Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (b) of Article 82(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) The purpose of this Directive is to establish procedural safeguards to ensure that children, meaning persons under the age of 18, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration.

(2) By establishing common minimum rules on the protection of procedural rights of children who are suspects or accused persons, this Directive aims to strengthen the trust of Member States in each other's criminal justice systems and thus to improve mutual recognition of decisions in criminal matters. Such common minimum rules should also remove obstacles to the free movement of citizens throughout the territory of the Member States.

(3) Although the Member States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the International Covenant on Civil and Political Rights, and the UN Convention on the Rights of the Child, experience has shown that this in itself does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(4) On 30 November 2009, the Council adopted a Resolution on a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings[(3)] (‘the Roadmap’). Taking a step-by-step approach, the Roadmap calls for

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the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communicate with relatives, employers and consular authorities (measure D), and special safeguards for suspected or accused persons who are vulnerable (measure E). The Roadmap emphasises that the order of the rights is indicative and thus implies that it may be changed in accordance with priorities. The Roadmap is designed to operate as a whole; only when all its components are implemented will its benefits be experienced in full.

(5) On 11 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme — An open and secure Europe serving and protecting citizens[(4)] (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap by inviting the Commission to examine further elements of minimum procedural rights for suspects and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.

(6) Four measures on procedural rights in criminal proceedings have been adopted pursuant to the Roadmap to date, namely Directives 2010/64/EU[(5)], 2012/13/EU[(6)], 2013/48/EU[(7)] and Directive (EU) 2016/343[(8)] of the European Parliament and the Council.

(7) This Directive promotes the rights of the child, taking into account the Guidelines of the Council of Europe on child-friendly justice.

(8) Where children are suspects or accused persons in criminal proceedings or are subject to European arrest warrant proceedings pursuant to Council Framework Decision 2002/584/JHA[(9)] (requested persons), Member States should ensure that the child's best interests are always a primary consideration, in accordance with Article 24(2) of the Charter of Fundamental Rights of the European Union (the Charter).

(9) Children who are suspects or accused persons in criminal proceedings should be given particular attention in order to preserve their potential for development and reintegration into society.

(10) This Directive should apply to children who are suspects or accused persons in criminal proceedings and to children who are requested persons. In respect of children who are requested persons, the relevant provisions of this Directive should apply from the time of their arrest in the executing Member State.

(11) This Directive, or certain provisions thereof, should also apply to suspects or accused persons in criminal proceedings, and to requested persons, who were children when they became subject to the proceedings, but who have subsequently reached the age of 18, and where the application of this Directive is appropriate in the light of all the circumstances of the case, including the maturity and vulnerability of the person concerned.

(12) When, at the time a person becomes a suspect or accused person in criminal proceedings, that person has reached the age of 18, but the criminal offence was committed when the person was a child, Member States are encouraged to apply the procedural safeguards provided for by this Directive until that person reaches the age

of 21, at least as regards criminal offences that are committed by the same suspect or accused person and that are jointly investigated and prosecuted as they are inextricably linked to criminal proceedings which were initiated against that person before the age of 18.

(13) Member States should determine the age of the child on the basis of the child's own statements, checks of the child's civil status, documentary research, other evidence and, if such evidence is unavailable or inconclusive, a medical examination. A medical examination should be carried out as a last resort and in strict compliance with the child's rights, physical integrity and human dignity. Where a person's age remains in doubt, that person should, for the purposes of this Directive, be presumed to be a child.

(14) This Directive should not apply in respect of certain minor offences. However, it should apply where a child who is a suspect or accused person is deprived of liberty.

(15) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions other than deprivation of liberty in relation to relatively minor offences. That may be the case, for example, in relation to road traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal or referral.

(16) In some Member States certain minor offences, in particular minor road traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides in respect of minor offences that deprivation of liberty cannot be imposed as a sanction, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters.

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

(18) This Directive should be implemented taking into account the provisions of Directives 2012/13/EU and 2013/48/EU. This Directive provides for further complementary safeguards with regard to information to be provided to children and to the holder of parental responsibility in order to take into account the specific needs and vulnerabilities of children.

(19) Children should receive information about general aspects of the conduct of the proceedings. To that end, they should, in particular, be given a brief explanation about the next procedural steps in the proceedings in so far as this is possible in the light of

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the interest of the criminal proceedings, and about the role of the authorities involved. The information to be given should depend on the circumstances of the case.

(20) Children should receive information in respect of the right to a medical examination at the earliest appropriate stage in the proceedings, at the latest upon deprivation of liberty where such a measure is taken in relation to the child.

(21) Where a child is deprived of liberty, the Letter of Rights provided to the child pursuant to Directive 2012/13/EU should include clear information on the child's rights under this Directive.

(22) Member States should inform the holder of parental responsibility about applicable procedural rights, in writing, orally, or both. The information should be provided as soon as possible and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the child.

(23) In certain circumstances, which can also relate to only one of the persons holding parental responsibility, the information should be provided to another appropriate adult nominated by the child and accepted as such by the competent authority. One of those circumstances is where there are objective and factual grounds indicating or giving rise to the suspicion that providing information to the holder of parental responsibility could substantially jeopardise the criminal proceedings, in particular, where evidence might be destroyed or altered, witnesses might be interfered with, or the holder of parental responsibility might have been involved in the alleged criminal activity together with the child.

(24) Where the circumstances which led the competent authorities to provide information to an appropriate adult other than the holder of parental responsibility cease to exist, any information that the child receives in accordance with this Directive, and which remains relevant in the course of the proceedings, should be provided to the holder of parental responsibility. This requirement should not unnecessarily prolong the criminal proceedings.

(25) Children who are suspects or accused persons have the right of access to a lawyer in accordance with Directive 2013/48/EU. Since children are vulnerable and not always able to fully understand and follow criminal proceedings, they should be assisted by a lawyer in the situations set out in this Directive. In those situations, Member States should arrange for the child to be assisted by a lawyer where the child or the holder of parental responsibility has not arranged such assistance. Member States should provide legal aid where this is necessary to ensure that the child is effectively assisted by a lawyer.

(26) Assistance by a lawyer under this Directive presupposes that the child has the right of access to a lawyer under Directive 2013/48/EU. Therefore, where the application of a provision of Directive 2013/48/EU would make it impossible for the child to be assisted by a lawyer under this Directive, such provision should not apply to the right of children to have access to a lawyer under Directive 2013/48/EU. On the other hand, the derogations and exceptions to assistance by a lawyer laid down in this Directive should not affect the right of access to a lawyer in accordance with Directive 2013/48/

EU, or the right to legal aid in accordance with the Charter and the ECHR, and with national and other Union law.

(27) The provisions laid down in this Directive on assistance by a lawyer should apply without undue delay once children are made aware that they are suspects or accused persons. For the purposes of this Directive, assistance by a lawyer means legal support and representation by a lawyer during the criminal proceedings. Where this Directive provides for the assistance by a lawyer during questioning, a lawyer should be present. Without prejudice to a child's right of access to a lawyer pursuant to Directive 2013/48/EU, assistance by a lawyer does not require a lawyer to be present during each investigative or evidence-gathering act.

(28) Provided that this complies with the right to a fair trial, the obligation for Member States to provide children who are suspects or accused persons with assistance by a lawyer in accordance with this Directive does not include the following: identifying the child; determining whether an investigation should be started; verifying the possession of weapons or other similar safety issues; carrying out investigative or evidence-gathering acts other than those specifically referred to in this Directive, such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints; or bringing the child to appear before a competent authority or surrendering the child to the holder of parental responsibility or to another appropriate adult, in accordance with national law.

(29) Where a child who was not initially a suspect or accused person, such as a witness, becomes a suspect or accused person, that child should have the right not to incriminate him or herself and the right to remain silent, in accordance with Union law and the ECHR, as interpreted by the Court of Justice of the European Union (Court of Justice) and by the European Court of Human Rights. This Directive therefore makes express reference to the practical situation where such a child becomes a suspect or accused person during questioning by the police or by another law enforcement authority in the context of criminal proceedings. Where, in the course of such questioning, a child other than a suspect or accused person becomes a suspect or accused person, questioning should be suspended until the child is made aware that he or she is a suspect or accused person and is assisted by a lawyer in accordance with this Directive.

(30) Provided that this complies with the right to a fair trial, Member States should be able to derogate from the obligation to provide assistance by a lawyer where this is not proportionate in the light of the circumstances of the case, it being understood that the child's best interests should always be a primary consideration. In any event, children should be assisted by a lawyer when they are brought before a competent court or judge in order to decide on detention at any stage of the proceedings within the scope of this Directive, as well as during detention. Moreover, deprivation of liberty should not be imposed as a criminal sentence unless the child has been assisted by a lawyer in such a way as to allow the child to exercise his or her rights of the defence effectively and, in any event, during the trial hearings before a court. Member States should be able to make practical arrangements in that respect.