, vol. 19, 332-336.

GRISSO, T. and POMICTER, C., "Interrogations of Juveniles. An Empirical Study of Procedures, Safeguards, and Right Waiver", *Law and Human Behavior*, 1977, vol. 1, 321-342.

GRISSO, T. and SCHWARTZ, R.G., *Youth on Trial*, Chicago, The University of Chicago Press, 2000, 462 p.

GRONING, L., "A Criminal Justice System or a System Deficit? Notes on the System Structure of the EU Criminal Law", *European Journal of Crime, Criminal Law and Criminal Justice*, 2010, 115-137.

HAMMARBERG, T., "Children should not be treated as criminals", 2 February 2009, http://www.coe.int/t/commissioner/viewpoints/090202_en.asp.

HARDING, C. and BANACH-GUTIERREZ, J.B., "The emergent EU criminal policy: identifying the species", *European Law Review* 2012, vol. 37, 758-770.

KABAN, B. and TOBEY, A.E., "When Police Question Children: Are Protections Adequate?", *Journal of the Center for Children and the Courts*, 1999, vol. 1, 151 -160.

KENNETH, K.J., "Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights", *Wisconsin Law Review*, 2006, 431-478.

KILKELLY, U., *Listening to children about justice: Report of the Council of Europe consultation with children on child-friendly justice*, Strasbourg, 2010, 57 p.

KUIJER, M., "The accession of the European Union to the ECHR: A gift for the ECHR's 60th anniversary or an unwelcome intruder at the party?", *Amsterdam Law Forum*, 2011, 17-32.

LOSEL, F., BOTTOMS A. and FARRINGTON, D.P. (eds.), *Young Adult Offenders: Lost in Transition?*, Oxon, Routledge, 2006, 192 p.

LOWE, D., "Justice and Home Affairs en the Third Pillar of Union: EU Criminal Law - In Through the Back Door", *Journal of Academic Legal Studies*, vol. 2, 30-38.

MARESCEAU, M., *Europees Recht*, Gent, 2010, unpublished, 174 p.

MARGUERY, T.P., "The protection of fundamental rights in European criminal law after Lisbon: what role for the Charter of Fundamental Rights?", *European Law Review* 2012, vol. 37, 444-463.

MCSWEENEY, K.A., "The potential for enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base", *Boston College International & Comparative Law Review*, 1993, vol. 1, 467-496.

MEUWESE, S., BLAAK M. and KAANDORP M., *Handboek Internationaal Jeugdrecht*, Nijmegen, Ars Aequi Libri, 2005, 550 p.

O'MEARA, N., "A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR", *German Law Journal*, 2011, 1813-1832.

OWEN-KOSTELNIK, J., REPPUCCI, N.D. and MEYER, R., "Testimony and Interrogations of Minors. Assumptions about Maturity and Morality", *American Psychologist*, 2006, vol. 61, 286-304.

PEERS, S., *EU Justice and Home Affairs Law*, New York, Oxford University Press, 2011, 983 p.

PEERS, S., *Guide to EU decision-making and justice and home affairs after the Treaty of Lisbon*, London, Statewatch, 2010, 12p.

PIAGET, J., *The moral judgment of the child*, New York, the Free Press, 1965, 498 p.

PIERCE, C.S. and BRODSKY, S.L., "Trust and Understanding in the Attorney-Juvenile Relationship", *Behavioral Sciences and the Law*, 2002, vol. 20, 89-107.

PIRIS, J., *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010, 426 p.

REDLICH, A.D. and GOODMAN, G.S., "Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility", *Law and Human Behavior*, 2003, Vol. 27, 141-156.

SAYLOR, C.H., "Interrogation of Juveniles: The Right to a Parent's Presence", *Dickinson Law Review*, 1972-1973, 543-560.

SIEBERSON, S.C., "Inching Toward EU Supranationalism? Qualified Majority Voting and Unanimity Under the Treaty of Lisbon", *Virginia Journal of International Law*, 2009-2010, 919-995.

SIEBERSON, S.C., "The Treaty of Lisbon and its impact on the European Union's democratic deficit", *Columbia Journal of European Law*, 2007-2008, vol. 14, 445-465.

SPRONKEN, T. and ATTINGER, M., *Procedural Rights in Criminal Proceedings: Existing Level of Safeguards in the European Union*, Maastricht, 12 December 2005, http://arno.unimaas.nl/show.cgi?fid=3891.

SPRONKEN, T. and DE VOCHT, D., "EU Policy to Guarantee Procedural Rights in Criminal Proceedings: "Step by Step"", *North Carolina Journal of International law & Commercial Regulation*, 2011-2012, vol. 37, 436-488.

SPRONKEN, T., VERMEULEN, G., DE VOCHT, D. and VAN PUYENBROECK, L., *EU Procedural Rights in Criminal Proceedings*, 8 September 2009, http://arno.unimaas.nl/show.cgi?fid=16315.

TOMASINI-JOSHI, D. and KEILLOR, D., "Protecting Children in Pretrial Detention", Open Justice Society Initiative, 29 March 2012, http://www.opensocietyfoundations.org/voices/protecting-children-pretrial-detention.

VAN DEN ANKER L., DALHUISEN, L. and STOKKEL, M., "Fitness to Stand Trial: A General Principle of European Criminal Law?", *Utrecht Law Review* 2011, 120-136.

VAN DER LAAN, A.M., VERVOORN, L., VAN DER SCHANS, C.A. and BOGAERTS, S., *Ik zit vast*, Meppel, Boom Juridische uitgevers, 2008, 147 p.

VAN KOPPEN, P.J., HESSING, D.J., MERCKELBACH, H.L.G.J. and CROMBAG, H.F.M. (eds.), *Het Recht van Binnen. Psychologie van het Recht*, Deventer, Kluwer, 2002, 1197 p.

VAN PUYENBROECK, L. and VERMEULEN, G., "Towards minimum procedural guarantees for the defence in criminal proceedings in the EU", *International and Comparative Law Quarterly*, October 2011, 1017-1038.

VANDE LANOTTE, J. AND HAECK, Y., *Handboek EVRM deel I,* Antwerpen, Intersentia, 2005, 949 p.

VERHELLEN, E., *Verdrag inzake de rechten van het kind. Achtergrond, motieven, strategieën, hoofdlijnen*, Anwerpen, Garant, 2000, 252 p.

VERMEULEN G., DE BONDT, G., RYCKMAN, C. and PERSAK, N., *The disqualification triad. Approximating legislation. Executing Requests. Ensuring equivalence,* Antwerpen, Maklu, 2012, 341 p.

VERMEULEN, G.(ed.), *Defence Rights. International and European Developments*, Antwerpen, Maklu, 2012, 138 p.

VERMEULEN, G., "Het Europees Aanhoudingsmandaat", *Tijdschrift voor Mensenrechten*, 2002, 3-7.

VERMEULEN, G., DE BONDT, W. and RYCKMAN, C. (eds.), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in* reality, Antwerpen, Maklu, 2012, 767 p.

VERMEULEN, G., VAN KALMTHOUT, A., PATERSON, N., KNAPEN, M., VERBEKE, P. and DE BONDT, W., *Cross-border execution of judgments involving deprivation of liberty in the EU*, Antwerpen, Maklu, 2011, 310 p.

4) <u>Websites</u>

http://www.coe.int/t/dg3/children/keyLegalTexts (May 2013).

http://www.eucharter.org/home.php?page_id=66 (May 2013).

http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en (May 2013).

http://www.opensocietyfoundations.org/voices/protecting-children-pretrial-detention (May 2013).