

Decisionof the Bundesrat

Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings**COM(2013) 822 final; Council document 17633/13**

The Bundesrat, in its 919th session on 14 February 2014, adopted the following opinion pursuant to §§ 3 and 5 of the EUZBLG (Act on Cooperation between the Federation and the Länder in European Union Affairs):

The proposal in general

1. The Bundesrat welcomes the proposal's objective of reinforcing the rights of children who are suspected or accused in criminal proceedings.
2. It agrees with the Commission that uniform minimum standards throughout Europe concerning the rights of persons suspected or accused in criminal proceedings are essential to securing mutual confidence in the administration of criminal justice in other Member States.
3. The Bundesrat supports the Commission's objective of reinforcing the protection of children suspected or accused in criminal proceedings throughout Europe. It therefore welcomes the Commission's intention to guarantee the core rights and legitimate interests of children and young people under eighteen who are accused in criminal proceedings by agreeing minimum standards for law enforcement. Children must be entitled to additional procedural rights in criminal proceedings to take account of their particular vulnerability. This applies in particular to the right to be present at the court proceedings and the right of a holder of parental responsibility to access to the same proceedings.

In this context particular account must be taken of the fact that it is more difficult for children to understand the significance and course of criminal proceedings and to exercise their rights.

4. The Bundesrat also agrees with the Commission that it makes sense to combine in a single legal instrument the procedural guarantees for children in criminal proceedings.

Articles 6 and 18

5. However, the Bundesrat considers that the right to access to a lawyer provided for in Article 6 of the proposal is formulated too broadly. It has particular concerns about the prohibition on waiving the right of access to a lawyer. It is true that children, being minors, may find it more difficult than adults to understand their situation and the options open to them. However, refusing them and their parents or guardians the right to take a decision on this matter is going too far.

Requiring the children concerned and their parents/guardians to use a lawyer whether they wish to or not, and irrespective of the complexity of the case and the gravity of the offence, seems inappropriate. This statutory requirement both fails to take account of the variety of cases that may be concerned and may also in part fail to serve the legislative objective of reinforcing the procedural rights of children. Support from a public defence lawyer is not necessary in all preliminary and criminal proceedings against minors.

Criminal law relating to minors has an educative function. The objective is to avoid further offences being committed, and at the same time achieve an educative effect on the minors concerned. To allocate a public defence lawyer to every accused or suspected child for all proceedings, even those relating to minor offences and petty misdemeanours, would undermine the educative principle. In many cases the accused child and parents/guardians themselves would regard the involvement of a defence lawyer as excessive or superfluous. This applies in particular to minor offences which do not give rise to a criminal conviction, but are dealt with informally by the public prosecution service.

6. In the numerous cases in which an out-of-court solution is reached (the prosecution service archives the case without consequences or subject to generally minor sanctions), the automatic allocation of a lawyer to minors, with legal aid, seems disproportionate.
7. Furthermore, calling in a public lawyer for the defence, who must first be found, appointed, notified, invited and informed about the case, slows down the proceedings considerably, whereas the prompt dispatch of proceedings is an important factor in the success of the educative effect.

The Bundesrat considers that the right to a lawyer enshrined in Article 6, in conjunction with Article 18 - with the provision of legal aid - should not be supported in its current specific form.

The provision for right of access to a lawyer should be worded in a differentiated fashion, not making such access a universal requirement. This could be achieved

through the insertion of a proportionality clause concerning the complexity of the case, the gravity of the charge and penalty for the alleged offence.

Articles 7 and 8

8. The Bundesrat is in favour of the provision in Article 8(1) of the proposal giving children the right to access to a medical examination to establish whether they have the capacity to face questioning or other investigative or evidence-gathering acts or any measures taken or envisaged against them. This should, however, only apply where the mental and physical condition of the child gives grounds for such examination.
9. Furthermore, binding assessments and medical investigations should, in line with established good practice, be restricted to appropriate cases and appropriate points in the criminal proceedings - e.g. before the detention or imprisonment of a minor.

Re Article 9

10. The Bundesrat also considers that the requirement under Article 9 that, as a rule, any questioning of children must be audio-visually recorded, is too all-encompassing and inappropriate. It increases the investment of time and human resources and is not useful. In particular, it disregards the fact that the child and/or his or her parents/guardians may wish to dispense with audio-visual recording and the additional strain it entails. It also raises the question of how to proceed in cases in which the accused minor has indicated a general willingness to make a statement, but he or she (or his or her parents/guardians) refuses to have the questioning recorded, invoking for, for instance, the right to privacy.
11. What concerns the Bundesrat about the provisions on both the appointment of defence lawyers and the audio-visual recording of questioning is that they are too comprehensive.

Children should not become the passive object of proceedings, but actively participate in them and affect their course. It follows that their wishes and those of their parents/guardians should not be disregarded when such rights are granted. Withholding from them any power to decide on the above points in the course of the proceedings is going too far.

Article 12(2)(b)

12. The Bundesrat would suggest that the provision in Article 12(2)(b) concerning the right of the child to education and training should take account of the length of the detention. If a child is deprived of liberty for only a short period, no suitable training will be available. Educative measures also require a minimum period in which to develop them effectively.

Article 12(2)(c)

13. The Bundesrat is in favour of the provision in Article 12(2)(c) of the proposal for ensuring the effective and regular exercise of the right to family life including the maintenance of family ties, where the child and family members desire this and it serves the well-being of the child.

Article 14

14. Protection of the privacy of accused minors is an important priority and is already comprehensively guaranteed in Germany, *inter alia* by the fact that proceedings of juvenile courts are not held in public.
15. However, a general ban on, for example, using photographs and videos of as yet unidentified suspected minors - for instance as part of an appeal to the public after grievous acts of violence - would disproportionately conflict with public security priorities and the interests of the victims; an insertion should be made in the text of the Directive to explicitly exclude such use from the scope of the ban.

Article 15

16. Where police question a suspect as part of law enforcement measures, it should suffice for one holder of parental responsibility to be informed and have access to the interview, as often - and not only in the case of single parents - only one parent can be contacted or is available.

Article 19

17. The Bundesrat also has concerns about the proposal in so far as Article 19 contains requirements for the specialisation and training of judicial and law enforcement authorities and prison staff. Firstly, it has concerns in terms of legal competence, since Article 82(2)(b) TFEU allows harmonisation only of the rights of individuals in criminal proceedings, i.e. only of those rules of criminal law that directly grant rights to individuals. Organisational requirements, for instance requiring that only professionals specialising in children be used and that they be specially trained, even if they contribute only indirectly to the protection of the children, do not, however, constitute direct rights of individuals involved in criminal proceedings. Article 82(1)(c) TFEU does not give the EU legislative competence to lay down such requirements either. Secondly, it is also inappropriate for the EU to impose binding requirements of this nature on the Member States. It must be left to the Member States to decide how to ensure that the personnel involved in implementing the provisions have the appropriate experience and skills. This applies to both judicial and law enforcement authorities and to the lawyers defending the children. The provisions on this subject should therefore be deleted.

Article 20

18. The data collection provided for in Article 20 will entail considerable administrative and financial costs. This seems disproportionate, as the simple collection of case statistics takes no account of the difference between Member States' different legal systems and traditions and would not therefore provide much useful information. There are better ways to assess the extent to which the proposed Directive's objectives are achieved.

Article 21

19. The provision in Article 21 that the Member States are to bear the costs of assessments, medical examinations and audio-visual recordings irrespective of the outcome of the proceedings may give rise to significant additional budget costs for the judicial and law enforcement systems.

Other

20. The Bundesrat hereby asks the Federal Government to submit to the Commission a request that the proposal for a Directive be reviewed, giving due and sufficient consideration to the interests of fast and effective criminal proceedings, a high level of public security, effective protection of victims and appropriate limits on the additional costs for the public budget.

21. The Bundesrat is transmitting this opinion directly to the Commission.