

ECJ: Criminally Prosecuted Minors Must Have Lawyer's Assistance during First Police Questioning

News

Thomas Wahl

In its [judgment](#) of 5 September 2024, the ECJ ruled that several provisions of the Polish Code of Criminal Procedure and legal practices are incompatible with the rights of minors charged with a criminal offence. These rights are mainly enshrined in [Directive 2016/800](#) on procedural safeguards for children who are suspects or accused persons in criminal proceedings. Hence, a lawyer's assistance must be guaranteed during the first police hearings. The ECJ also clarified the consequences of infringements of rights for the criminal proceedings.

Facts of the case and questions referred

In the case at issue ([Case C-603/22, M.S. and Others](#)), the District Court of Słupsk, Poland, referred several questions on the effectiveness of procedural guarantees and the conclusions to be drawn from possible incompatibility with EU rules in a criminal case involving three minors. Polish law enforcement authorities brought the three minors to court charging them with having broken into the buildings of a disused former holiday centre. At the material time the suspects were 17 years old. It was found that neither the minors nor their parents had been informed of the conduct of criminal proceedings, one minor only received a document with general information on the rights and obligation of a suspect in criminal proceedings without specific reference to the rights of children. The questionings by the police were conducted in the absence of a lawyer. The police also made no efforts to get benefits from a court-appointed lawyer in the pre-trial phase of the criminal proceedings.

Against this background, the referring court asked several questions on the correct transposition of the EU's procedural rights directives into Polish law, the consequences to be drawn from the failure to implement correctly EU law, given the direct effect of the provision in the directives, and the effectiveness of remedies to ensure protection of suspected or accused children.

Mandatory assistance by a lawyer during police questionings

The ECJ first examined the scope of the guarantees for access to a lawyer included in Art. 6(1)-(3) of Directive 2016/800. The ECJ stated the following:

- Unlike Art. 9 of [Directive 2013/48](#), which regulates access to lawyer by suspects or accused persons who are not children, Directive 2016/800 does not provide for the possibility for children to waive their right to be assisted by a lawyer;

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the
Study of Crime, Security and
Law

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- The national law of the Member States must ensure in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer (Arts. 18 and 6 of Directive 2016/800);
- Children who are suspects or accused persons must be afforded the practical and effective opportunity under national law to be assisted by a lawyer, before they are first questioned by the police or by another law enforcement or judicial authority and, at the latest, from the time of that questioning;
- A child must be entitled to a court-appointed lawyer who assists him/her during that questioning;
- Questionings cannot be carried out if the child concerned does not actually receive such assistance;
- The questioning of the child, or other investigative or evidence-gathering acts, must be postponed for a reasonable period of time in order to allow for the presence of a lawyer or, where the child has not nominated a lawyer, to arrange a lawyer for the child;
- Derogations from the right to be assisted by a lawyer as provided for in Art. 6(6)-(8) of Directive 2016/800 can only be justified if the particular circumstances of each case are taken into account in the best interest of the child.

Therefore, derogations, in a general and abstract manner, in the context of national legislation, from the right of children who are suspects or accused persons to be assisted by a lawyer in the pre-trial phase cannot be permitted. Against this background, the Polish legislation that does not provide for the mandatory presence of a lawyer for suspected children during their questioning (in particular at the pre-trial stage), foresees that children who are not detained must expressly request to be assisted by a lawyer, and allows the continuance of the questioning of children in the absence of such a lawyer are incompatible with Art. 6(1)-(3) of Directive 2016/800.

Access to lawyer for children becoming 18 years old during the proceedings

Second, the ECJ examined the Polish court practice (based on Article 79(1)(1) of the Polish CCP) that the participation of a lawyer in the proceedings is no longer mandatory once the accused or suspected person has reached the age of 18, which has the effect of automatically releasing the court-appointed lawyer from his or her mandate.

The ECJ found that such an “automatic loss” of the rights conferred on minors by EU law would counter the provisions of the Directive that ensure that the benefits of the rights (in particular access to a lawyer) must continue if all the circumstances of the case, including the maturity and the vulnerability of the persons concerned, deem this necessary. Such assessment is not ensured by the Polish practice which is therefore incompatible with Directive 2016/800.

Right to information on lawyer’s assistance

Third, given that Polish law does not provide for specific rules on the information of suspected and accused children, the ECJ clarified the point in time, scope, and form of information on the rights that children who are suspects or accused persons in criminal proceedings, and the holder of parental responsibility, are to receive. The ECJ noted that minors must be informed of their procedural rights as soon as possible, at the latest before they are first questioned. The information must be communicated in a simple and accessible way, adapted to their specific needs. A standard document, intended for adults (as done in Polish practice), does not meet those requirements.

Consequences of incompatibility of the national law

After having found that the Polish legislation does not comply with the procedural safeguards provided for in Directive 2016/800, the ECJ also gives guidance to the referring court on how it can ensure the effectiveness of the Union law. It reiterates its general case law that the principle of the primacy of Union law requires, *inter*

alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law. If it is impossible to interpret national legislation in compliance with the requirements of EU law, the national court, if necessary, must disapply of its own motion any national legislation or practice, which is contrary to a provision of EU law with direct effect. The national court is not obliged to request or await the prior setting aside of such national legislation or practice by legislative or other constitutional means. In view of the clear, precise and unconditional wording of the provisions of the Directive 2016/800 relevant in the case at issue, a direct effect can be affirmed.

Exclusion of evidence?

Lastly, the ECJ answered the question as to whether the Member State's obligation to ensure that children who are suspects or accused persons in criminal proceedings have an effective remedy under national law in the event of a breach of their rights under Directive 2016/800 (Art. 19) allows a court to declare as inadmissible incriminating evidence contained in statements made by a child during questioning by the police in breach of the right of access to a lawyer (provided for in Art. 6 of Directive 2016/800).

Having regard on its previous case law, the ECJ stressed that the guarantee of an effective remedy does not imply exclusionary rules for evidence. It remains for national law alone to determine the rules relating to the admissibility of evidence obtained in breach of rights conferred by Union law. However, the deciding national court must be able to give specific expression to the fundamental rights to a fair trial and to respect for the rights of the defence; in particular, it must be able to assess the probative value of evidence obtained in contravention of the requirements of EU law.

Put in focus

The new judgment from Luxembourg on the interpretation of the EU's rules conferring procedural rights strengthens the position of lawyers in criminal proceedings against minors. It stresses that minors must have concrete and effective opportunities to be assisted by a lawyer. Questionings by the law enforcement authorities without a lawyer are inadmissible. In addition, the protection granted by the EU's procedural safeguards does not end if the person concerned reaches the age of majority, but it is for the national authorities to ensure assessment of vulnerability and maturity. Lastly, the judges in Luxembourg stressed that minors (and their parents) must be informed of their procedural rights as soon as possible and at the latest before their first questioning. The relevant information must be provided in a simple and comprehensible form that is adapted to their specific needs.

However, the case also shows that obvious breaches of the guarantees conferred on children by Union law should entail uniform consequences in the EU. As Union law stands at the moment, this is not the case. Hence, the Union legislator is called upon to reinforce plans to harmonise the rules on the inadmissibility of evidence (→ L. Bachmaier, Mutual Admissibility of Evidence and Electronic Evidence in the EU - A New Try for European Minimum Rules in Criminal Proceedings? *eu crim* 2/2023, 223-229).

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